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AND

CONCISE ENCYCLOPEDIA

BY JOHN BOUVIER

Ignoratis terminis ignoratur et ars.—Co. Litt. 2a

Je sais que chaque science et chaque art a ses termes propres, inconnus au commun des hommes.—Fleury

THIRD REVISION

(BEING THE EIGHTH EDITION)

BY FRANCIS RAWLE

OF THE PHILADELPHIA BAR

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LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

N

N. C. D. *Nemine contra dicente.* No one dissenting.

N. E. I. See NON EST INVENTUS.

N. L. See NON LIQUET.

N. O. V. See NON OBSTANTE VEREDICTO.

NAAM. See NAMIUM.

NABÚB. Originally the governor of a province under the Mogul government of Hindostan, whence it became a mere title of any man of high rank, upon whom it was conferred without any office being attached. Wils. Gloss; Whart.

NAIF. See NEIF.

NAIL. A measure of length, equal to two inches and a quarter. See MEASURE.

NAIL COUSINS. See SIB-SHIP.

NAKED. This word is used in a metaphorical sense to denote that a thing is not complete, and for want of some quality it is either without power or it possesses a limited power. A naked contract is one made without consideration, and for that reason it is void. See CONSIDERATION. A naked authority is one given without any right in the agent, and wholly for the benefit of the principal. 2 Bouvier, Inst. n. 1302. See NUDUM PACTUM.

NAKED TRUST. A dry or passive trust; one which requires no action on the part of the trustee, beyond turning over money or property to the *cestui que trust.* See TRUST.

NAKED TRUSTEE. See TRUSTEE.

NAM. Distress; seizure. Anc. Inst. Eng. See NAMIUM.

NAMATION. The act of distraining or taking a distress. Cowell. See NAMIUM.

NAME. One or more words used to distinguish a particular individual: as Socrates, Benjamin Franklin.

Names are Christian, as Benjamin, or surnames, as Franklin. One Christian name only is recognized in law; 1 Ld. Raym. 562; Bacon, Abr. *Misnomer* (A); Boyd v. State, 7 Cold. (Tenn.) 69; Franklin v. Talmadge, 5 Johns. (N. Y.) 84; though two or more names usually kept separate, as John and Peter, may undoubtedly be compounded, so as to form in contemplation of law but one; 5 Term 195. The cases on various points are conflicting, but some of them will be given, without attempt to harmonize them. An initial is no part of a name. See INITIAL. Nor is the title junior (*q. v.*); Teague v. State, 144 Ala. 42, 40 South. 312; Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; nor "Second," nor the numeral II; Cobb v. Lucas, 15 Pick. (Mass.) 7; nor the prefix *Mrs.;* State v. Richards, 42 N. J. L. 69; Schmidt v. Thomas, 33 Ill. App. 109. But it has been held that where Lewis R. instead of Lewis S. was inserted in a writ of *sci. fa.* to revive a judgment, the writ was not notice to purchaser for value in a chain of title, in which Lewis S. was the actual name; Massey v. Noon, 1 Pa. Super. Ct. 198.

It was early held in England that if father and son have the same name it refers *prima facie* to the father; 1 Salk. 7; 1 Stark. 106; Hob. 330 A.; and some early cases held that, if it was intended to indicate the son, Jr. must be added; State v. Vittum, 9 N. H. 522; and where father and son of the same name resided in the same town, it was held that a writ against the son would abate if Jr. were omitted; Zuill v. Bradley, Quincy (Mass.) 6.

The name of a corporation is said to be "the very being of the constitution"; Bac. Abr. *Corp.* (C); Smith v. Plank-Road Co., 30 Ala. 664; and in general a corporation must contract and sue and be sued in its corporate name; Porter v. Nekervis, 4 Rand. (Va.) 359.

In the name of a corporation, which frequently consists of several descriptive words, the transposition, omission, or alteration of some of them may make no essential difference in the sense; Newport M. Mfg. Co. v. Starbird, 10 N. H. 124, 34 Am. Dec. 145; 1 B. & Ald. 699; Medway C. M. v. Adams, 10 Mass. 360; if there is no possibility of mis-

taking the identity of the corporation; Mechanics' & T. Bk. v. Prescott, 12 La. 444. See State v. Mfg. Co., 20 Me. 41, 37 Am. Dec. 38; Com. v. Demuth, 12 S. & R. (Pa.) 389.

A corporation, like an individual, may take a name by reputation; Soc. for Propagating the Gospel v. Young, 2 N. H. 310; Medway C. M. v. Adams, 10 Mass. 360; or may acquire it by usage; it is not indispensable that the name should be given by the charter; Smith v. Plank-Road Co., 30 Ala. 661; see Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; and after its name has been changed, it may continue under the old name and thus, by usage, regain the latter and sue thereunder; Alexander v. Berney, 28 N. J. Eq. 90.

Where parties transacted business and made a contract as the "Tow Boat Company," there being no corporation of that name, it was held that suit would lie in the names of the parties; The Nimrod, 141 Fed. 215.

The change of name of a private corporation is not material, but is mere business management, and does not require the unanimous consent of stockholders; Thomas & B. Co. v. Thomas, 165 Fed. 29, 91 C. C. A. 67. The omission of part of the corporate name in signing a mortgage and bond does not render them invalid, where proof is clear that they were in fact duly authorized and intended to be obligations of the corporation; In re Goldville Mfg. Co., 118 Fed. 892. Where "Company" is not part of a corporate name, and it is sued with the addition of "Company," it may be amended; Rosenbluth v. Reis Circuit Co., 36 Pa. Co. Ct. R. 332.

But it is held that a change of corporate name requires statutory authority, whether done directly or by user, though it may acquire a name by user when not given at incorporation; Sykes v. People, 132 Ill. 32, 23 N. E. 391; such change does not in any way affect its identity or rights; and an action against it by its former name cannot be defeated by showing the change, if the membership remains the same; Welfley v. Mfg. Co., 83 Va. 768, 3 S. E. 376. When a corporation is sued, a mistake in the name, in words and syllables, but not in substance, will not be regarded, unless pleaded in abatement; but if the mistake be in substance, the suit cannot be regarded as against the corporation; 1 B. & P. 39. Where the name in a contract in suit differed from the name in the declaration, but the identity was apparent, the variance was held not to constitute a defence; Dodge v. Barnes, 31 Me. 290. There is said to be a distinction between a misnomer which incorrectly *names*, but correctly *describes*, a corporation and the statement in the pleading of an entirely different party; the former is curable by amendment, the latter is not; Smith v. Plank-Road Co., 30 Ala. 650. A grant to a corporation by the wrong name is good if the corporation really intended be apparent; 2 Kent 292; 1 Dill. Mun. Corp. § 179; so of a contract; Berks v. Myers, 6 S. & R. (Pa.) 12, 9 Am. Dec. 402; and of a gift by will; 11 Eng. L. & Eq. 191. If a corporation conveys by the wrong name it cannot defeat its grant, if it has received the consideration; Sykes v. People, 132 Ill. 32, 23 N. E. 391.

As to the protection of a corporation in the use of its corporate name, see Moraw. Priv. Corp § 355; TRADE-MARK.

See GOOD-WILL; PARTNERSHIP; PARTNERS; MISNOMER.

The real name of a party to be arrested must be inserted in the warrant, if known; 8 East 828; Gurnsey v. Lovell, 9 Wend. (N. Y.) 320; if unknown, some description must be given; 1 Chitty, Cr. Law 39; with the reason for the omission; 1 Mood. & M. 281.

Proof may be given that the maker of an instrument habitually applied a nickname or peculiar designation used therein to a particular person or thing; Boggs v. Taylor, 26 Ohio St. 604. As to mistakes in devises, see LEGACY. As to the use of names having the same sound, see IDEM SONANS. As to the effect of using a name having the same derivation, see 2 Rolle, Abr. 135; Gordon v. Holiday, 1 Wash. C. C. 285, Fed. Cas. No. 5,610. At common law one could change his name; Linton v. Bank, 10 Fed. 894; Com. v. Trainor, 123 Mass. 415; 3 B. & Ald. 544; Smith v. Casualty Co., 197 N. Y. 420, 90 N. E. 947, 26 L. R. A. (N. S.) 1167, 18 Ann. Cas. 701 (where the origin and evolution of names is discussed at length); but not, perhaps, where one has obtained a name by judicial decree under a statute; *id.* Statutes in many states provide for a change of name. Jekyll, M. R., in 3 P. Wms. 65, declared that any one might take upon himself as many surnames as he chose; but this judgment was reversed in 4 Bro. P. C. 194 (H. of L.), where it was said that "the individual ought to have inherited or obtained an authority for using" a name. Fox-Davies and Carlyon-Britton on Names takes the view that no one can create a name for himself or change his name, but the power to do so is a prerogative of the crown.

The middle name is unimportant and the omission of it or its initial is of no legal effect; Cox v. Durham, 128 Fed. 870, 63 C. C. A. 338; Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463; Bletch v. Johnson, 40 Ill. 116; *contra*, Parker v. Parker, 146 Mass. 320; if the middle initial is given, it need not be correct even in criminal cases; People v. Lockwood, 6 Cal. 205; Franklin v. Talmadge, 5 Johns. (N. Y.) 84; Cox v. Durham, 128 Fed. 870, 63 C. C. A. 338; *contra*, King v. Clark, 7 Mo. 269; Cleveland, C., C. & St. L. Ry. Co. v. Pierce, 34 Ind. App. 188, 72 N. E. 604; the initial letter of the first name is sufficient in a warrant; Cox v. Durham, 128 Fed. 870, 63 C. C. A. 338.

The occasional use of a single letter as a name developed a strange contradiction. It was held that a vowel, being complete in itself, was sufficient, and a consonant, being part of a complete sound, was not; 6 C. B. 577; 7 C. B. 980. The supposed distinction was put an end to in 15 Jur. 657, by Lord Campbell. In this country the question has been raised and two initials were held to be a valid Christian name; Tweedy v. Jarvis, 27 Conn. 42; this has also been held in South Carolina; City Council v. King, 4 McCord (S. C.) 487; but the contrary was held in that state in one case; Norris v. Graves, 4 Strob. (S. C.) 32.

A mistake in the middle initial does not invalidate a process under which title to land is taken; Johnson v. Day, 2 N. D. 295; J. H. Burtis is taken as if J. Burtis, and is sufficient where the title was in J. F. Burtis; Illinois C. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 N. E. 815, 15 L. R. A. (N. S.) 129. A mortgage executed by Henry M. Ward as Henry N. Ward was held good where there was only one Henry Ward in the county; Fincher v. Hanegan, 59 Ark. 151, 26 S. W. 821, 24 L. R. A. 543; but where there is a misnomer amounting to a substantial defect, the proceedings will give no jurisdiction; thus O. P. Buchanan in a notice intended for Petter O. Buchanan was held bad; Buchanan v. Edmisten, 1 Neb. (Unof.) 429, 95 N. W. 620; as also was P. T. B. Hopkins in a notice intended for T. P. B. Hopkins; Fanning v. Krapfl, 61 Ia. 417, 14 N. W. 727, 16 N. W. 293; and a publication of a summons to George H. Leslie confers no jurisdiction over George W. Leslie; D'Autremont v. Iron Co., 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615, 15 Ann. Cas. 114.

It is held that since the use of initials instead of a given name before a surname has become a common practice, these initials must all be given and correctly given in court proceedings; Carney v. Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A. (N. S.) 905, where a certificate of tax delinquency reciting the name of the person assessed as J. G. Carney instead of J. E. Carney as it appeared on the assessment rolls was held insufficient to sustain a foreclosure.

Parties cannot in legal proceedings be designated by mere description; the words "and wife" following defendant's name do not make the wife a party; Sossman v. Price, 57 Ala. 204; nor "Mr. and Mrs." followed by the husband's initials and surname; Kauffman v. Sherbondy, 22 Pa. Dist. R. 114.

A mistake in the Christian name of a defendant duly served gives the court jurisdiction, if at the time of service he was duly apprised that he was the person intended to be named therein, where the statutes provide for correcting such mistakes; Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562. Misspelling is immaterial either of the Christian; Harrell v. Neef, 80 Kan. 348, 102 Pac. 838; or the surname; Phillips v. Palmer, 56 Tex. Civ. App. 91, 120 S. W. 911; particularly if they are *idem sonans*.

The omission of the Christian name by either plaintiff or defendant in legal process prevents the court from acquiring jurisdiction, there being no other description or identification and no appearance or waiver of process; Whitney v. Masemore, 75 Kan. 522, 89 Pac. 914, 11 L. R. A. (N. S.) 676, 121 Am. St. Rep. 442; Boynton v. Chamberlain, 38 Tex. 604; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; but where the notice by publication was directed to Etta R. Fisher and ——— Fisher, her husband, it was held a sufficient description to indicate his identity; Cruzen v. Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549.

Nicknames are not sufficient in process or pleading. They are names given in contempt, derision or sportive familiarity; Ohlmann v. Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 28 L. R. A. (N. S.) 432, 133 Am. St. Rep. 506, where process to recover taxes against land owned by Michael Ohlman, which described him as Mike Ohlman was held insufficient to give jurisdiction, Mike being held not a universally recognized abbreviation of Michael, but a mere diminutive or nickname. For a discussion of the origin of nicknames and their development in many cases into surnames, see Fox-Davies and Carlyon-Britton on Names, 20, 24, 25.

Identity of name raises the presumption of identity of person, where the name is an unusual one and when there is some similarity of business residence or the like, but not where the name is a common one and a number of persons bearing it live in the same place; Laws. Pres. Ev. 307; State v. Smith, 129 Ia. 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023. This presumption may be overcome by circumstances in the particular case; Garrett v. State, 76 Ala. 18, where the qualifications of the rule are discussed; where the similarity of circumstances is not present the presumption fails; People v. Cline, 44 Mich. 290, 6 N. W. 671. And in many cases the identity of name has been treated as *prima facie* evidence of identity of person without reference to qualifications; People v. Rolfe, 61 Cal. 540; Bayha v. Mumford, 58 Kan. 445, 49 Pac. 601; State v. McGuire, 87 Mo. 642; State v. Kelsoe, 76 Mo. 505; and in such case the identity of the person is a question for the jury; State v. Loser, 132 Ia. 419, 104 N. W. 337; and while it is not to be assumed as a matter of law; Shuler v. State, 125 Ga. 778, 54 S. E. 689; State v. Lashus, 79 Me. 504, 11 Atl. 180; yet it is not error to charge the jury that identity is presumed in the absence of evidence to the contrary; People v. Riley, 75 Cal. 98, 16 Pac. 544.

A person not having a fraudulent or criminal purpose in so doing may enter into a contract by any name he may choose to assume; Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 147, 70 Am. St. Rep. 326; Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; Den v. Peterson, 31 N. C. 184; Thomas v. Wyatt, 31 Mo. 188, 77 Am. Dec. 640. Under this rule, legal proceedings against a married woman under an assumed name have been held good after judgment; Clark v. Clark, 19 Kan. 522; and obligations incurred by or with third parties under her maiden name are mutually binding; Lane v. Duchac, 73 Wis. 646, 41 N. W. 962; Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618; see School. Dom. Rel. 40; until a decree in divorce giving a married woman leave to resume her maiden name goes into effect, or widowhood is succeeded by a new marriage, she keeps her former husband's surname; 2 P. D. 263.

A grant of land under an assumed name will pass title; and evidence is admissible to prove identity; Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671. The omission or mistake of a Christian name of the person to whom it is made (if he can be identified) will not avoid a patent; Northwestern F. E. Co. v. Fire Extinguisher Co., 1 Ban. & A. 177, Fed. Cas. No. 10,337; or a grant; 2 Co. Litt. 255; or a devise; 5 Co. 68; 2 Atk. 372. Apparently it was earlier held that an omission or mistake in the Christian name of the grantee rendered the grant void; Cro. Eliz. 328; Bac. Max. 107.

When a person uses a name in making a contract under seal, he will not be permitted to say that it is not his name: as, if he sign and seal a bond "A and B" (being his own and his partner's name), and he had no authority from his partner to make such a deed, he cannot deny that his name is A and B; 1 T. Raym. 2; 1 Salk. 214. And if a man describes himself in the body of a deed by the name of James, and signs it John, he cannot, on being sued by the latter name, plead that his name is James; 3 Taunt. 505; Cro. Eliz. 897, n. *a*. See 3 P. & D. 271; 11 Ad. & E. 594; Preiss v. Le Poidevin, 19 Abb. N. C. (N. Y.) 123. A man may sue by the name by which he has been known from childhood, instead of by that given him by his parents; Donaldson v. Donaldson, 31 Wkly. Law Bul. (Ohio) 102.

The right to the exclusive use of a name in connection with a trade or business is familiar to the law; and any person using that name, after a relative right of this description has been acquired by another, is considered guilty of a fraud, or at least an invasion of another's rights, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who has never been called by that name is a grievance to the family for which the law affords no redress; L. R. 2 P. C. 441. See L. R. 2 Ch. 307. A name may be a trade-mark; L. R. 10 Ch. D. 436; 1 Eq. 518; 13 Beav. 209; Wolfe v. Barnett, 24 La. Ann. 97, 13 Am. Rep. 111. A person cannot, however, have an exclusive right of trade-mark in a name as against all others bearing the same name, and honestly using the name in competition, unless the defendant uses the same brand or stamp in connection with the name; Gilman v. Hunnewell, 122 Mass. 139; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Howe v. Mach. Co., 50 Barb. (N. Y.) 236. But such exclusive right to a name may be acquired as against a corporation called by the same name.

"Dear Sir," at the commencement of a letter sent to one of the contracting parties which contains the terms of a contract, will be read as the name of that party so as to be a good note of the contract, if the letter is enclosed in an envelope addressed to that party; [1897] 1 Q. B. 688.

See an article on personal names by G. S. Arnold, 15 Y. L. J. 227; also an extensive note on names in 14 L. R. A. 690.

See ELECTION; IDENTITATE NOMINIS; TRADE-MARK; SIGNATURE; MISNOMER.

NAMED. Mentioned *nominatim*, if not by all their names, by some at least, either Christian or surnames. 22 L. J. Ch. 393.

It is sometimes used, but only in a secondary sense, as meaning mentioned or referred to. 34 S. J. 129.

NAMELY. A difference, in grammatical sense, in strictness exists between the words namely and including. Namely imports interpretation, *i. e.* indicates what is included in the previous term; but including imports addition, *i. e.* indicates something not included. 2 Jarm. Wills 222.

NAMIUM. An old word which signifies the taking or distraining another person's movable goods. 2 Inst. 140; 3 Bla. Com. 149. A distress. Dalrymple, Feud. Pr. 113.

NAMIUM VETITUM. The unjust taking of another person's cattle and driving them to an unlawful place, under pretence of damage having been done by them, in which case the owner may demand satisfaction for the injury. Cowell.

NANTISSEMENT. In French Law. The contract of pledge; if of a movable, it is called *gage*, and if of an immovable, *antichrèse;* Brown, Dict.

NARR. (an abbreviation of the word *narratio*). A declaration in a cause.

NARRATIO. A common-law name for the plaintiff's declaration or statement of claim as being a narrative of facts on which he relies.

NARRATOR. A pleader who drew narrs, or pleadings (in the time of William I),

See CONTEUR. *Serviens narrator*, a serjeant-at-law. Fleta, l. 2, c. 37. Obsolete.

NARROW SEAS. In English Law. Those seas which adjoin the coast of England. Bacon, Abr. *Prerogative* (B 3).

NASCITURUS. Not yet born. This term is applied in marriage settlements to the unborn children of a particular marriage, *natus* (born) being used to designate those already born.

NATALE. The state or condition of a man acquired by birth.

NATIO. A native place. Cowell.

NATION. An independent body politic. A society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

But every combination of men who govern themselves independently of all others will not be considered a nation; a body of pirates, for example, who govern themselves, is not a nation. To constitute a nation, another ingredient is required. The body thus formed must respect other nations in general, and each of its members in particular. Such a society has it affairs and interests; it deliberates and takes resolutions in common,—thus becoming a moral person, who possesses an understanding and will and is susceptible of obligations and rights. Vattel, Prelim. §§ 1, 2; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 52, 8 L. Ed. 25.

It belongs to the government to declare whether they will consider a colony which has thrown off the yoke of the mother-country as an independent state; and until the government have decided on the question, courts of justice are bound to consider the ancient state of things as remaining unchanged; Hoyt v. Gelston, 13 Johns. (N. Y.) 141; Gelston v. Hoyt, *id.* 561. See Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25; 1 Kent 22.

In American constitutional law the word *state* is applied to the several members of the Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government. Cooley, Const. Lim. See Texas v. White, 7 Wall. (U. S.) 720, 19 L. Ed. 227.

NATIONAL. A word commonly used in diplomatic language and in treaties to indicate a citizen or subject of a given country.

NATIONAL BANKS. Banks created and governed under the provisions of the "National Bank Act."

They are private corporations organized under a general law of congress, by individual stockholders, with their own capital, for private gain, and managed by officers, agents, and employés of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute, is of a general nature arising from their business relations to the people through individual citizens, and not as direct representatives of the state as a body politic in exercising its legal and constitutional functions; Branch v. U. S., 12 Ct. Cl. (U. S.) 281; but they are instruments designed to aid the government in an important branch of the public service; Farmers' & M. N. Bk. v. Dearing, 91 U. S. 29, 23 L. Ed. 196. Congress in the exercise of an undisputed constitutional power to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain the circulation of any notes not issued under its authority; Veazie Bk. v. Fenno, 8 Wall. (U. S.) 548, 19 L. Ed. 482.

National banks are quasi public institutions and for the purpose for which they are instituted are national in their character, and within constitutional limits are subject to control of congress, and not to be interfered with by state legislative or judicial action except so far as congress permits; Van Reed v. Bank, 198 U. S. 554, 25 Sup. Ct. 775, 49 L. Ed. 1161, 3 Ann. Cas. 1154; whether solvent or insolvent, they are exempt from attachment before judgment in any state, etc., court; *id.*

The minimum capital allowed is $100,000, except that banks with a capital of not less than $50,000 may, with the approval of the secretary of the treasury, be organized in any place the population of which does not exceed 6,000 inhabitants, and with not less than $25,000, with like sanction, in any place the population of which does not exceed 3,000 inhabitants; no association shall be organized in a city of more than 50,000 population with a capital of less than $200,000.

A national bank may change its name, or place of business, to any place within the same state, not more than thirty miles distant, with the approval of the comptroller and by a vote of two-thirds of the stockholders.

The corporate existence is twenty years and a bank may at any time within two years next previous to the expiration of that period, with the approval of the comptroller, extend its existence for another period of twenty years.

A bank may provide in its articles of association for an increase of its capital, the maximum to be approved by the comptroller; no increase shall be valid until fully paid in and notice submitted to the comptroller. A bank may, by vote of shareholders owning two-thirds of its capital stock, and subject to the approval of the comptroller, reduce its capital, but not below the amount required by the act to authorize the formation of a bank, nor below the amount required for its outstanding circulation, nor until approved by the federal reserve board (*infra*).

Shareholders are entitled to one vote for each share of stock, and may vote by proxy

in writing, but no "officer, clerk, teller or bookkeeper" of the bank shall act as proxy, and no shareholder, whose liability is past due and unpaid, shall be allowed to vote.

Not less than five directors are required; they hold office for one year or until their successors have been elected and qualified; every director must, during his whole term of service, be a citizen of the United States; at least three-fourths of the directors must have resided in the state, etc., in which the bank is located, for at least one year immediately preceding their election; every director must own in his own right at least ten shares of stock (only five shares in banks whose capital stock does not exceed $25,000); if a director becomes disqualified, his place is vacated (Act of February 8, 1905). Vacancies in the board are filled by the board, to hold until the next election. If an election of directors is not made at the time appointed, it may be held on a subsequent day, upon thirty days' notice given in a newspaper published in the city, etc., in which the bank is located, or, if none, published in the nearest city, etc. If the articles do not fix the day of election, or if no election is held on the day fixed, such day shall be designated by the directors in their by-laws or otherwise, and if they fail to do so, shareholders representing two-thirds of the shares may do so. The board chooses one of its members as president.

Shareholders are individually responsible equally and ratably for the debts of the bank, to the extent of the amount of their stock therein at par value, in addition to the amount invested therein. Persons holding stock as executors, administrators, guardians or trustees are not liable as stockholders, but the assets and funds in their hands are so liable.

State banking institutions may be organized as national banks. In such case, the articles of association may be accepted by a majority of the directors, who shall have the power to complete its organization; its shares may continue to be for the same amount as they were before, and the directors may continue until others are elected.

The total liability to a bank of any person, firm or corporation, for money borrowed, shall never exceed one-tenth of the capital stock of the association actually paid in and one-tenth of its unincumbered surplus capital, both unincumbered, and the total of such liabilities shall in no event exceed thirty per cent. of the capital; but the discounting of bills of exchange in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

The act of May 30, 1908, providing for national currency associations, has been extended to June 30, 1915, by the act of Dec. 23, 1913 (*infra*).

The powers of national banks are to be measured by the act creating them; Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; Logan Co. N. Bk. v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; the words of the act "by discounting and negotiating promissory notes, etc.," are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of business which is authorized; Shinkle v. Bank, 22 Ohio St. 516. A national bank may buy negotiable notes and bills of exchange; Merchants' N. Bk. v. Hanson, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; Union N. Bk. v. Rowan, 23 S. C. 339, 55 Am. Rep. 26; Pape v. Bank, 20 Kan. 440, 27 Am. Rep. 183. This power, it has been held, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling, and transferring it by means of a re-discount obtained or otherwise. It gives no implied authority to speculate or traffic in paper of this character or in financial securities of any description; First N. Bk. v. Pierson, 24 Minn. 140, 31 Am. Rep. 341; Lazear v. Bank, 52 Md. 78, 36 Am. Rep. 355. In the last case, by a divided court, the opinion was qualified by the remark that a national bank might invest its surplus capital in notes. The purchasing and discounting of paper has been held to be only a mode of loaning money; Smith v. Bank, 26 Ohio St. 141. It may collect notes; Mound City P. & C. Co. v. Bank, 4 Utah, 353, 9 Pac. 709; deal in national bonds; Leach v. Hale, 31 Ia. 69, 7 Am. Rep. 112; Yerkes v. Bank, 69 N. Y. 382, 25 Am. Rep. 208; and own coupons on state bonds; First N. Bk. v. Bennington, 16 Blatch. 53, Fed. Cas. No. 4,807; and it may deal in stocks; Williamson v. Mason, 12 Hun (N. Y.) 97; but the tendency of the decisions is *contra;* First N. Bk. v. Hoch, 89 Pa. 324, 33 Am. Rep. 769; Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; First N. Bk. v. Bank, 92 U. S. 122, 23 L. Ed. 679; Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95. It may lend on collateral security, including United States bonds; Third N. Bk. v. Boyd, 44 Md. 47, 22 Am. Rep. 35; or the stock of another national bank; Germania N. Bk. v. Case, 99 U. S. 628, 25 L. Ed. 448; or a warehouse receipt for merchandise; Cleveland v. Shoeman, 40 Ohio St. 176; or a locomotive; Shoemaker v. Bank, 1 Hughes 101, Fed. Cas. No. 12,801; but it may not lend its credit; Nat. Bk. of C. v. Atkinson, 55 Fed. 465. It may borrow money on its own notes, and pledge its assets for its repayment; 41 Bank. Mag. 131. It may, in a fair and *bona fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of a demand, so as to obtain by the arrangement a transfer of stocks, if done

in the belief that by turning the stocks into money under more favorable circumstances a loss which would otherwise accrue from the transaction might be averted or diminished; First N. Bk. v. Bank, 92 U. S. 122, 23 L. Ed. 679, affirming 39 Md. 600.

It has authority to receive special deposits of securities, etc., and is responsible for their loss if occasioned by gross negligence; First N. Bk. v. Graham, 100 U. S. 699, 25 L. Ed. 750, affirming 79 Pa. 106, 21 Am. Rep. 49; Turner v. Bank, 26 Ia. 562; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59; Chattahoochee N. Bk. v. Schley, 58 Ga. 369; Pattison v. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Prather v. Kean, 29 Fed. 498; *contra*, Wiley v. Bank, 47 Vt. 546, 19 Am. Rep. 122; Whitney v. Bank, 50 Vt. 388, 28 Am. Rep. 503; or by want of ordinary care; Bank v. Zent, 39 Ohio St. 105; Lancaster County N. Bk. v. Smith, 62 Pa. 47.

It may take legal proceedings to recover stolen property for itself or for depositors, and will be held responsible for lack of diligence, skill, and care in performing such an undertaking; Wylie v. Bank, 119 U. S. 361, 7 Sup. Ct. 268, 30 L. Ed. 455.

A national bank has no power to indorse a note for compensation; Nat. Bk. v. Burr, 27 Hun (N. Y.) 109; but, should it do so, only the government may object; *id.*; Nat. Bk. v. Whitney, 103 U. S. 99, 26 L. Ed. 443; but it may guarantee a note; People's Bk. v. Bank, 101 U. S. 183, 25 L. Ed. 907. It may not receive deposits when insolvent; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537. It cannot be garnisheed for a deposit of a trust estate or pay out funds of a bankrupt except upon a warrant of an assignee in bankruptcy of the district or by the register in bankruptcy of the district; Havens v. Bank, 6 Thomp. & C. (N. Y.) 346.

National banks may purchase, hold, and convey real estate for the following purposes, and for no others: 1. Such as shall be necessary for its immediate accommodation in the transaction of its business. 2. Such as shall be mortgaged to it in good faith by way of security, for debts previously contracted. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it; title in the latter case, or under mortgage, to be held for no longer than five years. And see Union N. Bk. v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

It is now settled that a bank may lawfully take a mortgage to secure future indebtedness; Simons v. Bank, 93 N. Y. 269; Thornton v. Bank, 71 Mo. 228; Winton v. Little, 94 Pa. 64; Turner v. Bank, 78 Ind. 19; Oldham v. Bank, 85 N. C. 240. Such a loan of money on real estate security by a national bank is valid between the parties; Union Nat. Bk. v. Matthews, 98 U. S. 621, 25 L. Ed. 188, reversing Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; *contra*, Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699; Fridley v. Bowen, 87 Ill. 151; and that it had so loaned money in violation of the prohibition of the national banking law does not give the debtor a right to object; the United States alone can complain; Fortier v. Bank, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764; Schuyler N. Bk. v. Gadsden, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258. It may take a purchase-money mortgage on real estate sold by it; New Orleans N. Bk. v. Raymond, 29 La. Ann. 355, 29 Am. Rep. 335; and it may purchase real estate at a judgment sale; Heath v. Bank, 70 Ind. 106; Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Upton v. Bank, 120 Mass. 153; Mapes v. Scott, 88 Ill. 352; and a prior mortgage if needful to protect the interest of the bank; Holmes v. Boyd, 90 Ind. 332. It may take real estate in payment of a debt due it, and may pay the excess value thereof over the debt; Libby v. Bank, 99 Ill. 622; and may buy in outstanding interests in such real estate, or encumbrances thereon, if necessary, to enable it better to handle or dispose of it; Cockrill v. Abeles, 86 Fed. 505, 30 C. C. A. 223; Holmes v. Boyd, 90 Ind. 332. If holding a second mortgage, it may buy the property at a foreclosure sale under the first mortgage; Heath v. Bank, 70 Ind. 106.

A converted bank may take real estate belonging to it whilst it was a state bank; Scofield v. Bank, 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412; it may accept personal property in payment upon the sale of real estate belonging to it; First N. Bk. v. Reno, 73 Ia. 145, 34 N. W. 796; and the assignment of a mortgage on land to secure a loan made at the time of the assignment; First N. Bk. v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

A transfer of stock in a national bank which is insolvent at the time, made with an intent to avoid liability, where the transferee has reason to believe that the bank is insolvent, will not relieve the transferror from the residuary liability to pay the debt of the bank, and such a transfer may be treated by the receiver as inoperative without regard to the financial condition of the transferee; but if the bank is solvent at the time of the transfer the motive with which it is made is immaterial; Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639.

When not defined by a board of directors the duties of the president and cashier are only such as may be incident to their offices respectively in their very nature, in the absence of anything to the contrary in the act of incorporation; Hodge's Ex'r v. Bank, 22 Gratt. (Va.) 58. Neither of these officers, nor both acting together, can give up a debt or liability to the bank, nor make

any admissions which would release the maker of a note due to the bank from his legal responsibility; *id.;* Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316. The president has no power to sell or surrender securities and receive others of an inferior value; First N. Bk. v. Bennett, 33 Mich. 520. Ordinarily his authority is very limited; he may bring actions at law and employ counsel for the purpose of protecting the rights of the bank, but he is not its executive officer nor has he charge of its money operations. He has no more power of management nor disposal of the property of the corporation than any other member of the board of directors unless further powers are conferred upon him by the charter of the bank or by the action of the managing board; First N. Bk. v. Lucas, 21 Neb. 280, 31 N. W. 805. He may not make an agreement binding on the bank and embodying a transaction not within the usual course of business of the bank; First N. Bk. v. Hoch, 89 Pa. 324, 33 Am. Rep. 769; but see Burton v. Burley, 13 Fed. 811, 9 Biss. 253.

A bank is liable upon notes, executed by it through its cashier, for loans made by another bank in an amount not so great as to create suspicion, where the actual management of the bank was left entirely to such cashier, and the negotiation and all the correspondence were such as might lead the officers of the lending bank to believe that he was acting on authority and in good faith and honest intention, though the money was used by him for his own individual purposes, and the signature of the president was forged; City N. Bk. v. Bank, 80 Fed. 859, 26 C. C. A. 195; but where the affairs of a national bank were managed entirely by the cashier, who was universally believed to be honest and capable, but whose dishonesty and reckless management resulted in wrecking the bank, the president and directors, most of whom were farmers knowing little of banking, were not guilty of negligence so as to be liable for losses to creditors because they failed to examine the books, the statements being prepared and furnished them by the cashier, and reporting the bank to be in a prosperous condition, and there being no grounds of suspicion known to them; Warner v. Penoyer, 82 Fed. 181, following Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

The United States district court has jurisdiction of suits against national banks, brought by the United States or by direction of any officer thereof, and of cases for winding up their affairs, and of all suits brought by any bank to enjoin the comptroller, or a receiver acting under his direction. Banks are "declared citizens of the states in which they are located," for the purposes of all other suits by or against them, real, personal or mixed. Judiciary Act of March 3, 1911.

A national bank may bring suit in the circuit court out of its district, against a citizen of the district where the court sits; Manufacturers' N. Bk. v. Baack, 8 Blatchf. 137, Fed. Cas. No. 9,052; Davis v. Cook, 9 Nev. 134; and state courts have jurisdiction of suits brought by national banks; First N. Bk. v. Hubbard, 49 Vt. 1, 24 Am. Rep. 97; but this must be a state court of its locality; Bank v. Bank, 14 Wall. (U. S.) 383, 20 L. Ed. 840; Crocker v. Bank, 101 Mass. 240, 3 Am. Rep. 336.

Mortgages held by national banks are not subject to taxation by a state; First N. Bk. v. Kreig, 21 Nev. 404, 32 Pac. 641; nor can the stock in a national bank be taxed in any state other than that in which the bank is located; De Baun v. Smith, 55 N. J. L. 110, 25 Atl. 277.

A national bank may go into liquidation and be closed by a vote of the shareholders of two-thirds of its stock; R. S. § 5220; although it be contrary to the wishes and against the interests of the owners of the minority of the stock; Watkins v. Bank, 51 Kan. 254, 32 Pac. 914. In case of a failure to pay its circulating notes, the comptroller may appoint a receiver to wind up national banks; R. S. § 5234.

State banks may be changed into national banks; the change when made is a transit, and not a creation; see Coffey v. Bank, 46 Mo. 140, 2 Am. Rep. 488; and does not affect its identity or its right to sue upon obligations or liabilities incurred to it by its former name; Michigan Ins. Bk. v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162.

Federal Reserve Banks. The act of December 23, 1913, is entitled an act "to provide for the establishment of federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

Federal Reserve Districts. It provides that the secretary of the treasury, the secretary of agriculture and the comptroller of the currency, acting as "the reserve bank organization committee," shall designate not less than eight nor more than twelve cities as federal reserve cities, and divide the continent of the United States, exclusive of Alaska, into districts, each to contain only one such city. Only the federal reserve board, when organized, shall review their action, and may readjust the districts and create new ones, not exceeding twelve in all.

The committee shall supervise the organization in each of the cities of a federal reserve bank, entitled, e. g., "Federal Reserve Bank of Chicago."

Every national bank is required, and every eligible bank in the United States and every trust company within the District of Columbia is authorized, to signify in writing within sixty days after the passage of the act its acceptance of its terms.

Every national bank within the district is required within thirty days after notice to subscribe to the stock of such reserve bank in a sum equal to six per cent. of its paid-up capital and surplus. The shareholders of every reserve bank are individually responsible, but not one for another, for the engagements of the reserve bank to the extent of the amount of their subscriptions at par in addition to the amount subscribed.

Any national bank failing to signify its acceptance of the act within sixty days shall cease to act as a reserve agent, upon thirty days' notice within its discretion from the committee or the reserve board.

Should any national bank fail within one year after the passage of the act to become a member bank, or to comply with the act, its franchises under the national banking act or under this act shall be forfeited, but only upon suit in a United States court of competent jurisdiction, brought where the bank is located, under the direction of the reserve board, by the comptroller of the currency. In case of any such noncompliance, other than the failure to become a member bank, every participating or assenting director is held personally liable for all damages such bank, its shareholders, or any other person shall have sustained. If the subscription by banks to the federal reserve banks or any one or more of them be, in the judgment of the committee, insufficient to provide the necessary capital, the committee may offer to public subscription at par such amount of reserve bank stock as the committee may determine. No individual, partnership or corporation, other than a member bank of its district, can subscribe for or hold at any time more than $25,000 par value of reserve bank stock. Such stock is to be known as *public stock* and may be transferred on the books of the reserve bank by the chairman of its board of directors. If the total bank and public subscriptions to the stock of the reserve banks or one or more of them be insufficient to provide the necessary capital, the committee shall allot to the United States such amount of stock as it shall determine, to be paid for by the United States at par out of any money in the treasury not otherwise appropriated.

Stock not held by member banks shall not be entitled to voting power.

No reserve bank shall commence business with less than $4,000,000 subscribed capital.

The organization of the reserve districts and reserve cities shall not change the present status of reserve cities and central reserve cities, except in so far as the act changes the amount of reserves that may be carried with approved reserve agents located therein.

Branch Offices. Each reserve bank shall establish branch banks within the district, to be operated by directors under the rules of the reserve board. Branch bank directors shall possess the same qualifications as directors of the reserve banks. Four of said directors shall be selected by the reserve bank and three by the federal reserve board, and they shall hold office during the pleasure, respectively, of the parent bank and the federal reserve board. The reserve bank shall designate one of the directors as manager.

Federal Reserve Banks. When the minimum amount of stock prescribed by this act for the organization of any reserve bank shall have been subscribed and allotted, the committee shall designate any five banks of those whose applications have been received, to organize a reserve bank. When the organization certificate has been filed with the comptroller, the reserve bank shall become a body corporate with the ordinary powers, for a period of twenty years, and may appoint by its board of directors such officers and employés not otherwise provided for in the act and dismiss them at pleasure. It may deposit with the United States treasurer bonds of the United States as provided by existing laws and receive circulating notes equal to the par value of the bonds; but the issue thereof shall not be limited to the capital stock of such reserve bank.

Reserve banks shall be conducted under control of directors with the usual powers and those prescribed by law; they shall administer their affairs "fairly and impartially and without discrimination in favor of or against any member bank or banks and shall, subject to the provisions of law and the orders of the reserve board, extend to each member bank such discounts, advancements and accommodations as may be safely and reasonably made, with due regard for the claims and demands of other member banks."

The board of directors shall consist of nine members, holding office for three years, and divided in classes, of three each, designated as classes A, B, and C. Class A shall be chosen by the stockholding banks. Class B shall be persons actively engaged in their district in commerce, agriculture or some other industrial pursuit. Class C shall be designated by the reserve board, which shall designate one of them as chairman. No senator or representative in congress shall be a member of the reserve board or an officer or director of a reserve bank.

No director of class B shall be an officer, director or employé of any bank. No director of class C shall be an officer, director, employé, or stockholder of any bank.

An elaborate plan for the choice of directors of classes A and B is provided, for which see the act.

Class C directors shall be appointed by the reserve board; they shall have been at least two years residents of the district. One of them shall be appointed chairman of the

board and as "federal reserve agent"; he shall be a person of "tested banking experience." Another member of class C, of like experience, shall be deputy chairman and deputy reserve agent.

Stock Issues. Reserve banks may increase their capital stock and surplus as member banks increase their capital stock, or additional banks become members or decrease it as member banks decrease their capital stock or surplus or cease to be members. Such stock owned by member banks shall not be transferred or hypothecated. When a member bank increases its capital stock or surplus, it must subscribe for an additional amount of capital stock equal to six per cent. of the increase, and may upon a reduction of its capital surrender a proportionate amount, or upon liquidation surrender all its holdings, receiving back its cash-paid subscriptions and one-half of one per cent. a month from the period of the last dividend, not to exceed the book value thereof, less any liability to the reserve bank.

Division of Earnings. Stockholders of reserve banks are entitled to annual cumulative dividends of six per cent. after the payment of which the remaining net earnings shall be paid to the United States as a franchise tax, except that one-half thereof shall be paid into a surplus fund until it shall amount to forty per cent. of the paid-in capital of such bank.

Reserve banks, including the stock, surplus and income, shall be exempt from all taxation except on real estate.

R. S. § 5154, is amended to provide that any bank incorporated under special or general law of any state or of the United States and having an unimpaired capital sufficient to entitle it to become a national bank may, by a vote of not less than fifty-one per cent. of the capital stock and the approval of the Comptroller, become a national bank, if such conversion shall not be in contravention of the state law.

State Banks as Members. Any bank incorporated by special law of any state or organized under the general laws of any state or of the United States may apply to the committee or to the reserve board for the right to subscribe for reserve bank stock within its district, but the applying bank must have a paid-up unimpaired capital sufficient to entitle it to become a national bank.

Power is given in certain cases to the reserve board to require member banks to surrender their stock in the reserve bank upon repayment of the cash-paid subscriptions as aforesaid, less any liability to the reserve bank except for subscriptions not previously called. The reserve board may in a proper case restore the membership.

A *federal reserve board* is created, which shall consist of the secretary of the treasury, the comptroller of the currency, *ex officio*, and five members appointed by the president by and with the advice and consent of the senate. Not more than one of such five appointive members shall be selected from any reserve district, and the president shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country. The five appointive members shall receive salaries of $12,000, and the comptroller shall receive $7,000 for his services as a member of the board. At least two of such five members shall be "persons experienced in banking or finance." One shall be designated by the president to serve for two years, one for four years, one for six years, one for eight years and one for ten years. Thereafter the terms shall be ten years, unless sooner removed for cause by the president. One of the persons shall be designated by the president as governor and one as vice-governor of the board.

Nothing in the act shall take away any powers heretofore vested in the secretary of the treasury in regard to the treasury department, and wherever any power vested by this act in the reserve board or the reserve agent appears to conflict with the powers of the secretary of the treasury, such powers shall be exercised subject to the supervision and control of the secretary.

A bureau in the treasury department is created, charged with the execution of all laws relating to the issue and regulation of national currency, etc.; the comptroller of the currency is to be chief of such bureau.

The reserve board is empowered to examine the accounts, books and affairs of each federal reserve bank and each member bank and to require such statements and reports as it may deem necessary; it shall publish once a week a statement showing the condition of each reserve bank and a consolidated statement of all reserve banks. It may permit or, on the affirmative vote of at least five of its members, require reserve banks to rediscount the discounted paper of other reserve banks, at rates of interest to be fixed by it.

It may suspend for a period not exceeding thirty days, and from time to time renew such suspension for periods not exceeding fifteen days, "any reserve requirement specified in this act," but with certain provisos.

It may add to the number of reserve cities or central reserve cities or reclassify them.

It may remove or suspend any officer or director of any reserve bank. It may require the writing off of doubtful or worthless assets by any reserve bank; for any violation of the act suspend the operations of any reserve bank, take possession thereof, administer the same, and liquidate or reorganize it. It has general supervision over reserve banks. It may grant by special permit to national banks applying therefor, when not in contravention of state or local

law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds.

Federal Advisory Council. A "federal advisory council" is created to consist of as many members as there are federal reserve districts. Each federal reserve bank appoints one member thereof. The council meets at Washington at least four times a year and oftener if called by the reserve board, and it may meet there or elsewhere as they may deem necessary. It has power to confer directly with the reserve board on general business conditions, to make oral or written representations concerning matters within the jurisdiction of the board, to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks and the general affairs of the reserve banking system.

Powers of Federal Reserve Banks. Such bank may receive from any of its member banks and the United States deposits of current funds in lawful money, national-bank notes, federal reserve notes, or checks and drafts upon solvent member banks or other federal reserve banks, payable upon presentation; or, solely for exchange purposes, may receive from other reserve banks deposits of current funds in lawful money, national-bank notes, etc. Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest, a reserve bank may discount notes, drafts and bills of exchange arising out of actual commercial transactions, that is, issued or drawn for agricultural, industrial or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes. This shall not include notes, etc., covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds or other investment securities, except government bonds and notes. Such notes, drafts and bills discounted must have a maturity at the time of discount of not more than ninety days, except that if drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, they may be discounted in an amount to be limited to a percentage of the capital of the reserve bank, to be ascertained and fixed by the reserve board.

A reserve bank may discount acceptances based on importation or exportation of goods and having a maturity at the time of discount of not more than three months and endorsed by at least one member bank, but the amount thereof shall at no time exceed more than one-half of the paid-up capital and surplus of the bank for which the rediscounts are made. The aggregate of such notes and bills bearing the signature and endorsement of any one person, firm or corporation, rediscounted for any one bank, shall at no time exceed ten per cent. of the unimpaired capital and surplus of such bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

A member bank may accept drafts and bills of exchange drawn on it and growing out of transactions involving the importation and exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

R. S. § 5202, is amended so as to provide that no national bank shall at any time be indebted to an amount exceeding its unimpaired capital stock except on account of demands of the following nature: Notes of circulation; moneys deposited with or collected by it; bills of exchange or drafts drawn against money actually on deposit or due thereto; liabilities to its stockholders for dividends and reserve profits; and liabilities incurred under the act.

The rediscount by any reserve bank of bills receivable and of domestic and foreign bills of exchange and acceptances shall be subject to the regulations of the reserve board.

Open-Market Operations. Any reserve bank may, under the rules of the reserve board, purchase and sell in the open market either from or to domestic or foreign banks, etc., cable transfers and bankers' acceptances and bills of exchange of the kind and maturities as by this act made eligible for rediscount with or without the endorsement of a member bank. It shall have power to deal in gold coin and bullion and make loans thereon; to buy and sell bonds and notes of the United States and bills, notes, revenue bonds and warrants with maturity from date of purchase of not exceeding six months issued in anticipation of the collection of taxes or of the assured revenue of any state, county, district, political subdivision or municipality in the continental United States, including irrigation, drainage and reclamation districts, but under the rules of the reserve board. It may purchase from member banks and sell, with or without endorsement, bills of exchange arising out of business transactions as thereinbefore defined. It may establish from time to time, subject to review by the reserve board, rates of discount for each class of paper, which shall be fixed with a view of accommodating commerce and business.

It may establish accounts with other reserve banks for exchange purposes and with the consent of the reserve board open and maintain banking accounts in foreign countries.

Note Issues. Federal reserve notes to be

issued at the discretion of the reserve board for the purpose of making advances to federal reserve banks are authorized. They are notes of the United States and "shall be receivable by all national and member banks and federal reserve banks and for all taxes, customs and other public dues. They shall be redeemed in gold on demand at the treasury department of the United States or in gold or lawful money at any federal reserve bank."

The federal reserve bank, in applying to the federal reserve agent for federal reserve notes, shall tender to such agent collateral in amount equal to the sum of the notes thus applied for, which shall consist of notes and bills accepted for rediscount under the act. The reserve board may at any time call upon the reserve bank for additional security to protect the reserve notes issued to it.

Every reserve bank shall maintain a reserve in gold or lawful money of not less than thirty-five per cent. against its deposits and reserves in gold of not less than forty per cent. against its reserve notes in actual circulation and not offset by gold or lawful money deposited with the federal reserve agent.

The reserve board shall require each reserve bank to maintain on deposit in the United States treasury a sum in gold sufficient in the judgment of the secretary for the redemption of federal reserve notes and in no event less than five per cent., but such deposit shall be included as part of the forty per cent. reserve above required. Any reserve bank may reduce its liability for outstanding reserve notes by depositing with the federal reserve agent, its federal reserve notes, gold, gold certificates or lawful money of the United States.

Bank Reserves. Demand deposits within the act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment.

After a federal reserve bank is established in any district, every subscribing member bank shall maintain reserves according to an elaborate scheme, as to which reference must be made to the act.

Bank Examinations. The comptroller, with the approval of the secretary of the treasury, shall appoint examiners, who shall examine every member bank at least twice a year and oftener if necessary; the reserve board may authorize examination by the state authorities to be accepted in the case of state banks or trust companies and may at any time direct the special examination of state banks or trust companies that are stockholders of a reserve bank.

The reserve board shall at least once a year order an examination of each reserve bank and upon joint application of ten member banks shall order a special examination of and a report upon any such bank.

Loans on Farm Lands. Any national bank not situated in a central reserve city may make loans secured by improved and unincumbered farm land situate within its reserve district, but not for more than five years nor exceeding one-half of the actual value of the property offered as security. Such loans may be made in an aggregate sum not exceeding twenty-five per cent. of its capital and surplus and one-third of its time deposits. The reserve board shall have power from time to time to add to its list of cities from which its members shall not be permitted to make loans on real estate.

Foreign Branches. Any national bank with a capital and surplus of $1,000,000 or more may apply to the reserve board for authority to establish branches in foreign countries or dependencies of the United States and to act as fiscal agents of the United States.

National banks having circulating notes secured otherwise than by United States bonds shall pay for the first three months a tax at the rate of three per cent. per annum upon the average amount of such of their notes in circulation as are based on the deposit of such securities, and afterwards an additional tax rate of one-half of one per cent. per annum for each month until a tax of six per cent. per annum is reached, and thereafter a tax of six per cent. per annum upon the average amount of such notes.

Certain changes are made in the national banking act, as to which attention is called to the act.

Finally, if any part of the act shall be adjudged invalid, it shall not affect the remainder of the act; the right to alter, amend or repeal the act is expressly reserved.

See DEPOSIT; INTEREST; PROXY; RESERVE; BANK.

NATIONAL CHURCH. A church established by law in a country or nation. See CHURCH OF ENGLAND.

NATIONAL CURRENCY. Notes issued by national banks and by the government. Dull v. Com., 25 Gratt. (Va.) 965. See CURRENT MONEY; MONEY; LEGAL TENDER.

NATIONAL DEBT. A sum owing by the government to individuals who have advanced money to it for public purposes, either in anticipation of the produce of the particular branches of the revenue, or on credit of the general power which the government possesses of levying the amount necessary to pay interest for the money borrowed or to repay the principal. See FUNDING SYSTEM.

NATIONAL DOMAIN. See LANDS, PUBLIC.

NATIONAL DOMICIL. See DOMICIL.

NATIONAL ENSIGN. The national flag. See FLAG.

NATIONAL GOVERNMENT. A government of the people of a single state or nation, united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things so far as they can be made the lawful objects of civil government. A federal government is distinguished from a national government by its being the government of a community of independent and sovereign states united by compact. Piqua Branch Bank v. Knoup, 6 Ohio St. 393.

NATIONAL GUARD. A name given to the organized militia in some parts of the United States. See MILITIA.

NATIONALITY. Character, status, or condition with reference to the rights and duties of a person as a member of some one state or nation rather than another.

Nationality may be determined from origin, naturalization, domicil, residence, trade, or other circumstances; 1 Halleck, Int. L. 403.

The term is in frequent use with regard to ships. Nationality determined by one's birthplace or parentage is called *nationality of origin;* that which results from naturalization, is *by acquisition.* In feudal times, nationality was determined exclusively by the place of birth, *jure soli;* but under the laws of Athens and Rome the child followed that of the parents, *jure sanguinis.* "Of these two tests, the place of birth and the nationality of the father, neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, while in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this latter theory has found acceptance among other European nations," as Belgium, Bavaria, Prussia, and Spain. Morse, Citizenship 10. The subject is usually regulated by treaty. See EXPATRIATION.

See ALIEN; ALLEGIANCE; CITIZEN; DENIZEN; DOMICIL; EXPATRIATION; NATURALIZATION.

NATIONS, LAW OF. See INTERNATIONAL LAW.

NATIVE, NATIVE CITIZEN. A natural-born subject. 1 Bla. Com. 366. Those born in a country, of parents who are citizens. Morse, Citizenship 12. See CITIZEN. There is no distinction between *native born* as used in the French Extradition treaty and *natural born* as used in the extradition act; 37 W. R. 269.

NATIVO HABENDO. A writ which lay for a lord when his villein had run away from him. *Termes de la Ley.*

NATIVUS. See NEIF.

NATURA BREVIUM. See OLD NATURA BREVIUM.

NATURAL AFFECTION. The affection which one naturally feels towards those who are nearly allied to him. It sometimes supplies the place of a valuable consideration in contracts; and natural affection is a good consideration in a deed. 2 Steph. Com. 68. See BARGAIN AND SALE; COVENANT TO STAND SEIZED; CONSIDERATION.

NATURAL ALLEGIANCE. See ALLEGIANCE.

NATURAL AND REASONABLE WEAR AND TEAR. Wear and tear by use. Damage by operation of nature, as by freshets, is not included therein. 20 N. J. L. 544.

NATURAL-BORN. See NATURALIZATION.

NATURAL-BORN SUBJECT. See NATURALIZATION.

NATURAL CHILDREN. Bastards; children born out of lawful wedlock. But in a statute declaring that adopted children shall have all the rights of "natural" children, the word "natural" was used in the sense of legitimate; 9 Am. L. Reg. 747.

In Civil Law. Children by procreation, as distinguished from those by adoption.

In Louisiana. Illegitimate children who have been adopted by the father. La. Civ. Code, art. 220.

NATURAL DAY. That space of time included between the rising and the setting of the sun. See DAY.

NATURAL DEATH. See DEATH.

NATURAL EQUITY. That which is founded in natural justice, in honesty and right, and which arises *ex æquo et bono.*

It corresponds precisely with the definition of justice or natural law, which is a constant and perpetual will to give to every man what is his. This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it. Every code of laws has left many matters of natural justice or equity wholly unprovided for, from the difficulty of framing general rules to meet them, from the almost impossibility of enforcing them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, or kindness. 4 Bouvier, Inst. n. 3720. See EQUITY.

NATURAL FOOL. An idiot; one born without the reasoning powers or a capacity to acquire them.

NATURAL FRUITS. The natural production of trees, bushes, and other plants, for the use of men and animals, and for the reproduction of such trees, bushes, or plants.

This expression is used in contradistinction to artificial or figurative fruits: for example, apples, peaches, and pears, are natural fruits; interest is the fruit of money, and this is artificial.

NATURAL GAS. See GAS.

NATURAL HEIRS. As used in a will and by way of executory devise, they are considered as of the same legal import as "heirs

of the body." Smith v. Pendell, 19 Conn. 112, 48 Am. Dec. 146.

NATURAL INFANCY. A period of non-responsible life, which ends with the seventh year. Whart. Dict.

NATURAL LAW. See LAW OF NATURE.

NATURAL LIBERTY. See LIBERTY.

NATURAL LIFE. The period between birth and natural death. The use of the word natural before life in a sentence of solitary confinement in a state prison for life, is a surplusage and does not affect the sentence; People v. Wright, 89 Mich. 70, 50 N. W. 792. See DEATH.

NATURAL OBLIGATION. One which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice. Pothier, nn. 173, 191. See OBLIGATION; MORAL OBLIGATION.

NATURAL PERSONS. See PERSON.

NATURAL PRESUMPTIONS. Presumptions of fact; those which depend upon their own form and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience.

NATURAL RESOURCES, CONSERVATION OF. See LANDS.

NATURAL WATERCOURSE. A natural stream flowing in a defined bed or channel, with banks and sides, and having permanent sources of supply. Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Hinkle v. Avery, 88 Ia. 47, 55 N. W. 78, 45 Am. St. Rep. 224. See WATERCOURSE.

NATURALEZA. **In Spanish Law.** The state of a natural-born subject. White, New Recop. b. 1, t. 5, c. 2.

NATURALIZATION. The act by which an alien is made a citizen of the United States of America.

The act of adopting a foreigner and clothing him with all the privileges of a native-born citizen. Osborn v. Bank, 9 Wheat. (U. S.) 827, 6 L. Ed. 204; 9 Op. Atty.-Gen. 359.

A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen, by admitting him into the body of the political society. This is called naturalization. Vattel, Laws of Nat., bk. 1, ch. xix. §§ 212–214.

It is believed that every state in Christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native-born subjects of other states, without reference to the consent of the latter for the release of the transfer of the allegiance of such subjects. See Morse, Citizenship, 66.

Naturalization, of itself, conveys no right of suffrage; Pars. Rights, Amer. Citizen 190; though by it a foreigner becomes, to all intents and purposes, a citizen of the United States, with no disability except that he cannot become president or vice-president. It does not operate as a bar against prosecution in one's native country for prior offences; 2 Whart. Dig. Int. L. § 180. The provision of the constitution applies to persons of foreign birth only; Scott v. Sandford, 19 How. (U. S.) 419, 15 L. Ed. 691; but not to Mongolians, or American Indians; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; 7 Op. Atty. Gen. 746; In re Buntaro Kumagai, 163 Fed. 922; In re Knight, 171 Fed. 299; In re Takuji Yamashita, 30 Wash. 234, 70 Pac. 482, 59 L. R. A. 671; and not, formerly, to a freeman of color, born in the United States; Smith v. Moody, 26 Ind. 299. Indians may be naturalized by act of congress; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691.

The term "white" in the naturalization acts has been generally construed to mean only the Caucasian race, and Chinese, Hawaiians, Burmese and Canadian Indians have been refused naturalization; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726; Matter of Po, 7 Misc. 471, 28 N. Y. Supp. 383; In re Camille, 6 Fed. 256; as was a half breed whose father was of English birth and parentage and whose mother was half Chinese and half Japanese, though the applicant had served in the United States navy; In re Knight, 171 Fed. 299; and a Japanese is held ineligible to citizenship; In re Takuji Yamashita, 30 Wash. 234, 70 Pac. 482, 59 L. R. A. 671. A Mexican of aboriginal descent was admitted because of treaties with Mexico; In re Rodriguez, 81 Fed. 337; a Parsee, though with considerable doubt; In re Balsara, 171 Fed. 294; Syrians in Rhode Island and Georgia, but not in Nebraska; In re Najour, 174 Fed. 735; and an Armenian born in Asiatic Turkey; *id.*, where "white" is said to be a catch-all word and, to include all persons not otherwise classified. The son of a German father and a Japanese mother was held ineligible to naturalization; In re Young, 198 Fed. 715.

See WHITE PERSONS.

Entire communities have been naturalized by a single act of national sovereignty; Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. The act of July 14, 1870, extended the naturalization laws to persons of African descent. Under R. S. § 1994, providing that "any woman who is now or hereafter may be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen," applies to women of African blood; Broadis v. Broadis, 86 Fed. 951.

An alien over twenty-one years who has enlisted in the United States army may, without previous declaration of intention, be naturalized on one year's residence, good

moral character and honorable discharge; Act of July 17, 1862, § 21. An alien seaman may become a citizen by declaring his intention and serving three years on a merchant vessel of the United States; R. S. § 2174.

An alien enemy cannot be naturalized; R. S. § 2171.

Minor children, though born out of the United States, if living within the United States at the time of the naturalization of the parents, become citizens by virtue of the naturalization of the parents; Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; but not so if they came after the father had been naturalized; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704.

A married woman was naturalized in Ex parte Pic, 1 Cra. C. C. 372, Fed. Cas. No. 11,118; she may be naturalized without the concurrence of her husband; Priest v. Cummings, 16 Wend. (N. Y.) 617; and an alien woman becomes a citizen when her husband is naturalized, even if she is not of age at the time; Renner v. Muller, 44 N. Y. Sup. Ct. 535; and though she may have lived in a foreign country for years and has never come to the United States until after his death; 14 Op. Atty.-Gen. 402.

The federal constitution, art. 1, § 8, vests in congress the power to establish a uniform rule of naturalization. "It follows from the very nature of the power that to be useful it must be exclusive, for a concurrent power in the states would bring back all the evils and embarrassments which the constitution was designed to remedy, and accordingly, though there was a momentary hesitation when the constitution first went into operation as to whether the power might not still be exercised by the states subject only to the control of congress so far as the legislation of the latter extended as the supreme law, yet the power is now firmly established to be exclusive;" 2 Story, Const. § 1104; Smith v Turner, 7 How. (U. S.) 556, 12 L. Ed. 702; Ex parte Knowles, 5 Cal. 300; Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31; and no state can pass a law which contravenes the acts of congress on the subject; Barzizas v. Hopkins, 2 Rand. (Va.) 276. A state may confer such rights of citizenship as it pleases so far as relates to itself only; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691; In re Wehlitz, 16 Wis. 443, 84 Am. Dec. 700; but this is not to be confounded with the right of citizenship of the United States; Boyd v. Nebraska, 143 U. S. 160, 12 Sup. Ct. 375, 36 L. Ed. 103; and no state can make a citizen of the United States; Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080.

By act of April 14, 1802, congress conferred power to naturalize upon state courts having common-law jurisdiction and a seal and clerk; the subject has since been regulated by the act of 1906, *infra*.

Congress may invest state courts with jurisdiction to naturalize; In re Beavins, 33 N. H. 89; but it is held that it cannot *impose* the duty of naturalization upon state courts; Lab's Petition, 3 Pa. Dist. R. 728; nor require them to act upon applications for naturalization; Rushworth v. Judges, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761. See State v. Norris, 37 Neb. 299, 55 N. W. 1086. "Whether the state courts are bound to exercise concurrent jurisdiction, permitted to be retained by them even when enjoined upon them by act of congress, is not altogether well settled. Some strong intimations to the contrary have been given by the judges of the supreme court of the United States, and in some instances the courts of the particular states have refused to exercise this jurisdiction." State v. Penney, 10 Ark. 621. No state can confer jurisdiction on any court, which does not come within the terms of the act of congress; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196.

Courts of record, in naturalizing foreigners, act judicially, ascertaining the facts and applying the law to them; Spratt v. Spratt, 4 Pet. (U. S.) 407, 7 L. Ed. 897; the certificate of naturalization issued by a court of competent jurisdiction is conclusive proof of the citizenship of the person named therein; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; though not the only proof. The judgment of the court, like every judgment, has been decided to be complete evidence of its own validity; *id.*

When no record can be produced showing the naturalization of a foreigner, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen; Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103.

The act of congress of June 29, 1906, "to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," provides: Exclusive jurisdiction to naturalize aliens is conferred upon the United States district courts in any state or territory, the District of Columbia, etc., also on "all courts of record in any state or territory, * * * having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." The jurisdiction of the courts specified extends only to aliens resident within the respective judicial districts of such courts. An alien shall declare on oath before the clerk of any such court two years prior to his admission, and after he has reached the age of eighteen years, that it is his intention to become a citizen of the United States. Not less than two years or more than seven years after the declaration, he shall file a petition in writing signed by him, setting forth certain specified facts. The petition shall be verified by at least two credible witnesses, who shall state

that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state or district for at least one year immediately preceding the date of the filing of the petition and that he is in every way qualified to become a citizen. Applicant shall declare on oath in open court that he will support the Constitution of the United States, and renounce allegiance to any foreign prince, and any title or order of nobility.

In addition to the applicant's oath, the testimony of at least two witnesses as to the facts of residence, moral character and attachment to the principles of the constitution shall be required.

If the alien who has declared his intention dies before he is naturalized, his widow and minor children may be naturalized without making any declaration. No person shall be naturalized or any certificate of naturalization be issued within thirty days preceding any general election within the district. The court may in its discretion, at the time of naturalization, make a decree changing the name of the alien and issue his certificate in the new name.

No person who disbelieves in organized government or is a member of or affiliated with any organization entertaining and teaching such disbelief, or advocates or teaches the duty, etc., of assaulting or killing of any officer or officers, or who is a polygamist, shall be naturalized. Nor shall any one who cannot speak the English language, but this does not apply to those who are physically unable to do so, if they are otherwise qualified.

Final hearing shall be in open court before a judge.

The act provides that any person belonging to the class qualified to become citizens, who has resided constantly in the United States for five years preceding May 1, 1910, and who, on account of misinformation as to the naturalization laws, has acted under a wrong impression, may, by showing such facts to a court having jurisdiction, receive a certificate of naturalization without requiring proof of filing a declaration of intention.

The act provides for cancelling naturalizations illegally procured. In Johannessen v. U. S., 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, it was held that this act was constitutional, and that certificates of naturalization, like patents for lands and inventions, can, when issued *ex parte*, be annulled for fraud. As to the result, if the government had exercised the power expressly given under this act to appear and cross-examine, was not decided.

Aliens may be naturalized in one dominion of the British Empire, but do not thereby become citizens of the empire or of any other dominion.

See ALIEN; CHINESE; CITIZEN; ALLEGIANCE; EXPATRIATION; WHITE PERSONS.

NATURALIZED CITIZEN. One who, being born an alien, has lawfully become a citizen of the United States. See NATURALIZATION.

NATURALLY. According to the usual course of things. Mitchell v. Clarke, 71 Cal. 164, 11 Pac. 882, 60 Am. Rep. 529.

NATURRECHT (German). The law of nature. See JURISPRUDENCE.

NAUCLERUS (Lat.). The master or owner of a vessel. Vicat. Voc. Jur.; Calvinus, Lex.

NAUFRAGE. In French Maritime Law. When, by the violent agitation of the waves, the impetuosity of the winds, the storm, or the lightning, a vessel is swallowed up, or so shattered that there remain only the pieces, the accident is called *naufrage.*

It differs from *échouement,* which is when the vessel remains whole, but is grounded; or from *bris,* which is when it strikes against a rock or a coast; or from *sombrer,* which is the sinking of the vessel in the sea when it is swallowed up, and which may be caused by any accident whatever. Pardessus, n. 613. See WRECK.

NAUGHT. Bad; defective.

NAULAGE. See NAULUM.

NAULUM (Lat.). Freight or passage money. 1 Pars. Mar. Law 124, n.; Bened. Adm. § 288; Dig. l. 6, § 1, *qui potiores in pignore.*

NAUTA (Lat.). One who charters (*exercet*) a ship. L. 1, § 1, ff. *nautæ, caupo;* Calvinus, Lex. Any one who is on board a vessel for the purpose of navigating her. U. S. v. Winn, 3 Sumn. 213, Fed. Cas. No. 16,740. Vicat, Voc. Jur.; 2 Emerigon 448; Pothier, Pand. lib. 4, tit. 9, n. 2; lib. 47, tit. 5, nn. 1, 2, 3, 8, 10. A carrier by water. 2 Ld. Raym. 917.

NAUTICA PECUNIA. A loan to a shipowner, to be repaid only upon the successful termination of the voyage, and therefore allowed to be made at an extraordinary rate of interest (*nauticum fœnus*). Holland, Jurispr. 250. See TRAJECTITIA PECUNIA.

NAUTICAL ASSESSORS. Experienced shipmasters or other persons having special knowledge of navigation and nautical affairs, who are called to the assistance of a court of admiralty in difficult cases involving questions of negligence, and who sit with the judge during the argument and give their advice upon questions of seamanship or the weight of testimony. The Empire, 19 Fed. 559.

NAUTICUM FŒNUS. See FŒNUS NAUTICUM.

NAVAGIUM. A duty on certain tenants to carry their lord's goods in a ship. 1 Mon. Ang. 922.

NAVAL ACADEMY. A school at Annapolis, Maryland, for the education of officers for the navy. By act of Congress of July 9, 1913, after June 30, 1913, and until June 30, 1919, each senator and each representative and delegate may appoint two midshipmen; there shall be one from Porto Rico, two from the District of Columbia, and ten at large. Upon graduation, they are to be commissioned ensigns in the navy, or may be assigned to the lowest commissioned grade in the marine corps or the staff corps of the navy. Appointments upon the recommendation of senators, representatives or delegates must be made by March 4th following notice of the vacancy; otherwise the secretary of the navy may appoint. All candidates must at the time of their examination be between the ages of 16 and 20 years.

Midshipmen are officers of the line in a qualified sense. Navy Reg. ch. II, 18, (3).

NAVAL CADET. Midshipmen at the Naval Academy were so called until the act of July 1, 1902, changed the name to midshipman.

NAVAL COURTS. Courts held abroad in certain cases to inquire into complaints by the master or seamen of a British ship, or as to the wreck or abandonment of such ship.

NAVAL COURTS MARTIAL. See COURT MARTIAL.

NAVAL LAW. A system of regulations for the government of the navy. 1 Kent 377, n. Homans, Nav. Laws; De Hart, Courts-Martial.

NAVAL OFFICER. An officer of the customs of the United States.

His office relates to the estimating duties, countersigning permits, clearances, etc., certifying the collectors' returns, and similar duties. Act of March, 2, 1799.

NAVAL PRIZE ACT. The act of 27 & 28 Vict. c. 25, which regulates questions of prize. See PRIZE.

NAVARCHUS, NAVICULARIUS (Lat.). **In Civil Law.** The master of an armed ship. *Navicularius* also denotes the master of a ship (*patronus*) generally. Cic. Ver. 4, 55; also, a carrier by water (*exercitor navis*). Calvinus, Lex.

NAVIGABLE WATERS. Those waters which afford a channel for useful commerce. The Montello, 20 Wall. (U. S.) 430, 22 L. Ed. 391.

The test by which the character of a stream as public or private is determined, is its navigability in fact; Fulmer v. Williams, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; State v. Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618.

In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide,—in other words, to tide-waters, the bed or soil of which is the property of the crown. All other waters are, in this sense of the word, unnavigable, and are, *prima facie*, strictly private property; but in England even such waters, if navigable in the popular sense of the term, are, either of common right or by dedication, subject to the use of the public as navigable highways, the fee or soil remaining in the riparian proprietors; 20 C. B. N. S. 1; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161.

The rule of the common law, by which the ebb and flow of the tide has been made the criterion of navigability, has never been adopted in any of the United States, or, if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants. According to the rule administered in the courts of this country, all rivers which are found "of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" Browne v. Scofield, 8 Barb. (N. Y.) 239; Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; or which are capable of use "for the floating of vessels, boats, rafts, or logs"; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Smart v. Lumber Co., 103 Me. 37, 68 Atl. 527, 14 L. R. A. (N. S.) 1083; Hot Springs L. & Mfg. Co., 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894 (but see American River W. Co. v. Amsden, 6 Cal. 443; Haines v. Hall, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; Spokane Mill Co. v. Post, 50 Fed. 429; Falls Mfg. Co. v. Imp. Co., 87 Wis. 134, 58 N. W. 257; are subject to the free and unobstructed navigation of the public, independent of usage or of legislation; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Morgan v. King, 18 Barb. (N. Y.) 277; Homochitto River Com'rs v. Withers, 29 Miss. 21, 64 Am. Dec. 126. See Gerrish v. Brown, 51 Me. 256, 81 Am. Dec. 569; Olson v. Merrill, 42 Wis. 203; Escanaba Co. v. Chicago, 107 U. S. 682, 2 Sup. Ct. 185, 27 L. Ed. 442. Water navigable for pleasure boating must be regarded as navigable; Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380; but the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable river of the United States; Leovy v. U. S., 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914. To make a stream a highway it must at least be navigable or floatable in its natural state at ordinary recurring winter freshets long enough to make it useful for some purpose of trade or agriculture; Banks v. Frazier, 111 Ky. 909, 64 S. W. 983; Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; People v. Lumber Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; Kamm v. Normand, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698; mere ability

to catch fish in a body of water does not make it navigable; Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. 532, 12 L. R. A. (N. S.) 275.

Navigable streams are highways; Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276; a navigable stream is not a highway in the sense that that word is used in the constitution of South Carolina, forbidding the enactment of local or special laws to lay out, open, alter or work roads or highways; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

The navigable waters of the United States are such as are navigable in fact; Scranton v. Wheeler, 57 Fed. 803, 6 C. C. A. 585, 16 U. S. App. 152; and which by themselves, or in connection with other waters, form a continuous channel for commerce with foreign countries or among the states; Miller v. New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed 971.

A river may be navigable below the ebb and flow of the tide in the sense of the common law, and, in fact, navigable above; and the question of boundary in respect to lands adjoining it will be determined by one principle above, and by another below tide-water; Attorney General v. R. Co., 27 N. J. Eq. 1. It is not necessary that the stream should be navigable all the year round; Thunder Bay R. B. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184; Bucki v. Cone, 25 Fla. 1, 6 South. 160. There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream; Olive v. State, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33.

"The term 'navigable waters,' as commonly used in the law, has three distinct meanings: first, as synonymous with 'tide-waters,' being waters whether fresh or salt wherever the ebb and flow of the sea is felt; or second, as limited to tide-waters which are capable of being navigated for some useful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide which can be used for navigation." Com. v. Vincent, 108 Mass. 447. See 19 Am. L. Reg. N. S. 147. In North Carolina the test of navigability is not whether the stream is subject to the ebb and flow of the tide, but whether it is navigable for seagoing vessels; State v. Eason, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811; while in South Carolina the test is its navigable capacity, without regard to the character of the craft; Heyward v. Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702.

In New York, it seems that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law; Browne v. Scofield, 8 Barb. (N. Y.) 239; but it has been held that what is a navigable stream is a mixed question of law and fact; if a stream is not navigable the legislature cannot declare it to be so, because the legislature cannot appropriate it to public use without provision for compensation; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58.

The technical title to the beds of navigable rivers of the United States is either in the states in which the rivers are situated or in the riparian owners, depending on the local law. It is a qualified one, and subordinate to the public right of navigation and subject to the absolute power of congress over the improvement of navigable rivers. Under the constitution, congress can adopt any means for the improvement of navigation that are not prohibited by that instrument itself. The judgment of congress as to whether a construction in or over a navigable river is or is not an obstruction to navigation is an exercise of legislative power and wholly within its control and beyond judicial review. The flow of the stream of a navigable river is in no sense private property, and there is no room for judicial review, at the instance of a private owner of the banks of the stream, of a determination of congress that such flow is needed for the improvement of navigation. One placing obstructions in a navigable stream under a revocable permit of the secretary of war does not acquire any right to maintain them longer than the government continues the license. Private right to running water in a great navigable stream is inconceivable. Every structure in the water of a navigable river is subordinate to the right of navigation and must be removed, even if the owners sustain a loss thereby, if congress, in assertion of its power over navigation so determines; U. S. v. Chandler-Dunbar Co., 229 U. S. 54, 33 Sup. Ct. 667, 57 L. Ed. 1063.

Such waters entirely within the limits of a state are subject to the same control by the federal government as those extending through or reaching beyond the limits of the state; Minnesota C. & P. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105.

The use and control of waters lying within the geographical boundaries of the United States is not restrained by international comity; Minnesota Canal & P. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105. Express authority is necessary to authorize the laying out of a highway into a navigable body of water for the purpose of a wharf or landing place; Com'r. of Highways v. Ludwick, 151 Mich. 498, 115 N. W. 419, 15 L. R. A. (N. S.) 1170, 14 Ann. Cas. 287; Chase v. Cochran, 102 Me. 431, 67 Atl. 320; an act giving a city the right to project or extend streets over tide lands is au-

thorized only for the extension of the existing streets; Seattle & M. Ry. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866; it has been held that a lake may be filled in along the shore to accommodate a street; People v. Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; that a town has jurisdiction to lay out a highway over land that is above mean high water mark although it is covered by the sea during the highest tides; Hunt v. Com., 183 Mass. 307, 67 N. E. 966. It has been held in England that the metropolitan board of works has no power to erect any works on the bed or soil of the Thames without the consent of the admiralty and the conservators of the river; 13 C. B. N. S. 768; 8 Jur. N. S. 891; 6 L. T. N. S. 187; the fact that the extension of a railroad across an arm of the sea would interfere with plaintiff's rights to navigate such waters does not inflict on him an injury different from that done to the public at large so as to entitle him to an injunction; O'Brien v. R. Co., 17 Conn. 372.

The act of congress of March 3, 1899, provides that no bridge, dam, dike or causeway shall be built over any harbor, river, canal or other navigable water until the consent of congress shall have been obtained and the plans approved by the chief of engineers and the secretary of war. The consent of congress is not required if a bridge is built by authority of a state legislature across rivers and waterways the navigable portions of which be wholly within the limits of a single state.

This act does not extend to an existing bridge but does cover the rebuilding of such; Rogers Sand Co. v. R. Co., 139 Fed. 7, 71 C. C. A. 419 (the earlier act of a like character of September 19, 1890, was held not to apply to a bridge the construction of which had been authorized by law prior to the act; Adams v. Ulmer, 91 Me. 47, 39 Atl. 347).

In the absence of congressional action, a state may authorize a construction over navigable waters; Depew v. Board, 5 Ind. 8; Highway Com'rs v. Chaffee, 1 Mich. N. P. 147; Kansas City M. & B. R. Co. v. Wiygul, 82 Miss. 223, 33 South. 965, 61 L. R. A. 578; though it more or less obstructs navigation; Fall River I. W. Co. v. R. Co., 5 Allen (Mass.) 221.

See DAM; BRIDGE; WATERS; WATERCOURSE; RIVERS; LAKE; RIPARIAN PROPRIETORS; TIDE-WATER.

NAVIGATING. A vessel which, though touching bottom, forces her way by her own screw through the soft mud is navigating. Western Union Tel. Co. v. S. S. Co., 59 Fed. 365, 8 C. C. A. 152.

NAVIGATION ACT. The stat. 12 Car. II. c. 78. It was repealed by 6 Geo. IV. cc. 109, 110, 114. See 16 & 17 Vict. c. 107; 17 & 18 Vict. cc. 5 and 120; 3 Steph. Com. 145.

NAVIGATION, RULES OF. Rules and regulations which govern the motions of ships or vessels when approaching each other under such circumstances that a collision may possibly ensue.

These rules are firmly maintained in the United States courts. A federal question is presented by a ruling of a state court which substantially ignores the obligatory force of rules of navigation; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218.

The rules of navigation which prevailed under the general maritime law, in the absence of statutory enactments, will be referred to, although, as hereinafter stated, they have been superseded by express enactment in most of the commercial countries of the world.

These rules were derived mainly from the decisions of the high court of admiralty in England, and of the superior courts of the United States, and they are based upon the rules promulgated by the corporation of the Trinity House on the 30th of October, 1840, and which may be found in full in 1 W. Rob. 488. Though now codified, see *infra*, they are here continued as in the former edition as a matter of historical interest.

For sailing-vessels about to meet. 1. Those having the wind *fair* shall *give way* to those on a wind [or close-hauled].

2. When both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand.

3. When both vessels have the wind large or abeam, and meet, they shall pass each other in the same way, on the larboard hand; to effect which two last-mentioned objects the helm must be put to port.

For a sailing and a steam vessel about to meet. 1. Steam-vessels are to be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack.

2. A steam-vessel and a sailing-vessel going large, when about to meet, should each port her helm and pass on the larboard side of the other; 1 W. Rob. 478; 2 *id.* 515.

But in the United States courts it has been almost uniformly held, and the rule is now firmly established, that when a sailing-vessel and a steamer are about to meet, the sailing-vessel must, under ordinary circumstances, and whether going large, or before the wind, or close-hauled by the wind, keep her course, and the steamer must take all the measures necessary to avoid a collision; St. John v. Paine, 10 How. (U. S.) 557, 13 L. Ed. 537; The R. R. Kirkland, 48 Fed. 760; The Havana, 54 Fed. 411; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469.

For steam-vessels about to meet. 1. When steam-vessels on different courses are about to meet under such circumstances as to in-

volve the risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of the other.

2. A steam-vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The following abstract of authorities may also be referred to as furnishing rules of decision (in addition to the general rules of navigation) in the particular cases alluded to; and they will be found generally applicable in cases of collision arising under the new regulations, as well as in cases arising under the general maritime law.

When a steamer or other vessel is about to pass another vessel proceeding in the same general direction, she must allow the foremost boat to keep her way and course, and must take the necessary measures to avoid a collision; Whitridge v. Dill, 23 How. (U. S.) 448, 16 L. Ed. 581; Abb. Adm. Pr. 108; The Rhode Island, 1 Blatchf. 363, Fed. Cas. No. 11,743.

A vessel under sail or steam is bound to keep clear of a vessel stationary or at anchor, provided the latter is in a proper place, and exhibits a proper light,—the presumption in such cases being that the vessel in motion is at fault; 3 Kent 231; 3 W. Rob. 49.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid a collision; Culbertson v. The Southern Belle, 18 How. (U. S.) 584, 15 L. Ed. 493; and in the night-time she ought generally to have her whole crew on deck; The Scioto, 2 Ware (Dav. 359) 360, Fed. Cas. No. 12,508. And see 3 Kent 231; 1 Dods. 467.

By the general maritime law, vessels upon the high seas were not ordinarily required constantly to exhibit a light; 2 W. Rob. 4; The Delaware v. The Osprey, 2 Wall. Jr. 268, Fed. Cas. No. 3,763; but the subject is now regulated by statute in the various maritime countries.

Regulations made by various governments are binding upon all vessels within the jurisdiction of that government; Story, Confl. Laws, ch. 14; 1 Swab. 38, 63, 96; Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35; but it is beyond the power of the legislature to make rules applicable to foreign vessels when beyond their jurisdiction; that is, more than a marine league from their shores; 1 Swab. 96. And see The New York v. Rae, 18 How. (U. S.) 223, 15 L. Ed. 359. It has, accordingly, been held that an English rule is not applicable in a case of collision on the high seas between a British and a foreign vessel, and that the latter could not set up in its defence a violation of the English statute by the British vessel; 1 Swab. 63, 96; and it was declared that in such a case the general maritime law must be the rule of the court. See The City of Washington, 92 U. S. 31, 23 L. Ed. 600.

The British Government, by an Order in Council, in 1863, promulgated certain regulations for preventing collisions at sea. An Order in Council, in 1879, promulgated new regulations, to take effect on September 1, 1880. These were adopted in pursuance of the recommendation of representatives of different nations, and are stated in the last-mentioned Order to have been very generally adopted by commercial nations. They were adapted to the United States with regard to vessels on the high seas and in coast waters, in 1864 (R. S. § 4233). A revised code was adopted by England in 1884, and then was adopted by the United States with reference to vessels on the high seas in 1885. (England by Orders in Council in 1896, 1897 and 1906, amended the Code of 1884.)

In 1890 under an international agreement congress adopted a complete system of rules of the road governing vessels both on the ocean and on our own inland waters. These rules consist of: 1. The International Rules agreed upon by all nations, which went into effect July 1, 1897; 1 R. S. Sup. 781. 2. Rules for the navigation of rivers, harbors, and inland waters of the United States, navigable by sea-going vessels, which went into effect October 7, 1897; 2 R. S. Sup. 620. 3. Rules to regulate the navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal, which went into effect March 1, 1895; 2 R. S. Sup. 320. 4. Rules for the navigation of the Red River of the North and rivers entering into the Gulf of Mexico and its tributaries, which are the same as were formerly in use, and are to be found in R. S. § 4233 and its amendments, and rules made pursuant to R. S. § 4412 by the Board of Supervising Inspectors of steam-vessels. Copies of all these rules are furnished on application by the Commissioner of Navigation. These various codes of rules are too long to be set forth here. An act of January 19, 1907 (supplementary to the act of August 19, 1890), made rules for fishing vessels and boats, and repealed article 10 of the act of March 3, 1885, and also the act of August 30, 1894.

It is evident that these rules and regulations were intended to supersede all other rules of navigation, and every other system of vessels' lights, wherever they may be adopted. They establish a well-devised and complete system of vessels' lights, and furnish plain and simple rules of navigation applicable to all the ordinary cases of vessels approaching each other under such circumstances as to involve the risk of collision, —leaving extraordinary cases, such as the meeting of vessels in extremely narrow or other very difficult channels (in respect to which no safe general rule can be devised), to the practical good sense and professional skill of those in charge of such vessels. Under all ordinary circumstances a vessel discharges her full duty to another vessel by a

faithful and literal observance of the international rules; The Oregon, 158 U. S. 187, 15 Sup. Ct. 804, 39 L. Ed. 943. Where there were no positive rules of navigation on a foreign river, but there was a certain practice, it was held that a vessel which disregarded the practice was responsible for a collision occurring thereby; L. R. 15 P. D. 194. A departure from the rules, to be justifiable, must *be necessary in order to avoid immediate* danger. But that necessity must not have been caused by the negligence or fault of the party disobeying the rule; and courts of admiralty lean against the exceptions; Crockett v. The Isaac Newton, 18 How. (U. S.) 581, 583, 15 L. Ed. 492; 1 W. Rob. 157, 478. And see Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175. It is no excuse for a vessel, in departing from the navigation rules, when rounding the Battery at New York, that vessels often agree with each other to do so, when it appears that the vessel in question took upon herself the responsibility of departing from the rules for her own convenience; The E. A. Packer, 58 Fed. 251, 7 C. C. A. 216, 14 U. S. App. 684.

Exceptions are admitted with reluctance and only where adherence to the rules must necessarily result in a collision; The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

The maritime law, however, requires that in collision cases every violation of a rule of navigation, and every other act or omission alleged to be a fault, shall be considered in connection with all the attending circumstances; and when by inevitable accident, or the fault of one of two colliding vessels, a vessel free from fault is suddenly brought into such circumstances of imminent danger as probably to render the deliberate or proper exercise of the judgment and skill of an experienced seaman impossible, an error of judgment, or other mistake, is not regarded as a legal fault; The Northern Indiana, 3 Blatch. 92, Fed. Cas. No. 10,320; The Havana, 54 Fed. 411; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

The proper and continual exhibition of the bright and colored lights which these rules and regulations prescribe, and their careful observance by the officer of the deck and the lookout of every vessel, constitute the very foundation of the system of navigation established by such rules and regulations. The exhibition of such lights, and the strict compliance with the rules in respect to *stationing* and *keeping* a competent and careful person in the proper place and exclusively devoted to the discharge of the duties of a lookout, are of the utmost importance.

The stringent requirements of our maritime courts in respect to lookouts may be learned by consulting the following authorities; St. John v. Paine, 10 How. (U. S.) 585, 13 L. Ed. 537; The Northern Indiana, 3 Blatch. 92, Fed. Cas. No. 10,320; The Clara, 55 Fed. 1021, 5 C. C. A. 390; The Charles H. Senff, 53 Fed. 669; The John T. Pratt, 60 Fed. 1022. This rule admits of no exception on account of size, in favor of any craft capable of committing injuries; The Marion, 56 Fed. 271. A sailing-vessel is entitled to assume that a steam-vessel, approaching her, is being navigated with a proper lookout and with reasonable attention to the obligations laid upon her; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219, 1 U. S. App. 11. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469.

The neglect to carry or display the lights prescribed by these rules and regulations will always be held, *prima facie*, a fault, in a collision case; Waring v. Clarke, 5 How. (U. S.) 441, 465, 12 L. Ed. 226; 3 W. Rob. 191; Swab. 120, 245, 253, 519; 1 Lush. 382; The Ann Caroline, 2 Wall. (U. S.) 538, 17 L. Ed. 833. And, upon the same principles, the neglect, in a fog, to use the prescribed fog-signals will also be considered, *prima facie*, a fault; Desty, Adm. § 360. See Fog.

It will be observed that the duty of slackening speed, in all cases when risk of collision is involved, is absolutely and imperatively imposed upon every steam-vessel, by these regulations, and that they require that every steam-vessel shall stop and reverse her engine when necessary to avoid a collision.

The duty of slackening speed in order to avoid a collision had been frequently declared by the maritime courts before the adoption of these regulations; 3 Hagg. Adm. 414; The Northern Indiana, 3 Blatch. 92, Fed. Cas. No. 10,320; 2 W. Rob. 1; 3 *id.* 95, 270, 377; St. John v. Paine, 10 How. (U. S.) 557, 13 L. Ed. 537; but there was no inflexible rule requiring a steamer to slacken speed in all cases when there was risk of collision; and the neglect to do it was held to be a fault only in those cases where its necessity was shown by the proofs. This left the question open to be determined by the courts in each particular case, and perhaps upon vague and unreliable estimates of time and distance and bearings, or upon conflicting and unsatisfactory testimony; but the legislature, in view of the great power and speed of the steamers now in general use, and the very disastrous consequences of a collision of such vessels when running at their ordinary speed, has wisely made the duty imperative; The Illinois, 5 Blatch. 256, Fed. Cas. No. 7,002. Newton v. Stebbins, 10 How. (U. S.) 586, 13 L. Ed. 551; The Free State, 91 U. S. 200, 23 L. Ed. 299; The State of California, 49 Fed. 172, 1 C. C. A. 224, 7 U. S. App. 20. See COLLISION; MARITIME LAW.

NAVIRE. In French Law. A ship. Emerig. *Traite des Assur.* c. 6, § 1.

NAVY. The whole shipping, taken collectively, belonging to the government of an independent nation, and appropriated for the purposes of naval warfare. It does not include ships belonging to private individuals nor (in the United States, at least) revenue vessels or transports in the service of the war department.

Under the constitution, congress has power to provide and maintain a navy. This power authorizes the government to buy and build vessels of war, to establish a naval academy, and to provide for the punishment of desertion and other crimes, and to make all needful rules for the government of the navy. See U. S. v. Bevans, 3 Wheat. (U. S.) 337, 4 L. Ed. 404; Dynes v. Hoover, 20 How. (U. S.) 65, 15 L. Ed. 838; U. S. v. Bevans, 3 Wheat. (U. S.) 370, 4 L. Ed. 404.

See COURT-MARTIAL; NAVY PERSONNEL ACT; NAVAL ACADEMY.

NAVY BILLS. Bills drawn by officers of the British navy for their pay, etc.

A bill of exchange drawn by the paymaster of a United States vessel, while abroad, to procure money for the expenses of his ship or fleet.

NAVY DEPARTMENT. See DEPARTMENT.

NAVY PERSONNEL ACT. The act of March 3, 1899, to reorganize and increase the efficiency of the navy and marine corps. It transferred engineer officers to the line and fixed their corresponding rank. It put officers of corresponding rank in the army and navy on the same general footing with respect to their general pay. See U. S. v. Thomas, 195 U. S. 418, 25 Sup. Ct. 102, 49 L. Ed. 259. As to their corresponding rank, see RANK.

NAVY REGISTER. An official list published semi-annually of the officers of the United States navy, their stations, rates of pay, etc., with a list of the ships.

NAVY REGULATIONS. Regulations of the navy established by the secretary of the navy with the approval of the president. They have the force of law; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538.

NE ADMITTAS (Lat.). The name of a writ now practically obsolete, so called from the first words of the Latin form, by which the bishop is *forbidden to admit* to a benefice the other party's clerk during the pendency of a *quare impedit.* Fitzh. N. B. 37; Reg. Orig. 31; 3 Bla. Com. 248; 1 Burn, Eccl. Law 31.

NE BAILA PAS (he did not deliver). A plea in detinue, by which the defendant denies the delivery to him of the thing sued for.

NE DISTURBA PAS. In Pleading. The general issue in *quare impedit.* Hob. 162. See Rast. Entr. 517; Winch, Entr. 703. Andr. Steph. Pl. 230.

NE DONA PAS, NON DEDIT. In Pleading. The general issue in formedon. It is in the following formula: "And the said C D, by J K, his attorney, comes and defends the right, when, etc., and says that the said E F did not give the said manor, with the appurtenances, or any part thereof, to the said G B, and the heirs of his body issuing, in manner and form as the said A B hath in his count above alleged. And of this the said C D puts himself upon the country." 10 Wentw. Pl. 182; Andr. Steph. Pl. 230.

NE EXEAT REPUBLICA, NE EXEAT REGNO (Lat. That he do not depart from the state, or kingdom). The name of a writ originally employed in England as a high prerogative process, for political purposes. Story, Eq. Jur. § 1467; Samuel v. Wiley, 50 N. H. 353; but now applied in civil matters only, issued by a court of chancery, directed to the sheriff, reciting that the defendant in the case is indebted to the complainant, and that he designs going quickly into parts without the state, to the damage of the complainant, and then commanding him to cause the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that he, the sheriff, do commit the defendant to prison.

This writ is a part of the English chancery practice and is usually a part of that practice in states where it is in force. It may be issued by the United States District Courts; Lewis v. Shainwald, 48 Fed. 492.

This writ has been expressly abolished in very many of the states. Yet its place has been filled by other methods of procedure, similar in effect. The constitutions of Vermont, Pennsylvania, Kentucky, Mississippi, and Louisiana prohibit any restraint upon emigration. In Arkansas the writ is abolished, and in the code of New York a system of arrest and bail is substituted. In Ohio and California it is abolished; Cable v. Alvord, 27 Ohio St. 654; Ex parte Harker, 49 Cal. 465. In those jurisdictions where *ne exeat* is still recognized, the circumstances under which the writ will be granted, and the requisites to its issuance, are largely regulated by statute; but certain general principles govern in nearly every case. These will be found set forth in Rhodes v. Cousins, 6 Rand. (Va.) 191, 18 Am. Dec. 715. See 14 Am. Dec. 560, note.

This writ is issued to prevent debtors from escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or to compel a party to give security to abide the decree to be made in his case; Bisph. Eq. § 36; 2 Kent 32; Beames, *Ne Exeat;* 13 Viner, Abr. 537; 1 Suppl. to Ves. Jr. 33, 352, 467; 1 Bla. Com. 138; 19 V. & B. 312; Smedberg v. Mark, 6 Johns. Ch. (N. Y.) 138; Cable v. Alvord, 27 Ohio St. 666; Adams v. Whitcomb, 46 Vt. 708; Clowes v. Judge, 1 Del. Ch. 295.

Arrest under this writ is not in violation of a constitutional provision that a person shall not be imprisoned for debt, unless in

cases of tort, or where there is a strong presumption of fraud; People v. Barton, 16 Colo. 75, 26 Pac. 149.

The *writ* may be issued against foreigners subject to the jurisdiction of the court, citizens of the same state, or of another state, when it appears by a positive affidavit that the defendant is about to leave the state, or has threatened to do so, and that the debt would be lost or endangered by his departure; Mattocks v. Tremain, 3 Johns. Ch. (N. Y.) 75; Woodward v. Schatzell, *id.* 412. On the same principle which has been adopted in the courts of law that a defendant could not be held to bail twice for the same cause of action, it has been decided that a writ of *ne exeat* was not properly issued against a defendant who had been held to bail in an action at law; 8 Ves. 594.

This writ can be issued only for equitable demands; Nixon v. Richardson, 4 Des. Eq. (S. C.) 108; Smedberg v. Mark, 6 Johns. Ch. 138; and not where the plaintiff by process of law may hold the defendant to bail; 3 Bro. C. C. 218; 8 Ves. Jr. 593; Orme v. McPherson, 36 Ga. 573; MacDonough v. Gaynor, 18 N. J. Eq. 249; Bonesteel v. Bonesteel, 28 Wis. 245; and where there is an adequate remedy at law, the writ will be dissolved; Hawthorn v. Kelly, 30 Ga. 965. It may be allowed in a case to prevent the failure of justice; Porter v. Spencer, 2 Johns. Ch. (N. Y.) 169. When the demand is strictly legal, it cannot be issued, because the court has no jurisdiction. When the court has concurrent jurisdiction with the courts of common law, the writ may, in such case, issue, unless the party has been already arrested at law; Porter v. Spencer, 2 Johns. Ch. (N. Y.) 170. In all cases when a writ of *ne exeat* is claimed, the plaintiff's equity must appear on the face of the bill; Woodward v. Schatzell, 3 Johns. Ch. (N. Y.) 414.

It was granted only after bill filed; 3 P. Wms. 312; so by act of congress of March 2, 1893; *contra*, 5 Ves. 92.

The writ may be provided for in the final decree and will continue in force until dissolved by the court or until the decree is satisfied; Lewis v. Shainwald, 48 Fed. 492. It is not superseded by a subsequent bond for the performance of final decree; Elliott v. Elliott (N. J.) 36 Atl. 951. It may be granted on motion founded on affidavit, but where the facts charged in the bill are such as to entitle the complainant to the writ, it is sufficient to refer to them as showing the ground of the complainant's demand without restating them in the affidavit; Clayton v. Mitchell, 1 Del. Ch. 32.

The amount of bail is fixed by the court itself; and a sum is usually directed sufficient to cover the existing debt and a reasonable amount of future interest, having regard to the probable duration of the suit; Gibert v. Colt, 1 Hopk. Ch. (N. Y.) 501, 14 Am. Dec. 557.

The defendant arrested upon a writ of *ne exeat* may obtain a discharge of the writ upon giving bond, with surety, to answer and be amenable to the process of the court; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678.

It is a breach of the bond if the party leaves the jurisdiction, although he has returned; In re Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76.

A writ of *ne exeat provincia* issued in colonial Pennsylvania only in cases of equitable debts; William Henry Rawle, Equity in Pennsylvania.

NE INJUSTE VEXES (Lat.). **In Old English Law.** The name of a writ which issued to relieve a tenant upon whom his lord had distrained for more services than he was bound to perform.

It was a prohibition to the lord, *not unjustly* to distrain or *vex* his tenant. Fitzh. N. B. Having been long obsolete, it was abolished in 1833.

NE LUMINIBUS OFFICIATUR (Lat.). **In Civil Law.** The name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house. Dig. 8. 4. 15. 17; SERVITUDE.

NE RECIPIATUR (Lat.). That it be not received. A caveat or words of caution given to a law officer, by a party in a cause, not to receive the next proceedings of his opponent. 1 Sell. Pr. 8.

NE RELESSA PAS (Law Fr.). The name of a replication to a plea of release, by which the plaintiff insists he *did not release*. 2 Bulstr. 55.

NE UNQUES ACCOUPLE (Law Fr.). A plea by which the party denies that he ever was lawfully married to the person to whom it refers. See the form, 2 Wils. 118; 10 Wentw. Pl. 158; 2 H. Bla. 145; 3 Chitty, Pl. 599.

NE UNQUES EXECUTOR. A plea by which the party who uses it denies that the plaintiff is an executor, as he claims to be; or that the defendant is executor, as the plaintiff in his declaration charges him to be. 1 Chitty, Pl. 484; 1 Saund. 274, n. 3; Comyns, Dig. *Pleader* (2 D 2); 2 Chitty, Pl. 498.

NE UNQUES SEISIE QUE DOWER. A plea by which a defendant denies the right of a widow who sues for and demands her dower in lands, etc., late of her husband, because the husband was not on the day of her marriage with him, or at any time afterwards, seised of such estate, so that she could be endowed of the same. See 2 Saund. 329; 10 Wentw. Pl. 159; 3 Chitty, Pl. 598.

NE UNQUES SON RECEIVER. The name of a plea in an action of account-render, by which the defendant affirms that he never

was receiver of the plaintiff. 12 Viner, Abr. 183.

NE VARIETUR (Lat. that it be not changed). A form sometimes written by notaries public upon bills or notes, for the purpose of identifying them. This does not destroy their negotiability. Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631.

NEAP TIDES. Those tides which happen between the full and change of the moon, twice in every twenty-four hours. Teschemacher v. Thompson, 18 Cal. 21, 79 Am. Dec. 151.

NEAR. Close or at no great distance. Ward v. R. Co., 109 N. C. 358, 13 S. E. 926. Near is a relative term, and its precise meaning depends upon circumstances; Barrett v. Schuyler Co. Ct., 44 Mo. 197; American D. & I. Co. v. Trustees, 39 N. J. Eq. 435; Kirkbride v. Lafayette Co., 108 U. S. 211, 2 Sup. Ct. 501, 27 L. Ed. 705.

Two and one half miles was held to be near; Barrett v. Schuyler Co. Ct., 44 Mo. 197.

NEAREST. Not necessarily nearest by geographical measurement, but by conveniences of access, having regard to the usual travelled route. Shaw v. Cade, 54 Tex. 307. See MILEAGE.

NEAT. See NET.

NEAT CATTLE. Oxen or heifers. Whart. Dict. "Beeves" may include neat stock, but all neat stock are not beeves; Castello v. State, 36 Tex. 324. It includes a cow. State v. Crow, 107 Mo. 341, 17 S. W. 745.

NEAT LAND. Land let out to the yeomanry. Cowell.

NEATNESS. In Pleading. The statement in apt and appropriate words of all the necessary facts and no more. Lawes, Plead. 62.

NEBRASKA. One of the states of the American Union, being the thirty-seventh admitted to the Union.

Its territory formed a part of the province of Louisiana as ceded by France, and was afterwards included in the *district* and the *territory* of Louisiana as organized in 1804 and 1805, respectively, and in the territory of Missouri, to which the name of the last-named territory was changed in 1812. The territory of Nebraska, extending beyond the limits of the present state westward to the summit of the Rocky Mountains, and northward to the British possessions, was organized by the act of May 30, 1854. An enabling act for the formation of a state government was passed April 19, 1864; a state constitution was adopted June 21, 1866; on the 9th of February, 1867, an act was passed for the admission of the state into the Union, on condition that civil rights and the elective franchise should be secured to all races, excepting Indians not taxed; and on the first of March, 1867, a proclamation by the president announced the acceptance of this condition, whereupon by the terms of the act the admission of the state became complete. The present constitution was adopted October 12, 1875.

There was an amendment in 1912, providing for initiative and referendum.

NEC NON. A clause so called which was used as a fiction to give jurisdiction to the common pleas in connection with the writ of *quare clausum fregit*. 1 Holdsw. Hist. E. L. 89, note. See BILL OF MIDDLESEX.

NECESSARIES. Such things as are proper and requisite for the sustenance of man, including food, clothing, medicine, and habitation. Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties; Add. Contr. 382; Cunningham v. Irwin, 7 S. & R. (Pa.) 247, 10 Am. Dec. 458. Ornaments and superfluities of dress, such as are usually suitable to the party's rank and situation in life; 7 C. & P. 52; 8 Term 578; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; Neasham v. McNair, 103 Ia. 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202 (a diamond shirt stud for the husband); some degree of education; 4 M. & W. 727; Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537 (but not a set of Stoddard's Lectures; Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74, 7 L. R. A. [N. S.] 1048, 116 Am. St. Rep. 961, 9 Ann. Cas. 1064); lodging and house-rent; 1 B. & P. 340; see Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; 5 Q. B. 606; a board bill; Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780; board and lodging; Edminston v. Smith, 13 Idaho, 645, 92 Pac. 842, 14 L. R. A. (N. S.) 871, 121 Am. St. Rep. 291; pew rent; St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17; horses, saddles, bridles, liquors, pistols; Beeler v. Young, 1 Bibb (Ky.) 519. An infant is not liable on a contract for the erection of a dwelling house; Allen v. Lardner, 78 Hun (N. Y.) 603, 29 N. Y. Supp. 213. A racing bicycle was held a necessary for an apprentice earning 21s. a week and living with his parents; 78 L. T. 296. Jewelry purchased by an infant as a present for a young lady to whom he was engaged without the consent of his guardian was held *not* a necessary; Hewlings v. Graham, 84 L. T. Rep. 496. Whether articles of a certain *kind* or certain *subjects* of expenditure are or are not such necessaries as an infant may contract for, is a matter of law; but the question whether any particular things come under these classes, and the question, also, as to *quantity*, are generally matters for the jury to determine; Tupper v. Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Phelps v. Worcester, 11 N. H. 51; 6 M. & W. 42; 6 C. & P. 690; Ans. Contr. 113; Poll. Contr. 67.

Infants, when not maintained by parent or guardian, may contract for necessaries; 4 M. & W. 727; Perrin v. Wilson, 10 Mo. 451; Wailing v. Toll, 9 Johns. (N. Y.) 141; Gen-

ereux v. Sibley, 18 R. I. 43, 25 Atl. 345. But when living with and supported by their parents they are not liable for necessaries; Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; McKanna v. Merry, 61 Ill. 177; Tharp v. Connelly, 48 Mo. App. 59; Ewell, Lead. Cas. 55. Nor can an infant pledge his father's credit, as a wife can her husband's, on abandonment of duty; Gordon v. Potter, 17 Vt. 348; 6 M. & W. 482; Schoul. Dom. Rel. 328. Infants are not liable at law for borrowed money, though expended for necessaries; Beeler v. Young, 1 Bibb (Ky.) 519; Walker v. Simpson, 7 W. & S. (Pa.) 83, 42 Am. Dec. 216; Bent v. Manning, 10 Vt. 225. See 1 P. Wms. 558; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; N. H. Mut. F. Ins. Co. v. Noyes, 32 N. H. 345. Otherwise in equity; 1 P. Wms. 558; Watson v. Cross, 2 Duvall (Ky.) 149; Walker v. Simpson, 7 W. & S. (Pa.) 83, 42 Am. Dec. 216. But they are liable for money advanced at their request to a third party to pay for necessaries; Swift v. Bennett, 10 Cush. (Mass.) 436; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780. An infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries; [1891] 1 Q. B. 413; held *contra* on a note; Melton v. Katzenstein (Tex.) 49 S. W. 173. See 35 Centr. L. J. 203.

Services rendered by an attorney to an infant in examining the public records and advising him as to his rights to certain property are not necessaries; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176. Necessaries for the infant's wife and children are necessaries for himself; Stra. 168; Com. Dig. *Enfant* (B 5); Beeler v. Young, 1 Bibb (Ky.) 519; Angel v. McLellan, 16 Mass. 31, 8 Am. Dec. 118; Sams v. Stockton, 14 B. Monr. (Ky.) 232.

The obligation must be repudiated upon coming of age, or the person is bound; [1899] 2 Ch. 569. An infant's obligation to pay for necessaries is not created by agreement, but imposed by law; Pollock, Contr. 57, citing [1908] 2 K. B. 1.

See INFANT.

When a wife is living with her husband, it is presumed that she has his assent to pledge his credit for necessaries. See Baker v. Carter, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764; O'Malley v. Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702. But this presumption may be rebutted by showing a prohibition on his part or that he has already supplied her with necessaries; Allen v. Rieder, 41 Pa. Super. Ct. 534, where it was held, if the husband makes a proper provision for the wife, he is not liable.

The fact of cohabitation is not conclusive of the husband's assent; 2 Ld. Raym. 1006; Tebbets v. Hapgood, 34 N. H. 420; Keller v. Phillips, 39 N. Y. 351; Schoul. Dom. Rel. 80. But if the husband altogether neglects to supply the wife, she may pledge his credit notwithstanding he has forbidden tradesmen to trust her; the law here raising a presumption of agency to enforce the marital obligation and protect the wife; Shelton v. Hoadley, 15 Conn. 535; Bloomingdale v. Brinckerhoff, 2 Misc. 49, 20 N. Y. Supp. 858. A wife is ordinarily authorized to purchase clothing on the husband's credit only in case of necessity, and where the wife has habitually clothed herself out of her separate income which is adequate for that purpose, the husband is not liable for clothing ordered by her; Dolan v. Brooks, 168 Mass. 350, 47 N. E. 408; Raynes v. Bennett, 114 Mass. 424.

It was held in Llewellyn v. Levy, 163 Pa. 647, 30 Atl. 292, that when a wife refused to accept an allowance of $125 a month offered by the husband whose income was $20,000, she could still charge him with necessaries; it also appeared there that the plaintiff had previously sold the wife like articles which had been paid for by the husband, and that the plaintiff did not know of the separation; but the first point above mentioned appears to have been ruled by the court. Under the Pennsylvania married woman's act, the wife's estate is liable for necessaries furnished to her during her lifetime, though the husband is primarily liable and could be called upon to reimburse her estate; In re Weber's Estate, 20 Phila. (Pa.) 8.

The husband is also liable when away from his wife without her fault or by his own misconduct; Wray v. Cox, 24 Ala. 337; 2 Kent 146; Seybold v. Morgan, 43 Ill. App. 39. In order to charge a husband with necessaries sold to his wife, it must affirmatively appear that the goods were sold on the husband's credit; Ehrich v. Bucki, 7 Misc. (N. Y.) 118, 27 N. Y. Supp. 247. But otherwise where it is the wife's fault; Evans v. Fisher, 5 Gilman (Ill.) 569; Allen v. Aldrich, 29 N. H. 63; Sturtevant v. Starin, 19 Wis. 268. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries; the very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives credit to the wife afterwards gives it at his peril; McCutchen v McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Hunter v. Boucher, 3 Pick. (Mass.) 289; 2 Kent 123; Bacon, Abr. *Baron and Feme* (H); 1 Hare & W. Sel. Dec. 104, 106; 6 C. B. N. S. 519; Sturtevant v. Starin, 19 Wis. 268.

A husband is liable for groceries purchased for the family by his wife; Bradt v. Shull, 46 App. Div. 347, 61 N. Y. Supp. 484; primarily for wages of a servant; Hackman v. Cedar, 13 Ohio Cir. Ct. R. 618; Woods v. Kauffman, 115 Mo. App. 398, 91 S. W. 399; for the tuition of a daughter in a commercial school; Haas v. Bank, 42 Tex. Civ. App. 167, 94 S. W. 439; for medical at-

tendance for a wife; Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666; though she promised to pay for the same out of her separate estate; Thomas v. Passage, 54 Ind. 106.

A statute making a married woman liable to a suit in connection with her separate property or business does not remove the common law disability rendering her liable for the services of a physician contracted by her for herself and family, since such contract does not relate to her separate property or business; Stack v. Padden, 111 Wis. 42, 86 N. W. 568.

In the absence of special agreement or provision, the separate estate of a deceased wife is not liable for her doctor's bills to the estate of her husband, who died after her, having paid such bills; they were necessaries supplied to her while living with him, for which he is liable; In re Stadtmuller, 110 App. Div. 76, 96 N. Y. Supp. 1101.

Insane persons are liable for necessaries; 5 B. & C. 170; Kendall v. May, 10 Allen (Mass.) 59; Sawyer v. Lufkin, 56 Me. 308.

See MARRIED WOMAN.

NECESSARY. Reasonably convenient. Alabama & V. Ry. Co. v. Odeneal, 73 Miss. 34, 19 South. 202.

This word has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose, St. Louis, J. & C. R. Co. v. Trustees, 43 Ill. 307. It frequently imports no more than that one thing is convenient, or useful, or essential to another; McCulloch v. Maryland, 4 Wheat. (U. S.) 414, 4 L. Ed. 579.

As used in a code exempting the wages of a laboring man when *necessary for the support of his family in whole or in part*, it does not mean that his wages must be absolutely indispensable to the bare subsistence of the family and that the family could not live without them, but is used in a broader and less rigid sense looking rather to the comfort and well being of the family, and contemplates the furnishing to it whatever is necessary to its comfort and well-being as distinguished from luxuries. Cushing v. Quigley, 11 Mont. 577, 29 Pac. 337.

Witness fees are not *necessary disbursements* where witnesses were not called at the trial, unless the party shows why he did not call them; Kohn v. R. Co., 8 Misc. 421, 28 N. Y. Supp. 663.

Necessary material for the construction of a railroad includes the railroad as a completed structure, station buildings, depots, machine shops, side tracks, turn outs, and water tanks. U. S. v. R. Co., 150 U. S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975.

Necessary help. A physician may be appointed by a warden of a state prison under authority to appoint all necessary help. State v. Hobart, 13 Nev. 419.

Necessary implication. In construing a will, not a natural necessity, but so strong a probability that a contrary construction cannot be supported. 1 V. & B. 466.

See EMINENT DOMAIN.

NECESSITOUS CIRCUMSTANCES. In the civil code of Louisiana the words are used relative to the fortune of the deceased and to the condition in which the claimant lived during the marriage. Smith v. Smith, 43 La. Ann. 1140, 10 South. 248.

NECESSITY. That which makes the contrary of a thing impossible.

Necessity is of three sorts: of conservation of life; see DURESS; of obedience, as the obligation of civil subjection, and, in some cases, the coercion of a wife by her husband; and necessity of the act of God, or of a stranger. Jacob.

Whatever is done through necessity is done without any intention; and as the act is done without will (*q. v.*) and is compulsory, the agent is not legally responsible; Whart. Cr. L. § 95; Bacon, Max. Reg. 5. Hence the maxim, Necessity has no law; indeed, necessity is itself a law which cannot be avoided nor infringed. *Clef des Lois Rom.;* Dig. 10. 3. 10. 1; Comyns, Dig. *Pleader* (3 M 20, 3 M 30). As to the circumstances which constitute necessity, see 1 Russ. Cr. 16, 20; Morris v. State, 31 Ind. 189; Flagg v. Millbury, 4 Cush. (Mass.) 243.

Either public officers or private persons may raze houses to prevent the spreading of a conflagration. But this right rests on public necessity, and no one is bound to compensate for or to contribute to the loss, unless the town or neighborhood is made liable by express statute; Ralli v. Troop, 157 U. S. 405, 15 Sup. Ct. 657, 39 L. Ed. 742, citing 2 Kent 338; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; The James P. Donaldson, 19 Fed. 269. See EMINENT DOMAIN; FIRES.

In 12 Rep. 63, it was *held* that in a tempest, and to save the lives of the passengers, a passenger might cast out ponderous and valuable goods, without making himself liable to an action by their owner, cited in Ralli v. Troop, 157 U. S. 405, 15 Sup. Ct. 657, 39 L. Ed. 742. Where a person goes to the house of another to buy cattle and there becomes ill and is turned out in the cold and injured thereby, it is an actionable breach of the duty to care for him in his necessity; Depue v. Flatau, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485.

To justify a trespass by a tenant on the ground that his intervention was necessary in order to prevent destruction of property (here a heath fire on land leased for shooting), it is sufficient to show that the intervention was, in the circumstances at the time it took place, reasonably necessary; 81 L. J. K. B. 346.

The law of necessity (*jus necessitatis*) is the right of a man to do that from which he cannot be dissuaded by any terror of legal punishment. The test of necessity is the powerlessness of any possible, not that of any reasonable, punishment. Only the most limited scope can be given to the *jus necessitatis;* it is acknowledged as a reason for the reduction of the penalty, even to a nominal amount, but not for its total remission. Salmond, Jurisprudence 429. See 2 Stephen, Hist. Cr. L. ch. 18; 1 L. Q. R. 51.

In the German Criminal Code, p. 51, the doctrine receives express recognition. See EMINENT DOMAIN; FIRES.

As to the meaning of the word under Sunday laws, see SUNDAY.

NECK-VERSE. The Latin sentence *Miserere mei, Deus*, Ps. li. 1, because the reading of it was made a test for those who claimed *benefit of clergy* (*q. v.*).

> If a monk had been taken
> For stealing of bacon,
> For burglary, murder, or rape;
> If he could but rehearse
> (Well prompt) his *neck-verse,*
> He never could fail to escape.
> Brit. Apollo 1710; Whart. Dict.

NEEDLESSLY. In a statute with reference to the needless killing or bad treatment of animals, it denotes an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. Hunt v. State, 3 Ind. App. 383, 29 N. E. 933; Grise v. State, 37 Ark. 460; State v. Bogardus, 4 Mo. App. 215.

NEFAS. That which is against right or divine law; a wicked thing or act. Calv. Lex.

NEGATIVE. Negative propositions are usually much more difficult of proof than affirmative, and in cases where they are involved, it is often a nice question upon which side lies the burden of proof. The general rule has been thus stated: Whoever asserts a right dependent for its existence upon a negative, must establish the truth of the negative, except where the matter is peculiarly within the knowledge of the adverse party. Otherwise rights of which a negative forms an essential element may be enforced without proof; Goodwin v. Smith, 72 Ind. 113, 37 Am. Rep. 144; Hale v. Smith, 78 N. Y. 480. Thus in actions for malicious prosecution, the plaintiff must prove that there was no probable cause; Carey v. Sheets, 67 Ind. 375; 2 Greenl. Ev. § 454. The rule applies whenever the claim is founded in a breach of duty in not repairing highways, and in cases of mutual negligence; Hale v. Smith, 78 N. Y. 480; Shearm. & Red. Neg. 312. So one must prove the allegation that a negotiable promissory note was not taken in payment of a debt; Smith v. Bettger, 68 Ind. 254, 34 Am. Rep. 256. So the *onus* is on a plaintiff who assigns as a breach by tenant that he did not repair; 9 C. & P. 734; 6 H. L. C. 672. In all actions for breach of warranty of the soundness of a personal chattel, the plaintiff must prove the negative. "It may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." 1 Whart. Ev. § 357; see 14 M. & W. 95; Heinemann v. Heard, 62 N. Y. 448; Maltman v. Williamson, 69 Ill. 423; Colorado C. & I. Co. v. U. S., 123 U. S. 317, 8 Sup. Ct. 131, 31 L. Ed. 182.

NEGATIVE AVERMENT. In Pleading. An averment in some of the pleadings in a case in which a negative is asserted.

NEGATIVE CONDITION. One where the thing which is the subject of it must not happen. 1 Bouvier, Inst. n. 751. See POSITIVE CONDITION.

NEGATIVE COVENANT. See COVENANT.

NEGATIVE EASEMENT. See EASEMENT.

NEGATIVE PREGNANT. In Pleading. Such a form of negative expression as may imply or carry within it an affirmative. Fields v. State, 134 Ind. 46, 32 N. E. 780.

Thus, where a defendant pleaded a license from the plaintiff's daughter, and the plaintiff rejoined that he did not enter by her license, the rejoinder was objected to successfully as a negative pregnant; Cro. Jac. 87. The fault here lies in the ambiguity of the rejoinder, since it does not appear whether the plaintiff denies that the license was given or that the defendant entered by the license; Steph. Pl. 381.

This ambiguity constitutes the fault; Hob. 295; which, however, does not appear to be of much account in modern pleading; Com. Dig. *Pleader* (R 6); Gould, Pl. c. 6, § 36.

A special denial in the words of the allegation denied is a mere negative pregnant and a motion to make more definite and certain will lie; Moody v. Belden, 60 Hun 582, 15 N. Y. Supp. 119. A mere denial in the language of the complaint, that a partial payment was made on a specified day, is an admission that the payment was made on some other day; Argard v. Parker, 81 Wis. 581, 51 N. W. 1012.

A negative pregnant is not a good plea; U. S. v. Larkin, 153 Fed. 113, 82 C. C. A. 247.

NEGATIVE STATUTE. One which is enacted in negative terms, and which so controls the common law that it has no force in opposition to the statute. Bac. Abr. *Statutes* (G); Brook, Abr. *Parliament*, pl. 72; Bish. Writ. L. § 153.

NEGGILDARE. To claim kindred. Jac. L. Dict.

NEGLECT. To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. Rosenplaenter v. Roessle, 54 N. Y. 262. See NEGLIGENCE.

NEGLIGENCE. The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. 11 Ex. 784. See Webb, Poll. Torts 537. The standard is not that of a particular man, but of the average prudent man; 3 Bing. N. C. 468.

The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Cooley, Torts 630; Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186.

The absence of care according to circumstances. See Philadelphia, W. & B. R. Co. v. Stinger, 78 Pa. 219; Texas & P. Ry. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272; Blaine v. R. Co., 9 W. Va. 252.

Such an omission by a reasonable person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. Bucki v. Cone, 25 Fla. 1, 6 South. 160.

The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. Baltimore & P. R. Co. v. Jones, 95 U. S. 441, 24 L. Ed. 506.

Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. Whart. Negl. § 3. It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. Bigelow, Torts 261; Needham v. R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; Chicago & A. R. Co. v. Adler, 129 Ill. 335, 21 N. E. 846; Louisville & N. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824.

The opposite of care and prudence, the omission to use the means reasonably necessary to avoid injury to others. Great W. R. Co. v. Haworth, 39 Ill. 353. Opposed to diligence or carefulness. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

The result of a failure to perform a duty; Toncray v. Dodge County, 33 Neb. 802, 51 N. W. 235. It implies a duty as well as its breach, and the fact can never be found in the absence of a duty; Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48.

When a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or on the tort; Robinson v. Threadgill, 35 N. C. 39; but there must be privity of contract between the parties, therefore an attorney who made a mistake in drawing a will is not liable to a person who, by the mistake, is deprived of a gift intended for him by the testator; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88.

It is not a thing but a relation. It implies a duty to use diligence, and such a duty may be owed to one person and not to another; Boston M. R. Co. v. Sargent, 72 N. H. 455, 57 Atl. 688. There must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled; Sweeney v. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644.

Due care is such attention and effort applied to a given case as the ordinary prudent man would put forth under the same circumstances; this rule seems to meet the demands of every conceivable case. The general duty of diligence includes the particular duty of competence where the matter in hand requires more knowledge or ability than any prudent man may be expected to have. If, in an emergency and to avoid imminent risk, the conduct of something generally intrusted to skilled persons, is taken by an unskilled person, no more is required of him than to make a prudent and reasonable use of such skill as he actually has; McNevins v. Lowe, 40 Ill. 209.

It is said that liability for negligence depends on the probability of the consequences, *i. e.* its capability of being foreseen by a reasonable man; Poll. Torts 37.

A person is expected to anticipate and guard against all reasonable consequences, but not against that which no reasonable man would expect to occur. See 5 Ex. 248. Some cases have gone to the extent of maintaining an action in tort even where no attempt has been made to perform a contract; Robinson v. Threadgill, 35 N. C. 39; 11 Cl. & F. 1.

It is said not to be essential to constitute negligence that the damage caused might reasonably have been expected from the negligent act; Whart. Negl. § 16. Thus Gray, C. J., says, in Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63: "A man who negligently sets fire on his own land and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or might not have reason-

ably anticipated the particular manner in which it was communicated." And in L. R. 6 C. P. 14, where a railway company left a pile of rubbisn in hot weather by the side of their track, and the pile was ignited by sparks from an engine, and the fire crossed a field and burned the plaintiff's cottage, Channell, B., said: "When there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there has been evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

Where a person unlawfully injures another, he is liable in damages, without regard to the intention with which the act was done; Bruch v. Carter, 32 N. J. L. 554; Cate v. Cate, 44 N. H. 211; and good faith does not excuse negligence; Lincoln v. Buckmaster, 32 Vt. 652. As to the right of action for negligence resulting in the death of the injured person, see ACTIO PERSONALIS MORITUR CUM PERSONA; DEATH.

The damage caused must arise from inadvertence. If it be intentional, a suit for negligence will not lie; the remedy is in trespass and not case.

One negligent person cannot escape liability for his negligence because the negligence of another concurred in producing the injury; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193.

Whether negligence is divisible into degrees, corresponding to degrees of care incumbent on the defendant, is a question which has elicited much discussion and a great variety of opinions. Speaking broadly, the various theories may be reduced to three classes:

First, that there are three degrees of care required by the law, slight, ordinary and great; and consequently there are three degrees of negligence: gross, the failure to exercise ordinary care, and slight, or the failure to exercise great care; Redington v. Tel. Cable Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; First N. Bk. v. Graham, 85 Pa. 91, 27 Am. Rep. 628; I. & G. N. R. Co. v. Cocke, 64 Tex. 151; Sullivan v. Electric Light Co., 181 Mass. 294, 63 N. E. 904; Davis v. Ry. Co., 63 S. C. 370, 41 S. E. 468.

Second, that but two degrees of care are required; the care ordinarily exercised by a specialist in the matter in hand, and the care ordinarily exercised by a non-specialist in the same matter. A failure to exercise the former of these degrees of care is termed ordinary negligence, while a failure to exercise the latter kind of care is termed slight negligence; Wharton, Neg. 636.

Third, that there are no degrees of care or of negligence; that negligence is in all cases the same thing, namely, the absence of due care. According to this view, it is in each case practically a question of fact for the jury whether the proper degree of care has been taken, the jury being guided by a consideration of what a reasonable and prudent man would have done under the circumstances; 11 M. & W. 115; The New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Purple v. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; Culbertson v. Holliday, 50 Neb. 229, 69 N. W. 853.

Where one is liable only in case of gross negligence, the slightest care is enough, or as a degree of negligence, it is falling much below the average standard; Brennan v. Oil Co., 187 Mass. 376, 73 N. E. 472.

It is said that there should be no degrees of negligence or care, but that the rule should be such care as an average, ordinary prudent man would exercise under the circumstances. So one would fall short of average prudence in trying to set a leg which could only be done by professional skill, and so it is negligence for a layman to try it, given a situation that any prudent man knew required special knowledge. These rules would be relaxed in extreme, extraordinary cases, as well as cases of necessity; Pollock, Torts 220. In dealing with prudence we always have to consider the advance of the science, learning and the particular locality, etc., and these incidents are the *circumstances* spoken of in the test; McCandless v. McWha, 22 Pa. 261.

"The tendency of modern judicial opinion is adverse to the distinction between gross and ordinary negligence;" Bradley, J., in New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 382, 21 L. Ed. 627; and the measure of duty owed by persons in the discharge of their mutual relations is better expressed by the use of the term negligence as a negative definition, or due, reasonable or ordinary care; Raymond v. R. Co., 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94.

No distinction between the degrees of negligence can be made so as to avoid the effect of a contract made by a Pullman porter releasing a railroad from liability for negligent injuries; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42; and injuries caused by gross negligence are included in a release which speaks only of "negligence"; *id.*

Proof of negligence. The first requisite for the plaintiff is to show the existence of the duty which he alleges has not been performed, and then he must show a failure to observe this duty; that is, he must establish negligence on the defendant's part. This is an affirmative fact, the presumption always being, until the contrary ap-

pears, that every man will perform his duty; Cooley, Torts 659. It is not sufficient for the plaintiff to prove a state of facts consistent with the accident having been caused either by the negligence of the defendant or by that of the person injured. He must prove that it was caused by the defendant; 12 App. Cas. 41.

The litigant who bases his case or his defence upon negligence is bound to prove that his opponent was negligent. The presumption of law is that every person performs his legal duty; Huff v. Austin, 46 Ohio St. 386. Accordingly, the burden of proving negligence, in any litigation, rests throughout the case on the party asserting it, although, as in other cases, the burden of giving evidence may shift from one side to the other, during the progress of the trial. The same evidence may or may not establish a *prima facie* case of negligence on the part of the defendant, according as it shows a breach of contract on defendant's part; Stokes v. Saltonstall, 13 Pet. (U. S.) 181, 10 L. Ed. 115; as where a railroad train is suddenly jolted; Piehl v. Ry., 162 N. Y. 617, 57 N. E. 1122; or a steamship is driven with extraordinary force against a wharf; Inland & S. C. Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; or a train is derailed by obstacles on the track, or by defective rails or defective rolling stock; New Jersey R. Co. v. Pollard, 22 Wall. (U. S.) 341, 22 L. Ed. 877; and a passenger is injured; in such cases the accident itself affords *prima facie* evidence of the carrier's negligence, for he contracted to carry the passenger safely. Had a servant of the carrier been injured in the same accident, a different rule would have obtained, for the employé would be bound to establish, as an affirmative fact, that the employer had been guilty of negligence; Patton v. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

One who is killed at a railroad crossing is presumed to have done his duty in exercising due care and not to have been guilty of contributory negligence; Hanna v. R. Co., 213 Pa. 157, 62 Atl. 643, 4 L. R. A. (N. S.) 344; and in the absence of evidence to the contrary, a railroad company is also presumed to have done its duty and this presumption must be overcome before any recovery can be had; *id.* Such presumption is destroyed if it appears that if the person killed had looked and listened on approaching the crossing he would have seen and heard the train; Carlson v. R. Co., 96 Minn. 504, 105 N. W. 555, 4 L. R. A. (N. S.) 349, 113 Am. St. Rep. 655; or if it is incompatible with the conduct of the person to whom it is sought to be applied; Wabash R. Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352.

The instinct of self-preservation is not alone sufficient to establish due care; Wright v. R. Co., 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832, 124 Am. St. Rep. 949; and the exercise of due care cannot be sustained by mere conjecture and speculation, or by showing or assuming what men in general would have done; *id.;* Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271, 15 L. R. A. (N. S.) 1096, 14 Ann. Cas. 225; *contra*, Adams v. Min. Co., 12 Idaho, 637, 89 Pac. 624, 11 L. R. A. (N. S.) 844, where it was held to constitute *prima facie* proof of the exercise of ordinary care.

The mere fact that a passenger train runs into an open switch and collides with cars standing thereon does not raise a presumption of gross negligence on the part of the carrier in favor of an injured passenger; Southern R. Co. v. Lee, 101 S. W. 307, 30 Ky. L. Rep. 1360, 10 L. R. A. (N. S.) 837.

There is no presumption of negligence on the part of the defendant for injury caused by his horse running away, where the only evidence as to the driver was that, when he was first seen, he was falling towards the ground; Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

Where there is a requirement for cars to "run slow," proof of the violation of such requirement by a motorman directly resulting in an injury to a pedestrian is evidence from which the jury may find a street railway company liable for negligence; Hayward v. R. Co., 74 N. J. L. 678, 65 Atl. 737, 8 L. R. A. (N. S.) 1062.

It is said that a presumption of negligence arises from the occurrence of an accident in the course of a business, which may, according to expert testimony, be safely carried on if conducted with due care; Judson v. Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146.

In the absence of a contract between the parties, the burden of proof of negligence is on the plaintiff, and if the "evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury;" 11 C. B. N. S. 588; but the rule of the burden of proof is modified when there is a relation of contract between the parties; Poll. Torts 416; as in cases of common-carriers, or where the thing which was the cause of the mischief was "under the management of the defendant or his servants, and the accident was such as in the ordinary course of things does not happen, if those who have the management use proper care;" 3 H. & C. 596.

In some classes of cases the mere proof of the accident constitutes sufficient *prima facie* proof of defendant's negligence. See RES IPSA LOQUITUR.

As a general rule this liability cannot be avoided by stipulation; thus, a common carrier will not be permitted to contract for immunity from the results of its own neg-

ligence or that of its agents; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Grogan v. Exp. Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360; Bartlett v. R. Co., 94 Ind. 281; Railway Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; School Dist. v. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 S. W. 815; this may be considered as the rule generally followed in this country, in which the leading case is New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627, where the authorities are collected by Bradley, J. In England, however, the courts seem to find no conclusive objection to sustaining such contracts when specially made; L. R. 10 Q. B. 212; 23 U. C. Q. B. 600; and in New York, though the contracts are upheld, it is only when expressed in clear and specific language and not by mere general words in the usual printed bills of lading or receipts; Knell v. S. S. Co., 1 Jones & S. (N. Y.) 423; Mynard v. R. Co., 71 N. Y. 180, 27 Am. Rep. 28. So the liability may be limited in consideration of a reduced rate of transportation; Richmond & D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; L. R. 8 H. L. 703; L. R. 10 Q. B. D. 250; or by special contract, for all negligence except gross; Chicago, B. & N. R. Co. v. Hawk, 42 Ill. App. 322. Such a contract, made in New York, was enforced in an action in Pennsylvania according to the law of New York; Forepaugh v. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672. See COMMON CARRIERS.

The contract of an express messenger, whereby the railroad upon which he travels as messenger is exonerated from liability for damages to him resulting from its negligence, is not void as against public policy; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; likewise the contract of a sleeping car porter; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42. A contract between a railroad and a partnership, to whom it has leased a strip of land near its track for the purpose of erecting a warehouse, which exonerates the railroad from liability for damage resulting from fire from locomotives, is not void as against public policy even though there is a state statute holding railroads liable for such damage; Hartford F. Ins. Co. v. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

Provisions contained in a steamship ticket exempting a carrier from liability for losses occasioned by negligence, although such provisions are valid by the law of the country where the ticket was bought, are unreasonable and void as against the public policy of the United States; The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; The New England, 110 Fed. 415.

By an act of congress of February 13, 1893 (Harter Act), common carriers by sea cannot exempt themselves from responsibility for loss or damage arising from the negligence of their own servants, and any stipulation for such exemption is contrary to public policy and void. See HARTER ACT.

Taking precaution after an accident against the future is not to be construed as an admission of responsibility for the past; Barber A. P. Co. v. Odasz, 60 Fed. 71, 8 C. C. A. 471, 20 U. S. App. 326; so a subsequent alteration or repair of the machine which caused an injury is not evidence of negligence in its original construction; Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Champion Ice Mfg. & C. S. Co. v. Carter, 51 S. W. 16, 21 Ky. L. Rep. 210; Cunningham v. R. Co., 40 Pa. Super. Ct. 212.

Law or fact. It is generally said that the question of negligence is a mixed question of law and fact, to be decided by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting; Whart. Negl. § 420; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; see Chaffee v. R. Co., 17 R. I. 658, 24 Atl. 141; Woolwine's Adm'r v. R. Co., 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859. In the great majority of cases the question is left to the jury to determine whether the defendant's conduct was reasonable under the circumstances. When a well-recognized legal duty rested upon the defendant, it is usual for the court to define this duty to the jury, and leave to it the question as to whether the defendant fulfilled this duty. More recently the courts have drawn a distinction between what is evidence of negligence for the jury and what is negligence *per se*, and therefore a question of law for the court, and the tendency has been rather to increase the number of cases in which the question of negligence is passed upon by the court. In Pennsylvania, when the standard of duty is defined by law, and is the same under all circumstances, and when there has been such an obvious disregard of duty and safety as amounts to misconduct, the courts have withdrawn the case from the consideration of the jury. Thus the Pennsylvania rule of stop, look and listen limits, to a great extent, the province of the jury, i. e. usually the jury must be satisfied that the plaintiff had met these requirements before the question of defendant's negligence arises. See GRADE CROSSING.

It is said to be clear, by most of the authorities, that when the facts are found, and it is perfectly manifest that a prudent man would or would not do as the defendant has done, the court may rule accordingly, or rather, may direct the jury to find accordingly. The same is also true when the law

has prescribed the nature of the duty, and also when there exists a well-known practice in the community, of a proper character. In other cases, the inference concerning negligence is left to the jury; Bigelow, Torts 263; Carrico v. R. Co., 35 W. Va. 389, 14 S. E. 12. When the evidence is conflicting, the court should instruct the jury that there would or would not be negligence, accordingly as they might find the facts; Knight v. R. Co., 110 N. C. 58, 14 S. E. 650.

"When the circumstances of a case are such that the standard of duty is fixed, when the measure of duty is defined by law and is the same under all circumstances, its omission is negligence and may be so declared by the court. But it is said that when the negligence is clearly defined and palpable, such that no verdict of a jury could make it otherwise, or when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law." 2 Thomp. Negl. 1236.

"As a general rule, a question whether a party has been guilty of negligence or not, is one of fact, not of law. Where, however, the plaintiff brings action for a negligent injury, and the action of the two parties must have concurred to produce it, it devolves upon him to show that he was not himself guilty of negligence; and if he gives no evidence to establish that fact, the court may properly instruct the jury that they should return a verdict for defendant. Where, however, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give such positive instructions, but must leave the jury to draw their own conclusions upon the facts, and upon the question of negligence depending upon them. To warrant the court in any case in instructing the jury that the plaintiff was guilty of negligence, the case must be a very clear one against him, and one which would warrant no other inference." Per Cooley, C. J., in Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

It is true, in many cases, that when the facts are undisputed, the effect of them is for the judgment of the court. That is true in that class of cases when the existence of such facts comes in question, rather than when deductions or inferences are to be made from the facts (and see Kansas Pac. R. Co. v. Richardson, 25 Kan. 391). In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used; another man, equally sensible, equally impartial, would infer that proper care had been used. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and of little education, men of learning and men whose learning consists in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experiences of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the final effort of the law to obtain; Sioux City & P. R. Co. v. Stout, 17 Wall. (U. S.) 663, 21 L. Ed. 745. Although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence: Ohio & M. P. W. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Brotherton v. Imp. Co., 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709.

The terms "ordinary care," "reasonable prudence," and such like terms have a relative significance, and cannot be arbitrarily defined; and, when the facts are such that reasonable men differ as to whether there was negligence, the determination of the matter is for the jury; Grand T. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; as it is in all cases where the inference from the facts is not so plain as to make it a legal conclusion that there was negligence; Northern P. R. Co. v. Egeland, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82; and it is only where they would draw the same conclusion that it is a question of law for the court; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; Southern Pac. Co. v. Burke, 60 Fed. 704, 9 C. C. A. 229, 23 U. S. App. 1; Travelers' Ins. Co. v. Melick, 65 Fed. 181, 12 C. C. A. 544, 27 L. R. A. 629; and a decision of the trial judge on the question is subject to review; *id.*

Whether a railroad company should erect guards at its car windows is a question for the jury; New Orleans & C. R. Co. v. Schneider, 60 Fed. 210, 8 C. C. A. 571, 13 U. S. App. 655; so also where a workman, returning from his work on the train and being ordered by the conductor to jump off at a station when the train was moving about four miles an hour and where the platform was about a foot lower than the car step, jumped and was seriously injured, the question of contributory negligence was for the jury; Northern P. R. Co. v. Egeland, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82; Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence; otherwise it is a question for the jury under proper instructions; McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50

L. Ed. 1162; nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish; Kreigh v. Westinghouse, C., K. & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is not one of law; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852.

See Lewis v. R. Co., 13 Am. L. Reg. N. S. 284, where the subject is fully treated and the earlier decisions collected by states.

In actions for negligence the English rule is said to be that the "judge has to say whether any facts have been established from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, negligence *ought to be* inferred;" 3 App. Cas. 197; or better, whether, as reasonable men, they *do* infer it; Poll. Torts 420.

Contributory Negligence. If the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, there can be no recovery; Beach, Contrib. Neg. 14. The distinction, however, must be drawn between condition and causes, between *causa causans* and *causa sine qua non.* The question must always be considered whether the act of the plaintiff had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If it had not, the plaintiff's negligence is not considered in law as contributing to the injury. One who sees or could have seen if he had looked, and has the faculties to understand the dangers to which he is exposed, is charged with a knowledge of them; and his failure to act on the knowledge as a prudent and cautious man would act under like circumstances, is negligence which, notwithstanding the negligence of the defendant, will defeat a recovery; Glascock v. R. Co., 73 Cal. 137, 14 Pac. 518. And when it appears that the plaintiff, by the defendant's misconduct, became frightened, and in endeavoring to escape the consequence of the defendant's misconduct, rushed into danger and was injured, the plaintiff's conduct does not contribute to the injury; Coulter v. Exp. Co., 56 N. Y. 585. If, through the defendant's negligence, the injured person is placed in a position of peril and confronted with sudden danger, the law does not require him to exercise the same degree of care and caution that it does of a person who has ample opportunities for the full exercise of his judgment; Dunham T. & W. Co. v. Dandelin, 143 Ill. 409, 32 N. E. 258; Gibbons v. Ry., 155 Pa. 279, 26 Atl. 417. Contributory negligence has been held to be no defence where defendant's negligence was reckless or wanton; Kansas P. R. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730.

Contributory negligence is a good defence to an action for damages for a personal injury; and it is immaterial to what extent it is proven, provided it contributed to the injury; Kyne v. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Gerity's Adm'x v. Haley, 29 W. Va. 98, 11 S. E. 901; in order to bar a recovery, the contributory negligence must have been a proximate cause of the injury; Cornwall v. R. Co., 97 N. C. 11, 2 S. E. 659; Virginia M. R. Co. v. White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874.

In some cases it has been held that the plaintiff must show affirmatively that he was in the exercise of due care, when the injury happened; Kepperly v. Ramsden, 83 Ill. 354; Beers v. R. Co., 19 Conn. 566; Murphy v. Deane, 101 Mass. 455, 3 Am. Rep. 390; Mosher v. Smithfield, 84 Me. 334, 24 Atl. 876. This is frequently termed the Illinois rule. Probably the proof need not be direct, but may be inferred from the circumstances of the case; Mayo v. R. Co., 104 Mass. 137; 2 Thomp. Negl. 1178, note. In other states, contributory negligence is a matter of defence, the burden of proving which is on the defendant; Hocum v. Weitherick, 22 Minn. 152; Hicks v. R. Co., 65 Mo. 34; Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Bromley v. R. Co., 95 Ala. 397, 11 South. 341; Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; Baker v. Gas Co., 157 Pa. 593, 27 Atl. 789, where the cases are discussed. But even in these courts, if the plaintiff's own showing disclose contributory negligence, he cannot recover. The rule that a plaintiff cannot recover, if himself guilty of contributory negligence, applies where the party inflicting the injury is not guilty of negligence after the position of the injured party was discovered, or, by the exercise then of reasonable care, could have been discovered; Texas & P. R. Co. v. Nolan, 62 Fed. 552, 11 C. C. A. 202, 23 U. S. App. 443.

Negligence of the defendant's employés in failing to whistle or ring a bell at a crossing is no excuse for contributory negligence of the plaintiff in failing to use his senses; Carlson v. R. Co., 96 Minn. 504, 105 N. W. 555, 4 L. R. A. (N. S.) 349, 113 Am. St. Rep. 655; and continuing contributory negligence will bar a recovery by the plaintiff, although the defendant ought to have discovered, but in fact did not discover, his peril in time to prevent the accident; Dyerson v. R. Co., 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207.

It is not contributory negligence to ride upon the platform of a street car in spite of a notice that it is dangerous to do so, and notwithstanding the fact that there was

room at the time within the car, where it was the custom of the company to overload its cars so that passengers ordinarily rode upon the platform; Capital Traction Co. v. Brown, 29 App. D. C. 473; but one who gives up his place in a street car to a woman and rides upon the platform where he is subsequently injured, forfeits the advantage of the presumption of negligence on the part of the defendant company; Paterson v. Rapid Transit Co., 218 Pa. 359, 67 Atl. 616, 12 L. R. A. (N. S.) 839. A spectator at a baseball game, who elects to occupy an unprotected seat, cannot recover for an injury; Crane v. Baseball Co., 168 Mo. App. 301, 153 S. W. 1076.

Negligence is only deemed contributory when it is the proximate cause of the injury; Smith v. Ry. & Lighting Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. (N. S.) 707.

The fact that the plaintiff lived near a powder magazine, with knowledge of the danger, does not constitute contributory negligence; Hazard Powder Co. v. Volger, 58 Fed. 152, 7 C. C. A. 130, 12 U. S. App. 665. It has been said that the true rule is that the onus of proving contributory negligence rests in the first instance on the defendant, although the plaintiff may disclose upon his own case such evidence of it as to relieve the defendant of that primary obligation and shift to the plaintiff the onus of displacing the effect of his own evidence; 12 Q. B. D. 71.

Last Clear Chance. If the plaintiff, by ordinary care, could have avoided the effect of the negligence of the defendant, he is guilty of contributory negligence, no matter how careless the defendant may have been at the last or any preceding stage; Tuff v. Warman, 2 C. B. N. S. 740 (on appeal, 5 C. B. N. S. 573). When the defendant was driving carelessly along the highway, and ran into and injured the plaintiff's donkey, which was straying improperly on the highway with his fore feet fettered, it was held that the plaintiff's negligence had not contributed to the accident; Davies v. Mann, 10 M. & W. 546. To this case the doctrine of the *last clear chance* is generally attributed. It is that the party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of the other party is considered responsible for it; 2 L. Quart. Rev. 507; Grand T. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Thompson v. Rapid Transit Co., 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621; Pilmer v. Traction Co., 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161.

If the plaintiff could by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover; Tuff v. Warman, 5 C. B. N. S. 573; Barnum v. Terpening, 75 Mich. 557, 42 N. W. 967; Willard v. Swansen, 126 Ill. 381, 18 N. E. 548. "The true ground of contributory negligence being a bar is that it is the proximate cause (or 'decisive' cause) of the mischief; and negligence on the plaintiff's part, which is only part of the inducing cause (*i. e.* a 'condition,' not a 'cause'; Whart. Negligence) will not disable him"; Poll. Torts 434; and it "would seem that a person who has by his own act or default deprived himself of ordinary ability to avoid the consequences of another's negligence, can be in no better position than if, having such ability, he had failed to avoid them; unless, indeed, the other has notice of his inability in time to use care appropriate to the emergency; in which case the failure to use that care is the decisive negligence." Poll. Torts 434. To make this doctrine applicable, it must clearly appear that the negligence of one person was subsequent to that of the other; The Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293. Where the negligence of each party was the same in character, time and duration, and equally active in causing the injury, the rule does not apply; Cleveland, C., C. & St. L. R. Co. v. Gahan, 24 Ohio Cir. Ct. R. 277.

"Ultimate negligence" is the negligence of the defendant which, though anterior to the plaintiff's negligence, makes the defendant liable if in the result he could by the exercise of ordinary care have avoided the mischief; 13 Ontario L. Rep. 423; Atchison, T. & S. F. R. Co. v. Baker, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825. The doctrine of last clear chance cannot be applied in an admiralty case; The Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293. The doctrine has been held not to apply where an intoxicated person is killed by an electric car whose head light can be seen 800 feet away and would have been sufficient warning to a sober man of the approach of the car; Vizacchero v. Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188. See Herrick v. W. Power Co. (Wash.) 134 Pac. 934.

A street car company is liable for running down a pedestrian who is walking negligently along the track where the motorman is inattentive and the pedestrian fails to hear the approach of the car because of noises made by other cars on other tracks; Indianapolis, T. & T. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942. A railroad company whose yard is customarily used as a thoroughfare with knowledge of the company, is liable for the death of one who is himself negligent, if those in charge of a train could have stopped it after the person was knocked down, but before he was killed; Teakle v. R. Co., 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486.

Where one, knowing of the frequent passage of cars, goes on the tracks for the

purpose of repairs and removing dirt, and is struck and killed, the company is not liable, although the motorman does not sound the gong in accordance with the requirements of a municipal ordinance; Brockschmidt v. R. Co., 205 Mo. 435, 103 S. W. 964, 12 L. R. A. (N. S.) 345; and *a fortiori* where the locomotive engineer used every effort to avert the accident; Hoffard v. R. Co., 138 Iowa, 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797; but the company is liable to its employés if it is shown that the train was running at an extraordinary and illegal rate of speed and not under full control as required by the company's rules; Neary v. R. Co., 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446. If an employé is lying helpless on the track as the result of being struck by lightning, and if those in charge of a train might have discovered his peril by the exercise of proper care in time to avoid the injury, the company is liable; Sawyer v. R. & L. Co., 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200.

Where a locomotive was run along the public street of a city at an unlawful rate of speed and no signal was given of its approach and no outlook was kept, and as a result a pedestrian is injured, the defence of contributory negligence is not available, although the employés did not know of the presence of the person injured; Atchison, T. & S. F. R. Co. v. Baker, 79 Kan. 183, 98 Pac. 804, 21 L. R. A. (N. S.) 427; likewise a railroad company is liable for injuries to a person who is negligently walking on its trestle, if those in charge of the train might, in the exercise of ordinary care, have discovered his peril and avoided the accident; Bogan v. R. Co., 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418.

Although one is negligent in attempting to cross a track in front of a street car, his act is not the proximate cause of a resulting collision, if the motorman, upon seeing his design, becomes confused and increases instead of decreases the speed of the car; Smith v. Ry. & Lighting Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. (N. S.) 707.

Although a company's employés may be negligent, after removing an intoxicated passenger from their train, in placing him upon a flight of steps down which he subsequently falls, to his injury, the jury may reasonably find that intoxication is the direct and proximate cause of the injury; Black v. R. Co., 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148, 9 Ann. Cas. 485.

A passenger alighting from a street car who immediately crosses the street and steps upon a parallel track without looking for an approaching car is negligent, but such negligence does not relieve a street car company from liability for injuries if those in charge of the other car, in the exercise of ordinary care, could have discovered his peril and averted the injury; Louisville Ry. Co. v. Hudgins, 124 Ky. 79, 98 S. W. 275, 7 L. R. A. (N. S.) 152; but there is no liability for injuries to one who steps from the hub of a wagon, standing near a car track, immediately in front of an approaching car, where it did not appear that his position on the hub was so perilous as to charge the company with the duty of taking precautions to avoid injuring him; State v. Ry. Co., 106 Md. 529, 68 Atl. 197, 16 L. R. A. (N. S.) 297.

No one is bound to anticipate that others will be guilty of negligence. See L. R. 5 H. L. 45.

Where one is in danger through fault of another and chooses between two methods of escape, he is not negligent if he chooses that which, otherwise, would not be prudent; 12 Q. B. 439. See, further, Washington & G. R. Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. Ed. 114; Hoyt v. Hudson, 41 Wis. 105, 22 Am. Rep. 714.

The question of contributory negligence is one of fact for the jury, under proper instructions, and is not one of law for the court; Smith v. R. Co., 9 Utah 141, 33 Pac. 626; Grand T. R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Thuringer v. R. Co., 71 Hun 526, 24 N. Y. Supp. 1087. Where the evidence of contributory negligence is not of such a conclusive character as would warrant the court in setting aside a verdict, the question should be left to the jury; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284.

Formerly a rule prevailed in Illinois that negligence "is relative, and that the plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable if he has been guilty of a higher degree of negligence, amounting to wilful injury. The fact that the plaintiff is guilty of slight negligence does not absolve the defendant from the use of care and the use of reasonable efforts to avoid the injury." See Chicago & N. W. R. Co. v. Dimick, 96 Ill. 42. But the doctrine has been repudiated in Illinois; Chicago & A. R. Co. v. Kelly, 75 Ill. App. 490; Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79; and it was rejected in Matta v. Ry. Co., 69 Mich. 109, 37 N. W. 54; Harrison v. Electric Light Co., 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; Tesch v. Ry. & Light Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; Riley v. R. Co., 69 Neb. 82, 95 N. W. 20; Birmingham Ry., L. & Power Co. v. Bynum, 139 Ala. 389, 36 South. 736; Woolf v. R. & N. Co., 37 Wash. 491, 79 Pac. 997; Missouri, K. & T. Ry. Co. v. Kellerman, 39 Tex. Civ. App. 274, 87 S. W. 401; Thomas v. R. Co., 124 Ga. 748, 52 S. E. 801.

In admiralty, where both ships are in fault, the damages are equally divided; Marsden, Coll. ch. 6; this rule is preserved by the Judicature Act in the Admiralty Division. See 2 L. Quart. R. 357; 13 *id.* 17; COLLISION; Report, Int. Law Asso. 1895.

An injury to a government inspector caused by the negligence of those in charge of a dredge, and in part by his own negligence is sufficient to bring him within the admiralty rule of apportionment of damages; The Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293.

Imputed Negligence. In cases of actions brought by infants of tender years for injuries caused by the defendant's negligence, it was held in Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, that the negligence of the parent or guardian of the infant in permitting it to be exposed to danger, should be imputed to the infant and bar its right of action. Substantially all the cases in other jurisdictions have refused to accept this doctrine. The court held in St. Louis & S. F. R. Co. v. Underwood, 194 Fed. 363, 114 C. C. A. 323, that the parent's negligence could not be imputed to the child in a case of suit brought by the child and said that this rule "was supported by the decided weight of authority." Agnew, J., in Kay v. R Co., 65 Pa. 269, 3 Am. Rep. 628, said: "The doctrine that imputes the negligence of the parent to the child in such a case is repulsive to our natural instincts and repugnant to that class of persons who have to maintain life by daily toil."

In Albert v. R. Co., 5 App. Div. 544, 39 N. Y. Supp. 430, affirmed without opinion in 154 N. Y. 780, 49 N. E. 1093, the court appears rather to avoid the application of the rule of Hartfield v. Roper, thus: "It is the settled rule in this state that it is not negligence, as matter of law, for parents to permit a child *non sui juris* [*i. e.* not of years of discretion] to play in the public streets of a city, and the burden is upon the plaintiff to establish freedom from contributory negligence." So of a child of six years playing out of doors without a caretaker; Ferrell v. Cotton Mills, 157 N. C. 528, 73 S. E. 142, 37 L. R. A. (N. S.) 64.

A child has been held to be without discretion in this connection when it was four years of age; Potter v. Leviton, 199 Ill. 93, 64 N. E. 1029; when it was two and one-half years of age; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. 138, 70 N. E. 995; when it was less than four years of age; Fink v. Des Moines, 115 Iowa, 641, 89 N. W. 28; and so of a boy five and one-half years of age who was used to go to school alone; Barksdull v. R. Co., 23 La. Ann. 180.

Negligence of a father as well as of the mother in not discovering a train at a railroad crossing was held to be imputable to a child held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father was not acting as driver merely, but also as the guardian of his child; Delaware, L. & W. R. Co. v. Devore, 114 Fed. 155, 52 C. C. A. 77. As this case arose in the Southern district of New York, it was probably influenced by the ruling in Hartfield v. Roper, *supra*.

While a child of such tender years as to be incapable of exercising any judgment or discretion is not chargeable with contributory negligence; yet where he has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might be reasonably expected of one of his age and mental capacity; Twist v. R. Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626; Houston & T. C. R. Co. v. Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615; Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242. At what age an infant's responsibility for negligence is presumed to begin is a question of law for the court; Schmidt v. Cook, 1 Misc. 227, 20 N. Y. Supp. 889. If the parent is negligent in permitting his child of tender years to be exposed to danger, his negligence is always held to bar his action. Thus the unexplained presence of a child too young to exercise judgment is *prima facie* evidence of its parents' negligence; Harrington v. R. Co., 37 Mont. 169, 95 Pac. 8, 16 L. R. A. (N. S.) 395.

The negligence of a gripman on a cable car in running across the crossing of another road undergoing repairs, at an excessive rate of speed, is imputable to the conductor of such car in control of such gripman, and will prevent him recovering for injuries sustained by reason of such negligence; Minster v. R. Co., 53 Mo. App. 276.

A vessel colliding with an obstruction to navigation cannot be charged with the negligence of a tug acting as an independent contractor in towing her, and wholly controlling her movements; Vessel Owners' T. Co. v. Wilson, 63 Fed. 626, 11 C. C. A. 366.

In England, where a passenger has been injured by concurrent negligence of his own carrier and a third party, it was formerly held that the carrier's negligence was imputed to the passenger and barred his recovery; Thorogood v. Bryan, 8 C. B. 115. But the doctrine has been overruled in 13 App. Cas. 1. See a review of the case in Dean v. R. Co., 129 Pa. 523, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733. It was rejected in New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; Chapman v. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; and, after a review of the authorities, in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. It was followed in Payne v. R. Co., 39 Ia. 523; Allyn v. R. Co., 105 Mass. 77; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

The negligence of a bailee of a horse and buggy is not to be imputed to the owner so

as to prevent him from recovering from a railroad company for killing the horse; Gibson v. R. Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535; *contra*, Illinois C. R. Co. v. Sims, 77 Miss. 325, 27 South. 527, 49 L. R. A. 322; nor is the negligence of a master imputable to his servant who is riding beside him on a truck driven by the master at the time of a collision between the truck and a street car; Doctoroff v. R. Co., 55 Misc. 216, 105 N. Y. Supp. 229; but the negligence of a driver is imputable to the employer under like circumstances; Markowitz v. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.

One who is riding as a guest is not precluded from recovery by the negligence of the driver where the impending danger is so sudden as not to permit her to act for her own protection; Shultz v. R. Co., 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; but the right of one who has entrusted himself to the care of another, with whom he is riding, to recovery for injuries caused by the negligence of a street car company, is dependent upon the exercise of due care by his companion; Evensen v. R. Co., 187 Mass. 77, 72 N. E. 355. The negligence of a locomotive engineer is not imputable to the conductor in charge of the train; St. Louis & S. F. R. Co. v. McFall, 75 Ark. 30, 86 S. W. 824, 69 L. R. A. 217, 5 Ann. Cas. 161. One who rides in a buggy with another, who is driving, is bound to exercise care upon approaching a railroad crossing; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700. The bailee of a carriage does not become the master or principal of the driver, so as to be chargeable with his negligence; Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186. The negligence of a husband who is driving his wife in a conveyance is not imputable to her, so as to prevent her recovery against another negligent person who causes injuries to her, and she can sue in her own name; Louisville Ry. Co. v. McCarthy, 129 Ky. 814, 112 S. W. 925, 19 L. R. A. (N. S.) 230, 130 Am. St. Rep. 494.

The negligence of a landlord is not imputable to his tenants for damage by the fall of a wall in their building due to such negligence, and the negligent excavation of the adjoining lot; Contos v. Jamison, 81 S. C. 488, 62 S. E. 867, 19 L. R. A. (N. S.) 498.

The negligence of a husband cannot be imputed to his wife, who was riding with him over a defective highway, unless it be shown that he was at that time under her control and direction; Reading Tp. v. Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355. Such is the weight of the authorities; Sheffield v. Tel. Co., 36 Fed. 164; Hoag v. R. Co., 111 N. Y. 199, 18 N. E. 648. There are cases to the contrary; Peck v. R. Co., 50 Conn. 379; Yahn v. Ottumwa, 60 Ia. 429, 15 N. W. 257; G., C. & S. F. R. Co. v. Greenlee, 62 Tex. 344.

In Rylands v. Fletcher, L. R. 3 H. L. 330, it was held that one who brings a dangerous substance on his property, and keeps it there without restraining it, is liable for an injury caused by its escape. In L. R. 10 Exch. 255, the court held that the mere fact of building a dam and accumulating water which flooded the plaintiff would not make the owner of the dam liable if it gave way without the fault of the owner; so in Everett v. Tunnel Co., 23 Cal. 225. In Turpen v. Irr. Dist., 141 Cal. 1, 74 Pac. 295, the defendant was held liable for damages from seepage from an irrigation ditch because its construction was not in the usual and reasonable manner; and a like case in Idaho placed the owner's liability on the ground of negligence; McCarty v. Canal Co., 2 Idaho (Hasb.) 245, 10 Pac. 623. In Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, the court says that the rule of Rylands v. Fletcher, 1 L. R. Ex. 265, does not apply in that state to one who builds a dam upon his own premises and holds back and accumulates water for his own use, or if he brings water upon his premises in a reservoir, without proof of some fault or negligence on his part; and to the same effect Pixley v. Clark, 35 N. Y. 524, 91 Am. Dec. 72; Murphy v. Gillum, 73 Mo. App. 487; but in Parker v. Larsen, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30, the owner of an artesian well who allowed percolation to injure others was held liable for the injury on the ground that the water which did the injury was not a natural stream flowing across defendant's land, but was brought upon the land by artificial means, and that where one brings a foreign substance upon his land, he must take care of it; a railroad company was found to maintain a nuisance where it failed to construct a culvert and thereby created a reservoir, which, filling up with water, damaged the plaintiff's land by percolation; International & G. N. R. Co. v. Slusher, 42 Tex. Civ. App. 631, 95 S. W. 717; one who undertakes to change the accustomed flow of surface water and to concentrate it in underground drains and a vault is bound to provide adequate means to discharge the water so gathered by it, and to discharge it in a way that would not be injurious to others. That the company relied on the judgment of competent engineers will not avail as a defence, and is not the fulfillment of a duty to avoid doing injury to another; Lion v. R. Co., 90 Md. 266, 44 Atl. 1045, 47 L. R. A. 127.

The rule of Rylands v. Fletcher has been adopted with or without modification in many of the states; Brennan Const. Co. v. Cumberland, 29 App. D. C. 554, where it was held that one who stores upon his premises near a navigable river large quantities of oil, the escape of which is bound to injure persons using the stream, is liable for the

injury done in case of an escape of the oil, although it occurs without any negligence in his part; so in Berger v. Gaslight Co., 60 Minn. 301, 62 N. W. 336, the escape of crude petroleum from a tank was held to render the defendant liable, without proof of negligence on his part; it was no defence that the defendant was ignorant that his tanks were leaking; Kinnaird v. Oil Co., 89 Ky. 468, 12 S. W. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545. The escape from a pipe line of oil brought from a distance is held a nuisance irrespective of negligence, and will render the owner of the pipe line liable in damages to one injured thereby; Hauck v. Pipe Line Co., 153 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 34 Am. St. Rep. 710. This case was distinguished from Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445, where the injuries complained of were the natural and necessary results of the development by the owner of the resources of his land. In the pipe line case the oil which was the cause of the injury to the plaintiff's property was brought from a distance, and allowed to escape from its pipes and to percolate through plaintiffs' lands and destroy their springs. The mere fact that the business is a lawful business and has been conducted with care is no defence where it is not incident and necessary to the development of the land or the substances lying within it. The owner of the land has a right to develop it by digging for coal, iron, gas, oil, or other minerals, and if in the progress of his development an injury occurs to the owner of adjoining land, without fault or negligence, an action for such an injury cannot be maintained. It is not so where the injury is caused by the prosecution of a business which has no necessary relation to the land itself and is not essential to its development; Robb v. Carnegie Bros. & Co., 145 Pa. 324, 22 Atl. 649, 14 L. R. A. 329, 27 Am. St. Rep. 694. To permit negligently the escape of crude oil into a sewer was held to give a right of action to one whose products were injured by gases arising therefrom; Brady v. S. & S. Co., 102 Mich. 277, 60 N. W. 687, 26 L. R. A. 175.

A gas company was held liable to the owner of a greenhouse for the escape of gas from its mains laid in a city street through a city sewer, owing to the negligence of the city in building the sewer; Butcher v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626; Evans v. Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681. It has been held that gas companies cannot be held liable without proof of negligence; Morgan v. Imp. Co., 214 Pa. 109, 63 Atl. 417; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653, where a gas company permitted the accumulation of gas on premises under its control, through percolation from a leak in the main pipe, it was held liable for an injury to one who in the course of his duty as a water inspector was required to visit the premises to inspect the meter.

While Rylands v. Fletcher has been cited frequently by our courts, few of them have given it unqualified approval, while many have emphatically rejected its doctrine. Massachusetts limits the doctrine to cases of trespass and nuisance; Ainsworth v. Lakin, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314. The doctrine has been rejected in Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394. The common law did not impose upon the owner of cattle the liability of an insurer against all damage done by them, if they escaped from his land; but when vicious animals are not useful for any lawful purpose, or are so kept as to be a menace to human beings, while engaged in lawful pursuits, they are fairly classed as a nuisance, and if they do damage, their owner or responsible keeper is liable; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123. When the vicious animal, such as a watchdog, may be lawfully kept for useful purposes, then the liability is for negligence in the manner of keeping it; Knickerbocker Ice Co. v. Finn, 80 Fed. 483, 25 C. C. A. 579; Hahnke v. Friederich, 140 N. Y. 224, 35 N. E. 487; Baldwin v. Ensign, 49 Conn. 113, 44 Am. Rep. 205.

The common law held the person starting a fire, even for necessary and lawful purposes, to an absolute responsibility for its consequences; 2 H. IV, 18, pl. 6. This was modified later. The same extraordinary liability rests upon one, who brings electricity upon his premises, whence it escapes, to the injury of neighbors; [1893] 2 Ch. 186. In the United States the common law liability for fire has never been enforced.

The rule in Rylands v. Fletcher has been treated at length by Prof. Francis H. Bohlen in Univ. of Pa. Law Rev., etc. (1911).

A landlord who lets premises in a condition so unrepaired that they are a nuisance, and agrees to keep them in repair, is liable in tort to any person, other then the tenant, who is injured because of such condition, on the ground that by the letting he has authorized the maintenance of the nuisance; he is not in such case liable in tort to the tenant; Miles v. Janvrin, 196 Mass. 431, 82 N. E. 708, 13 L. R. A. (N. S.) 378, 124 Am. St. Rep. 575.

In L. R. 6 Q. B. 759, the plaintiff was injured while walking along a public highway by a brick which fell from a pier of the defendant's bridge; the defendant was held liable. It was said to be the duty of the defendant from time to time to inspect the bridge and ascertain that the brickwork was in good order. In L. R. 1 Q. B. D. 314, it

was held that one who for his own benefit suspends an object over the highway, and puts the public safety in peril thereby, is under an absolute duty, to keep it in such a state as not to be dangerous (here the defendant was the lessee and occupier of a house from the front of which a heavy lamp projected over the public footway). A lot owner in a city who maintains a scuttle hole in the sidewalk in front of his house is liable for injuries received by one using the sidewalk, although the scuttle hole was authorized by the city and the tenant had agreed to keep it closed; Calder v. Smalley, 66 Ia. 219, 23 N. W. 638, 55 Am. Rep. 270. One who builds or maintains a high chimney, the fall of which would injure an adjoining building, is liable for its fall in a not unusual gale; Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 26 L. R. A. 256, 44 Am. St. Rep. 362. One who builds a wall owes a duty to persons lawfully upon the premises to take reasonable care that the wall should be so constructed as not to fall; Dettmering v. English, 64 N. J. L. 16, 44 Atl. 855, 48 L. R. A. 106; so if an awning be erected, the owner of the building is liable for damage occasioned by its fall, if the wall to which it is attached is of insufficient strength to support its burden; Riley v. Simpson, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622; and where a sign projects over the sidewalk it is the duty of the owner to see that the fastenings are secure; Railway Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189; one who permits a shivered pane of glass to remain in a window above a street will be liable to a person who is struck by a piece of the glass while on a sidewalk below the window; Detzur v. Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500. The owner was held liable where a cornice overhanging the sidewalk fell because nails fastening it to the building had been loosened by ordinary decay, though he had no knowledge of the defect; 21 Ont. App. 433.

The installation of an electric third-rail system will not render the company liable to a trespasser, it being guarded by a fence, though there was nothing to show the trespasser (an infant of seven years) that the third-rail was more dangerous than the ordinary track, it being exposed and uncovered; Riedel v. R. Co., 177 Fed. 374, 101 C. C. A. 428, 28 L. R. A. (N. S.) 98, 21 Ann. Cas. 746; *contra*, Anderson v. R. Co., 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962, where the passenger was injured by the third-rail while walking along the track after having been wrongfully ejected from a train.

A man must not set traps of a dangerous description in a situation to invite, and for the particular purpose of inviting, his neighbor's animals, so that it would compel them by their instinct to come into the trap; Walsh v. R. Co., 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; 9 East 277. One who dug a pit under a cotton-gin near the highway leaving it uninclosed, with corn and cotton seed scattered about it, was held liable for the death of a cow that wandered into it; Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575.

Lord Ellenborough intimates in Townsend v. Wathen, 9 East 277, that there is no difference between drawing an animal into a trap by means of his instinct which he cannot resist and putting him there by manual force.

It is a general principle that one who invites another upon his premises is bound to exercise more than ordinary care towards him. If the person giving the invitation is alone benefited he is responsible for even the slightest negligence. So a storekeeper, who either expressly or impliedly invites the public to enter his place of business for the purpose of trading must exercise a high degree of care to keep his premises in a safe condition, and where such person is accidentally injured the shopkeeper is liable in the absence of negligence on the part of the person injured; Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; Engel v. Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 519; Snyder v. Witwer Bros., 82 Ia. 652, 48 N. W. 1046; O'Brien v. Tatum, 84 Ala. 186, 4 South. 158; Clopp v. Mear, 134 Pa. 203, 19 Atl. 504; so letter-carriers have an implied invitation to enter certain buildings for the purpose of placing mail in boxes; Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; and an employé and contractor for the construction of a building is not a trespasser and may maintain an action for injuries; Ferris v. Aldrich, 12 N. Y. Supp. 482. See Webb, Elevators. A person invited to come upon a ship for the purpose of business is entitled to be protected by the exercise of such care and prudence as would render the premises reasonably safe; The William Branfoot, 52 Fed. 390, 3 C. C. A. 155, 8 U. S. App. 129; and one who, while riding in a private carriage of another at his invitation, is injured by the negligence of a third party, may recover against the latter, notwithstanding the negligence of the driver of the carriage may have contributed to the injury; Union Pac. R. Co. v. Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, 4 U. S. App. 542. But the owner of land and of buildings is not liable to one who is on his premises as a mere licensee. As one who enters on premises by permission only, without any inducement being held out to him by the occupant, cannot recover for injuries caused by obstructions or pitfalls; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; unless it was unlawful to erect the machine or contrivance, or the injury was wilful and wanton; the wilfulness will be presumed from gross negligence; Galveston Oil Co. v.

Morton, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611; where an elevator is out of order or is intended for freight only and not for passengers, and notice of such fact is duly posted, one who has a reasonable opportunity for seeing and reading such posted notice assumes the risk of venturing on or near such elevator; Springer v. Byram, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 159; Hansen v. Schneider, 58 Hun 60, 11 N. Y. Supp. 347; McCarthy v. Foster, 156 Mass. 511, 31 N. E. 385. There is an ambiguity in the use of the word license in decisions relating to negligence. It is sometimes used for sufferance of a trespass; L. R. 1 C. P. 274; sometimes equivalent to invitation; 4 C. B. N. S. 563, 567. See 2 C. P. D. 310.

Invited Persons. The defendant is obliged to exercise due care to warn an invited person of dangers he does know and those which, by the exercise of reasonable care, he might have known; L. R. 1 C. P. 274. A licensee is raised to an invited person when the defendant receives some benefit. An invited person is one going not only on his own business but also on business for defendant. There is a conflict, as to the position of a social guest or a fireman, but by the better view they are considered mere licensees.

One managing a place of public amusement, and who sells intoxicating liquors to a person whom he knows to be of a quarrelsome disposition when intoxicated, is bound to exercise reasonable care to protect other customers from the assaults and insults of such person; Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446. Persons conducting a fair are liable for injury to a patron caused by the fall of the floor in one of its buildings; Brown v. Agr. Soc., 47 Me. 275, 74 Am. Dec. 484; so are proprietors of a hall for the giving way of a guard rail against which persons were accustomed to lean; Schofield v. Wood, 170 Mass. 415, 49 N. E. 636; and so is a corporation conducting a balloon ascension for injuries caused by the insecure fastening of the guy ropes; Peckett v. Beach Co., 44 App. Div. 559, 60 N. Y. Supp. 966; or for the fall of a pole used in connection with the exhibition, where no notice was given that the pole would fall; Richmond & M. R. Co. v. Moore's Adm'r, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258. The owner of a toboggan slide must anticipate and provide against injuries from defects in construction to the extent that reasonably prudent men might foresee the necessity for doing; Barrett v. Imp. Co., 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829.

The owner of a pleasure park, in which there is a swimming pool operated for hire, is liable to one diving and injured by striking invisible timber under the water; Bass v. Reitdorf, 25 Ind. App. 650, 58 N. E. 95 (but the mere presence of a pond in a public pleasure park is not an invitation to bathe therein; and where there is no invitation or sign or appearance that the pond is used by visitors for such purpose, the proprietor is not obliged to inform all comers that they shall not bathe therein; Le Grand v. Traction Co., 10 Pa. Super. Ct. 12).

The owner of a public bathing resort may be found to be negligent if he places no signs as to the depth of water, or marks to indicate danger, and no one at hand to aid persons in danger; Larkin v. Beach Co., 30 Utah 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982, 116 Am. St. Rep. 818, 8 Ann. Cas. 977. Where the defendant had negligently constructed a shooting gallery on his exhibition grounds, he was held liable to one injured by a bullet therefrom, although the plaintiff was not at the time on the owner's land, but was waiting to be admitted; he was held to be classed as a business visitor; Thornton v. Agri. Soc., 97 Me. 113, 53 Atl. 979, 94 Am. St. Rep. 488.

One who maintains a park for the entertainment of the public, and has knowledge of a conspiracy on the part of certain persons to assault negroes visiting the park, is liable for injuries inflicted on a negro in pursuance of such conspiracy, where he permitted him to enter and took no measures to protect him from danger; Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909. In commenting on this case, it is said: "If as a result of the defendant's invitation, an unsuspecting plaintiff has been intentionally or negligently led into a trap, his right to demand indemnity from the defendant should not depend upon the particular manner in which he meets with injury;" 17 Harv. L. R. 358.

There is a duty to the licensee to warn him against all perils known to the defendant and concealed; Campbell v. Boyd, 88 N. C. 129, 43 Am. Rep. 740; Bennett v. R. Co., 102 U. S. 578, 26 L. Ed. 235.

A man is not liable in any way for the condition of his property to a trespasser unless he sets an active force in motion aimed at expectant trespassers; Lary v. R. Co., 78 Ind. 323, 41 Am. Rep. 572. The obligation of a railroad company and its operatives is not pre-existing, but arises at the moment of the discovery of the trespasser and is negative in its nature—a duty which is common to human conduct to make all reasonable effort to avert injury to others by means which can be controlled; Sheehan v. R. Co., 76 Fed. 201, 22 C. C. A. 121, 46 U. S. App. 498. As to the duty of an engineer to keep a lookout for trespassers, the decisions are in conflict: In Cincinnati & Z. R. Co. v. Smith, 22 Ohio 227, it was held that locomotive engineers, so far as consistent with their other duties, must use ordinary care to avoid injuring persons, and that they were of course bound to adopt the ordinary precau-

tions to discover danger as well as to avoid its consequences. In Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333, it was held that where a trespasser is discovered on the premises by the owner or occupant, then any negligence resulting in injury will render the person guilty of negligence liable to respond in damages. In Maynard v. R. Co., 115 Mass. 458, 15 Am. Rep. 119, the company was held not liable to a trespasser for anything short of reckless or wanton misconduct. In Jeffries v. R. Co., 129 N. C. 236, 39 S. E. 836, the duty of keeping a look-out was held to rest on the defendant. If it can keep a proper look-out by means of an engineer alone, that is sufficient. But if it cannot, and if the aid of the fireman is needed, he also should be used, and if either or both are so hindered that a proper look-out cannot be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed, for it is the duty of the defendant to keep a proper look-out.

Turntable Cases. There is a class of cases where the owner of property is held liable to children who are trespassing thereon and injured, upon the ground that the owner is bound to know that children may be attracted and may thereby be injured, although the owner is guilty of no negligence except in maintaining property in such condition that children may trespass thereon to their harm. As many such cases have arisen in connection with railroad turntables, the whole class has been called *turntable cases.*

Turntables being somewhat in the nature of a merry-go-rounds are such as to render them peculiarly attractive to children, and although on the private property of a railroad company, they are usually located in more or less public places, where the presence of children might naturally be expected. That a rule requiring all dangerous attractions to be guarded would be burdensome on the landowner is not denied and generally he is not held liable for injuries to child trespassers, unless guilty of gross and wanton negligence. But whether the good to the community would outweigh the partial restriction of the dominion over property is an open question. In the case of the turntable the expense and inconvenience of keeping them locked or secured is slight in comparison with the benefits to be derived to the public in keeping them secured. In an early case, the question of the negligence of the company in leaving its turntables unguarded was left to the jury, and it was said that the fact that the child was a trespasser did not relieve the company from the obligation to exercise reasonable care for its safety; Sioux City & P. R. Co. v. Stout, 17 Wall. (U. S.) 657, 21 L. Ed. 745. Though a railroad company is not obliged to fasten its turntable so securely that it is impossible for children to remove the fastenings, the fastenings must be such that an ordinarily prudent person would deem them sufficient to render it improbable that young children would remove them; O'Malley v. R. Co., 43 Minn. 289, 45 N. W. 440. A railroad company is liable for an injury received by an infant while upon its premises from idle curiosity or for purposes of amusement, if such injury was, under the circumstances, attributable to the negligence of the company; Union P. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434.

A turntable is a dangerous machine likely to cause injury to children who resort to it; if defendants took no means to keep children away and to prevent accident, they were guilty of negligence; Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; Ferguson v. R. Co., 77 Ga. 102; Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Nagel v. R. Co., 75 Mo. 653, 42 Am. Rep. 418; Bridger v. R. Co., 25 S. C. 24; Ft. Worth & D. C. R. Co. v. Measles, 81 Tex. 474, 17 S. W. 124; Edgington v. R. Co., 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561; Ft. Worth & D. C. R. Co. v. Robertson (Tex.) 16 S. W. 1093; *contra*, Daniels v. R. Co., 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; Walker's Adm'r v. R. Co., 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, 8 Ann. Cas. 862.

What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years; Keffe v. R. Co., 21 Minn. 207, 18 Am. Rep. 393. If the defendant knew that his turntable, when left unfastened, was attractive and dangerous to young children, and knew also that children were in the habit of going on it for play, it was not merely inviting young children to leave it unfastened and unguarded, but was holding out an allurement; Keffe v. R. Co., 21 Minn. 207, 18 Am. Rep. 393.

In the case of young children and other persons not *sui juris*, an implied license might sometimes arise, when it would not on behalf of others; thus, leaving exposed a tempting thing for children to play with, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; Cooley, Torts, c. 10, p. 303. A leading English case is Lynch v. Nurdin, 1 Q. B. 29, where the defendant's servant went into a house, leaving his horse and cart standing in the street for about half an hour unguarded, and a child playing about the team was run over by the wheel and his leg broken. The carelessness of the servant was held to have tempted the child and the action against the defendant was maintainable.

On the other hand, it is held that the defendant owes no duty of care in respect to the condition of a turntable or of a defective hedge, to a child trespassing upon its premis-

es, and the fiction of implied invitation or allurement is repudiated; 41 Ir. L. T. R. 157. Property owners are not bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen; Holbrook v. Aldrich, 168 Mass. 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. Rep. 364, per Holmes, J.

An invitation is not extended to children to enter upon private premises, by erecting thereon for beneficial use a structure which happens to be attractive to them; Delaware, L. & W. R. Co. v. Reich, 61 N. J. L. 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; [1913] 1 K. B. 398; and a landowner is not under a duty to keep his premises safe for mere trespassers, even if they are children; Ritz v. Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481; Dobbins v. R. Co., 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; Fitzmaurice v. Lighting Co., 78 Conn. 406, 62 Atl. 620, 3 L. R. A. (N. S.) 149, 112 Am. St. Rep. 159. To leave a street car in the streets is held not to be an invitation or license to children to play upon it, although the company knows that it attracts them; Gay v. Ry. Co., 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. Rep. 415; or to leave a hand car on the ground beside a railroad track; Robinson v. R. Co., 7 Utah 493, 27 Pac. 689, 13 L. R. A. 765. An owner was held to be not under obligation so to pile ties as to prevent injury to a child attempting to climb upon them; Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; Powers v. Bridge Co., 97 App. Div. 477, 89 N. Y. Supp. 1030; Kramer v. R. Co., 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359; Lynch v. Knoop, 118 La. 611, 43 South. 252, 8 L. R. A. (N. S.) 480, 118 Am. St. Rep. 391, 10 Ann. Cas. 807 (where an attempt had been made to drive the child away).

A city is not liable for the death of a child who falls into an open conduit while playing, and drowns; Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004; neither is the owner of an open bulkhead near a path used by school children, for the drowning of a child who falls therein; Bottum's Adm'r v. Hawks, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1025. See also 46 Am. L. Rev. 277. The fact that a public bridge is attractive to boys does not render an electric company liable where a boy climbs up a pier thereon and is electrocuted by contact with a live wire; Graves v. W. P. Co., 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452.

A child who climbs into a milk wagon and rides a short distance thereon with the consent of the owner is a trespasser, and the owner's consent does not constitute an implied invitation, and he is not liable for her injury; West v. Poor, 196 Mass. 183, 81 N. E. 960, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541. Where a child of 2½ years got through a fence to a pile of railroad sleepers at a place where the railroad company had knowledge that children constantly played, and from thence went 35 yards to its track (unfenced) and was injured, held that the license (if any) to play on the sleepers did not extend to the tracks; [1912] 1 K. B. 525. But where large gas pipes were so left as to be movable by children and a child was killed by one of them rolling on him, it was held to be a "death trap" and that the owner was liable; O'Hara v. Gaslight Co., 131 Mo. App. 428, 110 S. W. 642.

In Cincinnati & H. S. Co. v. Brown, 32 Ind. App. 58, 69 N. E. 197, a child while playing in a grove, situated partly on defendant's and partly on adjacent lands, was injured by running into a barbed wire, a remnant of a fence that originally separated the defendant's land from the rest of the grove. The defendant knew of the condition of the property and the habit of the children playing in the grove. It was held that the question of the defendant's negligence and the plaintiff's contributory negligence should be left to the jury. The thing which attracts the children, namely, the grove, unlike the turntable, is not dangerous in itself nor the instrument of injury, nor is it an artificial structure maintained by the land owner. See 11 H. L. Rev. 349.

The law recognizes that under some circumstances the omission of a duty owed by one individual to another will make the other chargeable with the consequences; the rule is based upon the proposition that the duty neglected must be a legal duty, imposed by law or by contract, and not a mere moral obligation; People v. Beardsley, 150 Mich. 206, 113 N. W. 1128, 13 L. R. A. (N. S.) 1020, 121 Am. St. Rep. 617, 13 Ann. Cas. 39.

Where one is in a house by express invitation and becomes violently ill, the defendants owe him the duty, upon discovering his physical condition, to exercise reasonable care not to expose him to danger by sending him from their home; and if defendants knew and appreciated his physical condition, their conduct amounts to negligence; Depue v. Flatau, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485. But where plaintiff was taken ill with an infectious disease while visiting the janitor in defendant's apartment house, and defendant ordered her from the house, and plaintiff, being unable to hire an ambulance, made use of the street cars and by walking reached her own home, where she immediately became worse, it was held that defendant violated no legal duty to plaintiff, it being as much his duty to look out for his tenants as to look out for her; Tucker v. Burt, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. (N. S.) 510.

In case of a person falling overboard from a ship at sea, whether a passenger or seaman, where he is not killed by the fall, the captain is bound both by law and by contract to do everything, consistent with the safety of the ship and of the passengers and crew, necessary to his rescue, no matter what delay in voyage may be occasioned, or what expense to the owners may be incurred; U. S. v. Knowles, 4 Sawy. 519, Fed. Cas. No. 15,540. If a guest in a hotel by reason of intoxication is troublesome to the other guests, the proprietor may rightfully put him out of the house, using no unnecessary force or violence. If, however, the trouble and disturbances caused by the guest are due to sickness, he must be treated with the consideration due to a sick man, and if he is removed, such removal must be in a manner suited to his condition; McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699.

Violation of Ordinance. When does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible? Sometimes it is said that the wrongful act is "negligence *per se*"; sometimes that it is only "evidence of negligence"; sometimes again that it is "*prima facie* evidence of negligence." See Jaggard, Torts § 263. Danger, reasonably to be foreseen at the time of acting, is the established test of negligence. The proposition, then, that the defendant is under a "duty of care" to certain persons in a certain situation means that as to them he acts at peril if he does dangerous things carelessly.

Does an ordinance or statute change this situation? Before its passage the common law liability was for negligent conduct; "negligent" meant "dangerous"; the test of danger was the foresight of the prudent man; the jury, within the territory where opinions could reasonably differ, was to say what he should have foreseen; outside this territory the question was for the court. The ordinance narrows the last question; Monroe v. R. Co., 76 Conn. 201, 56 Atl. 498; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; Smith v. Supply Co., 32 Utah 21, 30, 88 Pac. 683.

The court can no longer submit the question of danger to the jury, because there is no longer room for a reasonable difference of opinion; Smith v. Supply Co., *supra*. The ordinance has foreclosed the question whether the specified act is a dangerous thing. This can only mean that the act is labelled "dangerous."

As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions enacted by the legislature. They may be regulations of highway traffic, the position of vehicles on the highway; Newcomb v. Protective Dep't, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 344; the speed at which they may run; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081; the conduct of railways at crossings; Holman v. R. Co., 62 Mo. 562; or building laws passed to lessen fire risks; Aldrich v. Howard, 7 R. I. 199; or restrictions on the use of dangerous articles, such as the carrying of fire-arms by children; Horton v. Wylie, 115 Wis. 505, 92 N. W. 245, 95 Am. St. Rep. 953; or the sale of poisons unlabeled; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; or handling explosives without specified precautions; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451. Whatever form the prohibition may take (and the varieties are infinite) a danger has been deemed by the legislature so great as to justify making its creation or continuance a public wrong. A new statutory "nuisance" has thus been created in every sense in which that word has legal significance; and the proposition that he who violates the statute or ordinance does so at his peril is only an application of the principle that an action lies in favor of one who has suffered a private injury from a public nuisance.

The prior cases were under statutes forbidding objectionable conduct and punishing one who does the forbidden act. But suppose the statute calls for action, and punishes a failure to do the thing required. In Dawson & Co. v. Bingley Urban District Council, [1911] 2 K. B. 149, the defendant was a municipal board charged with the duty of furnishing water for fire protection, and among other things providing proper fire plugs and putting up signs in the street to show their situation. They put up the sign in the wrong place and this delayed the fire brigade in hunting for the plug while plaintiff's building was burning. The court held defendant liable for plaintiff's additional damage during this delay. In Couch v. Steel, 3 E. & B. 402, defendant was held liable for damage for breach of a statute requiring medicines to be kept on shipboard. In Evans v. R. Co., 109 Minn. 64, 122 N. W. 876, 26 L. R. A. (N. S.) 278, a carrier which had brought into the state a diseased horse without complying with the inspection laws, was held liable to a purchaser from the consignee.

See RES IPSA LOQUITUR.

One who leaves a horse unhitched in a street in which cars using snow scrapers are running cannot hold the street car company liable for injury to the horse due to its being frightened and dashing in front of a car; Moulton v. Ry., 102 Me. 186, 66 Atl. 388, 10 L. R. A. (N. S.) 845. The owner takes the risk of what the horse may do and such act raises a presumption of negligence, and puts upon him the burden of showing circumstances which justified or excused it; Stevenson v. Exp. Co., 221 Pa. 59, 70 Atl. 275, 128 Am. St. Rep. 725; Doherty v. Sweetser, 82 Hun 556, 31 N. Y. Supp. 649; and he is liable for any damage caused by the horse run-

ning away; Corona C. & I. Co. v. White, 158 Ala. 627, 48 South. 362, 20 L. R. A. (N. S.) 958. It is negligent for the driver of a horse to abandon his seat and run after his hat in the street without fastening or otherwise securing the animal; Damonte v. Patton, 118 La. 530, 43 South. 153, 8 L. R. A. (N. S.) 209, 118 Am. St. Rep. 384, 10 Ann. Cas. 862.

An employer is liable for the negligence of a servant who, while driving the master's horse within the scope of his employment, negligently leaves him standing unhitched, and the horse runs away and injures a third person who is lawfully upon the highway; Hayes v. Wilkins, 194 Mass. 223, 80 N. E. 449, 9 L. R. A. (N. S.) 1033, 120 Am. St. Rep. 549.

See CHARITABLE USES (as to liability of hospitals, etc.); CAUSA PROXIMA NON REMOTA SPECTATUR; COMMON CARRIERS; DEATH; ELEVATORS; EMPLOYERS' LIABILITY ACTS; GRADE CROSSINGS; INDEPENDENT CONTRACTORS; MASTER AND SERVANT (as to assumption of risk); RAILROADS; RES IPSA LOQUITUR.

NEGLIGENT ESCAPE. The omission on the part of a gaoler to take such care of a prisoner as he is bound to take, when in consequence thereof the prisoner departs from his confinement without the knowledge or consent of the gaoler, and eludes pursuit.

For a negligent escape, the sheriff or keeper of the prison is liable to punishment, in a criminal case; and in a civil case he is liable to an action for damages at the suit of the plaintiff. In both cases the prisoner may be retaken; 3 Bla. Com. 415. See ESCAPE.

NEGOTIABLE. In Mercantile Law. A term applied to a contract, the right of action on which is capable of being transferred by indorsement (of which delivery is an essential part), in case the undertaking is to A or his order, A or his agent, and the like, or by delivery alone, in case the undertaking is to A or bearer,—the assignee in either case having a right to sue in his own name.

That which is capable of being transferred, by assignment, indorsement, or by delivery. Victor v. Johnson, 148 Pa. 583, 24 Atl. 173.

Complete negotiability involves the right of the assignee to sue in his own name and take free of equities against the assignor; L. R. 8 Q. B. 874.

At common law, *choses in action* were not assignable; but exceptions to this rule have grown up by mercantile usage as to some classes of simple contracts, and others have been introduced by statute, so that now bills of exchange, promissory notes, and bank-notes, to order or bearer, are universally negotiable; and notes not to order or bearer have become *quasi* negotiable; that is, an indorsement will give a right of action in the name of the assignor; and in some states, by statute, bonds and other specialties are assignable by indorsement.

See ASSIGNMENT.

NEGOTIABLE INSTRUMENTS. Besides notes, bills, and checks, the following have been held to be negotiable instruments: exchequer bills; 4 B. & Ald. 1; 12 Cl. & F. 787, 805; state and municipal bonds; 3 B. & C. 45; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Independent School Dist. v. Hall, 113 U. S. 135, 5 Sup. Ct. 371, 28 L. Ed. 954; corporate bonds; L. R. 3 Ch. App. 758, 154; White v. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221; [1892] 3 Ch. 527; coupon bonds of an individual; In re Leland, 6 Ben. 175, Fed. Cas. No. 8,229; coupon bonds of a corporation; Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. Ed. 725; Evertson v. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Beaver County v. Armstrong, 44 Pa. 63; government scrip; L. R. 10 Ex. 337; United States treasury notes; Vermilye v. Exp. Co., 21 Wall. (U. S.) 138, 22 L. Ed. 609; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; post-office orders; 65 L. T. 52; certificates of deposit; Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; First N. Bk. v. Bank, 34 Neb. 71, 51 N. W. 305, 15 L. R. A. 386, 33 Am. St. Rep. 618; debentures of limited companies; [1898] 2 Q. B. 658; bonds of foreign governments; 3 B. & C. 45.

The following have been held not to be negotiable: lottery tickets; 8 Q. B. 134; dividend warrants; 9 Q. B. 396; iron scrip notes; 3 Macq. 1; debentures, on which authorities differ; L. R. 8 Q. B. 374; pass-book of savings bank; McCaskill v. Bank, 60 Conn. 300, 22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323; a treasury warrant not presented for three years, the amount having been covered back into the treasury; Harris v. U. S., 27 Ct. Cls. 177.

Bills of lading are not properly negotiable instruments, but they may be called so in a limited sense as against stoppage in transitu only; Poll. Contr. 207.

An instrument in the form of a promissory note drawn by a corporation, and bearing its seal, is not a promissory note negotiable by the law merchant; per Blatchford, J., in Coe v. R. Co., 8 Fed. 534.

Any addition to the form of a note which destroys its essential quality of a promise to pay, "simple, certain, unconditional, not subject to any contingency," will destroy its negotiable character; Woods v. North, 84 Pa. 409, 24 Am. Rep. 201. Thus, the addition of the words, "given as collateral security with agreement;" Costelo v. Crowell, 127 Mass. 293, 34 Am. Rep. 367; "a warrant to confess judgment;" Sweeney v. Thickstun, 77 Pa. 131; "in facilities;" Springfield Bank v. Merrick, 14 Mass. 322; "foreign bills;" Jones v. Fales, 4 Mass. 245; "and it is the understanding it will be renewed at maturi-

ty;" Citizens N. Bk. v. Piollet, 126 Pa. 195, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860; "return notice ticket with this order," and "deposit book must be at bank before money can be paid;" Iron City N. Bk. v. McCord, 139 Pa. 53, 21 Atl. 143, 11 L. R. A. 559, 23 Am. St. Rep. 166; "with exchange;" in varying forms with respect to place; Hughitt v. Johnson, 28 Fed. 865; Windsor S. Bk. v. McMahon, 38 Fed. 283, 3 L. R. A. 192; 23 U. C. C. P. 503; Flagg v. School District, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Nicely v. Bank, 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. Rep. 245; *contra*, Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Bradley v. Lill, 4 Biss. 473, Fed. Cas. No. 1,783; with counsel fees, expenses of collection, or other words to the same effect; First N. Bk. v. Bynum, 84 N. C. 27, 37 Am. Rep. 604; First N. Bk. v. Gay, 63 Mo. 35, 21 Am. Rep. 430; Hardin v. Olson, 14 Fed. 705; First N. Bk. v. Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; Sperry v. Horr, 32 Ia. 184; Schlesinger v. Arline, 31 Fed. 649.

A note containing a tax clause is not negotiable; Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 537; McClelland v. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397; nor is one given for rent and subject to set-off for repairs; Jones v. Laturnus (Tex.) 40 S. W. 1010.

Contracts are not necessarily negotiable because by their terms they inure to the benefit of the bearer. Hence, a receipt acknowledging that a person has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free in the hands of a transferee from equities which would have affected it in the hands of the original recipient; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117

Indorsements of payment on a promissory note before delivery do not destroy negotiability; Smith v. Shippey, 182 Pa. 24, 37 Atl. 844, 38 L. R. A. 823.

The rule in Illinois that a negotiable note, secured by a mortgage, transferred to a *bona fide* holder before maturity, is held subject to all equities between the original parties, is not binding on the federal courts, which hold in such cases that in a suit in equity brought to foreclose the mortgage, no other defences are allowed against it than would be allowed in an action at law to recover on the notes; Swett v. Stark, 31 Fed. 858. Coupons attached to a railroad bond and payable to bearer, when detached and negotiated, are no longer incidents of the bond, but independent negotiable instruments; Internal Imp. Fund v. Lewis, 34 Fla. 424, 16 South. 325, 26 L. R. A. 743, 43 Am. St. Rep. 209. See COUPONS.

"By the decisive weight of authority in this country where negotiable paper has been put in circulation, and there is no infirmity or defence between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid therefor." Wade v. R. Co., 149 U. S. 327, 13 Sup. Ct. 892, 37 L. Ed. 755. See Fowler v. Strickland, 107 Mass. 552; Bange v. Flint, 25 Wis. 544; National Bk. of Michigan v. Green, 33 Ia. 140.

All the states, territories, etc., have passed the Uniform Negotiable Instruments Act, except California, Georgia, Maine, Mississippi, Texas, and Porto Rico. Under this act an instrument, to be negotiable, must be in writing and signed; must contain an unconditional promise or order to pay a certain sum of money on demand at a fixed and determinable future time; it must be payable to order or to bearer, and where it is addressed to the drawee, he must be named or otherwise indicated with reasonable certainty; its negotiability is not affected by the fact that it is not dated, or that it bears a seal, or that it does not specify the value given or that any value was given.

The sum payable is certain within the act, although it is to be paid with interest, or by stated instalments, with the provision that, upon default in the payment of any instalment or interest, the whole sum becomes payable, or if payable with exchange or with costs of collection or an attorney's fee.

It may be payable to the order of a specified person, or to him, or his order. A note payable to the maker's order is not negotiable till he endorses it. It may be payable to the holder of an office.

Negotiability is not affected if the instrument authorizes the sale of collateral security; or a confession of judgment on default; or waives the benefit of any law intended for the obligor's benefit; or gives the holder an election to require something to be done in lieu of payment of money.

Warehouse receipts and bills of lading are said to be usually treated as only quasi negotiable instruments on the ground that they do not contain a sufficiently definite promise and are not payable in money; Sel. Neg. Inst. § 34. In some states receipts issued by certain warehouse and storage companies are still negotiable, for the statute giving them negotiability was not repealed by the Negotiable Instruments Act; Hanover N. Bk. v. Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721. In Wisconsin warehouse receipts, bills of lading and railroad receipts are negotiable unless the words "not negotiable" are plainly written, printed or stamped on the face of the instrument. A certificate of deposit payable to the order of the depositor is negotiable; Birch v. Fisher, 51 Mich. 36, 16 N. W. 220; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Johnson v. Henderson, 76 N. C. 227.

A note promising to pay a certain sum "to be allowed at my decease," is negotiable; Martin v. Stone, 67 N. H. 367, 29 Atl. 845; and one payable "sixty days after my death"; Crider v. Shelby, 95 Fed. 212; and one payable "on demand after my decease"; Bristol v. Warner, 19 Conn. 7.

But instruments payable on a contingency are not negotiable, and the happening of the contingency does not cure the defect; as an instrument payable when one shall become of age; Kelley v. Hemmingway, 13 Ill. 604, 56 Am. Dec. 474; or be elected to a certain office; Cooper v. Brewster, 1 Minn. 94 (Gil. 73); or when a certain estate shall be settled; Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273.

It has been a recognized rule that instruments payable at a fixed period after date or sight, though payable before then on a contingency, are sufficiently certain to be negotiable; Stevens v. Blunt, 7 Mass. 240; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.

That letters of credit "possess a real negotiability when they relate to bills of exchange," see 2 Dan. Neg. Inst. § 1798.

A receiver's certificate is not negotiable; Turner v. R. Co., 95 Ill. 134, 35 Am. Rep. 144; nor a passbook issued by a savings bank; Smith v. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; nor municipal warrants and orders; Stanton v. Shipley, 27 Fed. 498.

Instruments payable in services are not; Quinby v. Merritt, 11 Humph. (Tenn.) 439; or in merchandise; Gushee v. Eddy, 11 Gray (Mass.) 502, 71 Am. Dec. 728; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; or in the alternative, in money or merchandise; Thompson v. Gaylard, 3 N. C. 150; or in money or bank stock; Alexander v. Oaks, 19 N. C. 513.

A provision in a note, otherwise negotiable, that the title to the property for which it was given shall remain in the vendor until the note is paid, has been held to be not negotiable under the Negotiable Instruments Act; Third N. Bk. v. Spring, 28 Misc. 9, 59 N. Y. Supp. 794; but the rule is generally that such a provision will not destroy negotiability; Chicago R. Equipment Co. v. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; First N. Bk. v. Slaughter, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277.

The negotiable character of an instrument is not affected by the fact that it designates a particular kind of current money in which payment is to be made; thus an instrument is payable in money if payable in "pounds sterling"; King v. Hamilton, 12 Fed. 478; or in cash notes; Ward v. Lattimer, 2 Tex. 245; or in gold dollars; Chrysler v. Renois, 43 N. Y. 209; or in Mexican silver dollars; Hogue v. Williamson, 85 Tex. 553, 22 S. W. 580, 20 L. R. A. 481, 34 Am. St. Rep. 823; but is not payable in money if payable in bank stock; Markley v. Rhodes, 59 Ia. 57, 12 N. W. 775; or in current bank notes; State v. Corpening, 32 N. C. 58; or in current funds; Wright v. Hart's Adm'r, 44 Pa. 454 (*contra*, Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97); or in currency; Ruidskoff v. Barrett, 11 Ohio 172 (*contra*, Butler v. Paine, 8 Minn. 324 [Gil. 284]).

A note payable at New York in New York funds or their equivalent is not negotiable because the term "New York funds," it is presumed, may embrace stocks, bank notes, specie and every description of currency which is used in commercial transactions; Hasbrook v. Palmer, 2 McLean 10, Fed. Cas. No. 6,188; but a note payable in bank notes current in the city of New York was held negotiable; Keith v. Jones, 9 Johns. (N. Y.) 120; so also a note payable in "York State bills or specie"; Judah v. Harris, 19 Johns. (N. Y.) 144. See Selover, Neg. Instr. § 41.

In the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, but by statute in many states it is now otherwise; 1 Freem. Ex. § 112; Brown v. Anderson, 4 Mart. N. S. (La.) 416. It is held that a note may be made the subject of seizure and delivery in a replevin suit; Smith v. Eals, 81 Ia. 235, 46 N. W. 1110, 25 Am. St. Rep. 486. That bills and notes are governed by the designation of "goods and chattels" in the statute of frauds and other statutes, see 2 Ames, Bills and Notes 706. They are goods, wares and merchandise; Baldwin v. Williams, 3 Metc. (Mass.) 365; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; and are the subject of conversion; 3 Campb. 477. They may be the subject of a *donatio causa mortis*, even though payable to order and unindorsed; 2 Ames, Bills and Notes 699. Bonds and negotiable instruments are more than mere evidences of debt. The debt is inseparable from the paper which declares and constitutes it by a tradition which comes down from more archaic conditions; Blackstone v. Miller, 188 U. S. 206, 23 Sup. Ct. 277, 47 L. Ed. 439; Bacon v. Hooker, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. Rep. 279.

As to the early history of negotiable instruments, see Jenks, in 9 L. Q. R. 70 (3 Sel. Essays in Anglo-Amer. L. H. 51). As to the Negotiable Instruments Acts, see A. M. Eaton in 12 Mich. L. Rev. 89.

See PROMISSORY NOTES; BILLS OF EXCHANGE; BOND; COUPONS; Daniel, Neg. Instr. (Calvert's Ed. 1913); Selover, Neg. Instruments.

NEGOTIATE. The power to negotiate a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorser or holder. Weckler v. Bank, 42 Md. 581, 20 Am. Rep. 95; see Yerkes v. Bank, 69 N. Y. 386, 25

Am. Rep. 208; or, in case of such instrument payable to bearer, to deliver it. A note transferred by delivery is negotiated; Lowrie v. Zunkel, 49 Mo. App. 153. A national bank, under the power to negotiate evidences of debt, may exchange government bonds for registered bonds; Yerkes v. Bank, 69 N. Y. 383, 25 Am. Rep. 208.

NEGOTIATION. The deliberation which takes place between the parties touching a proposed agreement.

That which transpires in the negotiation makes no part of the agreement, unless introduced into it. It is a general rule that no evidence can be given to add to, diminish, contradict, or alter a written instrument; Leake, Contr. 26; McDermott v. Ins. Co., 3 S. & R. (Pa.) 609. But this rule has been much modified, and parol evidence is now held admissible to contradict, vary, or even avoid a written instrument where it would not have been executed but for the oral stipulation, except in the case of negotiable paper; Hoopes v. Beale, 90 Pa. 82. See EVIDENCE.

As to negotiations preceding a contract, see MERGER.

In Mercantile Law. The act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.

The transfer of a bill or note in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereby, *i. e.:*

The transferee can sue all parties to the instrument in his own name;

The consideration for the transfer is *prima facie* presumed;

The transferor can under certain conditions give a good title, although he has none himself;

The transferee can further negotiate the bill with the like privileges and incidents.

There are two modes of negotiation, viz.: by delivery and by indorsements. The former applies to bills, etc., payable to bearer; the latter to those payable to order. See Chalm. Dig. of Bills, etc. § 106; 1 Pars. Notes & B. 14; Byles, Bills 169.

Until an accommodation bill or note has been negotiated, there is no contract which can be enforced on the note; 2 M. & G. 911.

NEGOTIORUM GESTOR (Lat.). **In Civil Law.** One who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs.

In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract; but the civil law raises a *quasi* mandate by implication for the benefit of the owner, in many such cases; Mackeldey, Civ. Law, § 460; 2 Kent 616, n.; Story, Bailm. §§ 82, 189.

NEGRO. A black man descended from the black race of Southern Africa; it has been held not to include a mulatto; Felix v. State, 18 Ala. 726. A negro is defined by statute in Alabama, Kentucky, Maryland, Mississippi, North Carolina, Tennessee and Texas as a person of color who is descended from a negro to the third generation inclusive, though one ancestor in each generation may have been white; in Florida, Georgia, Indiana, Minnesota, Missouri and South Carolina, where there is as much as one-eighth negro blood; in Nebraska and Oregon, one-fourth, and so apparently in Virginia and Michigan. It was held in Monroe v. Collins, 17 Ohio St. 665, that if white blood predominates the person is to be considered white. If one was a slave before 1865, it is presumed that he is a negro; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; if it appears that a person usually associates with negroes, it is evidence that he is one; Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1; and if it appears that a woman's first husband was a white man, it is evidence tending to prove that she is a white woman; Bell v. State, 33 Tex. Cr. R. 163, 25 S. W. 769.

Compelling a sheriff with a negro prisoner to ride in a negro coach is not actionable; Gulf, C. & S. F. R. Co. v. Sharman (Tex.) 158 S. W. 1045. An ordinance making it unlawful for a colored person to reside upon a street where the greater number of houses are occupied by whites, is invalid; State v. Darnell (N. C.) 81 S. E. 338.

See 43 Am. L. Rev. 29, where the subject of Race Distinctions is fully treated by Gilbert S. Stephenson (since published in book form).

See MIXED JURY; CIVIL RIGHTS; MISCEGENATION; EQUAL PROTECTION OF THE LAWS; CONSTITUTION OF THE UNITED STATES; WHITE PERSONS.

NEIFE, NAIF, NATIVUS. In Old English Law. A woman who was born a villein, or a bond-woman. 1 Steph. Com. 133.

NEIGHBOR. One who lives in close proximity to another. In a grant relating to the use of water by neighbors, it was limited to the next adjoining farm; 1 A. C., 22 (So. Africa).

NEIGHBORHOOD. A surrounding or adjoining district. It depends upon no arbitrary rule of distance or topography. The neighborhood of a person will cover a larger space in a sparsely settled country than in a city; State v. Jungling, 116 Mo. 162, 22 S. W. 688. See Peters v. Bourneau, 22 Ill. App. 179; Langley v. Barnstead, 63 N. H. 246.

It is not synonymous with territory or district, but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. A district or locality, especially when considered with relation to its inhabitants or their

interests. Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 803.

NEMINE CONTRA DICENTE (usually abbreviated *nem. con.*). Words used to signify the unanimous consent of the house to which they are applied. In England, they are used in the house of commons; in the house of lords, the words used to convey the same idea are *nemine dissentiente.*

NEPHEW. The son of a brother or sister. Ambl. 514; 1 Jac. 207.

The Latin *nepos*, from which *nephew* is derived, was used in the civil law for nephew, but more properly for grandson; and we accordingly find *neveu*, the original form of nephew, in the sense of grandson. Britton, c. 119.

According to the civil law, a nephew is in the third degree of consanguinity; according to the common law, in the second; the latter is the rule of common law; 2 Bla. Com. 206. But in this country the rule of the civil law is adopted; 2 Hill, R. P. 194.

Nephews and nieces may be shown by circumstances to include grand-nephews and grand-nieces, and even a great-grand-niece; In re Logan, 131 N. Y. 456, 30 N. E. 485; but in a bequest, would not include, without special mention, nephews and nieces by marriage; Appeal of Green, 42 Pa. 25. See LEGACY.

NEPOS (Lat.). A grandson. See NEPHEW.

NEPTIS (Lat.). Granddaughter; sometimes great-granddaughter. Calv. Lex.; Vicat, Voc. Jur. See LEGACY.

NET. Clear of all charges and deductions; that which remains after the deduction of all charges or outlay, as net profit. St. John v. R. Co., 22 Wall. (U. S.) 148, 22 L. Ed. 743.

The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped.

NET BALANCE. In commercial usage it means the balance of the proceeds after deducting the expenses incident to the sale. Evans v. Waln, 71 Pa. 74.

NET EARNINGS. The excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. Union P. R. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274. See Barry v. R. Co., 27 Fed. 1; St. John v. R. Co., 22 Wall. (U. S.) 148, 22 L. Ed. 743; Sioux City & P. R. Co. v. U. S., 110 U. S. 205, 3 Sup. Ct. 565, 28 L. Ed. 120; Schmidt v. R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547.

NET PROFITS. This term does not mean what is made over the losses, expenses, and interest on the amount invested; it includes simply the gain that accrues on the investment, after deducting the losses and expenses of the business. Tutt v. Land, 50 Ga. 350. See Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162. See PROFITS.

NETHER HOUSE OF PARLIAMENT. The house of commons so called in the time of Henry VIII.

NETHERLANDS, THE. A monarchy of Europe.

The first constitution after its reconstruction as a kingdom was given in 1815. It has been revised, especially in 1848 and in 1887. It is a constitutional and hereditary monarchy.

The executive power consists of the Sovereign. He has the command of the army and navy, the control of the colonies and the right to create nobles, etc. *The Council of State* of which the members are appointed by the Sovereign advises His Majesty. *The Cabinet Ministers* appointed by the Sovereign are responsible to the country. *The First Chamber of the States-General* consists of fifty members appointed by the Provincial States from the highest direct tax-payers and great functionaries and persons of high rank. *The Second Chamber* consists of one hundred members elected by the male electors of the country. *The Provincial States*, elected by the male electors of the province, regulate the affairs of the province. *The Parish Corporations*, elected by the male electors of the parish, regulate the affairs of the parish. *Justice* is administered in the name of the Sovereign. *Religion* is free. *Taxes* are decreed by the law.

The judiciary consists of:

1. *The Court of the Canton*, of which there are one hundred and six, each having its judge, who decides without appeal all cases of civil or commercial nature in which the claim does not exceed fl. 50 ($20); and all criminal cases, subject to appeal, where the penalty does not exceed fl. 25 ($10). 2. The *Arrondissement* (or District) *Court*, of which there are twenty-three having from five to twenty-four judges each. The higher courts are: 3. The *Court of Justice*, of which there are five having from nine to twelve judges each, decides all appeals in civil, commercial and criminal cases from the Arrondissement Court. 4. The *High Court of Justice*, which has fourteen to sixteen judges and decides all cases in which the Sovereign, or the Royal House, or the members of the States-General are the defendants; cases of appeal from the Courts of Justice; all criminal cases in which high officials of the State are implicated; and all cases outside the jurisdiction of the lower courts.

The Netherlands law is based on the French law as introduced by Napoleon, and the earlier provincial law, which is for the greater part of German origin.

NEUTRAL PROPERTY. Property which belongs to neutral owners, and is used, treated, and accompanied by proper *insignia* as such.

Where the insured party has property and commercial establishments and depositories in different countries, if the property and concern of any one are in, or belong to, a belligerent country, they will have the national character of such country though the national character of the owner may be that of a neutral; 5 W. Rob. 302; The Antonia Johanna, 1 Wheat. (U. S.) 159, 4 L. Ed. 60. The declaration of war by a nation subsequently to the time in reference to which the policy takes effect will, however, only affect ownership thereafter acquired or acts

thereafter done; 1 C. Rob. 107, 336; 6 *id.* 364; The Fortuna, 3 Wheat. (U. S.) 245, 4 L. Ed. 379.

The description of the subject in a policy of insurance as neutral or belonging to neutrals, is, as in other cases, a warranty that the property is what it is described to be, and it must, accordingly, in order to comply with the warranty not only belong to neutral owners at the time of making the insurance, but must continue to be so owned during the period for which it is insured, and must, so far as it depends upon the assured, be accompanied by the usual *insignia*, as such, and in all respects represented, managed, and used as such; Livingston v. Ins. Co., 6 Cra. (U. S.) 274, 3 L. Ed. 222; 1 C. Rob. 26, 336; 2 *id.* 133, 218.

NEUTRALITY. The state of a nation which takes no part between two or more other nations at war with each other.

"The relation of neutrality will be found to consist in two principal circumstances: Entire abstinence from any participation in the war, and impartiality of conduct towards both belligerents." 3 Phill. Int. L. 225. They remain the common friends of the belligerents, favoring the arms of neither to the detriment of the other; 2 Halleck, Int. L., Baker's ed. 161.

It has been said that there should be, on the part of a neutral state, not an impartiality of action, but of nonaction; Massé, Droit Com. 199.

The rights and duties of neutral states may be classified as follows:

Rights. The territory of neutral powers must not be violated by any acts of hostility between the two belligerents or by any acts on the part of either belligerent which are directly connected with the conduct of hostilities. Neutral powers may repel by force any such acts without thereby committing a hostile act.

Duties. *Passive duties.* In all matters relating to the war a neutral must *abstain* in its official capacity from giving any help to either belligerent; it must not furnish troops or give or sell arms or munitions to either belligerent, nor make presents or loans of money, nor purchase belligerent ships, nor decide in its courts upon the validity of belligerent captures, nor give expression to its sympathy for either party. It must *acquiesce* in the exercise of the belligerent's right of search, blockade, and capture of contraband.

Active duties. A neutral state must *resist* the commission of any act of hostility by either belligerent within its territories; it must *prevent* the issuance of commissions in the service of either belligerent, the enlistment of soldiers, the fitting out of hostile expeditions in its ports, and the preparation of military expeditions on land; it need not, however, prevent its individual subjects from leaving the country to enlist abroad, nor from exporting arms or ammunition to either belligerent, nor from making loans to either belligerent, nor from giving expression to their sympathy for either party.

On the other hand, belligerents have the right to interfere with neutral commerce by the capture of contraband (*q. v.*) and by blockade (*q. v.*), and they have the duty of refraining from committing within neutral territory any acts connected with hostile operations.

There are certain acts of friendliness on the part of neutral towards belligerent states, such as the furnishing of warships with limited supplies of food, coal, etc., which are permitted in spite of the fact that they involve a certain amount of *indirect* assistance to the belligerents. But absolute impartiality must be observed towards both belligerents.

It was formerly held that where a neutral has bound itself, by previous treaty, to one belligerent, assistance under such treaty does not necessarily forfeit its neutral character; but this doctrine is now rejected by the majority of writers. 2 Opp. § 305.

The idea of neutrality which, strictly speaking, consists of an abstention from any participation in a public, private or civil war, must not be so extended as to prevent the recognition of the belligerency of an insurgent party in a foreign state, when the extent of the insurrection calls for such recognition; and acts of war undertaken upon the territory of the United States in favor of foreign insurgents cannot be excused on the ground that the neutrality of the United States prevents that government from recognizing the belligerency of the insurgents to the extent of checking their hostile operations upon its soil. See The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.

The recognition of the belligerency of insurgents relieves the parent state from all responsibility for damages for any irregularities committed against neutrals by the other belligerent, which claims could be enforced against the parent nation if the injuries were committed by insurgents.

The public ships of a neutral are inviolable; and so are its private ships, subject, however, to laws relating to a breach of blockade, contraband, and search. Neutral territory, including the sea for a distance of three miles from low-water mark, is inviolable. If a ship is captured in neutral waters, in violation of neutrality, the neutral power is bound to enforce its restoration or compensate the injured belligerent; and, in general, a neutral is bound to prevent and punish a violation of its rights as a neutral by either belligerent; Halleck, Int. L., Baker's ed. 143. These principles are now confirmed by 13 H. C. (1907) arts. 1–3.

Where a United States war vessel captured a Confederate steamer in a neutral port of

Brazil and brought it to a United States port, and it was there sunk by a collision, and the United States disavowed the action of its ship in making the capture, it was held that as the capture was unlawful, or had been disavowed by the government, a libel for the captured vessel as prize of war could not be sustained; The "Florida," 101 U. S. 37, 25 L. Ed. 898. A neutral may demand the return of a captured vessel and further redress. But where the vessel chooses to resist capture in neutral waters, its capture is not an offence against the neutral; Cobb, Int. L. Cas. 230; Hall, Int. L. § 228.

Where neutral territory is violated by illegal outfit and equipment, the offence is deposited after the termination of the voyage; The Santissima Trinidad, 7 Wheat. 283, 348, 5 L. Ed. 454. A neutral ship should, ordinarily, submit to capture and seek its remedies in the courts for damage; 1 Rob. 374.

It has been suggested that a belligerent who has begun an attack on another belligerent outside of neutral territory or water may continue the contest within the neutral waters and complete the capture; 5 C. Rob. 365; but on the other hand it is said that the inviolability of neutral territory should allow of no exceptions, and that property captured under such circumstances must be restored, though it actually belonged to the enemy; 5 C. Rob. 15; 3 Phill. Int. L. 386.

It belongs exclusively to the neutral government to raise the question of a capture made within neutral territory; The Adela, 6 Wall. (U. S.) 266, 18 L. Ed. 821; the owner of the captured ship must assert his claim through his government; 1 Kent 121; an enemy cannot do so; The Sir William Peel, 5 Wall. (U. S.) 517, 18 L. Ed. 696; but whenever a capture is made by a belligerent in violation of neutral rights, if the prize come voluntarily within the jurisdiction of the neutral, it should be restored to its original owner; 3 Phill. Int. L. 532; La Amistad de Rues, 5 Wheat. (U. S.) 385, 5 L. Ed. 115. See 13 H. C. (1907) arts. 12–20.

A public vessel of a belligerent may enter a neutral port to make such repairs or to take in such coal and provisions as may be necessary; but the ordinary rule is that it must not remain more than twenty-four hours, except in case of necessity.

A belligerent vessel may bring a prize into a neutral port and sell it there, with the consent of the neutral; Hopner v. Appleby, 5 Mas. 77, Fed. Cas. No. 6,699; and a neutral may permit a prize to be brought into its ports for repairs; 1 Op. Att. Gen. 603; but neutrals may prohibit this and have often, by proclamation, done so; 2 Halleck, Int. L., Baker's ed. 148.

Where a neutral allows the right of passage through its territory to one belligerent, it must accord it to both; 3 Phill. Int. L. 183; 1 Kent *120; 21 *Rev. de Dr. Int.* 117. The troops of a belligerent cannot cross neutral territory, nor can even the wounded be taken across neutral territory, without the express permission of the neutral, which, in the case of the Franco-Prussian War of 1870, was refused by Belgium; nor can a neutral allow its ports and waters to be used as a base of operations or supplies, or as a point from which to watch the other belligerent. See 5 H. C. (1907) arts. 1–2; 13 H. C. (1907) art. 5.

The subjects of neutral states are entitled to carry on, upon their own account, a trade with a belligerent; this doctrine is well settled; 3 Phill. Int. L. 300. But it was considered unlawful, under the common law, for an English subject to raise a loan to support the subjects of a foreign state at war with a government in alliance with his own; 3 Phill. Int. L., 247; yet it now appears to be the opinion that, although the neutral state cannot loan money, yet the individual citizens of a neutral state may, and such loans are not considered a violation of neutrality any more than the sales of arms and ammunition; Snow, Lect. Int. Law 119. But such loans to an insurgent state or colony have been considered unlawful; Risley, Law of War; 9 Moore, P. C. 586.

A neutral will not permit a belligerent's ship to coal in its ports except in case of necessity, and then only to the extent necessary to carry them to their nearest home port; and a belligerent vessel cannot take on coal again at any port of such neutral within three months. See 13 H. C. (1907) arts. 19–20.

It was formerly held that citizens of a neutral state may send armed vessels as well as munitions of war to a belligerent port for sale; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. Ed. 454; though they would be subject, of course, to capture as contraband. But this doctrine has been modified as between the United States and Great Britain by the treaty relating to the Alabama claims, by which those nations agreed that "A neutral state is bound: 1. To use due diligence to prevent the fitting out, arming, or equipping, etc., within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use due diligence to prevent the departure from its jurisdiction of any vessel, etc., such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." 2. "Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

A belligerent may capture certain articles as contraband of war when carried in neu-

tral ships and having a hostile destination. See 13 H. C. (1907) arts. 5, 8. This includes munitions of war. Other articles are of doubtful use, *ancipitis usus*, and may be contraband or not according to circumstances. There is no settled definition of contraband, nor any practice in regard to its exact limits. Provisions, money, or coal destined for the use of a belligerent army or fleet have been included within the term. Coal is declared contraband in the proclamation of President McKinley, April 26, 1898, and by the British government on the breaking out of the Hispano-American war. Where things are of doubtful use, that is, occasional contraband, they are not usually confiscated, but are bought by the captor at a fair price. This is called Pre-emption (*q. v.*), and usually applies to cargoes of provisions. See CONTRABAND; 1 Kent 138.

The question whether a belligerent may take the goods of its enemy, not contraband, which are being carried in a neutral ship, has been much discussed, and also whether innocent goods of a neutral can be transported in a belligerent's vessel without being confiscated when the vessel is captured. Formerly it was held that a belligerent might take enemy's goods from neutral custody, on the high seas. But the Declaration of Paris changed the rule of the nations, except in the case of the United States, Spain, and Venezuela, and a neutral flag now covers enemy's goods with the exception of contraband of war. This is a general rule of international law, although some treaties made by the United States have laid down a different rule; Snow, Int. Law 164; it was applied by the United States during the war of the Rebellion; 1 Kent 128; and adopted by it in the Hispano-American war of 1898.

By the Declaration of Paris (*q. v.*) the following principles were adopted: The neutral flag covers enemy's goods, except contraband of war. Neutral goods, except contraband of war, are not liable to capture under an enemy's flag.

Neutral goods on an armed belligerent cruiser are not subject to capture, though there was resistance to capture by the vessel, provided the neutral owner did not aid in the armament or the resistance, notwithstanding he had chartered the whole vessel and was on board at the capture; The Nereide, 9 Cra. (U. S.) 388, 3 L. Ed. 769; The Atalanta, 3 Wheat. (U. S.) 409, 4 L. Ed. 422. British practice is, however, to the contrary; 1 Dods. 443. If the neutral vessel is in the direct employ of the enemy, both ships and goods are liable to capture; The City of Mexico, 24 Fed. 33; and so are neutral goods on a neutral vessel, if the latter be under the enemy's protection; The Schooner Nancy, 27 Ct. Cl. 99.

It is lawful for a neutral ship to carry contraband goods, but the right is always exercised subject to capture. Ordinarily the neutral ship is not subject to confiscation and will be released in the prize court, unless she belongs to the owner of the contraband, or her owner is privy to the carriage of the contraband goods, or uses false papers; Risley, Law of War 232; 1 Kent 143.

When two states are at war, it has become the practice of modern times for other states to issue a proclamation of neutrality to protect their commercial interests and territory.

The subjects of a neutral power residing in a belligerent territory are not entitled to any special protection for their property or to exemption from military contributions to which they may be liable in common with the inhabitants of the place in which they reside or in which their property may be situated; 2 Halleck, Int. L., Baker's ed. 144.

By Convention of the Great Powers, 1887 and 1888, the Suez Canal is neutralized, and is to remain open in war or peace, to vessels of commerce and war of all nations. See *id.* 149. In 1815, the Rhine was neutralized, as between the States of the Rhine, to a certain extent. In 1829, entrance into the Black Sea was admitted to belong to Russia and to powers at amity with Russia. By the treaty of Paris the Black Sea was neutralized, but this was largely abrogated in 1871. By the Clayton-Bulwer treaty, 1850, Great Britain and the United States agreed that any canal built between the Atlantic and Pacific oceans should be forever neutral. The principle is again asserted in the Hay-Pauncefote treaty, 1901, entered into in contemplation of the canal about to be constructed by the United States.

The neutrality acts of the United States, which regulate the conduct of its citizens and of aliens while within its jurisdiction, constitute Title LXVII. of the Revised Statutes. Their origin and scope are as follows: President Washington, in his annual message to Congress, December 3, 1793, said: "The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful." The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was passed in accordance with this recommendation. The acts of 1817 and 1818 were successively passed and carried forward into R. S. Title LXVII., which forbids citizens from accepting a commission from a foreign prince against a foreign prince with whom we are at peace; enlisting, or hiring or retaining another to enlist, in the army or navy of such foreign prince; fitting out or arming a vessel in the service of a

foreign prince to commit hostilities against a foreign prince, etc. (the vessel to be forfeited—one half to the informer); increasing the force of any vessel of war of such foreign prince by adding any equipment solely applicable to war; preparing any military expedition in the United States to be carried on thence against any foreign prince with whom we are at peace.

Sec. 5288 provides that the president may employ the land and naval forces of the United States and militia in compelling any foreign vessel to depart the United States in all cases in which by the laws of nations or the treaties of the United States she ought not to remain therein. Sec. 5289 provides that the owners or consignees of every armed vessel sailing out of our ports belonging wholly or in part to citizens thereof shall before clearing give bond in double the value of the vessel and cargo, conditioned that she shall not commit any hostilities against any foreign prince, etc., with whom we are at peace. Sec. 5290 provides that the United States shall detain any vessel manifestly built for warlike purposes and about to depart the United States, the cargo of which consists principally of munitions of war, when the number of men on board or other circumstances render it probable that it is intended to commit hostilities against any such foreign prince, etc., until the decision of the president is had thereon or the owner gives bond and securities as required in cases under § 5289. Sec. 5291 provides that this title shall not extend to subjects of any foreign prince, etc., transiently within the United States, who enlist on a vessel of war or privateer which at the time of its arrival here was equipped as such, or who employ other citizens of the same foreign prince, etc., to enlist on board such vessel of war, etc., if the United States shall then be at peace with such foreign prince, etc. Offences under these sections are made high misdemeanors. These sections are now part of the Crim. Code, ch. 2.

The act does not prohibit armed vessels belonging to citizens from sailing out of our ports, but only requires their owners to give security; U. S. v. Quincy, 6 Pet. (U. S.) 445, 8 L. Ed. 458.

The word "people," as used in § 5283, covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.

Where a vessel is chartered by a foreign government to carry a cargo of arms to that government, she is not liable to seizure; The Carondelet, 37 Fed. 799. It is not the intent of § 5286 to interfere with the commercial activities of citizens of the United States, but to prevent complications between this government and foreign powers, and fitting out military expeditions against friendly nations; U. S. v. Murphy, 84 Fed. 609, per Bradford, J.

The offence covered by the act consists of an act done in the United States, with the intent to commit an offence against the act; the intent is a necessary ingredient; The Conserva, 38 Fed. 431; and it must be formed and exist within the United States; The City of Mexico, 24 Fed. 33. The offence is complete when the expedition is organized; U. S. v. Ybanez, 53 Fed. 536; and although it is formed and detached in separate parts; U. S. v. The Mary N. Hogan, 18 Fed. 529.

No particular number of men is necessary to constitute a military expedition under the act; its character may be determined by the designation of the officers, the organization of the men in regiments or companies, and the purchase of military stores; U. S. v. Ybanez, 53 Fed. 536. Where insurgents carrying on war against a foreign country sent a vessel to procure arms in the United States, the purchase of such arms and placing them on board the vessel was held not within § 5286, though they were intended to be used by the insurgents in carrying on war against a foreign country, if they were not designed to constitute any part of the furnishings of the vessel herself; U. S. v. Trumbull, 48 Fed. 99. Placing munitions of war on a vessel, with intent to carry them to insurgents in a foreign country, but without intent that they shall constitute any part of the furnishings of the vessel, is not within the act; The Itata, 49 Fed. 646. One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, commits an offence under § 5286; Hart v. U. S., 84 Fed. 799, 28 C. C. A. 612. Sec. 5283 is not applicable to such a case; 13 Op. Att. Gen. 177.

A proceeding under § 5283 is a simple suit in admiralty, where the decree is that the libel be dismissed, or the vessel condemned; and no decree of restitution is necessary; The Conserva, 38 Fed. 431.

The above sections of R. S. were re-enacted in the Criminal Code, March 4, 1909, in effect January 1, 1910.

The British Foreign Enlistment Act of 1819 forbade British subjects to enlist or to induce others to enlist, or to leave or to induce others to leave the king's dominions in order to enlist; and forbade ship-owners to take aboard their ships persons illegally enlisted. It is a substantial copy of the American act of 1818; The Three Friends, 166 U. S. 60, 17 Sup. Ct. 495, 41 L. Ed. 897. In 1870 a new British act was passed, with a view to preventing the evasions of the law which gave rise to the complaints of the United States that Confederate cruisers had been fitted out in the ports of Great Britain.

At the Second Hague Peace Conference, 1907, two conventions dealing with neutral-

ity were adopted, one respecting the rights and duties of neutral powers and persons in war on land, and the other respecting the rights and duties of neutral powers in maritime war. The former asserts the principle that the territory of neutral powers is inviolable, and prohibits belligerents from moving troops or convoys across the territory of a neutral power. It also forbids the erection of wireless telegraph stations upon neutral territory and reaffirms the principle in R. S. § 5282 (see Cr. Code), forbidding recruiting upon neutral territory in the interest of a belligerent. It relieves neutral powers of responsibility for the fact that persons cross the frontier singly to enter the service of one of the belligerents, and of the duty of preventing the export from their territories of arms and munitions of war. Further provisions regulate the use of neutral telegraph and telephone systems.

The Convention Respecting the Rights and Duties of Neutral Powers in Maritime War, besides codifying existing custom, enacts the following rules:

When belligerent ships have been captured in neutral waters, the neutral power must employ the means in its power to release the ship if it be still within its jurisdiction; if the ship has been removed, the captor government must, on demand of the neutral power, release the vessel and its crew. In adhering to the convention the United States insisted that it was the *duty* of neutrals to make the said demand.

Art. 8 reaffirms the first rule of the Treaty of Washington (1871) making it the duty of the neutral government to prevent the fitting out or arming, or the departure from its ports, of any vessel which it has reason to believe is intended to cruise or engage in hostile operations against one of the belligerents.

Art. 12 restricts to a period of twenty-four hours the asylum which may be given to belligerent war vessels in neutral ports.

Art. 16 regulates the departure of war vessels of the opposing belligerents from neutral ports.

Arts. 17-20 regulate the repairs which may be carried out, and the amount of provisions and fuel which may be taken on, in neutral ports.

Arts. 21-24 regulate the duties of neutral powers with regard to prizes brought by a belligerent into their ports.

See Fenwick's Neutrality Laws of the U. S.

See APPROACH; ASYLUM; BELLIGERENCY; BLOCKADE; CAPTURE; COMMERCIA BELLI; CONFISCATION; CONTRABAND; DECLARATION OF PARIS; FREE SHIPS; INSURGENCY; INTERNATIONAL LAW; INTERVENTION; NEUTRAL PROPERTY; PRE-EMPTION; PRIZE; PRIZE COURT; RANSOM BILLS; RECAPTURE; RULE OF WAR OF 1756; SEARCH; SHIPS OF WAR; VISIT; WAR.

NEVADA. One of the United States of America.

It was admitted into the Union, Oct. 31, 1864. Its boundaries were defined by an enabling act, approved March 21, 1864, as amended by the act of May 5, 1866.

The constitution was amended in 1912, by providing that women shall be eligible to certain public offices and it also provides for the recall of public officers.

NEVER INDEBTED. A plea to an action of *indebitatus assumpsit*, by which the defendant asserts that he is not indebted to the plaintiff. 6 C. & P. 545; 1 Q. B. 77. The plea of never indebted has, in England, been substituted for *nil debet*, in certain actions specified in schedule B (36) of the Common Law Procedure Act of 1852; and the effect of the plea never indebted is to deny those facts from which the liability of the defendant is alleged. In actions on negotiable bills or notes, never indebted is inadmissible; Reg. Gen. Hil. T. 1833, §§ 6, 7; 3 Chitty, Stat. 560. By the judicature act, 1875, Ord. xix. r. 20, a defendant is no longer allowed to deny generally the facts alleged by the plaintiff; Whart. Lex. A defendant cannot, under the plea of "never indebted," contend that, though a contract was made in fact, it was void in point of law, for the facts from which its invalidity is inferred must form the subject of a special plea; Moz. & W.

NEW. This term in its ordinary acceptation, when applied to the same subject or object, is the opposite of old. Pollard v. Kibbe, 14 Pet. (U. S.) 364, 10 L. Ed. 490.

NEW AND USEFUL INVENTION. A phrase used in the act of congress relating to patents for inventions. See PATENT.

NEW ASSIGNMENT. A re-statement of the cause of action by the plaintiff, with more particularity and certainty, but consistently with the general statement in the declaration. Steph. Pl. 241; Troup v. Smith's Ex'rs, 20 Johns. (N. Y.) 43.

Its purpose is to avoid the effect of an evasive plea which apparently answers the declaration, though it does not really apply to the matter which the plaintiff had in view; 1 Wms. Saund. 299 *b*. Thus, if a defendant has committed two assaults on the plaintiff, one of which is justifiable and the other not, as the declaration may not distinguish one from the other, the defendant may justify, and the plaintiff not being able either to traverse, demur, or confess and avoid, must make a new assignment.

There may be several new assignments in the course of the same action; 1 Chitty, Pl. 614. A plaintiff may reply to a part of the plea and also make a new assignment. A new assignment is said to be in the nature of a new declaration; 1 Saund. 299 *c*; but is more properly considered as a repetition of the declaration; 1 Chit. Pl. 602; differing only in this, that it distinguishes

the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is, consequently, to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular; Gould, Pl. 339 n.; Bac. Abr. *Trespass* (I 4, 2); 1 Chit. Pl. 610. See 3 Bla. Com. 311; Archb. Civ. Pl. 286. In England, under the Judicature Act, 1875, Ord. xix. r. 14, no new assignment is necessary or is to be used; but everything which has heretofore been alleged by way of new assignment is to be introduced by way of amendment of the statement of claim; Whart. Dict.

NEW CODE. A collection of imperial constitutions in twelve books, promulgated in 534, so called in reference to a code promulgated by Justinian in 529. 1 Steph. Com. 33.

NEW FOR OLD. A term used in marine insurance in cases of adjustment of a loss when it has been but partial. In making such adjustment, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one-third *new for old* upon the balance. See Byrnes v. Ins. Co., 1 Cow. (N. Y.) 265; Brooks v. Ins. Co., 7 Pick. (Mass.) 259. The deduction is usually one-third, and is made from the cost of labor and material, and in practice also from the incidental expenses of repairs, as towage, etc.; but see, as to this last, Potter v. Ins. Co., 3 Sumn. 45, Fed. Cas. No. 11,335; The Star of Hope v. Annan, 9 Wall. (U. S.) 203, 19 L. Ed. 638. The deduction is without regard to the age of the vessel; Dunham v. Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374. A writer criticises the rule of *thirds*, and suggests that the increase of iron mills will change the rule of law; Gourlie, Gen. Av. In Liverpool, no deduction is made on iron vessels for the first eighteen months.

NEW FOREST. The royal forest in Hampshire, created by William the Conqueror. See FOREST LAW.

NEW HAMPSHIRE. The name of one of the original thirteen United States of America.

It was subject to Massachusetts from 1641 to 1680. It was governed as a province, under royal commissions, by a governor and council appointed by the king, and a house of assembly elected by the people, until the revolution.

In January, 1776, a temporary constitution was adopted, which continued till 1784. The constitution adopted in 1784 was amended by a convention of delegates held at Concord, approved by the people in their town-meetings, and established by the convention in February, 1792. This constitution was amended in 1850, by abolishing the property qualifications for certain offices, and amended again in 1877, changing it in eleven particulars, the principal of which were the abolition of the religious test, and adoption of biennial elections, increasing the number of senators, and changing the election from March to November. It was amended in 1912, by disqualifying voters convicted of certain crimes.

NEW INDUSTRY. See LABOR.

NEW INN. An inn of chancery. See INNS OF COURT.

NEW JERSEY. The name of one of the original thirteen states of the United States of America.

The territory of which the state is composed was included within the patent granted by Charles II. to his brother James, duke of York, bearing date on the 12th of March, 1663-4. This grant comprised all the lands lying between the western side of Connecticut river and the east side of Delaware bay, and conferred powers of government over the granted territory. At this time the province was in the possession and under the government of Holland. Before the close of the year the inhabitants of the province submitted to the government of England, on the 23d and 24th of June, 1664. The duke of York, by deeds of lease and release, conveyed to John Lord Berkeley and Sir George Carteret, their heirs and assigns forever, "all that tract of land adjacent to New England and lying and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson river, and hath upon the west Delaware bay or river, and extendeth southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of the said bay or river of Delaware, which is in 41 degrees and 40 minutes of latitude, and crosseth over thence in a straight line to Hudson's river in forty-one degrees of latitude; which said tract of land is hereafter to be called Nova Cæsaria, or New Jersey."

This grant first defined the boundaries and gave the name of the province. It conferred upon the grantees, with the territory, powers of government in as full and ample manner as they were conferred by the crown upon the duke of York. Lord Berkeley and Sir George Carteret, being by virtue of this conveyance the sole proprietors of New Jersey, on the 10th of February, 1664-5, signed a constitution which they published under the title of "The concessions and agreement of the lords proprietors of the province of Nova Cæsaria, or New Jersey, to and with all and every of the adventurers, and all such as shall settle or plant there." This document, under the title of "The Concessions," was regarded as the first constitution of New Jersey, and continued in force until the division of the province in 1676. The instrument was considered as irrevocable, and therefore of higher authority than the acts of assembly, which were subject to alteration and repeal. War having been declared by England against Holland in 1673, the Dutch were again in possession of the country, and the inhabitants submitted to their authority.

By the treaty of peace between England and Holland on the 9th of February, 1674, the country was restored to the possession of the English. On the conclusion of peace, in order to remove all grounds of objection to his title on account of the recapture of the country by the Dutch, the duke of York obtained from the crown a new patent, similar to the first, and dated on the 29th of June, 1674. On the 20th of July in the same year, the duke of York made a second grant of a portion of the province to Sir George Carteret individually. The partition which this patent was intended to secure, in addition to the confirmation of Carteret's grant, was accomplished by deeds of partition executed July 1, 1676, between Carteret and the trustees of Byllinge In 1702, the proprietors of the two provinces, called respectively East New Jersey and West New Jersey, surrendered their powers of government to Queen Anne, still retaining their title to the land. The two divisions constituted thenceforth but one colony. The colony was governed by a governor

and council appointed by the crown, and an assembly of the representatives of the people chosen by the freeholders. This form of government continued till the American revolution.

The first constitution of the *state* of New Jersey was adopted by the provisional congress on the second day of July, 1776. This body was composed of representatives from all the counties of the state, who were elected on the fourth Monday of May, and convened at Burlington on the tenth day of June, 1776. It was finally adopted on the second day of July, but was never submitted to a popular vote. This constitution continued in force until the first day of September, 1844, when it was superseded by the existing constitution. The new constitution was adopted May 14, 1844, by a convention composed of delegates elected by the people in pursuance of an act passed by the legislature. The constitution thus framed, having been submitted to and adopted by the people at an election held on the thirteenth day of August, took effect and went into operation, pursuant to one of its provisions, on the twenty-second of September, 1844. This constitution was amended at a special election held September 7, 1875.

NEW MATTER. **In Pleading.** Matter not previously alleged. Statements of fact not previously alleged by either party to the pleadings. Where special pleading prevails, such matter must be pleaded in avoidance, and it must, in general, be followed by a verification; Gould, Pl. c. 3, § 195; Steph. Pl. 251; Com. Dig. *Pleader* (E 32); 1 Wms. Saund. 103. See PLEA.

In equity, new matter, discovered by either plaintiff or defendant, may be introduced by cross or supplemental bill before a decree has been pronounced, but not by amendment after an answer has been filed; Stafford v. Howlett, 1 Paige Ch. (N. Y.) 200; Hammond v. Place, Harr. Ch. (Mich.) 438.

NEW MEXICO. One of the states of the United States.

By act of congress, approved September 9, 1850, the territory of New Mexico was constituted and described. A proviso was annexed that the United States might divide the territory into two or more, and that when admitted as a state the said territory, or any portion of the same, should be received into the Union with or without slavery, as their constitution might prescribe at the time of admission.

Colorado was partly formed from New Mexico in 1861, and in 1863 the entire territory of Arizona, which reduced New Mexico to its present boundaries. By the organic act, the powers of the territory were lodged in three branches,—the legislative, executive, and judicial. The operation of this act was suspended until the Texan boundary was agreed upon, when it went into force by proclamation of the president, December 13, 1850.

The enabling act for its admission was passed by congress June 20, 1910. The joint resolution for its admission was passed August 21, 1911, to take effect upon proclamation by the president that certain conditions had been complied with. The proclamation was made January 6, 1912.

NEW PROMISE. A contract made after the original promise has, for some cause, been rendered invalid, by which the promisor agrees to fulfil such original promise. Within the meaning of the statute of frauds the renewal of a promise to pay is a new promise; McCrillis v. Millard, 17 R. I. 724, 24 Atl. 576. See LIMITATIONS.

NEW TRIAL. A re-examination of an issue in fact before a court and a jury, which has been tried at least once before the same court; Hill. N. Tr. 1. A rehearing of the legal rights of the parties, upon disputed facts, before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose; 4 Chitty, Gen. Pr. 30; Grah. & W. N. Tr. 32. It is either upon the same, or different, or additional evidence, before a *new* jury, and probably, but not necessarily, before a different judge. It is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

The origin of the practice of granting new trials is of extremely ancient date, and, consequently, involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer; 3 Com. 387.

Courts have, in general, a discretionary power to grant or refuse new trials, according to the exigency of each particular case, upon principles of substantial justice; 1 Burr. 390. That the trial judge is not satisfied with a verdict is not binding on the court in banc, but deserves serious consideration; L. J. 55 Q. B. 403. This discretion is generally not reviewable on error; Hardin v. Inferior Court, 10 Ga. 93; Kerr v. Clampitt, 95 U. S. 188, 24 L. Ed. 493; Rex v. Gough, 2 Doug. 791; and such action by the court may be taken if a motion is not made within the time limited by rule or statute, since "if the court conceive a doubt that justice is not done, it is never too late to grant a new trial, but not on application of the party"; Lord Mansfield in 5 Term 437; and the same opinion was expressed by Kenyon, C. J., and Buller, J., in 5 Term 436. It should be exercised with great caution where a new trial is asked only because the verdict is against the weight of the evidence; Ruffner's Heirs v. Hill, 31 W. Va. 428, 7 S. E. 13.

Where one party moves for a new trial and the opposing party consents thereto, the court is not compelled to grant the same; Smedley v. R. Co., 45 Ill. App. 426. An order granting a new trial operates to set aside the judgment; Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119.

"Ordinarily a court has no power to grant a new trial after the adjournment of the term if no application has been made previous to the adjournment and no continuance granted"; Belknap v. U. S., 150 U. S. 588, 14 Sup. Ct. 183, 37 L. Ed. 1191; Sanderson v. U. S., 210 U. S. 168, 175, 28 Sup. Ct. 661, 52 L. Ed. 1007, where it was held that the power to grant a new trial after the term may be given by statute and that the provision of U. S. R. S. § 1088, permitting a motion for a new trial on behalf of the government within two years after final disposition of a claim by the court of claims was within the power of congress, inasmuch as, where

the government consents to be sued, it may attach such conditions as to it seem proper. And in Pennsylvania by statute (1903) the supreme court may authorize the trial court to grant a new trial, *nunc pro tunc*, after the term at which a prisoner was convicted and sentenced for murder in the first degree, when it is made to appear that there is ground for substantial doubt of guilt. But a new trial may be granted after judgment so long as the case is still under the control of the trial court and if the motion was made reasonably within the rule of the state statute or common law; Kingman v. Wester Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192.

The usual grounds for a new trial may be enumerated as follows:

The *not giving the defendant sufficient notice* of the time and place of trial, unless waived by an appearance and making a defence, will be a ground for setting aside the verdict; 3 Price 72; Lisher v. Parmelee, 1 Wend. (N. Y.) 22. But the defendant's ignorance must not have been owing to his own negligence, and the insufficiency of the notice must have been reasonably calculated to mislead him; 3 B. & P. 1; Kitchen v. Crawford, 13 Tex. 516; Seymour v. Miller, 32 Conn. 402.

Pleadings. Failure of the complaint to state a cause of action is available on motion for a new trial; Consol. Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. 74; so of one which shows the alleged cause of action to be barred; Lambert v. Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

Misconduct of parties, counsel, or witnesses. The use of crutches by plaintiff in going to and from the witness stand, when just before and after the trial he walked readily without them, is ground for a new trial; Corley v. R. Co., 12 App. Div. 409, 42 N. Y. Supp. 941; but plaintiff's hysteria while on the witness stand is not; Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290; nor is a controversy, between court and counsel, during the trial, not prejudicial to the defeated party; Herdler v. Range Co., 136 Mo. 3, 37 S. W. 115; nor improper remarks made by counsel in his argument; Gulf, C. & S. F. Ry. Co. v. Curb, 66 Fed. 519, 13 C. C. A. 587, 27 U. S. App. 663.

A new trial will be granted where jurors were treated by a party to the cause; Phillipsburgh Bk. v. Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193; Harrington v. Probate Judge, 153 Mich. 660, 117 N. W. 62; Scott v. Tubbs, 43 Colo. 221, 95 Pac. 540, 19 L. R. A. (N. S.) 733, and note; or by counsel; People v. Montague, 71 Mich. 447, 39 N. W. 585; Rainy v. State, 100 Ga. 82, 27 S. E. 709; Steenburgh v. McRorie, 60 Misc. 510, 113 N. Y. Supp. 1118; Stewart v. Woolman, 26 Ont. Rep. 714; or by persons interested; McGill Bros. v. Ry., 75 S. C. 177, 55 S. E. 216; 6 U. C. Q. B. O. S. 352; though in some cases, where the treating was satisfactorily explained and considered innocent of evil effect, the verdict was not disturbed, though generally disapproval of the practice was expressed; Patton v. Mfg. Co., 11 R. I. 188; Doe v. Roe, 3 Pennewill (Del.) 128, 50 Atl. 217. Giving the jury a dinner in a public place after the verdict is rendered is not ground for a new trial; Beach Front Hotel Co. v. Sooy, 197 Fed. 881, 118 C. C. A. 579.

Mistakes or omissions of officers in summoning and drawing jurors, when the irregularity deprives the party complaining of a substantial right, will entitle him to a new trial; Straughan v. State, 16 Ark. 37; Com. v. Roby, 12 Pick. (Mass.) 496. Likewise, where the officer summoning the jury is nearly related to one of the parties; Munshower v. Patton, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; Rector v. Hudson, 20 Tex. 234; or is interested in the event; Woods v. Rowan, 5 Johns. (N. Y.) 133; unless the objection to the officer was waived by the party; Walker v. Green, 3 Greenl. (Me.) 215; Orrok v. Ins. Co., 21 Pick. (Mass.) 457, 32 Am. Dec. 271; or the authority of the officer be so circumscribed as to put it out of his power to select an improper jury; Wakeman v. Sprague, 7 Cow. (N. Y.) 720. A verdict will be set aside for the following causes: The unauthorized interference of a party, or his attorney, or the court, in selecting or returning jurors, unless the interference can be satisfactorily explained; Park v. Harrison, 8 Humphr. (Tenn.) 412; that a juror not regularly summoned and returned personated another; Stripling v. State, 77 Ga. 108, 3 S. E. 277; 7 Dowl. & R. 684; but not if the juror personated another through mistake, was qualified in other respects, and no injustice has been done; 12 East 229; Toledo Consol. St. R. Co. v. R. Co., 12 Ohio Cir. Ct. R. 367. That a juror sat on the trial after being challenged and stood aside, unless the party complaining knew of it, and did not object; Jordan v. Meredith, 3 Yeates (Pa.) 318, 2 Am. Dec. 373; that a juror was discharged without any sufficient reason, after being sworn; Stewart v. State, 1 Ohio St. 66; but not if the juror was discharged by mistake and with the knowledge and acquiescence of the party; Com. v. Stowell, 9 Metc. (Mass.) 572; State v. Lytle, 27 N. C. 58; that the jury were not sworn, or that the oath was not administered in the form prescribed by law; Irwin v. Jones, 1 How. (Miss.) 497.

The *disqualification of jurors*, if it has not been waived, will be ground for a new trial; but a principal cause of challenge to a juror, not discovered during the trial, will not require a new trial in a criminal case, unless injustice resulted to the prisoner from the fact that such juror served; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; that a juror was also a member of the grand jury finding the bill will not sustain

a motion in arrest of judgment, where no objection was made to the juror on the trial; State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; People v. Lewis, 4 Utah, 42, 5 Pac. 543. The want of a necessary property qualification is ground for a new trial; 4 Term 473; Briggs v. Georgia, 15 Vt. 61; irregularity in selection, which results in injury to the defeated party; State v. Breen, 59 Mo. 417; but after a plea of not guilty and conviction, defendant may not object to the venire or to jurors summoned under it; State v. Cole, 9 Humphr. (Tenn.) 626; or to a juror whose name was not in the box, on the list, or on the books of the tax receiver; Osgood v. State, 63 Ga. 791; but not if it appears that injustice was not done; Beck v. Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; and there was a fair trial, and the verdict was fully warranted by the evidence; Fisher v. Yoder, 53 Fed. 565. Relationship to one of the parties; Hardy v. Sprowle, 32 Me. 310; or to one of the counsel; Brown v. Reed, 81 Me. 158, 16 Atl. 504; Swift v. Mott, 92 Ga. 448, 17 S. E. 631; or business relations with the counsel; Fealy v. Bull, 11 App. Div. 468, 42 N. Y. Supp. 569; is ground; but knowledge of such relation must not have been obtained before trial, else the disqualification is waived; Jewell v. Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473; unless the relationship be so remote as to render it highly improbable that it could have had any influence; Churchill v. Churchill, 12 Vt. 661. So is interest in the event; Wood v. Stoddard, 2 Johns. (N. Y.) 194; Page v. R. R., 21 N. H. 438; concealment of his interest by juror; Pearcy v. Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; bias or prejudice; U. S. v. Fries, 3 Dall. (U. S.) 515, 1 L. Ed. 701; where a juror was deputy prosecuting attorney; Block v. State, 100 Ind. 357; conscientious scruples against finding a verdict of guilty; Pierce v. State, 13 N. H. 536; Martin v. State, 16 Ohio 364; People v. Damon, 13 Wend. (N. Y.) 351; an opinion held by juror which would have excluded him if discovered before he was sworn; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; and mental or bodily disease unfitting jurors for the intelligent performance of their duties; Hogshead v. State, 6 Humphr. (Tenn.) 59; Baxter v. People, 3 Gilman (Ill.) 368; alienage; Richards v. Moore, 60 Vt. 449, 15 Atl. 119; (but not criminality of juror; State v. Powers, 10 Or. 145, 45 Am. Rep. 138; Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171; but see Greenup v. Stoker, 3 Gilman [Ill.] 202; Hollingsworth v. Duane, 4 Dall. [U. S.] 353, 1 L. Ed. 864); The want of purely statutory qualifications, such as citizenship, age, property, etc., which are not essential to an intelligent and impartial discharge of duty by a juror, are not treated with the same strictness as bias and like causes; Brewer v. Jacobs, 22 Fed. 234.

When *indirect measures have been resorted to, to prejudice the jury,* or tricks practised or disingenuous attempts made to suppress or stifle evidence or thwart the proceedings, or to obtain an unconscionable advantage, they will be defeated by granting a new trial. For example: where papers material on the point in issue, not previously submitted, are surreptitiously handed to the jury; Cas. *temp.* Hardw. 116; Sheaff v. Gray, 2 Yeates (Pa.) 273; or where the party, or some one in his behalf, directly approaches the jury on the subject of the trial; Ritchie v. Holbrooke, 7 S. & R. (Pa.) 458; Knight v. Freeport, 13 Mass. 218; or where one not a member of the jury slept in the same room with them, and had a conversation with one or two of them, in which he made statements reflecting on the character of the party against whom the verdict was rendered; Welch v. Taverner, 78 Ia. 207, 42 N. W. 650. But if the other party is aware of such attempts, and neglects to correct them when in his power, he will be deemed to have waived all objection; 11 Mod. 118. If the interference with the jury comes from a stranger, be without fault in the jury, and without the knowledge of the parties, and no injury has thereby ensued, the verdict will not be disturbed; Stewart v. Small, 5 Mo. 525; Luster v. State, 11 Humphr. (Tenn.) 169; Rowe v. State, *id.* 491. But see Boles v. State, 13 Smedes & M. (Miss.) 398. Where the jury, after retiring to deliberate, examined witnesses in the case, a new trial was granted; Cro. Eliz. 189; Thompson v. Mallet, 2 Bay (S. C.) 94; Smith v. Graves, 1 Brev. (S. C.) 16; so, also, when one of their number communicates to his fellows private information possessed by him, which influences the finding; Booby v. State, 4 Yerg. (Tenn.) 111; Wood R. Bk. v. Dodge, 36 Neb. 708, 55 N. W. 234; or the judge addresses a note to them, or privately visits them, after they have retired to deliberate; Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; or a juror takes a private view; Harrington v. R. Co., 157 Mass. 579, 32 N. E. 955; Consolidated Ice-Mach. Co. v. Ice Co., 57 Fed. 898; Woodbury v. Anoka, 52 Minn. 329, 54 N. W. 187.

Misconduct of jurors will sometimes avoid the verdict, and by the weight of authority, if prejudicial, is ground for reversal; Com. v. Landis, 12 Phila. (Pa.) 576.

Instances of misconduct are: Jurors betting as to the result; Booby v. State, 4 Yerg. (Tenn.) 111; sleeping during the trial; Baxter v. People, 3 Gilman (Ill.) 368; see Com. v. Jongrass, 181 Pa. 172, 37 Atl. 207; unauthorized separation; Wesley v. State, 11 Humphr. (Tenn.) 502; but see State v. Harper, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; Sanitary Dist. of Chicago v. Cullerton, 147 Ill. 385, 35 N. E. 723; taking refresh-

ment at the charge of the prevailing party; Harrison v. Rowan, 4 Wash. C. C. 32, Fed. Cas. No. 6,142; Vose v. Muller, 23 Neb. 171, 36 N. W. 583; see *supra;* see Wichita & W. R. Co. v. Fechheimer, 49 Kan. 643, 31 Pac. 127; drinking spirituous liquor; Gregg's Lessee v. McDaniel, 4 Harr. (Del.) 367; Rose v. Smith, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331; People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719; if any mental incapacity results therefrom; Territory v. Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; but see Territory v. Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; State v. Bailey, 100 N. C. 528, 6 S. E. 372; talking to strangers on the subject of the trial; Bennett v. Howard, 3 Day (Conn.) 223; Riley v. State, 9 Humphr. (Tenn.) 646; but not general conversation; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; determining the verdict by a resort to chance; Harvey v. Rickett, 15 Johns. (N. Y.) 87; Hendrickson v. Kingsbury, 21 Ia. 379; St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131), 61 Am. Dec. 494; Boynton v. Trumbull, 45 N. H. 408; by returning as the verdict the quotient obtained by dividing by twelve the total of the sums named by the jurors; E. Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Parshall v. R. Co., 35 Fed. 649; Houk v. Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706. But not every irregularity which would subject jurors to censure will overturn the verdict, unless there be some reason to suspect that it may have had an influence on the final result. See Testard v. State, 26 Tex. App. 260, 9 S. W. 888; State v. Gould, 40 Kan. 258, 19 Pac. 739. In general, if it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, and does not indicate improper bias, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict will not be disturbed. For gross misconduct of the jury a new trial may be granted on grounds of public policy; Hilly. New T. 198. Where the jury after returning an informal verdict were discharged, and within thirty seconds recalled and the verdict corrected, the separation will not vitiate the verdict; Boyett v. State, 26 Tex. App. 689, 9 S. W. 275. When the jury were kept out eighty-four hours it was held that their agreement was coerced and a new trial ordered; People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564.

Reading a newspaper account of the facts is misconduct; Moore v. State, 36 Tex. Cr. R. 88, 35 S. W. 668; but if favorable to the prisoner or not such as to cause prejudice against him, it is immaterial; U. S. v. Reid, 12 How. (U. S.) 361, 13 L. Ed. 1023. If the article was such as to aid in reaching a verdict, a new trial will be granted; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; People v. Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102. Where jurors had read a newspaper article with a strong bias against the prisoner, but records so clearly established guilt that whether they had read the article or not they could have returned no other verdict, a new trial was denied; State v. Williams, 96 Minn. 351, 105 N. W. 265. The reading by jurors of a scurrilous newspaper article is ground for a motion for a new trial, but where the jurors had been interrogated, and counsel had expressed himself satisfied and declined to press a motion to withdraw a juror, he was not afterwards entitled to a new trial; U. S. v. Marrin, 159 Fed. 767, 772, where many cases of motions for new trials on that ground are cited.

Error of the judge will be ground for a new trial; such as, admitting illegal evidence which has been objected to,—unless the illegal evidence was wholly immaterial, or it is certain that no injustice has been done; Thompson v. Thompson, 77 Ga. 692, 3 S. E. 261; and where the illegal testimony was admitted in gross violation of the well-settled principles which govern proof, it has been deemed *per se* ground for a new trial, notwithstanding the jury were directed to disregard it; Penfield v. Carpender, 13 Johns. (N. Y.) 350; but see Hamblett v. Hamblett, 6 N. H. 333; improperly rejecting evidence tending in any degree to aid the jury in determining a material fact; Coleman v. Allen, 3 J. J. Marsh. (Ky.) 229; the admission of incompetent evidence, although of slight importance, if the party has suffered or might have suffered prejudice by its admission; Glover v. Flowers, 101 N. C. 134, 7 S. E. 579; but the objection that the jury were not allowed to take to their room letters introduced in evidence cannot first be raised on a motion for a new trial; German S. Bk. v. Bank, 101 Ia. 530, 70 N. W. 769, 63 Am. St. Rep. 399; nor the admission of improper evidence not objected to at the trial; Herdler v. Range Co., 136 Mo. 3, 37 S. W. 115; withdrawing testimony once legally before the jury,—unless the excluded testimony could not be used on a second trial; Brown v. Williams, 4 Humphr. (Tenn.) 22; denying to a party the right to be heard through counsel; Belmore v. Caldwell, 2 Bibb (Ky.) 76; erroneously refusing to grant a non suit; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; improperly restricting the examination or cross-examination of witnesses, or allowing too great latitude in that respect, under circumstances which constitute a clear case or abuse; Allen v. Bodine, 6 Barb. (N. Y.) 383; refusing to permit a witness to refer to documents to refresh his memory, where, by the denial, the complaining party has sustained injury; Key v. Lynn, 4 Litt. (Ky.) 338; improperly refusing an adjournment,

whereby injustice has been done; Bishop v. State, 9 Ga. 121; improperly denying the right to open and close at the trial; Royce v. Gazan, 76 Ga. 79; refusing to give such instructions to the jury as properly arise in the case, where it is manifest that the jury erred through want of instruction; Maston v. Fanning, 9 Mo. 305; giving to the jury binding instructions, when there are circumstances in the case which ought to have been submitted to them,—unless the verdict is in strict accordance with the weight of evidence; Fitzgerald v. Alexander, 19 Wend. (N. Y.) 402; giving an erroneous exposition of the law on a point material to the issue,—unless it is certain that no injustice has been done, or the amount in dispute is very trifling, so that the injury is scarcely appreciable; Stoddard v. R. Co., 5 Sandf. (N. Y.) 180; misleading the jury by a charge which is not explicit, or which is absurd and impossible, or contradictory, or argumentative and evasive; Benham v. Cary, 11 Wend. (N. Y.) 83; erroneous instruction as to the proof that is requisite; Handly v. Harrison, 3 Bibb (Ky.) 481; State v. Somerville, 21 Me. 20; misapprehension of the judge as to a material fact, and a direction to the jury accordingly, whereby they are misled; Murden v. Ins. Co., 1 Mill (S. C.) 200; see MISDIRECTION; instructing the jury as to the law upon facts which are purely hypothetical,—but not if the charge was correct in point of law, and the result does not show that the jury were misled by the generality of the charge; Bethune v. McCrary, 8 Ga. 114; submitting as a contested point what has been admitted; Toby v. Reed, 9 Conn. 216; erroneously leaving to the jury the determination of a question that should have been decided by the court, whereby they have mistaken the law; charging as to the consequences of the verdict; Baylies v. Davis, 1 Pick. (Mass.) 206; 2 Graham & W. New Tr. 595. Neither the rejection nor admission of immaterial evidence is cause for a new trial; Thompson v. Thompson, 77 Ga. 692, 3 S. E. 261.

Misconduct of the Court. Where the judge took it upon himself to develop the plaintiff's case by asking questions, which would have been objectionable if asked by counsel, the appellate court reversed the judgment and granted a new trial, remarking that they would have done so, even if no exception had been taken, owing to the extreme use of judicial power; Bolte v. Ry. Co., 38 App. Div. 234, 56 N. Y. Supp. 1038; and such abuse of judicial discretion is recognized as a ground of relief in Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33; Dunn v. People, 172 Ill. 582, 50 N. E. 137, where the court objected to the examination of witnesses in criminal trials as prejudicial to a fair result. And see 13 H. L. R. 144.

Where the trial judge smiled when the name of a witness was called out as Ananias Godwin, and an exception was taken and the witness was not examined, it was held not reversible error and the appellate court remarked that it was impossible to place itself in a position to consider intelligently the harmful effect, if any, of this slight lapse from severe judicial decorum had Ananias been before the jury as a witness. It is reasonably certain, however, that had he been presented to the jury, the biblical forbear of the name would speedily have been brought to the attention of any juror so ignorant as to be unaware of it, and that the smile was natural, even if not justified or excusable; Bellamy v. State, 56 Fla. 43, 47 South. 868.

Surprise, as a ground for setting aside the verdict, is cautiously allowed. When it is occasioned by the act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it, this has sometimes been held to constitute grounds for relief; but not when he might have been fully informed by the exercise of ordinary diligence; Matthews v. Allaire, 11 N. J. L. 242; Clifford v. R. Co., 12 Colo. 125, 20 Pac. 333; although even when the complainant is not entirely free from fault, the court, in cases where great wrong would otherwise be done, will, for the sake of promoting justice, grant a new trial. Among the cases of surprise may be enumerated the following: the unexpectedly being summoned and detained as a witness or juror in another court, or sudden and serious illness, which prevents the party from attending at the trial; Stewart v. Durrett, 3 T. B. Monr. (Ky.) 113; Sherrard v. Olden, 6 N. J. L. 344; that the cause was brought on prematurely, in the absence of the party; Donallen v. Lennox, 6 Dana (Ky.) 89; erroneous ruling of the court as to the right to begin, which has worked manifest injustice; Davis v. Mason, 4 Pick. (Mass.) 156; but see Comstock v. Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Scott v. Hull, 8 Conn. 296; perturbation of counsel, arising from sudden and dangerous sickness occurring in his family and coming to his knowledge during the trial; Cutler v. Rice, 14 Pick. (Mass.) 494; where some unforeseen accident has prevented the attendance of a material witness; 6 Mod. 22; Glover v. Miller, Harp. (S. C.) 267; that testimony beyond the reach of the party injured, and completely under the control of the opposite party, was not produced at the trial; Jackson v. Warford, 7 Wend. (N. Y.) 62; that competent testimony was unexpectedly ruled out on the trial; Boyce v. Yoder, 2 J. J. Marsh. (Ky.) 515; where a party's own witnesses, through forgetfulness, mistake, contumacy, or perjury, testify differently than anticipated, or where evidence is unexpectedly sprung upon a party by his opponent; Wilson v. Brandon, 8 Ga. 136;

the withdrawal of a material witness before testifying, attended with suspicions of collusion; Tilden v. Gardiner, 25 Wend. (N. Y.) 663; that a material witness was suddenly deprived of the power of testifying by a paralytic stroke, or other affection, or that the testimony of the witness was incoherent on account of his being disconcerted at the trial; Ainsworth v. Sessions, 1 Root (Conn.) 175; where it is discovered after the trial that a material witness who testified is interested in the event, or where it is probable that the verdict was obtained by false testimony, which the party injured could not until after the trial contradict or expose; 2 C. B. 342; Morrell v. Kimball, 1 Greenl. (Me.) 322. But a new trial cannot be obtained on the ground of surprise caused by evidence which was clearly within the issues presented by the pleadings; Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise; Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835. Accident or surprise which ordinary prudence could not have guarded against, does not include ignorance, mistake, nor misapprehension of an attorney, not occasioned by the adverse party, nor mismanagement of the defence by the attorney, through design, ignorance, or neglect; Holderman v. Jones, 52 Kan. 743, 34 Pac. 352; Tittman v. Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

New trials *on account of after-discovered evidence* are granted but rarely, and with great caution. The court, in order to set aside the verdict on this ground, must be satisfied that the evidence has come to the applicant's knowledge since the trial; Wiggin v. Coffin, 3 Sto. 1, Fed. Cas. No. 17,624; State v. Carr, 21 N. H. 166, 53 Am. Dec. 179; that it is not owing to the want of diligence that it did not come sooner; Floyd v. Jayne, 6 Johns. Ch. (N. Y.) 479; Wright v. Exp. Co., 80 Fed. 85; Etowah G. M. Co. v. Exter, 91 Ga. 171, 16 S. E. 991; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; that it is so material that it will probably produce a different result; Chicago v. Edson, 43 Ill. App. 417; see Morgan v. Bell, 41 Kan. 345, 21 Pac. 255; and that it is not cumulative; Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109; as mere cumulative evidence is insufficient to warrant a new trial; Plumb v. Campbell, 129 Ill. 101, 18 N. E. 790; Gilmore v. Brost, 39 Minn. 190, 39 N. W. 139; Sabine & E. T. R. Co. v. Wood, 69 Tex. 679, 7 S. W. 372; Bond v. Com., 83 Va. 581, 3 S. E. 149; but the rule does not apply where it is cumulative evidence to prove an *alibi;* State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609. Nor must the sole object of the newly-discovered evidence be to impeach witnesses examined on the former trial; Robinson v. Veal, 79 Ga. 633, 7 S. E. 159; Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; State v. Mitchell, 102 N. C. 347, 9 S. E. 702. The moving party must state what the evidence is, and what diligence he has used in the preparation of his case; and his application must be accompanied by affidavits of the newly-discovered witness, unless some cause be shown why they cannot be produced; Sheppard v. Sheppard, 10 N. J. L. 250; Gilbert v. Woodbury, 22 Me. 246. Evidence which could have been procured before the trial by the exercise of reasonable diligence is not sufficient; Beachley v. McCormick, 41 Kan. 485, 21 Pac. 646; Gray v. Barton, 62 Mich. 186, 28 N. W. 813; Fears v. Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Booth v. McJilton, 82 Va. 827, 1 S. E. 137.

When a continuance on account of absent testimony is refused, and it subsequently appears that such evidence is necessary and material to the defendant, he should be awarded a new trial; Fowler v. State, 25 Tex. App. 27, 7 S. W. 340; McCline v. State, 25 Tex. App. 247, 7 S. W. 667.

Perjury. Where perjured testimony had been procured by bribery on the part of the successful party, it was held not a ground for setting aside a verdict, though there was a reasonable certainty that the result of a new trial would be different; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; nor where the perjured testimony was obtained by conspiracy of the opposing party and his witnesses; Ross v. Wood, 70 N. Y. 9; the perjury of a witness will not be a ground for a new trial even if he promise that he would tell the truth; Loucheine v. Strouse, 49 Wis. 623, 6 N. W. 360; but a new trial was granted where one party alleged that a witness had committed perjury and the allegation was sustained by the affidavit of the witness; Seward v. Cease, 50 Ill. 228. In any event, a conviction of perjury is necessary before a new trial will be granted because of it; Holtz v. Schmidt, 44 N. Y. Super. Ct. 327; unless the witness has died since the trial so that his conviction is impossible; Dyche v. Patton, 56 N. C. 332; where there has been a conviction, a new trial was granted; Great Falls Mfg. Co. v. Mathes, 5 N. H. 574. But the conviction for perjury would not be ground for granting a new trial where it was procured mainly on the testimony of the party moving for the new trial; Horne v. Horne, 75 N. C. 101. Pico v. Cohn, *supra,* was decided mainly on the authority of U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 95, in which keeping the unsuccessful party away from the court by a false promise of a compromise, or falsely keeping him in ignorance of the suit, or a fraudulent pretence of the attorney who represented the party and corruptly sold out his client's interests, were given as illustra-

tions of the rule that in order to afford a basis for setting aside a judgment on the ground of fraud, it must be extrinsic or collateral to the question examined and determined.

Excessive damages may be good cause for granting a new trial; first, where the measure of damages is governed by fixed rules and principles, as in actions on contracts, or for torts to property, the value of which may be ascertained by evidence; second, in suits for personal injuries, where, although there is no fixed criterion for assessing the damages, yet it is clear that the jury acted from passion, partiality, or corruption; Lang v. Hopkins, 10 Ga. 37.

A new trial should be granted for an error of law, where the general merits of the case, as one for a recovery at all, are doubtful, and where the damages are apparently excessive; Savannah, F. & W. R. Co. v. Harrigan, 80 Ga. 602, 7 S. E. 280. In actions for personal torts, a new trial will not, in general, be granted on account of the smallness of the damages, unless the verdict is the result of contrivance by the defendant, or surprise on the plaintiff, or of partiality or misconduct of the jury, or unless the finding is entirely disproportioned to the injury. See 49 L. J. Q. B. 233, where a verdict of £7,000 in favor of a physician for damages, caused by defendant's negligence, was set aside on the ground of the damages being insufficient.

A state statute forbidding new trials on account of inadequate damages, if binding on the federal courts, would be in violation of the constitutional right of a trial by jury; Hughey v. Sullivan, 80 Fed. 72. Where the verdict is for an amount exceeding the damages laid in the writ, it will be set aside unless the plaintiff will release the excess; McIntire v. Clark, 7 Wend. (N. Y.) 330. See JURY; DAMAGES.

The court will not grant a new trial on motion of plaintiff on the ground that the amount of the verdict was inadequate, where in its opinion the verdict should have been for the defendant; Blazosseck v. Sherman Co., 141 Fed. 1022.

It is within the discretion of the trial court, after a verdict awarding excessive damages, to make an order denying a motion for a new trial on the condition that the plaintiff will remit a certain part of the verdict; Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646; Arkansas Valley L. & C. Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854. It is error to set aside a verdict as excessive unless the amount is such as to show misconduct and impropriety on the part of the jury; Scott v. Pub. Ass'n, 74 Hun 284, 26 N. Y. Supp. 690. Where the question of damages is peculiarly for the jury, if the court grant a new trial, it should be granted absolutely and not on condition of a refusal to file a remittitur; Albany v. Sikes, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653, 47 Am. St. Rep. 132.

When the verdict is clearly against the law, it will be set aside, notwithstanding the jury had power to decide both the law and the fact, or the issue was one exclusively of fact and there have been concurrent verdicts by two successive juries; State v. Sims, Dudl. (Ga.) 213; Chambers v. Collier, 4 Ga. 193; see Cheatham v. Lord, 79 Ga. 770, 4 S. E. 162; if, however, substantial justice has been done, a new trial will not be granted though the law arising on the evidence would have justified a different result; 1 Burr. 54; 4 Term 468.

The jury are bound to follow the instructions of the court, even though they be held erroneous by the appellate court; they are the law of the trial; Barton v. Shull, 62 Neb. 570, 87 N. W. 322; Crane v. R. Co., 74 Ia. 330, 37 N. W. 397, 7 Am. St. Rep. 479; Flemming v. Ins. Co., 4 Whart. (Pa.) 59, 33 Am. Dec. 33; Emerson v. Santa Clara County, 40 Cal. 543; Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; Swartout v. Willingham, 6 Misc. 179, 26 N. Y. Supp. 769; Lucas v. Claflin, 76 Va. 269; 17 C. B. 280; Lynch v. Iron Works, 132 Ky. 241, 116 S. W. 693, 21 L. R. A. (N. S.) 852, and note; even if the judge is subsequently convinced that his view of the law was wrong; Paul v. Casselberry, 12 Phila. (Pa.) 313; Dent v. Bryce, 16 S. C. 1; although if there is an instruction which is correct and with which the verdict accords, it will be sustained; Cobb v. R. Co., 38 Ia. 601; *contra;* Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368; Cochrane v. Winburn's Ex'rs, 13 Tex. 143; Van Vacter v. Brewster, 1 Smedes & M. (Miss.) 400.

A new trial has been refused where verdict was justified by the evidence, though the jury disregarded an erroneous instruction; Galligan v. R. Co., 27 R. I. 363, 62 Atl. 376; St. Louis, I. M. & S. R. Co. v. Dooley, 77 Ark. 561, 92 S. W. 789.

Courts are at all times reluctant to grant a new trial *on the ground that the verdict is against the evidence;* and where the jury have passed upon a mere question of fact, they will only do so when the verdict is palpably against the evidence; injustice must have been done by the verdict, and there must be a probability that justice will be done on a retrial; Derwort v. Loomer, 21 Conn. 245; Hinton v. McNeil, 5 Ohio 509, 24 Am. Dec. 315. A statute forbidding courts to set aside a third verdict in the same action, does not apply to a case where there is *no* evidence, and thus construed, is constitutional; Railway Co. v. Mahoney, 89 Tenn. 311, 15 S. W. 652. See Louisville & N. R. Co. v. Woodson, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032. Where the verdict is founded on circumstantial evidence, the court

will rarely, if ever, interfere with it; Young v. Silkwood, 11 Ill. 36. On the other hand, when the issue approximates to a purely legal question, courts are somewhat more liberal in granting new trials; Felder v. Bonnett, 2 McMull. (S. C.) 44, 37 Am. Dec. 545. The verdict will be set aside where the witnesses upon whose testimony it was obtained have since the trial been convicted of perjury; 3 Dougl. 24; so where the testimony on which the verdict is founded derives its credit from circumstances, and those circumstances are afterwards clearly falsified by affidavit; 1 B. & P. 427; 3 Grah. & W. N. Tr. 1203.

The verdict may be void for *obscurity or uncertainty;* Diehl v. Evans, 1 S. & R. (Pa.) 367; and where special findings are contradictory on essential questions, a new trial should be granted; State v. River Corp., 111 N. C. 661, 16 S. E. 331. It will be set aside where it is not responsive to the issue, or does not comprehend all of the issues, unless the finding of one or more of the issues will be decisive of the cause; Toulmin v. Lesesne, 2 Ala. 359; or where it is contrary to the instructions, whether the latter are right or wrong: Crane v. R. Co., 74 Ia. 330, 37 N. W. 397, 7 Am. St. Rep. 479; or where the verdict shows that it includes items not shown by the evidence to be due; McDole v. Simmons, 45 Ill. App. 328. So, where the findings on the issues are contradictory, thus rendering the general verdict inconsistent and unintelligible; Porter v. R. Co., 97 N. C. 66, 2 S. E. 581, 2 Am. St. Rep. 272. That it was not recorded in open court, or was received in the absence of the plaintiff, or was altered after it was recorded and the jury dismissed, will be ground for a new trial; People v. Mayor's Court, 1 Wend. (N. Y.) 36; Walters v. Junkins, 16 S. & R. (Pa.) 414, 16 Am. Dec. 585. If rendered on Sunday, it will, in general, be void; but there are many instances in which verdicts have been sustained though rendered on that day; Hoghtaling v. Osborn, 15 Johns. (N. Y.) 119; Huidekoper v. Cotton, 3 Watts (Pa.) 56; State v. Engle, 13 Ohio 490.

In the United States courts no exception lies to the overruling of a motion for a new trial; Northern Pac. R. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380, 7 U. S. App. 359; Luitweiler v. U. S., 85 Fed. 957, 29 C. C. A. 504; or where a new trial on the ground of after discovered evidence is refused; McLeod v. New Albany, 66 Fed. 378, 13 C. C. A. 525, 24 U. S. App. 601.

The Pennsylvania act of 1891 provides that "the supreme court shall have power in all cases to affirm, reverse, amend, or modify a judgment, decree, etc., and to enter such judgment or decree as it may deem proper, without returning the record to the court below, and may order a verdict and judgment to be set aside and a new trial had." In Smith v. Pub. Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819, it was said by the court that this was "a new power, a wide departure from the policy of centuries in regard to appellate courts and clearly exceptional in character;" but the act was held to be constitutional, and the court ordered the verdict set aside. A later statute (1905) authorizing the appellate court to "review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court," is enforced in that state; but it was held that it cannot be enforced in the federal courts in Pennsylvania, being obnoxious to the prohibition of the seventh amendment of the federal constitution; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. See NON OBSTANTE VEREDICTO.

An act of Montana authorizing its supreme court to grant a new trial for excessive damages, was upheld in Kennon v. Gilmer, 131 U. S. 29, 9 Sup. Ct. 696, 33 L. Ed. 110; where it was held that the court below could order a new trial, or, with the plaintiff's consent, reduce the verdict, but could not enter judgment itself for a lesser sum than the verdict.

A new trial will be ordered where the appellant is deprived of his bill of exceptions by the death of the trial judge; People v. Judge, 41 Mich. 726, 49 N. W. 924; Hume v. Bowie, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; (*contra*, Etchells v. Wainwright, 76 Conn. 534, 57 Atl. 121); Taylor v. Simmons, 116 N. C. 70, 20 S. E. 961; or his retirement; Borrowscale v. Bosworth, 98 Mass. 34; see Malony v. Adsit, 175 U. S. 286, 20 Sup. Ct. 115, 44 L. Ed. 163. Other cases hold that it may be signed by the new judge; People v. McConnell, 155 Ill. 192, 40 N. E. 608; Water S. & S. Co. v. Tenney, 21 Colo. 285, 40 Pac. 442; the legislature may provide for signature by another judge, there being no vested right in the practice previously followed in the state of giving a new trial as a matter of right; Johnson v. Smith, 78 Vt. 145, 62 Atl. 9, 2 L. R. A. (N. S.) 1000, and note.

In the federal courts (R. S. § 953, as amended June 5, 1900), where, by reason of death, sickness, or other disability, a circuit judge is unable to pass on a motion for a new trial and sign a bill of exceptions, his successor, or any other judge holding the court, shall do so, or, if satisfied that he cannot, he may, in his discretion, grant a new trial; Penn Mut. Life Ins. Co. v. Ashe, 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491.

A new trial will be granted where the judge has lost his notes; Ritter v. Grimm, 114 N. C. 373, 19 S. E. 239; or has neglected to prepare a statement of the case on appeal; Bryans v. State, 29 Tex. App. 247, 15 S. W. 288; or where papers had been lost by appellee; Com'rs of Greenville v. S. S. Co., 98 N. C. 163, 3 S. E. 505; or the summons was lost; Smith v. Trimble, 27 Ill. 153; or

the charge had been destroyed by fire; Fire Ass'n of Philadelphia v. McNerney (Tex.) 54 S. W. 1053; or necessary papers had been lost; Zweibel v. Caldwell, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84 (*contra*, Devore v. Territory, 2 Okl. 562, 37 Pac. 1092); or where by the fault of the official stenographer, an appellant is deprived of his bill of exceptions; Mathews v. Mulford, 53 Neb. 252, 73 N. W. 661; James v. French, 5 Pa. Co. Ct. R. 270 (*contra*, Morin v. Claflin, 100 Me. 271, 61 Atl. 782); or where the stenographer's notes had been stolen; Nichols v. Harris, 32 La. Ann. 646; or lost; Richardson v. State, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048.

Loss of papers will not excuse delay in filing the record on appeal, unless the appellant has secured an extension of time, or applied to the lower court to have the papers supplied, and has acted with diligence and been without fault; Bailey v. U. S., 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 865, and note citing Williams v. La Penotiere, 25 Fla. 473, 6 South. 167; Succession of Llula, 42 La. Ann. 475, 7 South. 585; Buckman v. Whitney, 28 Cal. 555.

When the record on a criminal appeal is incomplete and does not contain the evidence, without appellant's fault, it was held that a new trial will be granted; State v. McCarver, 113 Mo. 602, 20 S. W. 1058.

In Alley v. McCabe, 147 Ill. 410, 35 N. E. 615, it was held that the hardship to the appellant could not be imposed upon the appellee.

Judgment was reversed and a new trial ordered because the judge went out of the county while the jury was deliberating; Martin v. State, 10 Ga. App. 455, 73 S. E. 686.

Courts of Equity have always proceeded with great caution in awarding new trials where an issue has been sent to be tried at law. At the present day they are but seldom applied to for this purpose, as courts of law are liberal in exercising the same jurisdiction, and it has been held to be unconscionable and vexatious to bring into courts of equity a discussion which might have been had at law; 1 Sch. & L. 201. But, in general, when it would have been proper for a court of law to have granted a new trial if the application had been made while that court had the power, it is equally proper for a court of equity to do so if the application be made on grounds arising after the court of law can no longer act; Colyer v. Langford's Adm'rs, 1 A. K. Marsh. (Ky.) 237. A court of equity will not grant a new trial at law to enable a party to impeach a witness, or because the verdict is against evidence; Woodworth v. Van Buskerk, 1 Johns. Ch. (N. Y.) 432; or when the new trial can be obtained by application to a law court; Wolcott v. Jackson, 52 N. J. Eq. 387, 28 Atl. 1045. It will only interpose in cases of newly discovered evidence, surprise, fraud, or the like, where the party is deprived of the means of defence by circumstances beyond his control; Harrison v. Harrison, 1 Litt. (Ky.) 140; Peagram v. King, 9 N. C. 605. But it has been held that a court of equity will often grant a second, and sometimes a third, fourth, and even fifth trial of a feigned issue, in cases where a court of law would not disturb a first verdict; Patterson v. Ackerson, 1 Edw. Ch. (N. Y.) 96. This arises from the consideration that the responsibility of the decision rests upon the judge in equity; 3 Grah. & W. N. Tr. 1570.

New trials may be granted *in criminal* as well as in civil cases, on motion of the defendant, when he is convicted even of the highest offences. But a person once lawfully convicted on a sufficient indictment can never after, against his consent, be a second time put in peril for the same offence, unless the former conviction was instituted by the fraudulent procurement of the defendant with a view to shield himself from adequate punishment; 2 Grah. & W. N. Tr. 61. Where the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, the law, mingling justice with mercy *in favorem vitæ et libertatis*, does not permit a new trial; State v. Brown, 16 Conn. 54. In civil actions for the recovery of penalties, and in some cases where the form of proceeding is criminal, if the object be only to establish a civil right, as in cases of *quo warranto* and the like, new trials may be granted even after acquittal. But, in such cases, when the verdict is for the defendant, it will not, in general, be disturbed unless some rule of law be violated in the admission or rejection of evidence or in the charge of the court to the jury; 4 Term 753; Paddock v. Salisbury, 2 Cow. (N. Y.) 811. See JURY; MISDIRECTION; CHARGE; MISTRIAL; Thayer, Evid., for history of new trial.

NEW WORKS. By a new work is understood every sort of edifice or other work which is newly commenced on any ground whatever. Where the ancient form of work is changed, either by an addition being made to it or by some part of the ancient work being taken away, it is styled also a new work. La. Civ. Code, Art. 856.

NEW YORK. The name of one of the original states of the United States of America.

In its colonial condition this state was governed from the period of the revolution of 1688 by governors appointed by the crown, assisted by a council, which received its appointments also from the parental government, and by the representatives of the people. 1 Story, Const. b. 1, ch. 10.

The constitution adopted in 1777 remained in force until January 1, 1823, when the second went into operation. This second constitution remained until January 1, 1847, when a constitution, adopted by a convention of the people at Albany, went into force. This constitution was amended in certain particulars, and remained in force until January 1, 1895, when the present constitution was adopted by a convention at Albany and went into effect on Jan-

uary 1, 1895, except article six, relating to the courts, which became operative January 1, 1896.

NEWLY DISCOVERED EVIDENCE. Proof of some new and material fact in the case, which has been discovered since the verdict. See NEW TRIAL.

NEWSPAPERS. Papers for conveying news, printed and distributed periodically.

A paper issued every day of the week except one is a daily newspaper; Richardson v. Tobin, 45 Cal. 30.

A paper devoted principally to legal intelligence is a newspaper in which notices required by statute may be published; Kerr v. Hitt, 75 Ill. 51; but see Beecher v. Stephens, 25 Minn. 147.

Publication of notice from June 26 to July 26, both dates inclusive, is a sufficient compliance with an ordinance directing publication for thirty days, although the paper in which the publication is made is not issued on Sundays or on the 4th of July; Moore v. Walla Walla, 60 Fed. 961.

One who receives and retains a newspaper regularly sent to him is bound to pay for it, though he had ordered it discontinued; Austin v. Burge, 156 Mo. App. 286, 137 S. W. 618; Fogg v. Atheneum, 44 N. H. 115, 82 Am. Dec. 191; Ward v. Powell, 3 Harr. (Del.) 379.

See LIBEL; LIBERTY OF THE PRESS; POSTAL SERVICE.

NEXI. In Roman Law. Persons bound (*nexi*); that is, insolvents, who might be held in bondage by their creditors until their debts were discharged. Heineccius, Antiq. Rom. ad Inst. lib. 3, tit. 330; Calvinus; Mackeldey, Civ. Law § 486 *a*. See NEXUM.

NEXT. Nearest or nighest, not in the sense of propinquity alone, as, for example, three persons on three chairs, one in the midst, those on each side of the middle one are equally near, each "next" to the middle one; but it signifies also order, or succession, or relation as well as propinquity. 27 L. J. Ch. 654. See 3 Q. B. 723; Couch v. Turnpike Co., 4 Johns. Ch. (N. Y.) 26.

NEXT FRIEND. One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not *sui juris*.

Where a person of unsound mind, not found so by inquisition, conveys his land by deed to another, the proper mode of proceeding in equity to have such deed cancelled, annulled, and made void is not by information exhibited by the attorney-general on the relation of others, but by a bill in the name of the incompetent person by a responsible next friend; Penington v. Thompson, 5 Del. Ch. 328, where the practice in such cases was elaborately discussed, both in argument and by Saulsbury, Ch., who permitted an information in the name of the attorney-general to be amended into a bill by next friend, and whose decision was affirmed on appeal, where the only question was the propriety of the amendment.

It has been held in other states that such suit may be brought by next friend on behalf of a person not adjudged insane and having no guardian appointed; Holzheiser v. R. Co., 11 Tex. Civ. App. 677, 33 S. W. 887; Gillespie v. Hauenstein, 72 Miss. 838, 17 South. 602; but in Ohio it was held that such action must be by guardian, not next friend; Row v. Row, 53 Ohio St. 249, 41 N. E. 239; and in Iowa that it could not be done independently of statute; Tiffany v. Worthington, 96 Ia. 560, 65 N. W. 817. In such cases the court may supersede a next friend by a guardian *ad litem*, and in its discretion stay proceedings instituted by the former; King v. Asylum, 64 Fed. 331, 12 C. C. A. 145.

See PROCHEIN AMI.

Where an infant is so young as to be incapable of making a selection of a person to represent him, the court will permit any person to institute suit in his behalf, exercising, however, discretion to prevent any abuse of that right; Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047.

A next friend may select one of several tribunals in which the infant's case shall be tried and may elect to accept the jurisdiction of the federal court to which the case may be removed; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164.

The weight of authority is against the right of the next friend to receive payment of and satisfy a judgment recovered on behalf of an infant; Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 11 L. R. A. (N. S.) 913, 118 Am. St. Rep. 89; Galveston Oil Co. v. Thompson, 76 Tex. 235, 13 S. W. 60; Collins v. Gillespy, 148 Ala. 558, 41 South. 930, 121 Am. St. Rep. 81; Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530 (*dictum*). A person of unsound mind who has not been adjudged insane, and for whom no conservator has been appointed, may bring a suit by next friend; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513.

In a suit on behalf of an infant, by his next friend, the infant must be a plaintiff; Morgan v. Potter, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670.

NEXT OF KIN. This term is used to signify the relations of a party who has died intestate.

In general, no one comes within this term who is not included in the provisions of the statutes of distribution; 3 Atk. 422, 761; 1 Ves. Sen. 84; Slosson v. Lynch, 28 How. Pr. (N. Y.) 417. The phrase means relation by blood; Keteltas v. Keteltas, 72 N. Y. 312, 28 Am. Rep. 155. It has been held, on the other hand, that next of kin in a will means "nearest of kin;" 10 Cl. & F. 215; Redmond v. Burroughs, 63 N. C. 242. A

wife cannot, in general, claim as next of kin of her husband, nor a husband as next of kin of his wife; Haraden v. Larrabee, 113 Mass. 430; Peterson v. Webb, 39 N. C. 56; 14 Ves. 372; Townsend v. Radcliffe, 44 Ill. 446; Appeal of Ivins, 106 Pa. 176, 51 Am. Rep. 516. But see Merchants' Ins. Co. v. Hinman, 34 Barb. (N. Y.) 410; Steel v. Kurtz, 28 Ohio St. 192; French v. French, 84 Ia. 655, 51 N. W. 145, 15 L. R. A. 300. But when there are circumstances in a will which induce a belief of an intention to include them under this term, they will be so considered, though in the ordinary sense of the word they are not; Hovenden, Fr. 288, 289; 1 My. & K. 82; the same rule holds as to the interpretation of statutes; Lima E. L. & P. Co. v. Deubler, 7 Ohio Cir. Ct. R. 185; French v. French, 84 Ia. 655, 51 N. W. 145, 15 L. R. A. 300.

As to next of kin in the act of congress of March 3, 1891, see FRENCH SPOLIATION CLAIMS.

In the construction of wills and settlements, after a considerable conflict of opinions, the established rule of interpretation in England is that next of kin when found in ulterior limitations must be understood to mean nearest of kin without regard to the statute of distribution; 2 Jarm. Wills 108; Blagge v. Balch, 162 U. S. 464, 16 Sup. Ct. 853, 40 L. Ed. 1032. This rule was followed in Swasey v. Jaques, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65; Redmond v. Burroughs, 63 N. C. 242; but it was not approved in Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1; Pinkham v. Blair, 57 N. H. 226.

Next of kin ordinarily have no standing in law or equity for the recovery of property alleged to belong to their decedent; Buchanan v. Buchanan, 75 N. J. Eq. 274, 71 Atl. 745, 22 L. R. A. (N. S.) 454, 138 Am. St. Rep. 563, 20 Ann. Cas. 91, citing Ware v. Galveston City Co., 111 U. S. 170, 4 Sup. Ct. 337, 28 L. Ed. 393, and a large number of other cases; otherwise, if there was collusion between the personal representatives and the party against whom they have brought suit; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Trotter v. Life Ass'n, 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887; McLemore v. Min. Co., 121 Ky. 53, 88 S. W. 1062; Hubbard v. Urton, 67 Fed. 419. Many cases find an exception to that rule where there are no debts against the estate and nothing remains but to collect the assets and pay them over to the next of kin; Bridgman v. R. Co., 58 Vt. 198, 2 Atl. 467; Walker v. Abercrombie, 61 Tex. 69; Hurt v. Fisher, 96 Tenn. 570, 35 S. W. 1085; Roberts v. Messinger, 134 Pa. 298, 19 Atl. 625, *contra:* Davenport v. Brooks, 92 Ala. 627, 9 South. 153; Leamon v. McCubbin, 82 Ill. 263; also an exception to the rule has been made when the administrator refuses to sue; Matheny v. Ferguson, 55 W. Va. 656, 47 S. E. 886; Randel v. Dyett, 38 Hun (N. Y.) 347; but even in such case the rule was applied in L. R. 7 Ch. Div. 210. It seems that, if the administrator consents, the next of kin may sue; Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679. In Samuel v. Marshall, 3 Leigh (Va.) 567, a bill by the next of kin to set aside a fraudulent gift was sustained, but the property was decreed to the personal representatives.

See LEGACY; DESCENT AND DISTRIBUTION; KIN; KINDRED.

NEXUM (Lat.). **In Roman Law.** The transfer of the ownership of a thing, or the transfer of a thing to a creditor as a security.

In one sense *nexum* includes *mancipium;* in another sense, *mancipium* and *nexum* are opposed, in the same way as sale and mortgage or pledge are opposed. The formal part of both transactions consisted in a trasfer *per æs et libram.* The person who became *nexus* by the effect of a *nexum* placed himself in a servile condition, not becoming a slave, his *ingenuitas* being only in suspense, and was said *nexum inire.* The phrases *nexi datio, nexi liberatio,* respectively express the contracting and the release from the obligation.

The Roman law as to the payment of borrowed money was very strict. A curious passage of Gellius (xx. 1) gives us the ancient mode of legal procedure in the case of debt, as fixed by the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judex,* he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio,* and ultimately to be assigned over to the creditor (*addictus*) by the sentence of the prætor. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor, on three *nundinæ,* and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or put him to death. If there were several creditors, the letter of the law allowed them to cut the debtor in pieces and take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor, who was *addictus,* as a slave, and compel him to work out his debt; and the treatment was often very severe. In this passage Gellius does not speak of *nexi,* but only of *addicti,* which is sometimes alleged as evidence of the identity of *nexus* and *addictus,* but it proves no such identity. If a *nexus* is what he is here supposed to be, the laws of the Twelve Tables could not apply; for when a man became *nexus* with respect to one creditor, he could not become *nexus* to another; and if he became *nexus* to several at once, in this case the creditors must abide by their contract in taking a joint security. This law of the Twelve Tables only applied to the case of a debtor being assigned over by a judicial sentence to several creditors, and it provided for a settlement of their conflicting claims. The precise condition of a *nexus* has, however, been a subject of much discussion among scholars. See Smith, Dict. Rom. & Gr. Antiq.; MANCIPIUM.

Nexum was apparently a contract for the repayment of a money loan, the security for which was the debtor's own person. Launspach, State of Family in Early Rome 229.

NICHILLS or NIHILS. Debts due to the exchequer which the sheriff could not levy, and as to which he returned *nil.* These sums were transcribed once a year by the clerk of the nichills, and sent to the treasurer's remembrancer's office, whence process was issued to recover the "nichill" debts.

Both of these offices were abolished in 1833; Manning's Exch. Pr. 321.

NICKNAME. A short name; one *nicked* or cut off for the sake of brevity, without conveying any idea of opprobrium and frequently evincing the strongest affection or the most entire familiarity. Busb. Eq. 74. See Rawnley's Dict. of Engl. Names; NAME.

NIDERLING. A vile, base person or sluggard; chicken-hearted. Spelm. Sometimes Nidering and Nithing. Toml. Dic.

NIECE. The daughter of a brother or sister. Ambl. 514; 1 Jac. 207. See NEPHEW; LEGACY.

NIEFE. See NEIF.

NIENT COMPRISE (Law Fr. not included). An exception taken to a petition because the thing desired is not contained in that deed or proceeding whereon the petition is founded. Toml. Law Dict.

NIENT CULPABLE (Law Fr. not guilty). The name of a plea used to deny any charge of a criminal nature, or in an action for a tort.

NIENT DEDIRE (Law Fr. to say nothing). Words used to signify that judgment be rendered against a party because he does not deny the cause of action: *i. e.* by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the practice in the English courts is, on an affidavit of the circumstances, to change it, in transitory actions; or, in local actions, they will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in another county. 1 Tidd, Pr. 655. See 10 C. B. N. S. 825.

NIENT LE FAIT (Law Fr.). **In Pleading.** The same as *non est factum*, a plea by which the defendant asserts that the deed declared upon is not his deed.

NIENT SEIST. In Old Pleading. Not seised. The general plea in a writ of annuity. Crabb, Eng. L. 424.

NIGHT. That space of time during which the sun is below the horizon of the earth, except that short space which precedes its rising and follows its setting, during which by its light the countenance of a man may be discerned.

It is night when there is daylight, *crepusculum* or *diluculum*, enough left or begun to discern a man's face withal. 1 Hale, Pl. Cr. 550; 4 Bla. Com. 224; Bac. Abr. *Burglary* (D); 2 Russ. Cr. 32. See State v. Morris, 47 Conn. 182; Kroer v. People, 78 Ill. 295.

The common-law rule has been modified by statute in some of the states, and by the stat. 9 Geo. IV. c. 69, the night, for purposes of poaching, was held to begin one hour after sunset, and end one hour before sunrise. By the stat. 24 & 25 Vict. c. 96, the night, during which a burglary may be committed, is deemed to commence at 9 p. m., and end at 6 a. m.; 4 Steph. Com. 105. But see Klieforth v. State, 88 Wis. 163, 59 N. W. 507, 43 Am. St. Rep. 875, where it was held that it is day when there is daylight enough to discern a person's face.

In the time of the English Saxons and even till Henry I., time was computed by nights: as fortnight for two weeks.

NIGHT WALKERS. Persons who sleep by day and walk by night: 5 Edw. III. c. 14; that is, persons of suspicious appearance and demeanor, who walk by night. In many of the states there are statutes against this practice; 1 Bish. Cr. L. § 501, n. See State v. Dowers, 45 N. H. 543. Watchmen may undoubtedly arrest them; and it is said that private persons may also do so; 2 Hawk. Pl. Cr. 120. But see 3 Taunt. 14; Hamm. N. P. 135. See 4 Steph. Com. 227.

NIHIL CAPIAT PER BREVE (Lat. that he take nothing by his writ). The form of judgment against the plaintiff in an action, either in bar or in abatement. When the plaintiff has commenced his proceedings by bill, the judgment is *nihil capiat per billam.* Co. Litt. 363.

NIHIL DICIT (Lat. he says nothing). The name of the judgment rendered against a defendant who fails to put in a plea or answer to the plaintiff's declaration by the day assigned. In such a case, judgment is given against the defendant of course, as he says nothing why it should not. See 15 Viner, Abr. 556; Dane, Abr. Index.

NIHIL EST (Lat. there is nothing). A form of return made by a sheriff where he has been unable to serve the writ. "Although *non est inventus* is the more frequent return in such case, yet it is by no means so full an answer to the command of the writ as is the return of *nihil.* That amounts to an averment that the defendant has nothing in the bailiwick; no dwelling-house, no family, no residence; and no personal presence to enable the officer to make the service required by the act of assembly. It is, therefore, a full answer to the exigency of the writ." Sherer v. Bank, 33 Pa. 139.

NIHIL HABET (Lat. he has nothing). The name of a return made by a sheriff, marshal, or other proper officer, to a *scire facias* or other writ, when he has not been able to serve it on the defendant. Sullivan v. Johns, 5 Whart. (Pa.) 367.

Two returns of *nihil* in proceedings *in rem* are, in general, equivalent to a service; Yelv. 112; Cumming v. Eden's Devisees, 1 Cow. (N. Y.) 70; Colley v. Latimer, 5 S. & R. (Pa.) 211; Taylor v. Young, 71 Pa. 81.

NIHILS. See NICHILLS.

NIL DEBET (Lat. he owes nothing). The general issue in debt on simple contract. Gould. Pl. 284. It is in the following form: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." When, in debt on specialty, the deed is the only inducement to the action, the general issue is *nil debet*. Steph. Pl. 174, n.; Bullis v. Giddens, 8 Johns. (N. Y.) 83. In English practice, by rule 11, Trinity Term, 1853, the plea of *nil debet* was abolished; 2 Chitty, Pl. 275.

NIL HABUIT IN TENEMENTIS. (Lat.). A plea by which the defendant, who is sued by his landlord in debt for rent upon a lease, but by deed indented, denies his landlord's title to the premises, alleging *that he has no interest in the tenements*. 2 Lilly, Abr. 214; 12 Viner, Abr. 184.

NISI PRIUS (Lat. unless before). For the purpose of holding trials by jury. Important words in the writ (*venire*) directing the sheriff to summon jurors for the trial of causes depending in the superior courts of law in England, which have come to be adopted, both in England and the United States, to denote those courts or terms of court held for the trial of civil causes with the presence and aid of a jury.

The origin of the use of the term is to be traced to a period anterior to the institution of the commission of *nisi prius* in its more modern form. By Magna Carta it was provided that the common pleas should be held in one place, and should not follow the person of the king; and by another clause, that assizes of novel disseisin and of mort d'ancestor, which were the two commonest forms of actions to recover land, should be held in the various counties before the justices in eyre. A practice obtained very early, therefore, in the trial of trifling causes, to continue the cause in the superior court from term to term, provided the justices in eyre did not sooner (*nisi prius justiciarii*) come into the county where the cause of action arose, in which case they had jurisdiction when they so came. Bracton, l. 3, c. 1, § 11. By the statute of *nisi prius*, 13 Edw. I. c. 30, enforced by 14 Edw. III. c. 16, justices of assize were empowered to try common issues in trespass and other suits, and return them, when tried, to the superior court, where judgment was given. The clause was then left out of the continuance and inserted in the venire, thus: *"Præcipimus tibi quod venire facias coram justiciariis nostris apud Westm. in Octavis Scti Michælis, nisi talis et talis, tali die et loco, ad partes illas venerint duodecim,"* etc. (we command you that you cause to come before our justices at Westminster, on the octave of Saint Michael, *unless* such and such a one, on such a day and place, shall come to those parts, twelve, etc.). Under the provisions of 42 Edw. III. c. 11, the clause is omitted from the venire, and the jury is respited in the court above, while the sheriff summons them to appear before the justices, upon a *habeas corpora juratorum*, or, in the king's bench, a *distringas*. See Sell. Pr. Introd. lxv.; 1 Spence, Eq. Jur. 116; 3 Shars. Bla. Com. 352-354; 1 Reeve, Hist. Eng. Law 245, 382.

See ASSIZE; COURT OF ASSIZE AND NISI PRIUS; JURY.

NISI PRIUS ROLL. The transcript of a case made from the record of the superior court in which the action is commenced, for use in the nisi prius court.

It includes a history of all the proceedings in the case, including the declaration, plea, replication, rejoinder, issue, etc. It must be presented in proper manner to the nisi prius court. When a verdict has been obtained and entered on this record, it becomes the *postea*, and is returned to the superior court.

NITHING. See NIDERLING.

NO AWARD. The name of a plea in an action on an award. Barlow v. Todd, 3 Johns. (N. Y.) 367.

NO BILL. Words frequently indorsed on a bill of indictment by the grand jury when they have not sufficient cause for finding a true bill. They are equivalent to *Not found*, or *Ignoramus*. State v. Fitch, 2 N. & M'C. (S. C.) 558.

NOBILITY. An order of men, in several countries, to whom special privileges are granted. The constitution of the United States provides, Art. 1, § 10, that "no state shall grant any title of nobility," and § 9, that "no title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any title of any kind whatever, from any king, prince, or foreign state." It is singular that there should not have been a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress, but it has not been ratified by a sufficient number of states to make it a part of the constitution, probably from a growing sense that it is unnecessary. Rawle, Const. 120; Story, Const. § 1350; Federalist No. 84.

NOCTANTER (By night). A writ which issued out of chancery and was returned to the king's bench for the prostration of inclosures, etc. It was repealed by 7 & 8 Geo. IV. c. 27.

NOCTES DE FIRMA. In Domesday book understood of entertainment of meat and drink for so many nights. Toml. Law Dict. See NIGHT.

NOCUMENTUM (Lat. harm, nuisance). **In Old English Law.** A thing done whereby another man is annoyed in his free lands or tenements. Also, the *assize* or writ lying for the same. Fitzh. N. B. 183; Old N. B. 108, 109. Manw. For. Laws, c. 17, divides *nocumentum* into *generale*, *commune*, *speciale*. Reg. Orig. 197, 199; Coke, Will Case. *Nocumentum* was also divided into *damnosum*, for which no action lay, it being done by an irresponsible agent, and *injuriosum et damnosum*, for which there were several remedies. Bracton 221; Fleta, lib. 4, c. 26, § 2.

NOISE. See NUISANCE; INJUNCTION.

NOL. PROS. See NOLLE PROSEQUI.

NOLENS VOLENS (Lat.). Whether willing or unwilling.

NOLISSEMENT. In French Law. Affreightment. Ord. Mar. liv. 3, t. 1.

NOLLE PROSEQUI. An entry made on the record, by which the prosecutor or plaintiff declares that he will proceed no further. See Tr. & H. Pr. 566.

A *nolle prosequi* may be entered either in a criminal or a civil case. In *criminal* cases, before a jury is impanelled to try an indictment, and also after conviction, the attorney-general has power to enter a *nolle prosequi* without the consent of the defendant; but after a jury is impanelled a *nolle prosequi* cannot be entered without the consent of the defendant; State v. Roe, 12 Vt. 93; State v. Fleming, 7 Humphr. (Tenn.) 152, 46 Am. Dec. 73; Durham v. State, 9 Ga. 306. See Com. v. Cain, 102 Mass. 487; State v. Smith, 49 N. H. 155, 6 Am. Rep. 480. It is for the prosecuting officer to enter a *nol. pros.* in his discretion; State v. Thompson, 10 N. C. 613; but in some states leave must be obtained of the court; Anonymous, 1 Va. Cas. 139; State v. Roe, 12 Vt. 93.

It may be entered as to one of several defendants; 11 East 307.

The effect of a *nolle prosequi*, when obtained, is to put the defendant without day; but it does not operate as an acquittal; for he may be afterwards reindicted, and, it is said, even upon the same indictment fresh process may be awarded; 6 Mod. 261; Com. Dig. *Indictment* (K); Com. v. Wheeler, 2 Mass. 172; State v. Thornton, 35 N. C. 256. See 3 Cox, C. C. 93; Williams v. State, 57 Ga. 478; State v. Primm, 61 Mo. 173.

A *nolle prosequi* as to some of the counts in an indictment works no acquittal, but leaves the prosecution just as though such counts had never been inserted in the indictment; Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545.

In *civil cases*, a *nolle prosequi* is considered not to be of the nature of a *retraxit* or release, as was formerly supposed, but an agreement only not to proceed either against *some* of the defendants, or as to *part* of the suit. See 1 Wms. Saund. 207; 1 Chitty, Pl. 546. A *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; 3 Term 511.

In civil cases, a *nolle prosequi* may be entered as to one of several counts; Brown v. Feeter, 7 Wend. (N. Y.) 301; or to one of several defendants; Minor v. Bank, 1 Pet. (U. S.) 80, 7 L. Ed. 47; as in the case of a joint contract, where one of two defendants pleads infancy, the plaintiff may enter a *nolle prosequi* as to him and proceed against the other; Woodward v. Newhall, 1 Pick. (Mass.) 500.

See, generally, Beidman v. Vanderslice, 2 Rawle (Pa.) 334; Grahame v. Harris, 5 Gill. & J. (Md.) 489; Judson v. Gibbons, 5 Wend. (N. Y.) 224.

An entry of *nolle prosequi* does not amount to a *retraxit;* it may be entered by plaintiff as to a part of the suit or as to one of the defendants where the action is joint and several, or where the defendants sever in their pleas; but not as to a defendant in assumpsit where the action is joint (unless it be for some matter which may be pleaded for his personal discharge); Beidman v. Vanderslice, 2 Rawle (Pa.) 334. It rather resembles a continuance; 1 Troub. & Haly Pr. § 566.

NOLO CONTENDERE (Lat. I do not wish to contest). A plea sometimes accepted in criminal cases not capital whereby the defendant does not directly admit himself to be guilty, but tacitly admits it by throwing himself upon the mercy of the court and desiring to submit to a small fine, which plea the court may either accept or decline. Chitty, Crim. L. 431. The difference in effect between this "implied confession" and a plea of guilty is that, after the latter, not guilty cannot be pleaded in an action of trespass for the same injury, whereas it may be pleaded at any time after the former. The defendant making this plea may take exception in arrest of judgment for faults apparent on the record; *id.*

The acceptance of the plea is said to rest entirely upon the discretion of the trial judge; State v. Henson, 66 N. J. L. 601, 50 Atl. 468, 616; State v. La Rose, 71 N. H. 435, 52 Atl. 943; Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449. This plea has the same effect in a criminal case as the plea of guilty, to the extent that judgment and sentence may be pronounced as if upon a verdict of guilty; Com. v. Ingersoll, 145 Mass. 381, 14 N. E. 449; Clark, Crim. Proc. 374; Com. v. Holstine, 132 Pa. 361, 19 Atl. 273. The legal effect of the plea is the same as that of a plea of guilty so far as all the proceedings on the indictment are concerned; U. S. v. Hartwell, 3 Cliff. 221, Fed. Cas. No. 15,318; State v. Siddall, 103 Me. 144, 68 Atl. 634; State v. Judges, 46 N. J. L. 112; a sentence thereon is a "conviction"; it is a waiver of all formal defects; Com. v. Hinds, 101 Mass. 210; but defendant may still move in arrest of judgment; Com. v. Northampton, 2 Mass. 116.

It is not admissible in a civil proceeding on the same facts to show that the defendant was guilty; White v. Creamer, 175 Mass. 567, 56 N. E. 832. The plea, if accepted, cannot be withdrawn and a plea of not guilty entered except by leave of court; State v. Siddall, 103 Me. 144, 68 Atl. 634; but in Buck v. Com., 107 Pa. 486,

the court held the plea to be equivalent to a confession which may be withdrawn at any time before sentence. That it was, at one time, accepted in England only where a fine was to be imposed, see Tucker v. U. S., 196 Fed. 260, 116 C. C. A. 62, 41 L. R. A. (N. S.) 70, holding that it cannot be accepted where the punishment must be imprisonment, but may be, in an internal revenue case, where, under some counts, the punishment must be imprisonment and under others a fine alone. (The subject was here much discussed.)

The cases are collected in 41 L. R. A. (N. S.) 70.

In recent prosecutions under the Sherman act in the district court for the southern district of New York, Archbald, J., in accepting such plea, said: "This plea is a well recognized one and results in a sentence, and in that respect entirely fulfills the law. I have received this plea in other courts."

NOMEN (Lat.). **In Civil Law.** A name of a person or thing. In a stricter sense, the name which declared the *gens* or family: as, Porcius, Cornelius; the *cognomen* being the name which marked the individual: as Cato, Marcus; *agnomen* a name added to the cognomen for the purpose of description. The name of the person himself: *e. g. nomen curiis addere.* The name denoting the condition of a person or class: *e. g. nomen liberorum*, condition of children. Cause or reason (*pro causa aut ratione*): *e. g. nomine culpæ*, by reason of fault. A mark or sign of anything, corporeal or incorporeal. *Nomen supremum, i. e.* God. Debt or obligation of debt. A debtor. See Calvinus, Lex.

In Old English Law. A name. The Christian name, *e. g.* John, as distinguished from the family name; it is also called *prænomen.* Fleta, lib. 4, c. 10, §§ 7, 9; Law Fr. & Lat. Dict.

NOMEN COLLECTIVUM (Lat.). A word in the singular number which is to be understood in the plural in certain cases. Misdemeanor, for example, is a word of this kind, and when in the singular may be taken as *nomen collectivum* and including several offences. 2 B. & Ad. 75. *Heir*, in the singular, sometimes includes all the heirs. *Felony* is not such a term.

NOMEN GENERALISSIMUM (Lat.). A most universal or comprehensive term: *e. g.* land. 2 Bla. Com. 19; 3 *id.* 172; Tayl. Law Gloss. So *goods.* 2 Will. Ex. 1014.

NOMINAL DAMAGES. A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.

Those awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show; Bellingham B. & B. C. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144.

Wherever any act injures another's right, and would be evidence in future in favor of a wrong-doer, an action may be sustained for an invasion of the right without proof of any specific injury; 1 Wms. Saund. 346 *a;* Bassett v. Mfg. Co., 28 N. H. 438; Chapman v. Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401; and wherever the breach of an agreement or the invasion of a right is established, the law infers some damage, and if none is shown will award a trifling sum: as, a penny, one cent, six and a quarter cents, etc.; Burnap v. Wight, 14 Ill. 301; Sedgw. Dam. 47; Field, Damages § 860.

Thus, such damages may be awarded in actions for flowing lands; Pastorius v. Fisher, 1 Rawle (Pa.) 27; Bassett v. Mfg. Co., 28 N. H. 438; injuries to commons; 2 East 154; violation of trade-marks; 4 B. & Ad. 410; infringement of patents; Lee v. Pillsbury, 49 Fed. 747; diversion of water-courses; 5 B. & Ad. 1; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; but see Burden v. Mobile, 21 Ala. 309; McElroy v. Goble, 6 Ohio St. 187; trespass to lands; Dixon v. Clow, 24 Wend. (N. Y.) 188; Carter v. Wallace, 2 Tex. 206; neglect of official duties, in some cases; Goodnow v. Willard, 5 Metc. (Mass.) 517; Bruce v. Pettengill, 12 N. H. 341; breach of contracts; Horton v. Bauer, 129 N. Y. 148, 29 N. E. 1; Excelsior Needle Co. v. Smith, 61 Conn. 56, 23 Atl. 693; Watts v. Weston, 62 Fed. 136, 10 C. C. A. 302; Dulaney v. Refining Co., 42 Mo. App. 659; when substantial damages have not been sustained; Stock Quotation Tel. Co. v. Board of Trade, 44 Ill. App. 358; and many other cases where the effect of the suit will be to determine a right; 12 Ad. & E. 488; Moulton v. Chapin, 28 Me. 505; Whitehead v. Ducker, 11 Smedes & M. (Miss.) 98; Henry v. Banking Co., 89 Ga. 815, 15 S. E. 757; Weber v. Squier, 51 Mo. App. 601. And see, in explanation and limitation; 10 B. & C. 145; 1 Q. B. 636; Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Jennings v. Loring, 5 Ind. 250.

The title or right is as firmly established as though the damages were substantial; Sedgw. Dam. 47. As to its effect upon costs, see *id.* 55; Ryder v. Hathaway, 2 Metc. (Mass.) 96.

See DAMAGES; MEASURE OF DAMAGES.

NOMINAL PARTNER. One who allows his name to appear as a member of a firm, wherein he has no real interest. See PARTNER.

NOMINAL PLAINTIFF. One who is named as the plaintiff in an action, but who has no interest in it, having assigned the cause or right of action to another, for whose use it is brought.

In general, he cannot interfere with the

rights of his assignee, nor will he be permitted to discontinue the action, or to meddle with it; Welch v. Mandeville, 1 Wheat. (U. S.) 233, 4 L. Ed. 79; Bisp. Eq. § 172; Greenl. Ev. § 173.

NOMINATE CONTRACT. A contract distinguished by a particular name, the use of which name determines the rights of all the parties to the contract: as, purchase and sale, hiring, partnership, loan for use, deposit and the like. The law thus supersedes the necessity for special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary, to the explication of that contract. In Roman law there were twelve nominate contracts, with a particular action for each. Bell, Dict. *Nominate and Innominate;* Mackeldey, Civ. Law §§ 395, 408; Dig. 2. 14. 7. 1.

NOMINATION. An appointment: as, I nominate A B executor of this my last will.

A proposal or naming. The word nominate is used in this sense in the constitution of the United States, art. 2, s. 2, § 2: the president "shall nominate, and by and with the consent of the senate shall appoint, ambassadors," etc.

In an agreement for reference, a provision that each party shall nominate a referee means not only naming him, but also the communication of the nomination to the other party. 17 L. J. Q. B. 2; 11 Q. B. 7.

As to nominations under modern ballot laws, see ELECTION.

NOMINE PŒNÆ (Lat. in the nature of a penalty). **In Civil Law.** A condition annexed to heirship by the will of the deceased person. Domat, Civ. Law; Hallifax, Anal.

At Common Law. A penalty fixed by covenant in a lease for non-performance of its conditions. 2 Lilly, Abr. 221.

It is usually a gross sum of money, though it may be anything else, appointed to be paid by the tenant to the reversioner, if the duties are in arrear, in addition to the duties themselves. Hamm. N. P. 411.

To entitle himself to the *nomine pœnæ*, the landlord must make a demand of the rent on the very day, as in the case of a reentry; 1 Saund. 287 *b;* 7 Co. 28 *b;* Co. Litt. 202 *a*. A distress cannot be taken for a *nomine pœnæ* unless a special power to distrain be annexed to it by deed; 3 Bouvier, Inst. n. 2451. See Bac. Abr. *Rent* (K 4); Dane, Abr. Index.

NOMINEE. One who has been named or proposed for an office.

NOMOCANON. A body of canon law with the addition of imperial laws bearing upon ecclesiastical matters; also a collection of the canons of the ancient church and fathers without regard to the imperial constitutions.

NON-ABILITY. Inability; an exception against a person. Fitz. Nat. Brev. 35, 65.

NON ACCEPTAVIT (Lat. he did not accept). The name of a plea to an action of assumpsit brought against the drawee of a bill of exchange upon a supposed acceptance by him. See 4 M. & G. 561.

NON-ACCESS. The non-existence of sexual intercourse between husband and wife is generally expressed by the words non-access of the husband to the wife; which expressions, in a case of bastardy, are understood to mean the same thing. 2 Stark, Ev. 218, n. See ACCESS.

NON-AGE. By this term is understood that period of life from birth till the arrival at twenty-one years. In another sense it means under the proper age to be of ability to do a particular thing: as, when non-age is applied to one under the age of fourteen, who is unable to marry. See AGE.

NON-APPARENT OR NON-CONTINUOUS EASEMENTS. Discontinuous easements. Such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way, or right of drawing a seine upon the shore. Fetters v. Humphreys, 18 N. J. Eq. 262. See EASEMENT.

NON-ASSUMPSIT (Lat. he did not undertake). The general issue in an action of assumpsit. Andr. Steph. Pl. 231.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise, in manner and form as the said A B hath above complained. And of this he puts himself upon the country."

Under this plea almost every matter may be given in evidence, on the ground, it is said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the obligation of the contract, at the time when the action was commenced, goes to the gist of the action. 1 B. & P. 481. See 12 Viner, Abr. 189; Com. Dig. *Pleader* (2 G 1).

NON ASSUMPSIT INFRA SEX ANNOS (Lat. he has not undertaken within six years). The plea by which, when pleadings were in Latin, the defendant alleged that the obligation was not undertaken and the right of action had not accrued within six years, the period of limitation of the right to bring suit. See LIMITATION. It is still in use.

NON BIS IN IDEM. In Civil Law. A phrase which signifies that *no one shall be twice tried for the same offence:* that is, that when a party accused has been once tried by a tribunal in the last resort, and either convicted or acquitted, he shall not

again be tried. Code 9. 2. 9. 11; Merlin, *Répert.* See JEOPARDY.

NON CEPIT MODO ET FORMA (Lat. he did not take in manner and form). The plea which raises the general issue in an action of replevin; or rather which involves the principal part of the declaration, for, properly speaking, there is no general issue in replevin; Morris, Repl. 142.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle (*or*, goods and chattels, according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

It denies the taking the things and having them in the place specified in the declaration, both of which are material in this action. Steph. Pl., Andr. ed. 239, n.; 1 Chitty, Pl. 490.

NON-CLAIM. An omission or neglect by one entitled to make a demand within the time limited by law: as, when a continual claim ought to be made, a neglect to make such claim within a year and a day.

NON-COMMISSIONED OFFICER. A subordinate officer who holds his rank not by commission from the executive authority of a state or nation, but by appointment by a superior officer.

NON COMPOS MENTIS (Lat. not of sound mind, memory, or understanding). A generic term, including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness. Co. Litt. 247; 4 Co. 124; 4 Comyns, Dig. 613; 5 *id.* 186; Shelf. Lun. 1. See INSANITY.

NON CONCESSIT (Lat. he did not grant). **In English Law.** The name of a plea by which the defendant denies that the crown granted to the plaintiff by letters-patent the rights which he claims as a concession from the king: as, for example, when a plaintiff sues another for the infringement of his patent right, the defendant may deny that the crown has granted him such a right. It does not deny the grant of a patent, but of the patent as described in the plaintiff's declaration; 3 Burr. 1544; 6 Co. 15 *b*. Also a plea resorted to by a stranger to a deed, because estoppels do not hold with respect to strangers. It brought into issue the title of the grantor as well as the operation of the deed; Whart. Dict.

NON-CONFORMISTS. A name given to certain dissenters from the rites and ceremonies of the church of England.

NON CONSTAT (Lat. it does not appear. It is not certain). Words frequently used, particularly in argument, to express dissatisfaction with the conclusions of the other party: as, it was moved in arrest of judgment that the declaration was not good, because *non constat* whether A B was seventeen years of age when the action was commenced. Swinb. pt. 4, § 22, p. 331.

NON CULPABILIS. A plea of not guilty. It is usually abbreviated *non cul.;* 16 Viner, Abr. 1.

Issue was joined thereon by the abbreviation *"prit";* i. e. *paratus*, ready to prove the prisoner guilty. In later years, the officer of the court began to apply these abbreviations to the prisoner: *"Culprit*, how wilt thou be tried?" This is commonly believed to be the origin of the word *culprit.* 4 Steph. Com. 340; New Engl. Dict.

NON DAMNIFICATUS (Lat. not injured). A plea in the nature of a plea of performance to an action of debt on a bond of indemnity, by which the defendant asserts that the plaintiff has received no damage. 1 B. & P. 640, n. *a;* 1 Saund. 116, n. 1; 2 *id.* 81; Douglass v. Clark, 14 Johns. (N. Y.) 177; Brent v. Davis, 10 Wheat. (U. S.) 396, 6 L. Ed. 350; Washington v. Young, 10 Wheat. (U. S.) 406, 6 L. Ed. 352.

NON DECIMANDO. See DE NON DECIMANDO.

NON DEDIT. The general issue in formedon. See NE DONA PAS.

NON DEMISIT (Lat. he did not demise). A plea proper to be pleaded to an action of debt for rent, when the plaintiff declares on a parol lease. Gilb. Debt 436; Bull. N. P. 177; 1 Chitty, Pl. 477. A plea in bar, in replevin, to an avowry for arrears of rent, that the avowant did not demise. Morris, Repl. 179. It cannot be pleaded when the demise is stated to have been by indenture; 12 Viner, Abr. 178; Com. Dig. *Pleader* (2 W 48).

NON DETINET (Lat. he does not detain). The general issue in an action of detinue. Its form is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels (or 'deeds and writings,' according to the subject of the action) in the said declaration specified; or any part thereof, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country." Andr. Steph. Pl. 231.

It puts in issue the detainer only: a justification must be pleaded specially; 8 Dowl. Pract. Cas. 347. It is a proper plea to an action of debt on a simple contract in the case of executors and administrators. 6 East 549; Bac. Abr. *Pleas* (I); 1 Chitty, Pl. 476. See DETINET.

NON-ENUMERATED DAY. Used to denote a motion day in New York on which

the court hears motions classified by the Code as "non-enumerated motions." Jackson v. ———, 2 Caines (N. Y.) 259.

NON EST FACTUM (Lat. is not *his* deed). **In Pleading.** A plea to an action of debt on a bond or other specialty.

Its form is, "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that the said supposed writing obligatory (or 'indenture,' or 'articles of agreement,' according to the subject of the action) is not his deed. And of this he puts himself upon the country." Cleaton v. Chambliss, 6 Rand. (Va.) 86; Porter v. Martin, 1 Litt (Ky.) 158.

It is a proper plea when the deed is the foundation of the action; 1 Wms. Saund. 38, note 3; 2 *id.* 187 *a*, note 2; 2 Ld. Raym. 1500; Minton v. Woodworth, 11 Johns. (N. Y.) 476; and cannot be proved as declared on; 4 East 585; on account of non-execution; 6 Term 317; or variance in the body of the instrument; 4 Maule & S. 470; 2 D. & R. 662. Under this plea the plaintiff may show that the deed was void *ab initio;* Van Valkenburgh v. Rouk, 12 Johns. (N. Y.) 337; Stoever v. Weir, 10 S. & R. (Pa.) 25; see Marine Ins. Co. v. Hodgson, 6 Cra. 219, 3 L. Ed. 200; or became so after making and before suit; 5 Co. 119 *b;* 11 *id.* 27. See 1 Chitty, Pl. 417, n.

In covenant, the defendant may, under this plea, avail himself of a mis-statement or omission of a qualifying covenant; 9 East 188; 1 Campb. 70; or omission of a condition precedent; 11 East 639; 7 D. & R. 249.

NON EST INVENTUS (Lat. he is not found). The sheriff's return to a writ requiring him to arrest the person of the defendant, which signifies that he is *not to be found* within his jurisdiction. The return is usually abbreviated *N. E. I.* Chitty, Pr. The English form "not found" is also commonly used.

NON-FEASANCE. The non-performance of some act which ought to be performed.

When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment: as, if a statute require the supervisors of the highways to repair such highways, the neglect to repair them may be punished. See 1 Russ. Cr. 48; MANDATUM.

NON FECIT (Lat. he did not make it). The name of a plea, for example, in an action of assumpsit on a promissory note. 3 M. & G. 446. Rarely used.

NON FECIT VASTUM CONTRA PROHIBITIONEM (Lat. he did not commit waste against the prohibition). The name of a plea to an action founded on a writ of estrepement, that the defendant did not commit waste contrary to the prohibition. 2 Bla. Com. 226.

NON IMPEDIVIT (Lat. he did not impede). The plea of the general issue in *quare impedit.* 3 Bla. Com. 305; 3 Woodd. Lect. 36. In law French, *ne disturba pas.*

NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI. A writ to prohibit bailiffs, etc., from levying a distress upon any man without the king's writ touching his freehold. Cowell.

NON INFREGIT CONVENTIONEM (Lat. he has not broken the covenant). A plea in an action of covenant. This plea is not a general issue: it merely denies that the defendant has broken the covenants on which he is sued. It being in the negative, it cannot be used where the breach is also in the negative. Bacon, Abr. *Covenant* (L); 3 Lev. 19; 2 Taunt. 278; Phelps v. Sawyer, 1 Aik. (Vt.) 150; Bender v. Fromberger, 4 Dall. (Pa.) 436, 1 L. Ed. 898; Roosevelt v. Fulton's Heirs, 7 Cow. (N. Y.) 71.

NON-INTERCOURSE. The refusal of one state or nation to have commercial intercourse with another. See EMBARGO.

NON-INTERCOURSE ACT. An act prohibiting commercial intercourse with one or more foreign nations. On June 13, 1798, an act was passed suspending commercial intercourse between the United States and France and her dependencies. On March 1, 1809, an act was passed interdicting commercial intercourse between the United States and Great Britain and France, and their dependencies. The act forbade entrance into the ports or harbors of the United States by the public vessels of England and France and imposed a penalty upon any citizen who should afford any aid or supplies to such public ships. It provided, moreover, that if any vessel sailing under the flag of Great Britain or France should, after May 20th following, enter the ports of the United States, it should be forfeited with its cargo. The importation of goods from England and France was forbidden to vessels of any nationality, subject to forfeiture of the imported articles. On June 28th a second act was passed providing that the former act should continue in force until the end of the next session of congress. On May 1, 1810, a third act was passed forbidding British and French armed vessels to enter the ports of the United States. On March 2, 1811, an act was passed providing that, in case Great Britain should revoke or modify her edict in violation of the neutral commerce of the United States, the restrictions imposed by the act of March 1, 1809, should be removed.

NON INTROMITTENDO QUANDO BREVE DE PRÆCIPI IN CAPITE SUBDOLE IMPETRATUR. A writ which used to be directed to the justices of the bench

or in eyre, commanding them not to give one who had (under cover of entitling the king to land, etc., as holding of him *in capite*) deceitfully obtained the writ, the benefit of the same, but to put him to his writ of right if he thought fit to use it. Cowell.

NON-ISSUABLE PLEAS. Those upon which an issue would not determine the action upon the merits, as a plea in abatement.

NON-JOINDER. In Pleading. The omission of one or more persons who should have been made parties to a suit at law or in equity, as plaintiffs or defendants.

In Equity. It must be taken advantage of before the final hearing; Kean v. Johnson, 9 N. J. Eq. 401; California Electrical Works v. Finck, 47 Fed. 583; except in very strong cases; Mechanics Bk. v. Seton, 1 Pet. (U. S.) 299, 7 L. Ed. 152; as, where a party indispensable to rendering a decree appears to the court to be omitted; Woodward v. Wood, 19 Ala. 213. The objection may be taken by demurrer, if the defect appear on the face of the bill; Spear v. Campbell, 4 Scam. (Ill.) 424; Shubrick's Ex'rs v. Russell, 1 Des. (S. C.) 315; or by plea, if it do not appear; Gamble v. Johnson, 9 Mo. 605. The objection may be avoided by waiver of rights as to the party omitted; Bull v. Bell, 4 Wis. 54; or a supplemental bill filed, in some cases; Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605. It will not cause dismissal of the bill in the first instance; Pringle v. Carter, 1 Hill (S. C.) 53; but will, if it continues after objection made; Lyde v. Taylor, 17 Ala. 270; without prejudice; Picquet v. Swan, 5 Mas. 561, Fed. Cas. No. 11,135; Miller v. McCan, 7 Paige Ch. (N. Y.) 451. The cause is ordered to stand over in the first instance; Colt v. Lasnier, 9 Cow. (N. Y.) 320. See JOINDER; PARTIES; MISJOINDER.

In Law. See ABATEMENT; PARTIES.

In England, the Judicature Act of 1875, Ord. xvi., has made very full provisions as to the joinder of parties, and the consequences of misjoinder and non-joinder. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.

NON JURIDICUS. See DIES NON.

NON JURORS. In English Law. Persons who refuse to take the oaths, required by law, to support the government. See Moore v. Few, 1 Dall. (U. S.) 170, 1 L. Ed. 86.

NON LIQUET (Lat. it is not clear). **In Civil Law.** Words by which the judges (*judices*), in a Roman trial, were accustomed to free themselves from the necessity of deciding a cause when the rights of the parties were doubtful. On the tablets which were given to the judges wherewith to indicate their judgment, was written N. L.

See AMPLIATION.

NON MERCHANDIZANDO VICTUALIA. An ancient writ directed to justices of assize commanding them to inquire whether the officers of certain towns sold victuals in gross or by retail during the exercise of their office, contrary to a statute then in force, and to punish them accordingly. Cowell; Reg. Orig. 184.

NON MOLESTANDO. A writ which lay for him who was molested, contrary to the king's protection granted him. Cowell.

NON OBSTANTE. In English Law. These words, which literally signify *notwithstanding*, were used to express the act of the English king by which he dispensed with the law, that is, authorized its violation. He would by his license or dispensation make an offence dispunishable which was *malum in se;* but in certain matters which were *mala prohibita* he could, to certain persons and on special occasions, grant a *non obstante*. Vaugh. 330; 12 Co. 18; Bacon, Abr. *Prerogative* (D 7); 2 Reeve, Eng. C. L. 8, p. 83.

That the crown might, by the royal prerogative, make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium*, was held in Dyer 225, but the whole doctrine was abolished by the Bill of Rights.

NON OBSTANTE VEREDICTO. Notwithstanding the verdict. See JUDGMENT.

Judgment *non obstante veredicto*, strictly and technically, is a judgment given for the plaintiff, on his motion, where the defendant had a verdict, but it appears from the record that, either from some matter growing out of the pleading or because the fact found by the jury is immaterial, the defendant is not, in law, entitled to the judgment. In such cases where the common-law practice prevails, a writ of inquiry is awarded to assess the damages; 2 Tidd, Pr. 920. "The right method . . . is not to state the entry of judgment upon the verdict by rule, but to enter the verdict upon record, and then the judgment for the plaintiff *non obstante veredicto*." *id.* For a statement of the nature and effect of such a judgment at common law, see JUDGMENT. As appears from the definition there given, this was a judgment for the plaintiff, and in many of the states, it has been uniformly held that judgment *non obstante veredicto* can only be given for a plaintiff; the remedy for a defendant is to have the judgment arrested; Buckingham v. McCracken, 2 Ohio St. 287; Bellows v. Shannon, 2 Hill (N. Y.) 86. A motion by a defendant for a judgment *non obstante veredicto* is never allowable; Smith v. Powers, 15 N. H. 546; Sheehy v. Duffy, 89 Wis. 6, 61 N. W. 295; Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 956; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345; Burnham v. R. Co., 17 R. I. 544, 23 Atl. 638; Steph. Pl. [98]; 1

Freem. Judg. § 7; 1 Black, Judg. § 16; unless the well-settled common-law rule has been relaxed by statute or decisions; German Ins. Co. v. Frederick, 58 Fed. 144, 7 C. C. A. 122, 19 U. S. App. 24.

A motion for such judgment must be founded on the record alone; Stearn v. Clifford, 62 Vt. 92, 18 Atl. 1045; Smith v. Smith, 2 Wend. (N. Y.) 624; it cannot be rendered after a judgment upon a verdict has been entered; State v. Bank, 6 Smedes & M. (Miss.) 218, 45 Am. Dec. 280; Schelble v. Hart (Ky.) 12 S. W. 628. It is allowed where a verdict has been found for the defendant on an insufficient plea in avoidance; Jones v. Fennimore, 1 G. Greene (Iowa) 134; Dewey v. Humphrey, 5 Pick. (Mass.) 187; that is, where the plea confesses the action and entirely fails to avoid it; Martindale v. Price, 14 Ind. 115; or if found true, is neither bar nor answer; Sullenberger v. Gest, 14 Ohio 204; or if an immaterial issue tendered by the plaintiff was found for the defendant and a repleader was unnecessary to effect justice; Shreve v. Whittlesey, 7 Mo. 473; or if on motion for a new trial it is clear that in no event could damages be recovered on the cause of action; Ballou v. Harris, 5 R. I. 419. But such a judgment will not be entered where the evidence on material issues of fact was conflicting to such an extent as to require the submission of such issues to the jury; Blazosseck v. Sherman Co., 141 Fed. 1022.

In Pennsylvania, under a statute, where a point of law is reserved at the trial, the jury is instructed to find for the plaintiff, whereupon the defendant moves for judgment on the point reserved *non obstante veredicto.* See 2 Brewster, Prac. 1219. This statute is held by the United States supreme court to be not enforceable in the federal courts as being in conflict with the seventh amendment to the constitution; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. See NEW TRIAL. And in some other states, the technical common-law rule that this form of judgment should not be given for the defendant, has not been observed; though it would seem that this change of practice is due, in some degree, to the confusion of this subject with judgment on special verdicts and points reserved, and to the fact that judgments are frequently entered under the name *non obstante veredicto,* which properly and technically would not be such if the common-law distinctions were carefully observed. Such judgment for defendant has been entered in an action for damages where a plea of contributory negligence was not controverted; Louisville & N. R. Co. v. Mayfield (Ky.) 35 S. W. 924; or where plaintiff's evidence is a mere *scintilla;* Holland v. Kindregan, 155 Pa. 156, 25 Atl. 1077; or where special findings in plaintiff's favor were set aside as against undisputed evidence, and defendant moved for judgment on the remaining findings and undisputed evidence; Menominee R. S. & Door Co. v. R. Co., 91 Wis. 447, 65 N. W. 176. But such statute does not apply to a case in which the jury disagreed; McKinnon v. Rynkiewicz, 145 Fed. 863; and such motion by defendant will not be granted where the defence is a general denial; Virgin Cotton Mills v. Abernathy, 115 N. C. 402, 20 S. E. 522; or where the pleadings and evidence raise questions of fact proper for a jury; Slivitski v. Wien, 93 Wis. 460, 67 N. W. 730; or where the evidence supports a verdict for plaintiff, but the undisputed facts show the transaction to be within the statute of frauds; Templeman v. Gibbs (Tex.) 25 S. W. 736. A reservation of "the question whether there is any evidence in this case, to be submitted to the jury, on which plaintiff is entitled to recover," does not present a "point reserved" to authorize judgment for defendant *non obstante veredicto;* Yerkes v. Richards, 170 Pa. 346, 32 Atl. 1089; nor can such judgment be rendered for plaintiff where verdict is for defendant, subject to the question reserved whether, notwithstanding the findings, plaintiff was not entitled to recover; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52. Where there was a verdict for plaintiff subject to the opinion of the court on the question of law reserved, the court directed judgment for defendant *non obstante veredicto,* saying that it had the same effect as a directed verdict; Casey v. Pav. Co., 109 Fed. 744, affirmed 114 Fed. 189, 52 C. C. A. 145.

A motion for such judgment is properly denied, after verdict upon an issue distinctly raised by the answer and submitted to the jury without objection; Lewis v. Foard, 112 N. C. 402, 17 S. E. 9; or where the evidence is sufficient to support the verdict; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146; or where, after reserving a point on certain facts, other evidence is submitted to the jury, and it is uncertain on which evidence the jury found; Keifer v. Eldred Tp., 110 Pa. 1, 20 Atl. 592.

It is not sufficient that the verdict was contrary to the weight of the evidence; Manning v. Orleans, 42 Neb. 712, 60 N. W. 953; and the judgment can be entered only when the moving party is entitled to it upon the pleadings of the party who had the verdict; Gibbon v. Loan Ass'n, 43 Neb. 132, 61 N. W. 126.

In Ohio, judgment against a general verdict cannot be entered unless all the facts necessary to support such judgment are expressly found; Fairbank & Co. v. R. Co., 66 Fed. 471. In Indiana, a judgment *non obstante* will not be granted unless there is an irreconcilable conflict between the general verdict and the answer to the interrogatories; British-American Assur. Co. v. Wilson, 132 Ind. 278, 31 N. E. 938. When the special

finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly; School Dist. v. Lund, 51 Kan. 731, 33 Pac. 595. In Oregon, there is a statutory provision authorizing judgment for the other party where the verdict does not correspond with pleadings, and it is held that that right is not impaired by failing to move for judgment before verdict; Benicia Agr. Works v. Creighton, 21 Or. 495, 28 Pac. 775, 30 Pac. 676. In Minnesota, such judgment can be given only to a party who, after the testimony, moved to direct a verdict in his favor; Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366. In Kansas, by statute, such a judgment may be entered by the court in favor of the party against whom an adverse verdict has been rendered; Ft. Scott v. Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

In many states there are statutes on the subject which must be considered in connection with the decisions.

NON OMITTAS (Lat. more fully, *non omittas propter libertatem*, do not omit on account of the liberty or franchise). There were districts or liberties in England in regard to which grants were formerly made by the crown to individuals, conferring on them or their bailiffs the exclusive privilege of executing legal process therein. When it became necessary to execute a writ in such a liberty, it was framed with a clause of *non omittas* specially authorizing the sheriff to enter; 2 Steph. Com. 683. This clause is now usually inserted in all processes addressed to sheriffs. Wharton, Lex.; 3 Chitty, Pr. 190, 310.

NON-PLEVIN. In Old English Law. A neglect to replevin land taken into the hands of the king upon default, within fifteen days, by which seisin was lost, as by default. Heugh. de Magn. Ch. c. 8. By 9 Edw. III. c. 2, no man shall lose his land by *non-plevin*.

NON PONENDIS IN ASSISSIS ET JURATIS. A writ which lay for persons who are summoned to attend the assizes or to sit on a jury and wish to be freed and discharged from the same. Reg. Orig. 100.

NON PROCEDENDO AD ASSISSAM REGE INCONSULTO. A writ to put a stop to the trial of a cause appertaining unto one who is in the king's service, etc., until the king's pleasure respecting the same be known. Cowell.

NON PROS. An abbreviation of *non prosequitur*, he does not pursue. Where the plaintiff, at any stage of the proceedings, fails to prosecute his action, or any part of it, in due time, the defendant enters *non prosequitur*, and signs final judgment and obtains costs against the plaintiff, who is said to be *non pros'd*. 2 Archb. Pr., Chitty ed. 1409; 3 Bla. Com. 296; 3 Chitty, Pr. 10; Caines, Pr. 102. The name *non pros.* is applied to the judgment so rendered against the plaintiff; 1 Sell. Pr.; Steph. Pl. 195.

When entered by defendant under a rule of court for failure to file a statement of claim within a year, it is said to be final; Patton's Pr. in Pa. 67; but no case is cited. See NOLLE PROSEQUI.

NON-RESIDENCE. In Ecclesiastical Law. The absence of spiritual persons from their benefices.

NON-RESIDENT. Not residing in the jurisdiction. Service of process on non-resident defendants is void, excepting cases which proceed *in rem*, such as proceedings in admiralty or by foreign attachment, and the like, or where the property in litigation is within the jurisdiction of the court.

One does not necessarily become a non-resident by absconding or absenting himself from his place of abode; Lindsey v. Dixon, 5 Mo. App. 291; nor does a mere casual or temporary absence on business or pleasure render one a non-resident, even if he may not have a house of usual abode in the state; Crawford v. Wilson, 4 Barb. (N. Y.) 504; if there be no intent to change his residence; Fitzgerald v. McMurran, 57 Minn. 312, 59 N. W. 199. But where a man has a settled abode, for the time being, in another state for the purpose of business or pleasure, he is a non-resident; Hanson v. Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127; and it has been held that one who departs from the state with his family and remains absent for about a year is a non-resident, though he has not acquired a residence elsewhere, and though he intended to return in a few months; Hanover N. Bk. v. Stebbins, 69 Hun 308, 23 N. Y. Supp. 529. See HOME; DOMICIL; RESIDENCE; PROCESS; SERVICE.

NON RESIDENTIA PRO CLERICIS REGIS. A writ addressed to a bishop charging him not to molest a clerk employed in the king's service, by reason of his non-residence. Cowell; Reg. Orig. 58.

NON SOLVENDO PECUNIAM AD QUAM CLERICUS MULCTATUR PRO NON RESIDENTIA. A writ prohibiting an ordinary from taking a pecuniary mulct imposed upon a clerk of the king's for non-residence. Cowell.

NON SUBMISSIT (Lat.). The name of a plea to an action of debt on a bond to perform an award, by which the defendant pleads that he did not submit. Bacon, Abr. *Arbitration, etc.* (G).

NON SUM INFORMATUS (Lat.). I am not informed. See JUDGMENT.

NON TENENT INSIMUL (Lat. they do not hold together). A plea to an action in partition, by which the defendant denies that he holds the property which is the subject of the suit, together with the complainant or plaintiff.

NON TENUIT (Lat. he did not hold). The name of a plea in bar in replevin, when the defendant has avowed for rent-arrear, by which the plaintiff avows that he did not hold in manner and form as the avowry alleges. Rosc. Real Act. 628.

NON-TENURE. A plea in a real action, by which the defendant asserted that he did not hold the land, or at least some part of it, as mentioned in the plaintiff's declaration. 1 Mod. 250; in which case the writ abates as to the part with reference to which the plea is sustained; Green v. Liter, 8 Cra. (U. S.) 242, 3 L. Ed. 545. It may be pleaded with or without a disclaimer. It was a dilatory plea, though not strictly in abatement; 2 Saund. 44, n. 4; Dy. 210; Booth, Real Act. 179; Hunt v. Sprague, 3 Mass. 312; but might be pleaded as to part along with a plea in bar as to the rest; 1 Lutw. 716; Rast. Ent. 231 *a*, *b*; and was subsequently considered as a plea in bar; Otis v. Warren, 14 Mass. 239; Miles v. Peirce, 2 N. H. 10; Bac. Abr. *Pleas* (I 9).

NON-TERM. The vacation between two terms of a court.

NON-TRADING PARTNERSHIP. A partnership organized for carrying on the business of sawing lumber pickets and lath is non-trading in character; Dowling v. Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795, reversing National Exch. Bank v. White, 30 Fed. 413.

NON-USER. The neglect to make use of a thing.

A right which may be acquired by use may be lost by non-user; and an absolute discontinuance of the use for twenty years affords presumption of the extinguishment of the right in favor of some other adverse right; Dyer v. Depui, 5 Whart. (Pa.) 584; Williams v. Nelson, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; but non-user of the franchise of a corporation is held insufficient to constitute a dissolution of the same without a judicial adjudication thereof; Parker v. Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 700.

See DISSOLUTION; FORFEITURE.

A right of way, by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is an intentional abandonment of the former way; Jamaica Pond Aqueduct Corp. v. Chandler, 121 Mass. 3. See ABANDONMENT; EASEMENT.

Every public officer is required to use his office for the public good; a non-user of a public office is, therefore, a sufficient cause of forfeiture; 2 Bla. Com. 153; 9 Co. 50.

As to repeal of a statute by non-user, see OBSOLETE.

NONSENSE. That which in a written agreement or will is unintelligible.

It is a rule of law that an instrument shall be so construed that the whole, if possible, shall stand. When a matter is written grammatically right, but it is unintelligible and the whole makes nonsense, some words cannot be rejected to make sense of the rest; 1 Salk. 324; but when matter is nonsense by being contrary and repugnant to some precedent sensible matter, such repugnant matter is rejected; 14 Viner, Abr. 142; 15 *id.* 560. The maxim of the civil law on this subject agrees with this rule: *Quæ in testamento ita sunt scripta ut intelligi non possent, perinde sunt ac si scripta non essent.* Dig. 50. 17. 73. 3. See AMBIGUITY; INTERPRETATION. In pleading, when matter is nonsense by being contradictory and repugnant to something precedent, the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected: as in ejectment where the declaration is of a demise on the *second* day of January, and that the defendant *postea scilicet*, on the *first* of January, ejected him, here the *scilicet* may be rejected as being expressly contrary to the *postea* and the precedent matter; 5 East 255; 1 Salk. 324.

NONSUIT. The name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue.

In construing a statute such as those existing in some states, extending the statute of limitations after a nonsuit is "suffered" so as to facilitate the bringing of a new suit a nonsuit has been defined as "any judgment of discontinuance or dismissal whereby the merits are left untouched"; Mason v. R. Co., 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N. S.) 914; and under this statute the dismissal of a cause for want of prosecution was held to be a nonsuit; Meddis v. Wilson, 175 Mo. 126, 74 S. W. 984; and the extension of the limitation was held not to begin to run until judgment on appeal from the nonsuit; Hewitt v. Steele, 136 Mo. 334, 38 S. W. 82.

A *voluntary* nonsuit is an abandonment of his cause by plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon. Runyon v. R. Co., 25 N. J. L. 556.

After the trial is begun, it is held in many jurisdictions that the plaintiff's right to take a nonsuit is not absolute, but lies in the discretion of the court, and will be denied when plaintiff gets all his own evidence in and is not surprised by defendant's evidence; Johnson v. Bailey, 59 Fed. 670, where many cases are cited which support the decision. But the practice in many jurisdictions is otherwise, particularly where the common law is adhered to, and it is permis-

sible to take a voluntary nonsuit at any time before verdict is rendered; Bradshaw v. Earnshaw, 11 App. D. C. 495; Lay v. Collins, 74 Ark. 536, 86 S. W. 281; New Hampshire Banking Co. v. Ball, 57 Kan. 812, 48 Pac. 137; Woodward v. Woodward, 84 Mo. App. 328; Helwig v. Judge, 73 Mich. 258, 41 N. W. 268; Beals v. Tel. Co., 53 Neb. 601, 74 N. W. 54. This is somewhat modified where the defendants set up a counter-claim (as to which, see *infra*); Summer v. Kelly, 38 S. C. 507, 17 S. E. 361; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

If a nonsuit is proper, to grant it prematurely is harmless error; Vincent v. Pac. Grove, 102 Cal. 405, 36 Pac. 773. Defendant waives his motion for a nonsuit and cannot base any claim of error upon it, where, after it is overruled, he proceeds with his defence and introduces testimony; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694. Exception cannot be taken to the court's refusal to enter a compulsory nonsuit; Medary v. Cathers, 161 Pa. 87, 28 Atl. 1012.

After a voluntary nonsuit taken by the plaintiff, the court may reinstate the case; Sharpless v. Sevier, 1 Overt. (Tenn.) 117; but it is said that the reinstatement is not as a matter of right; Grant v. Burgwyn, 88 N. C. 95. The case is still within the jurisdiction of the court, so as to entitle it to vacate the judgment on a showing of mistake; Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; but it has been held that the court has no authority to reinstate it against the consent of the defendant; Simpson v. Brock, 114 Ga. 294, 40 S. E. 266; although if the record shows that the court has acted irregularly and unadvisedly, it may and should, so long as its jurisdiction over the matter continues, reverse its action; Horton v State, 63 Neb. 34, 88 N. W. 146.

An *involuntary* nonsuit takes place when the plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict. Pratt v. Hull, 13 Johns. (N. Y.) 334.

At common law the plaintiff cannot be nonsuited against his will; for a party cannot be compelled to make default.

There is much difference of practice in the United States as to the granting of nonsuits or orders dismissing causes. In many of the state courts involuntary nonsuits are not allowed, either as matter of practice or because, as it is put in some cases, there is no authority to grant it. In some of the states there are statutes under which such nonsuits are authorized. And where there was a statute authorizing a nonsuit, it could only be granted upon the ground and in the manner therein provided; Burns v. Rodefer, 15 Nev. 59. Among the cases from states in which involuntary nonsuits are not allowed, are: Williams v. Port, 9 Ind. 551; Hill, M. & Co. v. Rucker, 14 Ark. 706; Cahill v. Ins. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Scruggs v. Brackin, 4 Yerg. (Tenn.) 528; Winston v. Miller, 12 S. & M. (Miss.) 550; Thweat v. Finch, 1 Wash. (Va.) 217; Kettlewell v. Peters, 23 Md. 312; French v. Smith, 4 Vt. 363, 24 Am. Dec. 616; Huston v. Berry, 3 Tex. 235; Mitchell v. Ins. Co., 6 Pick. (Mass.) 117; Saunders v. Coffin, 16 Ala. 421; Bryan v. Pinney, 3 Ariz. 34, 21 Pac. 332; Rankin v. Curtenius, 12 Ill. 334.

It has been frequently said that an involuntary nonsuit cannot be ordered in a federal court; Doe v. Grymes, 1 Pet. (U. S.) 469, 7 L. Ed. 224; Crane v. Morris, 6 Pet. (U. S.) 598, 609, 8 L. Ed. 514; Silsby v. Foote, 14 How. (U. S.) 218, 14 L. Ed. 394; Castle v. Bullard, 23 How. (U. S.) 172, 183, 16 L. Ed. 424; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; but in Central Trans. Co. v. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, the court after citing the above cases said: "Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below," citing Crane v. Morris and Castle v. Bullard, *supra*, and the court proceeded to consider the case on the merits and affirmed the judgment of nonsuit, apparently following the action of the court below which was in accordance with a Pennsylvania statute providing for such practice in the state courts. And that case was cited with approval in Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442, where the cases denying the power to grant an involuntary nonsuit are said to have been based "upon the absence of authority, whether statutory or by a rule promulgated by this court," and the action under the state statute is approved and taken as authority "that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury."

The reason for refusing to permit compulsory nonsuits is given in Booe v. Davis, 5 Blackf. (Ind.) 115, 33 Am. Dec. 457, in these words: "The plaintiff has a right to have every question of fact in his case tried by a jury; and to nonsuit him on the trial, against his consent, would be an infringement of that right." In one case it was held that the court had no power to dismiss a suit on the ground that it appeared from the evidence that the contract sued on was illegal and void; Hudson v. Strickland, 49 Miss. 591. In French v. Smith, *supra*, it was said: "In this state, where the right of review is given by statute, a nonsuit should not be ordered at the first trial, as the plaintiff may be able to supply the defects in his first proofs; nor

at the last, because public policy will then require that the controversy should be ended."

Cases in which it is held that the power of compulsory nonsuit exists are: Bailey v. Kimball, 26 N. H. 351; Naugatuck R. Co. v. Button Co., 24 Conn. 468; Ensminger v. McIntire, 23 Cal. 593; Ellis v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; Turnbull v. Rivers, 3 McCord (S. C.) 131, 15 Am. Dec. 622; Spensley v. Ins. Co., 54 Wis. 433, 11 N. W. 894; Deyo v. R. Co., 34 N. Y. 9, 88 Am. Dec. 418. In Warren v. McGill, 103 Cal. 153, 37 Pac. 144, a motion was held to have been properly overruled because there was some evidence tending to prove plaintiff's case, but the power was recognized. A nonsuit should be allowed where, on the uncontroverted facts, the plaintiff is not entitled to recover, or if he did the verdict would be set aside; Aycrigg's Ex'rs v. R. Co., 30 N. J. L. 460; People v. Ins. Exch., 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340; and where a verdict for the plaintiff would be clearly against the weight of evidence so that it must be set aside if rendered, a nonsuit should be granted; Wilds v. R. Co., 24 N. Y. 430; but there must be absolutely no evidence to support the plaintiff's claim in order to entitle the defendant to a nonsuit; Potter v. Mellen, 36 Minn. 122, 30 N. W. 438.

The legitimate ground for a nonsuit is either that the plaintiff has alleged no legal cause of action, or that there is no evidence to support his case. It is not the duty of the court to determine the question on the preponderance of evidence; that is for the jury; Bayley v. R. Co., 125 Mass. 65; and the refusal of the court to withdraw the case from the jury is not to be treated as indicating its opinion that the plaintiff should have a verdict, he simply does his duty in submitting the case to the jury even if he considers the preponderance of evidence to be against the plaintiff; if the evidence taken altogether raises a question of fact, it should go to the jury; Gaynor v. Ry. Co., 100 Mass. 212, 97 Am. Dec. 96; Warren v. R. Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700.

Where an issue has been directed, the court in which it is tried cannot grant a nonsuit, but must have a trial and report the result of it; Woolfolk v. Mfg. Co., 22 S. C. 332. Where a case entitling the plaintiff to relief is not established by the pleadings nor the evidence, a nonsuit is proper; Manzy v. Hardy, 13 Neb. 36, 13 N. W. 12; and when any essential element of the plaintiff's case is wholly without proof; Murphy v. R. Co., 45 Ia. 661; Long v. Lewis, 16 Ga. 154.

By section 4 of the act of July 20, 1892, U. S. Comp. St. (1901) 707, of which section 1 was amended by act of June 25, 1910, *id.* (1911) 273, it is provided for suits in the federal courts *in forma pauperis*, the court may dismiss such cause if it appear that the allegation of poverty is untrue or the alleged cause of action is frivolous or malicious. In a suit under this statute, the circuit court of appeals held that the statute applied, but added that, independently of the statute, any court of general jurisdiction has power to dismiss frivolous proceedings which upon the face of the pleadings present no legal cause of action; O'Connell v. Mason, 132 Fed. 245, 65 C. C. A. 541. Where the declaration stated no cause of action, the court refused leave to defendant to withdraw his plea and demur and dismissed the suit on its own motion; Webb v. Fisher, 109 Tenn. 702, 72 S. W. 110, 60 L. R. A. 791, 97 Am. St. Rep. 863.

On opening statement of counsel. In many cases the trial court exercises the authority to direct a verdict or enter a nonsuit where the opening statement of plaintiff's counsel shows unmistakably that if the facts stated were proved there could be no recovery; Hornblower v. University, 31 App. D. C. 64; Pratt v. Conway, 148 Mo. 299, 49 S. W. 1028, 71 Am. St. Rep. 602; Jordan v. Reed, 77 N. J. L. 584, 71 Atl. 280. Such may be the case and such action may be warranted where the statement discloses that the cause of action was a corrupt contract or one void as unlawful or against public policy; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Crisup v. Grosslight, 79 Mich. 380, 44 N. W. 621. It should not be done unless it clearly appears (1) that the complaint does not state a cause of action; (2) that a cause of action well stated is clearly defeated by some defense interposed and admitted as a fact; or (3) that the statement of the plaintiff's case has completely ruined it by some admission or statement of fact; Hoffman House v. Foote, 172 N. Y. 350, 65 N. E. 169; Montgomery v. Boyd, 78 App. Div. 65, 79 N. Y. Supp. 879. So a motion to dismiss may be granted if it appears from the opening statement that the cause of action did not survive to plaintiff; Hey v. Prime, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570 (but the court may, in its discretion, withhold the decision until all the evidence, or the plaintiff's, is in); or that the claim is barred by the statute of limitations; Preusse v. Hotel Co., 134 App. Div. 384, 119 N. Y. Supp. 98; or where the suit is for a breach of covenant respecting property in which the plaintiff has parted with his estate; Wallace v. Vernon, 3 N. B. 5. Where an officer was charged with bribery and the opening statement discloses that the defendant did not at the time hold the office, a verdict of acquittal was properly directed; U. S. v. Dietrich, 126 Fed. 676. Upon such application all the facts stated should be considered without limitation of the allegations of the declaration or complaint, unless any additional facts stated would not be admitted in proof under the

pleadings; Roberton v. New York, 7 Misc. 645, 28 N. Y. Supp. 13, affirmed 149 N. Y. 609, 44 N. E. 1128; and all inferences proper to be drawn from the facts stated should have full consideration; Carr v. R. Co., 78 N. J. L. 692, 75 Atl. 928; and opportunity should be given to amplify the statement if it seem too meagre; Kelly v. Gas Co., 74 N. J. L. 604, 67 Atl. 21; and it must clearly appear that there can be no recovery; Brashear v. Rabenstein, 71 Kan. 455, 80 Pac. 950.

Such motion admits that the statements made are true; Roberts v. R. Co., 45 Colo. 188, 101 Pac. 59; and where a nonsuit was granted on the opening statement of counsel which did not appear in the record the appeal was dismissed; Johnson v. Spokane, 29 Wash. 730, 70 Pac. 122; but where after the opening the complaint was dismissed as not stating a legal cause of action, on appeal it will be considered as if on demurrer; Sheridan v. Jackson, 72 N. Y. 170. In Wisconsin such practice is not recognized; Smith v. Ins. Co., 49 Wis. 322, 5 N. W. 804. And it is not permissible in England; [1892] 1 Q. B. 122. In Idaho, under a statute authorizing the entry of judgment or nonsuit if the proof of the plaintiff's case fails, a nonsuit may not be granted on the opening statement of his counsel; Wheeler v. Nav. Co., 16 Idaho, 375, 102 Pac. 347. A judge has no right, without the consent of the plaintiff's counsel, to nonsuit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even if the greatest care is taken, the evidence of the witnesses when they are called may differ from that which has been opened by counsel. It is for that very reason that a liberty is given to the plaintiff's counsel; [1892] 1 Q. B. 122.

A plaintiff has no longer the old common law right of allegation to suffer a nonsuit at the trial; he cannot at that stage of the proceedings discontinue his action without leave; [1900] A. C. 19.

The right of voluntary nonsuit in case of counter-claim entitling defendant to affirmative relief. The common law rule permitting the plaintiff to dimiss his suit and take a nonsuit at his pleasure before verdict, antedated the modern practice of permitting the defendant to establish a set-off or counter-claim and, under some statutes, to have a verdict in his favor if his claim exceeded the plaintiff's demand. The effect of modern statutes providing for the adjudication of counter-claims in the same suit has given rise to considerable conflict of decision. Probably the nearest approach to certainty which is practicable is to state that in the majority of cases the determination has been that while the plaintiff may take a nonsuit as to his own claim he cannot prejudice the defendant in the pursuit of his remedy. Such was the decision in Bertschy v. McLeod, 32 Wis. 205, where the court held that the right of discontinuance as at common law still remained under the present practice and had been rightfully exercised by the plaintiff, but that his action did not carry with it those proceedings of the defendant which he was permitted "to institute in the action, or rather to engraft upon it, but which are, in substance and effect, actions brought by the defendant against the plaintiff." This case was followed by others in the same state up to Grignon v. Black, 76 Wis. 674, 45 N. W. 122, in which a rehearing was denied in 76 Wis. 686, 45 N. W. 938. In another jurisdiction it was held that the plaintiff might take a voluntary nonsuit without putting out of court the defendant who had availed himself of the permission of the statute to maintain a counter-claim at the trial; Samaha v. Samaha, 18 App. D. C. 76; and following this case there was a statutory provision in the District of Columbia that when a plea of set-off has been filed, the plaintiff should not discontinue without the defendant's consent, and that without respect to what the defendant might do, the plaintiff would be entitled to a trial in judgment as to his own claim; and the rule of this statute that the defendant must consent to a nonsuit was applied in Francis v. Edward, 77 N. C. 271; but in a later case a distinction was drawn between counter-claims arising out of the plaintiff's cause of action and those which were independent of it; and as to the first a voluntary nonsuit was not permitted but might be as to the latter class of cases though without prejudicing the defendant's right to litigate his own claim. Many cases have followed the general doctrine of these cases up to Boyle v. Stallings, 140 N. C. 524, 53 S. E. 346. In many other states the courts have followed the same doctrine that the plaintiff may not, by a voluntary nonsuit, prejudice the rights of the defendant setting up a counter-claim; Griffin v. Jorgenson, 22 Minn. 92; N. W. Mut. L Ins. Co. v. Barbour, 95 Ky. 7, 23 S. W. 584; in New York there has been a lack of precision and continuity in the decisions but they seem to have settled upon a rule that the right to dismiss where counter-claim has been set up is within the discretion of the court, legal and not arbitrary, and subject to review by the appellate court which will protect the rights of defendants; Carleton v. Darcy, 75 N. Y. 375; Jansen v. Whitlock, 58 App. Div. 367, 68 N. Y. Supp. 1086; Livermore v. Bainbridge, 61 Barb. (N. Y.) 358, affirmed 49 N. Y. 125. Where a referee had found a balance, due to the defendant, and the statute of limitations would bar an original suit, without discussing the general question and under the circumstances of the case, a discontinuance will not be permitted without the consent of

the defendant; Holcomb v. Holcomb, 23 Fed. 781. In many cases the contrary view is taken and it is held that the right of a defendant to take judgment for a balance due him where he has pleaded a set-off does not interfere with the right of the plaintiff to take a nonsuit and dismiss his case at any time before verdict unless that right is expressly denied by the statute; Buffington v. Quackenboss, 5 Fla. 196; Cummings v. Pruden, 11 Mass. 206; Theobald v. Colby, 35 Me. 179; McCredy v. Fey, 7 Watts (Pa.) 496; Usher v. Sibley, 2 Brev. (S. C.) 32; Branham v. Brown's Adm'x, 1 Bail. L. (S. C.) 262; Huffstutler v. Packing Co., 154 Ala. 291, 45 South. 418, 129 Am. St. Rep. 57, 15 L. R. A. (N. S.) 340, and note, where the cases are collected.

In cases of libel. The question of the power to grant a nonsuit in such cases has been raised in a few cases. In Cox v. Lee, L. R. 4 Exch. 284, such suits were treated as on the same footing as others, and it was held that the court should not withdraw the case from the jury unless satisfied that the publication is not libel and that a verdict finding it such would be set aside. In this country where there is a constitutional provision relating to libel suits both civil and criminal, it has been held that a nonsuit may be granted in such a civil action as in other cases; Hazy v. Woitke, 23 Colo. 556, 48 Pac. 1048; Ukman v. Daily Record Co., 189 Mo. 378, 88 S. W. 60.

Final judgment or not. It appears to be the weight of authority that upon the entry of a nonsuit there is no jurisdiction to enter a final judgment so as to prevent a new suit within the period of limitation, the action taken being a mere dismissal of the former suit; Mason v. R. Co., 226 Mo. 212, 125 S. W. 1128, 26 L. R. A. (N. S.) 914; Davis v. Preston, 129 Ia. 670, 106 N. W. 151; Miller v. R. Co., 30 Mont. 289, 76 Pac. 691; Kelly v. Kelly, 23 Tex. 437; Connor v. Knott, 10 S. D. 384, 73 N. W. 264; a final judgment cannot be entered either for the plaintiff; Hamilton v. Barricklow, 96 Ind. 398; or against him; Miller v. Mans, 28 Ind. 194; Bailey v. Wilson, 34 Or. 186, 55 Pac. 973 (where new matter had been stricken out of the answer, as, it was held, erroneously); but in Deyo v. R. Co., *supra*, where the plaintiff was nonsuited, judgment was entered for defendants and affirmed first at the general term and then by the Court of Appeals. In that case however there was no question of the effect upon a statutory privilege. It has been permitted to attack a judgment of nonsuit collaterally for fraud; Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501; *contra;* Sisco v. Parkhurst, 23 Vt. 537.

Reinstatement. An order of reinstatement has been made where the nonsuit was granted under a mistake of fact, which however need not be mutual; Palace Hardware Co. v. Smith, *supra*, or the order was fraudulently obtained; Thompson v. Judge, 138 Mich. 81, 101 N. W. 61; or where the statutory period of limitation has elapsed pending suit and the order of dismissal was obtained by an attorney after his employment had terminated; Steinkamp v. Gaebel, 1 Neb. (Unof.) 480, 95 N. W. 684; but the attorney's mistake of judgment as to the law, or his ignorance of the facts which ought to have been known to him, is not a sufficient ground for vacating an order; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A. (N. S.) 244.

The order setting aside a nonsuit reinstates the cause and leaves it pending in the court making such order notwithstanding the entry of another intermediate void order, transferring the cause to another court; Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; and the order vacating the order of dismissal, unappealed from, operates to annul the entry in the clerk's record showing dismissal as well as the judgment of dismissal; Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143.

The formality of "calling" the plaintiff when he is to suffer a nonsuit is obsolete in most of the states.

NORMALLY. As a rule; regularly; according to rule, general custom, etc. Palmer v. Mach. Co., 186 Fed. 504.

NORMAN FRENCH. See LANGUAGE.

NORROY. See HERALD.

NORTH. In a description in a deed, unless qualified or controlled by other words, it means due north. Northerly in a grant, where there is no object to direct its inclination to the east or west, must be construed to mean north. Brandt v. Ogden, 1 Johns. (N. Y.) 156; Currier v. Nelson, 96 Cal. 505, 31 Pac. 531, 746, 31 Am. St. Rep. 239.

NORTH CAROLINA. The name of one of the original states of the United States of America.

The territory which now forms this state was included in the grant made in 1663 by Charles II., to Lord Clarendon and others, of a much more extensive country. The boundaries were enlarged by a new charter granted by the same prince to the same proprietaries in the year 1665. By this charter the proprietaries were authorized to make laws, with the assent of the freemen of the province or their delegates, and they were invested with various other powers. Being dissatisfied with the form of government, the proprietaries procured the celebrated John Locke to draw up a plan of government for the colony, which was adopted, and proved to be impracticable: it was highly exceptionable on account of its disregard of the principles of religious toleration and national liberty, which are now universally admitted. After a few years of unsuccessful operation it was abandoned. The colony, had been settled at two points, one called the Northern and the other the Southern settlement, which were governed by separate legislatures. In 1729 the proprietaries surrendered their charter, when it became a royal province, and was governed by a commission and a form of government in sub-

stance similar to that established in other royal provinces. In 1732 the territory was divided, and the divisions assumed the names of North Carolina and South Carolina.

A constitution was adopted December 18, 1776. To this constitution amendments were made in convention June 4, 1835, which were ratified by the people, and took effect on January 1, 1836. There was a second constitution in 1868, and an amended constitution in 1876.

NORTH DAKOTA. One of the states of the United States.

By the act of congress of February 22, 1889 (1 Supp. Rev. Stat. 645), the area comprising the territory of Dakota was divided on the line of the seventh standard parallel produced due west to the western boundary of said territory, and that portion north of said parallel forms the state of North Dakota. The proclamation announcing the admission of this state into the Union was made by the President on November 2, 1889. The constitution was amended, 1912, providing for initiative, referendum and recall.

NORTHAMPTON TABLES. See LIFE TABLES.

NORTHHAMPTON, ASSIZE OF. An assize held in 1176; in it, the king confirmed and perfected the judicial legislation which he had begun ten years before in the Assize of Clarendon. The kingdom was divided into six circuits, and the judges appointed in them were given a more full independence, and were no longer joined with the sheriffs in their sessions. Their powers were extended beyond criminal jurisdiction to questions of property, inheritance, wardship, forfeiture of crown lands, advowsons and the tenure of land. It provided for a more thorough administration of criminal law. It provided that no one should entertain a guest in his house for more than a night unless the guest had some reasonable excuse which the host must show to his neighbors, and when the guest leaves, it must be in the presence of neighbors and by day. Stephen, Cr. Proc. in 2 Essays in Anglo-Amer. L. H. 445; Mrs. J. R. Green in 1 *id.*

NORTHWEST TERRITORY. A name formerly applied to the territory northwest of the Ohio river. See OHIO.

NORWAY. The most northerly country of Europe. It is a limited hereditary monarchy. The executive power is vested in a king and a ministry, and the legislative in a Storthing consisting of an upper and a lower house.

NOSOCOMI. In Civil Law. Persons who have the management and care of hospitals for paupers. *Clef Lois Rom.* mot *Administrateurs.*

NOT FOUND. Words indorsed on a bill of indictment by a grand jury, when they have not sufficient evidence to find a true bill. See IGNORAMUS.

NOT GUILTY. The general issue plea in several sorts of actions and in criminal cases.

In *trespass*, its form is as follows: "And the said C D, by E F, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in the manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

Under this issue the defendant may give in evidence any matter which directly controverts the truth of any allegation, which the plaintiff on such general issue will be bound to prove; 1 B. & P. 213; and no person is bound to justify who is not *prima facie* a trespasser; 2 B. & P. 359; 2 Saund. 284 *d.* For example, the plea of not guilty is proper in trespass to *persons*, if the defendant have committed no assault, battery, or imprisonment, etc.; and in trespass to *personal* property, if the plaintiff had no property in the goods, or the defendant were not guilty of taking them, etc.; and in trespass to *real* property, this plea not only puts in issue the fact of trespass, etc., but also the title, which, whether freehold or possessory in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *primâ facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant or the person under whom he justifies; 7 Term 354; Steph. Pl. 178; 1 Chitty, Pl. 491, 492.

In *trespass on the case in general* the formula is as follows: "And the said C D, by E F, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said A B hath above complained. And of this the said C D puts himself upon the country."

This, it will be observed, is a mere traverse, or denial, of the facts alleged in the declaration, and therefore, on principle, should be applied only to cases in which the defence rests on such a denial. But here a relaxation has taken place; for, under this plea, a defendant is permitted not only to contest the truth of the declaration, but, with some exceptions, to prove any matter of defence that tends to show that the plaintiff has no cause of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given, or satisfaction made; Steph. Pl. 182; 1 Chitty, Pl. 486.

In *trover*. It is not usual in this action to plead any other plea, except the statute of limitations; and a release, and the bankruptcy of the plaintiff, may be given in evidence under the general issue; 7 Term 391.

In *debt* on a judgment suggesting a *devastavit*, an executor may plead not guilty; 1 Term 462.

In *criminal cases*, when the defendant wishes to put himself on his trial, he pleads not guilty. This plea makes it incumbent

upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment, information, or complaint. On the other hand, the defendant may give in evidence under this plea not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification.

See NON CULPABILIS; NIENT CULPABLE.

NOT POSSESSED. A plea sometimes used in actions of trover, when the defendant was not possessed of the goods at the commencement of the action. 3 M. & G. 101, 103.

NOT PROVEN. In Scotch Criminal Law. It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of not proven, corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to not guilty; for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to thole an assize twice. But, although the verdict of not proven is so far tantamount to an acquittal that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation. He goes away from the bar of the court with an indelible stigma upon his name. There stands recorded against him the opinion of a jury that the evidence respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in 1554, he said, "It is better to be tried than to live suspected." But in Scotland a man may be not only tried, but acquitted, and yet live suspected, owing to the sinister influence of a verdict of not proven. Forsyth, Hist. Trial by Jury 334.

NOTARIAL WILL. A will executed by the testator in the presence of a Notary Public and two witnesses.

NOTARIUS. In Civil Law. One who took notes or draughts in shorthand of what was said by another, or of proceedings in the senate or in a court. One who draughted written instruments, wills, conveyances, etc. Vicat, Voc. Jur.; Calvinus, Lex.

In English Law. A notary. Law Fr. & Lat. Dict.; Cowell.

NOTARY, NOTARY PUBLIC. An officer appointed by the executive or other appointing power, under the laws of different states.

Notaries are of ancient origin; they existed in Rome during the republic, and were called *tabelliones forenses*, or *personæ publicæ*. Their employment consisted in the drawing up of legal documents. They exist in all the countries of Europe, and as early as A. D. 803 were appointed by the Frankish kings and the popes. Notaries in England are appointed by the archbishop of Canterbury. 25 Hen. VIII. c. 21, § 4. They are officers of the civil and canon law; Brooke, Office & Pr. of a Notary 9. In most of the states, notaries are appointed by the governor alone, in others by the governor by and with the advice of his council, in others by and with the advice and consent of the senate; in the District of Columbia they are appointed by the President of the United States. A notary is a state officer; Com. v. Shindle, 19 Pa. Co. Ct. R. 258. As a general rule, throughout the United States, the official acts of a notary public must be authenticated by seal as well as signature; Tunis v. Withrow, 10 Ia. 305, 77 Am. Dec. 117; Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Stout v. Slattery, 12 Ill. 162.

Their duties differ somewhat in the different states, and are prescribed by statute. They are generally as follows: to protest bills of exchange and draw up acts of honor; to authenticate and certify copies of documents; to receive the affidavits of mariners and draw up protest relating to the same; to attest and take acknowledgments of deeds and other instruments; and to administer oaths. Ordinarily notaries have no jurisdiction outside the county or district for which they are appointed; but in several states they may act throughout the state.

By act of congress, Sept. 16, 1850, notaries are authorized to administer oaths and take acknowledgments in all cases where under the laws of the United States justices of the peace were formerly authorized to act.

By act of Aug. 15, 1876, c. 304, notaries are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits with the same effect as commissioners of the United States circuit courts may do. R. S. § 1778. They may protest national bank circulating notes; R. S. § 5226; take acknowledgment of assignment of claims upon the United States; *id.* § 3477; and administer oaths of allegiance to persons prosecuting such claims; *id.* § 3479. By act of June 22, 1874, c. 390, notaries may take proof of debts against the estate of a bankrupt. By act of Feb. 26, 1881, c. 82, reports of national banks may be sworn to before notaries, but such notary must not be an officer of the bank; R. S. § 5211. By act of Aug. 18, 1856, c. 127, every secretary of legation and consular officer may, within the limits of his legation, perform any notarial act; R. S. § 1750. By act of April 5, 1906, every consular officer is required, within his consulate, to perform notarial acts.

A statute which authorizes a *notary public* to commit for contempt a witness who has been duly subpœnaed to testify before him and who refuses to be sworn or give his deposition, is unconstitutional; In re Huron,

58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. Rep. 614.

The acts of notaries are respected by the custom of merchants and the law of nations. Their protest of a bill is received as evidence in the courts of all civilized countries. Except in cases of protest of bills, the signature of a notary to an instrument going to a foreign country ought to be authenticated by the consul or representative of that country.

The notaries of England have always considered themselves authorized to administer oaths; and the act of 5 & 6 Will. IV. has placed it beyond dispute. In this country they do not exercise the power unless authorized by statute, except in cases where the oath is to be used out of the state or in the courts of the United States.

Upon general principle they cannot act in cases in which they are interested; 95 Am. Dec. 378, note; Ogden B. & L. Ass'n v. Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; Hayes v. Loan Ass'n, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216; Sample v. Irwin, 45 Tex. 567 (an attorney for either party).

The acknowledgment of a deed to a corporation cannot be taken by a notary who is a stockholder and director in the corporation; Fugman v. Loan Ass'n, 209 Ill. 176, 70 N. E. 644. One incorporator, who is a notary, cannot take the acknowledgment of another incorporator to the articles of incorporation; People v. Board, 105 App. Div. 273, 93 N. Y. Supp. 584.

A mortgage should not be acknowledged before a notary who is a stockholder and officer of the mortgagee; Kothe v. Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594; a notary who is a stockholder of a corporation cannot take a valid acknowledgment of his company; Bexar B. & L. Ass'n v. Heady, 21 Tex. Civ. App. 154, 50 S. W. 1079, 57 S. W. 583; nor one who is director, stockholder and assistant cashier of a bank; Wilson v. Griess, 64 Neb. 792, 90 N. W. 866. A protest by a notary who is a stockholder in the bank is invalid; Monongahela Bank v. Porter, 2 Watts (Pa.) 141; but where a notary public was intermediary between a borrower and lender on mortgage and took the acknowledgment of the mortgage, his act was held valid, there being nothing on the face of the papers to indicate to third parties that there was any incapacity to act; Jarvis-Conklin Mtg. Trust Co. v. Willhoit, 84 Fed. 515; and some cases hold that the mere fact that he is an officer of a corporation does not make its acknowledgment before him invalid; Horbach v. Tyrrell, 48 Neb. 514, 67 N. W. 485, 489, 37 L. R. A. 434; Read v. Loan Co., 68 Ohio St. 280, 67 N. E. 729, 62 L. R. A. 790, 96 Am. St. Rep. 663; Cooper v. Loan Ass'n, 97 Tenn. 285, 37 S. W. 12, 33 L. R. A. 338, 56 Am. St. Rep. 795; Keene Guaranty S. Bk. v. Lawrence, 32 Wash. 572, 73 Pac. 680.

It is held that a mortgage to a corporation is valid although the notary who took the acknowledgment was a stockholder; Read v. Loan Co., 68 Ohio St. 280, 67 N. E. 729, 62 L. R. A. 790, 96 Am. St. Rep. 663; so where the president of the mortgagee company took an acknowledgment of a mortgage to his company; Keene Guaranty S. Bk. v. Lawrence, 32 Wash. 572, 73 Pac. 680; so, in the case of a chattel mortgage, where the notary was a director, treasurer and stockholder of the mortgagee (the fact not appearing on the face of the papers); Ardmore N. Bk. v. Supply Co., 20 Okl. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133; and in the case of a notary who was vice-president of the company; Florida S. Bk. & R. E. Exch. v. Rivers, 36 Fla. 575, 18 South. 850.

The books or registers of a deceased notary are admissible to prove his official acts as to presentment, demand, and notice of non-payment of negotiable paper; Porter v. Judson, 1 Gray (Mass.) 175; and so are entries of a notary's clerk; Gawtry v. Doane, 51 N. Y. 84. When produced, the handwriting of the deceased person must be proved; Chaffee v. U. S., 18 Wall. (U. S.) 516, 21 L. Ed. 908; but as to what extent a certificate shall be conclusive proof of the legality of the acknowledgment is not entirely certain; but the general tendency is to protect one who relies on the certificate; Webb, Record Title §§ 87–89, and note in 1 Am. Dec. 81. In several states certificate is, by statute, *prima facie* evidence only; 1 Hill's Code (Wash.) Sec. 1436.

A recorded deed of trust acknowledged before a notary disqualified by statute may be record notice to a subsequent judgment creditor; Southwestern Mfg. Co. v. Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684.

Where a lawyer who was also a notary was in the habit of mailing instruments to his clients for signature and then certifying his acknowledgment, he was censured by the court, but not further punished as he acted without improper motive; In re Barnard, 151 App. Div. 580, 136 N. Y. Supp. 185.

Where an action is brought against a notary for a false certificate of acknowledgment, the presumption is that the defendant, acting in his judicial capacity, did so on reasonable information, and discharged his full duty. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; Com. v. Haines, 97 Pa. 228, 39 Am. Rep. 805; Proff. Notaries, 2d ed. §§ 48, 175; Notary's Manual. It has been held an actionable libel for a notary falsely and maliciously to protest for non-payment the acceptance of a person, and then send the draft with such protest to

the source from whence it came; May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154. In England they are appointed by the Archbishop of Canterbury through the master of the Court of Faculties. In the city of London they must have been apprenticed, and also be freemen of the Scriveners' Company; Odgers, C. L. 1446. See [1910] W. N. 228.

See AUTHENTIC ACT; ACKNOWLEDGMENT.

NOTATION. The act of making a memorandum of some special circumstance on a probate or letters of administration.

NOTCHELL, or NOCHELL. "Crying the wife's Notchell" seems to have been a means of preventing her running up debts against her husband. See 20 Law Mag. & Rev. 280. In use in Lancashire. Cent. Dict.

NOTE A BILL. See NOTING A BILL.

NOTE OF A FINE. The fourth step of the proceedings in acknowledging a fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcel of land, and the agreement, and enrolled of record in the proper office. 2 Sharsw. Bla. Com. 351, App. n. iv. § 3; 1 Steph. Com., 11th ed. 542.

NOTE OF ALLOWANCE. A note delivered by a master to a party to a cause, who alleged that there was error in law in the record and proceedings, allowing him to bring error.

NOTE OF HAND. A popular name for a promissory note.

NOTE OF PROTEST. A note or minute of the protest, made by the notary, at time of protest, on the bill, to be completed or filled out at his leisure. Byles, Bills, 15th ed. 214.

NOTE OR MEMORANDUM. An informal note or abstract of a transaction required by the statute of frauds.

The form of it is immaterial; but it must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without reference to parol evidence to show intent of parties; Browne, Stat. of Fr. 353, 386; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; Tallman v. Franklin, 14 N. Y. 584; Johnson v. Brook, 31 Miss. 17, 66 Am. Dec. 547; White v. Watkins, 23 Mo. 423; McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661. In some states, and in England, the consideration need not be stated in the note or memorandum; 4 B. & Ald. 595; Violett v. Patton, 5 Cra. (U. S.) 142, 3 L. Ed. 61; Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; Sage v. Wilcox, 6 Conn. 81.

A memorandum of the terms of an agreement was signed by plaintiff but not by defendant; the latter subsequently wrote to plaintiff referring to "our agreement for the hire of your carriage," and "my monthly payment." There was no other arrangement between the parties, to which these expressions could refer. *Held*, that the letter and the document containing the terms of the arrangement together constituted a note and memorandum signed by defendant, within the statute of frauds; 45 L. T. Rep. N. S. 348. See Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Lee v. Hills, 66 Ind. 474.

See Browne; Reed, Stat. of Frauds; MEMORANDUM.

NOTES. See JUDGE'S NOTES.

NOTICE. The information given of some act done, or the interpellation by which some act is required to be done. Knowledge.

A statutory notice is not binding unless given as the law directs or allows; Allen v. Strickland, 100 N. C. 225, 6 S. E. 780; O'Fallon v. R. Co., 45 Ill. App. 572.

Actual notice exists when knowledge is actually brought home to the party to be affected by it. This statement is criticised, as being too narrow, in Wade, Notice 4. This writer divides actual knowledge into two classes, express and implied; the former includes all knowledge of a degree above that which depends upon collateral inference, or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them, choosing to remain ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest; Wade, Notice 5. In Appeal of Craft, 42 Conn. 146, there is a division into "particular or explicit" and "general or implied" notice. Information which a prudent man believes to be true, and which if followed by inquiry must lead to knowledge, is equivalent to knowledge; Tucker v. Constable, 16 Or. 407, 19 Pac. 13. Where the direct issue of fraud is involved, knowledge may be imputed to one wilfully closing his eyes to information within his reach; Wecker v. Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757.

Notice of any fact which is sufficient to put a purchaser of land on inquiry, is adequate notice; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; and of everything to which such inquiry may lead; Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry (which is the same as *implied notice, supra*), or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy; Bates v. Norcross, 14 Pick. (Mass.) 224; Pritchard v. Brown, 4 N. H.

397, 17 Am. Dec. 431; Scott v. Gallagher, 14 S. & R. (Pa.) 333, 16 Am. Dec. 508. The *recording* a deed; Wise v. Wimer, 23 Mo. 237; Magoffin v. Mandaville, 28 Miss. 354; 4 Kent 182, n.; an *advertisement in a newspaper*, when authorized by statute as a part of the process, *public acts* of government, and *lis pendens* (but see LIS PENDENS), constitute constructive notice. Judge Story defines the term as "knowledge" imputed by the court on presumption, too strong to be rebutted, that the information must have been communicated; Story, Eq. Jur. § 399. "Constructive notice is a legal inference of notice, of so high a nature, as to be conclusive, unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice, and believed the vendor's title to be good;" 2 Lead. Cas. Eq. 77. Constructive notice is sometimes called notice in law; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261. Proof of notoriety of the fact in the neighborhood of the party to be affected is competent to prove notice; Wright v. Stewart, 130 Fed. 905.

To establish notice by telephone, the party relying upon such notice has the burden of proving the identity of the person receiving the communication and that it reached the party sought to be charged; Second Pool Coal Co. v. Coal Co., 188 Fed. 892, 110 C. C. A. 526.

Proof that an envelope was mailed and received is not conclusive evidence that the notice was enclosed, and if its receipt is denied, it is for the jury; Empire State Surety Co. v. Lumber Co., 200 Fed. 224, 118 C. C. A. 410.

The constructive notice given by the record of a deed is sometimes called record notice. Where an instrument affecting the title to real estate is properly recorded, the record thereof is notice to subsequent purchasers, etc., from the same grantor; Wade, Notice, 2d ed. § 97; Vaughan v. Greer, 38 Tex. 530; Mayo v. Cartwright, 30 Ark. 407; Randolph v. R. Co., 28 N. J. Eq. 49.

The possession of land is notice to all the world of the possessor's rights thereunder; Lipp v. Land Syndicate, 24 Neb. 692, 40 N. W. 129; Buck v. Holt, 74 Ia. 294, 37 N. W. 377; Brooke v. Bordner, 125 Pa. 470, 17 Atl. 467; Daniel v. Hester, 29 S. C. 147, 7 S. E. 65; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

Notice to an agent in the same transaction is, in general, notice to the principal; Farmers & C. Bk. v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Pritchett v. Sessions, 10 Rich (S. C.) 293; Baker v. Bliss, 39 N. Y. 70; Armstrong v. Abbott, 11 Colo. 223, 17 Pac. 517. A principal imposing confidence in an agent, and therefore neglecting some source of knowledge which he might have sought, is not chargeable with what he might have found out upon inquiry aroused by suspicion; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. Notice to the trustees is notice to the beneficiaries in a deed of trust; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Crumlish v. R. Co., 32 W. Va. 244, 9 S. E. 180.

A principal is not bound by his agent's knowledge where it is not the duty of the agent to communicate it; Hummel v. Bank, 75 Ia. 689, 37 N. W. 954. Notice to an agent must be on the very business on hand; Alger v. Keith, 105 Fed. 105, 44 C. C. A. 371. So of knowledge incidentally acquired by a corporate officer when not acting in his official capacity; Caffee v. Berkley, 141 Ia. 344, 118 N. W. 267. If the agent is acting adversely to the principal his knowledge is not imputed to the principal; Central C. & C. Co. v. Good & Co., 120 Fed. 793, 57 C. C. A. 161; Gunster v. Power Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650. Where it is in the private interest of the officer of a bank to conceal knowledge from his bank, the law does not, by a fiction, charge the bank with such knowledge; American N. Bk. v. Miller, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. 1310.

Notice to the president and some directors of a corporation is sufficient to bind it; Paul S. S. Co. v. Paul, 129 Fed. 757; but where the president, acting in his private capacity, acquires knowledge of a particular fact, it does not affect the corporation in a later transaction unless he participated therein; Smith v. Carmack (Tenn.) 64 S. W. 372; Teagarden v. Lumber Co., 105 Tex. 616, 154 S. W. 973. Notice to one who acts as local representative, advisor, secretary and treasurer, is notice to his association; Dennis v. Loan Ass'n, 136 Fed. 539, 69 C. C. A. 315; but where one is secretary of two companies, it must be shown that when notice was given to him, it was his duty to communicate it to the proper company, even though he was acting at the time for the other company; [1902] 1 Ch. 507.

The giving notice in certain cases is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus, in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is that he will pay the bill or note, provided it be not paid, on presentment at maturity, by the acceptor or maker (being the party *primarily* liable), and provided that he (the indorser) has due *notice* of the dishonor, and without which he is discharged from all liability: consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, or some facts dispensing with such notice; 1 Chitty, Pr. 496; 1 Pars. Notes & B. 516.

Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. So, in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures.

Notice may be written or oral, in many cases, at the option of the party required to give it; but written notice is generally preferable, both as avoiding doubt and ambiguity in its terms, and as admitting more easy and exact proof of delivery; 2 Dan. Neg. Inst. 972.

Immediate notice of a fire means reasonable notice; Solomon v. Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707.

Acknowledging service of notice does not preclude showing it was too late; Shearouse v. Morgan, 111 Ga. 858, 36 S. E. 927.

Personal service does not include service at the last known residence; Dalton v. R. Co., 113 Mo. App. 71, 87 S. W. 610.

See KNOWLEDGE; RECORD.

NOTICE, AVERMENT OF. The statement in a pleading that notice has been given.

When the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof; as, when the defendant promised to give the plaintiff as much for a commodity as another person had given or should give for the like.

But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred; 1 Saund. 117, n. 2; 2 *id.* 62 *a*, n. 4. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice need not be averred; for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice of it at his peril; Com. Dig. *Pleader* (C 65). See Com. Dig. *Pleader* (C 73, 74, 75); Viner, Abr. *Notice;* Hardr. 42; 5 Term 621.

The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default; Cro. Jac. 432; but may be aided by verdict; 1 Saund. 228 *a;* unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict; Dougl. 679.

NOTICE OF DISHONOR. A notice given to a drawer or indorser of a bill, or an indorser of a negotiable note, by a subsequent party, that it had been dishonored either by non-acceptance in the case of a bill, or by non-payment in the case of an accepted bill or a note.

The subject is provided for in almost all the states by the Uniform Negotiable Instruments Act (see NEGOTIABLE INSTRUMENTS); the old cases are, however, retained as having at least historical interest.

Notice of dishonor by non-acceptance or non-payment must be given to the drawer and to each indorser, and any drawer or indorser to whom notice is not given is discharged; Neg. Instr. Act.

The notice must contain a description of the bill or note; Housatonic Bk. v. Laflin, 5 Cush. (Mass.) 546; Kilgore v. Bulkley, 14 Conn. 362; Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346; Brewster v. Arnold, 1 Wis. 264; sufficient to leave no doubt in the mind of the indorser, as a reasonable man, what note was intended; Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; Crawford v. Bank, 7 Ala. 205; Youngs v. Lee, 12 N. Y. 551; Bradley v. Davis, 26 Me. 45; Mills v. Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316.

It must also contain a clear statement of the dishonor of the bill; 2 Cl. & F. 93; 2 M. & W. 799; Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; Lockwood v. Crawford, 18 Conn. 361; and something more than the mere fact of non-acceptance or non-payment must be stated; 2 Q. B. 388; Mills v. Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Boehme v. Carr, 3 Md. 202; Nailor v. Bowie, *id.* 251; Chewning v. Gatewood, 5 How. (Miss.) 552; except in some cases; Housatonic Bk. v. Laflin, 5 Cush. (Mass.) 546; Graham v. Sangston, 1 Md. 59; Hunter v. Van Bomhorst & Co., *id.* 504; see as to effect of the use of the word *protested*, Mills v. Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Crawford v. Bank, 7 Ala. 205; Kilgore v. Bulkley, 14 Conn. 362; Housatonic Bk. v. Laflin, 5 Cush. (Mass.) 546.

As to whether there must be a statement that the party to whom the notice is sent is looked to for payment, see 11 M. & W. 372; 7 C. B. 400.

Notice "may be given in any terms which sufficiently identify the instrument" and indicate that it has been dishonored; a misdescription does not vitiate the notice unless the party has been misled thereby; Neg. Instr. Act.

The notice is generally *in writing*, but may be oral; Woodin v. Foster, 16 Barb. (N. Y.) 146; Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329; Glasgow v. Pratte, 8 Mo. 336, 40 Am. Dec. 142; 8 C. & P. 355. So in the Neg. Instr. Act.

It need not be personally served, but may be sent by mail; 7 East 385; Bussard v. Levering, 6 Wheat. (U. S.) 102, 5 L. Ed. 215;

Commercial Bk. v. Strong, 28 Vt. 316, 67 Am. Dec. 714; Walters v. Brown, 15 Md. 285, 74 Am. Dec. 566; otherwise, perhaps, if the parties live in the same town; see Peirce v. Pendar, 5 Metc. (Mass.) 352; Ireland v. Kip, 10 Johns. (N. Y.) 490; Manchester Bk. v. Fellows, 28 N. H. 302; Remington v. Harrington, 8 Ohio 507; Brown v. Bank, 85 Va. 95, 7 S. E. 357; or left in the care of a suitable person, representing the party to be notified; Miles v. Hall, 12 Smedes & M. (Miss.) 332; Cook v. Renick, 19 Ill. 598; Isbell v. Lewis, 98 Ala. 550, 13 South. 335.

It may be sent through the mails or delivered in person; it may be left with the party's agent. If he is dead, the notice should be given to a personal representative, and if there is none, it should be sent to the last residence or place of business of the deceased. Notice to one partner is sufficient, even though there has been a dissolution. Notice to joint parties must be given to each of them. Notice to a bankrupt can either be given to the bankrupt himself or to his trustees or assignees; Neg. Instr. Act.

It should be sent to the place where it will most probably find the party to be notified most promptly; Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 578, 7 L. Ed. 269; whether the place of business; Hyslop v. Jones, 3 McLean 96, Fed. Cas. No. 6,990; Ireland v. Kip, 11 Johns. (N. Y.) 231; Green v. Darling, 15 Me. 139; 1 Maule & S. 545; or place of residence; Commercial Bk. v. Strong, 28 Vt. 316, 67 Am. Dec. 714.

The word residence in the law of negotiable instruments may be satisfied by a temporary, partial, or even constructive residence; Wachusett N. Bk. v. Fairbrother, 148 Mass. 181, 19 N. E. 345, 12 Am. St. Rep. 530. When sent by mail, it should be to the post-office to which the party usually resorts; Bank of U. S. v. Carneal, 2 Pet. (U. S.) 543, 7 L. Ed. 513; Sherman v. Clark, 3 McLean 91, Fed. Cas. No. 12,763; Farmers' & M. Bk. v. Battle, 4 Humphr. (Tenn.) 86; Glasscock v. Bank, 8 Mo. 443; Bank of Columbia v. Magruder's Adm'x, 6 H. & J. (Md.) 172, 14 Am. Dec. 271; Webber v. Gotthold, 8 Misc. 503, 28 N. Y. Supp. 763. If properly addressed and mailed it will charge the indorser, whether he has received it or not; Townsend v. Auld, 8 Misc. 516, 28 N. Y. Supp. 746.

It should be sent to the address given by the party after his signature, or if no such address is given then to the post-office nearest his place of residence, or where he is accustomed to receive his letters. If notice is actually received within the time specified, it will be sufficient, although not sent in accordance with the requirements of the act; Neg. Instr. Act.

Every person who, by and immediately upon the dishonor of the note or bill, and only upon such dishonor, becomes liable to an action either on the paper or on the consideration for which the paper was given, is entitled to immediate notice; 1 Pars. Notes & B. 499. The holder need give notice only to the parties and to the indorser whom he intends to hold liable; Baker v. Morris, 25 Barb. (N. Y.) 138; Carter v. Bradley, 19 Me. 62, 36 Am. Dec. 735; Bank v. Bank, 49 Ohio St. 351, 30 N. E. 958; Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597. A second indorser duly notified cannot defend on the ground that the first was not so notified; Boteler v. Dexter, 20 D. C. 26; notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged; Neg. Instr. Act.

Notice may be given by any party to a note or bill not primarily liable thereon as regards third parties, and not discharged from liability on it at the time notice is given; Baker v. Morris, 25 Barb. (N. Y.) 138; Brailsford v. Williams, 15 Md. 150, 74 Am. Dec. 559; Stanton v. Blossom, 14 Mass. 116, 7 Am. Dec. 198; 15 M. & W. 231. The English doctrine that any party to a note or bill may give the notice by which an antecedent party may be held liable to subsequent parties, is now quite firmly established; Wade, Notice § 709. Such notice may be by the holder's agent; Harris v. Robinson, 4 How. (U. S.) 336, 11 L. Ed. 1000; Payne v. Patrick, 21 Tex. 680; 15 M. & W. 231; and in the agent's name; Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773; may be by an indorsee for collection; Cowperthwaite v. Sheffield, 3 N. Y. 243; a notary; Burke v. McKay, 2 How. (U. S.) 66, 11 L. Ed. 181; Renick v. Robbins, 28 Mo. 339; the administrator or executor of a deceased person; Story, Pr. Notes § 304; the holder of the paper as collateral security; 14 C. B. N. S. 728. It has been held that notice by a stranger, pretending to be the holder, may be ratified by the real holder; 2 C. & K. 1016.

Mere knowledge on the part of an indorser of a note, learned from the maker that it had been dishonored, is not a notice, since notice must come from a party who is entitled to look to the indorser for payment; Jagger v. Bank, 53 Minn. 386, 55 N. W. 545; notice may be given by or on behalf of the holder, on by or on behalf of any party to the instrument who might be compelled to pay it to the holder. It may be given by an agent of such parties, and an agent, who holds the instrument for another, may give notice to the parties liable or notify his principal; Neg. Instr. Act.

The notice must be forwarded as early as the day after the dishonor, by a mail which does not start at an unreasonably early hour; Chick v. Pillsbury, 24 Me. 458, 41 Am Dec. 394; Stephenson v. Dickson, 24 Pa. 148, 62 Am. Dec. 369; Downs v. Bank, 1 Smedes & M. (Miss.) 261, 40 Am. Dec. 92; Deminds v. Kirkman, 1 Smedes & M. (Miss.) 644;

Seventh Ward Bk. v. Hanrick, 2 Sto. 416, Fed. Cas. No. 12,678.

Notice must be given before the close of business hours on the day following dishonor. If given at the residence, it must be given before the usual hours of rest on the day following. If sent by mail, it must be deposited in the post-office in time to arrive in the usual course on the following day. Neg. Instr. Act.

An indorser is entitled to notice of demand and non-payment of a note, notwithstanding he has collateral security; Whittier v. Collins, 15 R. I. 44, 23 Atl. 39; Kramer v. Sandford, 4 W. & S. (Pa.) 328, 39 Am. Dec. 92.

Notice of dishonor may be excused: where it is prevented by inevitable accident, or overwhelming calamity; by the prevalence of a malignant disease which suspends the operations of trade; by war, blockade, invasion, or occupation by the enemy; by the interdiction of commerce between the countries from which or to which the notice is to be sent; by the impracticability of giving notice, by reason of the party entitled thereto to having absconded or having no fixed place of residence, or his place of business or residence being unknown, and incapable of being ascertained upon reasonable inquiries. These are the excuses of a general nature given by Story, on Pr. Notes and on Bills.

Delay in giving notice of dishonor is excused when caused by circumstances beyond the control of the holder and not due to his negligence or misconduct, and it must be given with reasonable diligence when the cause of delay ceases to operate; Neg. Instr. Act.

Special excuses are: That the note was for the accommodation of the indorser only; an original agreement on the part of the indorser, made with the maker or other party at all events to pay the note at maturity; the receiving security or indemnity from the maker, or other party for whose benefit the note is made, by the indorser, or money to take it up with; receiving the note as collateral security for another debt where the debtor is no party to the note, or if a party has not indorsed it; an original agreement by the indorser to dispense with notice; an order or direction from the makee to the maker not to pay the note at maturity. See Story, Pr. Notes §§ 293, 357.

Notice of dishonor is not required to be given to the drawer when the drawer and drawee are the same person, or when the drawee is a fictitious person, or when the drawer is the person to whom the instrument is presented for payment, or where the drawer has the right to expect that the drawee or acceptor will honor the instrument, or where the drawer has countermanded payment; Neg. Instr. Act.

Notice of dishonor need not be given to an indorser where the drawee is a fictitious person and the indorser knows of the fact at the time he indorsed, or where the indorser is the person to whom the instrument is presented for payment, or where the instrument was made or accepted for his accommodation; Neg. Instr. Act.

NOTICE OF EXECUTION. Under an exemption act which requires an execution, the debtor desiring to avail himself of its benefits should make a schedule of all his personal property within ten days after notice of execution. The sheriff should, whenever practical, give personal notice, and an ambiguously worded notice by mail from which the debtor may infer that personal demand will be made on him at some time in the future is insufficient; Boggess v. Pennell, 46 Ill. App. 150.

NOTICE OF INQUIRY. The plaintiff must give a written notice of executing a writ of inquiry to the defendant or his solicitor; 2 Chit. Arch. Prac.; Wharton.

NOTICE OF JUDGMENT. In several of the states it is provided by statute that a written notice shall be served by the party entering the judgment upon his adversary or his attorney, stating the time when the judgment is entered.

NOTICE OF LIS PENDENS. A notice filed for the purpose of warning all persons that the title to certain property is in litigation. See LIS PENDENS.

NOTICE OF MOTION. A notice in writing, entitled in a cause, stating that, on a certain day designated, a motion will be made to the court for the purpose stated. Burrill.

NOTICE OF PROTEST. A notice given to a drawer or indorser of a bill, or to an indorser of a note, that the bill or note has been protested for refusal of payment or acceptance. See NOTICE OF DISHONOR.

NOTICE OF TRIAL. The plaintiff under the practice of some states may give notice of trial at any time after the issues of fact are ready for trial; and if not given within a certain time the defendant may give notice of same or move to dismiss the action for want of prosecution.

NOTICE TO ADMIT. In the practice of the English high court either party may call upon the other to admit a document, and on refusal or neglect to admit he must bear the costs of proving the document, unless the judge certifies that the refusal was reasonable. Rules of Court XXXII; Whart.

NOTICE TO PLEAD. Written notice to defendant, requiring him to plead within a certain time. It must always be given before plaintiff can sign judgment for want of a plea. 1 Chitty, Archb. Pr. 221. Notice to plead, indorsed on the declaration or delivered separately, is sufficient without demand-

ing plea or rule to plead, in England, by statute.

NOTICE TO PRODUCE PAPERS. When it is intended to give secondary evidence of a written instrument or paper which is in the possession of the opposite party, it is, in general, requisite to give him notice to produce the same on the trial of the cause, before such secondary evidence can be admitted. See Roberts v. Dixon, 50 Kan. 436, 31 Pac. 1083.

To this general rule there are some exceptions: *first*, in cases where, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in the case of trover for a bond. McClean v. Hertzog, 6 S. & R. (Pa.) 154; 1 Campb. 143; State v. Mayberry, 48 Me. 218; Forward v. Harris, 30 Barb. (N. Y.) 338; Morrill v. R. R., 58 N. H. 68; *second*, where the party in possession has obtained the instrument by fraud; 4 Esp. 256.

In general, a notice to produce papers ought to be given in writing, and state the title of the cause in which it is proposed to use the papers or instruments required; 2 Stark. 19. It seems, however, that the notice may be by parol; 1 Campb. 410. It must describe with sufficient certainty the papers or instruments called for, and must not be too general and by that means be uncertain; Ry. & M. 341; M'Cl. & Y. 139.

The notice may be given to the party himself, or to his attorney; 2 Term 203, n.; 3 *id.* 306; Ry. & M. 327.

The notice must be served a reasonable time before trial, so as to afford an opportunity to the party to search for and produce the instrument or paper in question; 1 Stark. 283; Pitt v. Emmons, 92 Mich. 542, 52 N. W. 1004; Burlington Lumber Co. v. Min. Co., 66 Ia. 292, 23 N. W. 674.

When a notice to produce an instrument or paper in the cause has been proved, and it is also proved that such paper or instrument was, at the time of the notice, in the hands of the party or his privy, and upon request in court he refuses or neglects to produce it, the party having given such notice and made such proof will be entitled to give secondary evidence thereof. See Moneyer v. Wool Co., 66 Hun 626, 20 N. Y. Supp. 814; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

Where a party is notified to produce certain writings, and the same are shown not to be within the state, copies may be introduced; Danforth v. R. Co., 99 Ala. 331, 13 South. 51; Smith v. Bank, 82 Tex. 368, 17 S. W. 779. See PRODUCTION OF BOOKS.

NOTICE TO QUIT. A request from a landlord to his tenant to quit the premises leased, and to give possession of the same to him, the landlord, at a time therein mentioned. Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Den v. Adams, 12 N. J. L. 99.

The form of the notice. The notice or demand of possession should contain a request from the landlord to the tenant or person in possession to quit the premises which he holds from the landlord (which premises ought to be particularly described, as being situate in the street and city or place, or township and county), and to deliver them to him on or before a day certain,—generally, when the lease is for a year, the same day of the year on which the lease commences. But where there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." 2 Esp. 589. It should be dated, signed by the landlord himself, or by some person in his name, who has been authorized by him, and directed to the tenant. The notice must include all the premises under the same demise; for the landlord cannot determine the tenancy as to part of the premises demised and continue it as to the residue. For the purpose of bringing an ejectment, it is not necessary that the notice should be in writing, except when required to be so under an express agreement between the parties; Com. Dig. *Estate by Grant* (G 11, n. p.); 2 Campb. 96. But it is the general and safest practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain. Care should be taken that the words of a notice be clear and decisive, without ambiguity or giving an alternative to the tenant; for if it be really ambiguous or optional, it will be invalid; Ad. Ej. 204.

As to the person by whom the notice is to be given. It must be given by the person interested in the premises, or his agent properly appointed; Ad. Ej. 120. See 3 C. B. 215. As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may act upon with security, and should, therefore, be binding upon all the parties concerned at the time it is given. Where, therefore, several persons are jointly interested in the premises, they need not all join in the notice; but, if any of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid. But see 1 B. & Ad. 135; 7 M. & W. 139. But if the notice be given by an agent, it is sufficient if his authority is afterwards recognized; 3 B. & Ald. 689. But see 10 B. & C. 621.

As to the person to whom the notice should be given. When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. It should invariably be given to the tenant of the party serving the notice, notwithstanding a part

may have been underlet or the whole of the premises may have been assigned; Ad. Ej. 119; 5 B. & P. 330; 6 B. & C. 41; unless, perhaps, the lessor has recognized the subtenant as his tenant; Jackson v. Baker, 10 Johns. (N. Y.) 270. When the premises are in possession of two or more as joint tenants or tenants in common, the notice should be to all. A notice addressed to all and served upon one only will, however, be a good notice; Ad. Ej. 123. The delivery of a notice to quit to the wife of a tenant, she being in possession of the premises, is a good service upon the husband; Bell v. Bruhn, 30 Ill. App. 300.

As to the mode of serving the notice. The person about serving the notice should make two copies of it, both signed by the proper person, then procure one or more respectable persons for witnesses, to whom he should show the copies, who, upon comparing them and finding them alike, are to go with the person who is to serve the notice. The person serving the notice then, in their presence, should deliver one of these copies to the tenant personally, or to one of his family, at his usual place of abode, although the same be not upon the demised premises; 2 Phill. Ev. 185; or serve it upon the person in possession; and where the tenant is not in possession, a copy may be served on him, if he can be found, and another on the person in possession. The witnesses should then, for the sake of security, sign their names on the back of the copy of the notice retained, or otherwise mark it so as to identify it; and they should also state the manner in which the notice was served. In the case of a joint demise to two defendants, of whom one alone resided upon the premises, proof of the service of the notice upon him has been held to be sufficient ground for the jury to presume that the notice so served upon the premises has reached the other who resided in another place; 7 East 553; 5 Esp. 196. In ejectment the defence of adverse possession is inconsistent with a tenancy, and exempts the plaintiff from the necessity of proving a notice to quit; Wolf v. Holton, 92 Mich. 136, 52 N. W. 459; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. 44; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237.

At what time it must be served. At common law it must be given six calendar months before the expiration of the lease; 1 Term 159; Nichols v. Williams, 8 Cow. (N. Y.) 13; Hanchet v. Whitney, 1 Vt. 311; Den v. McIntosh, 26 N. C. 291, 42 Am. Dec. 122; Rising v. Stannard, 17 Mass. 287; see Logan v. Herron, 8 S. & R. (Pa.) 459; Godard's Ex'rs v. R. Co., 2 Rich. (S. C.) 346; and three months is the common time under statutory regulations; and where the letting is for a shorter period the length of notice is regulated by the time of letting; 6 Bing. 362; Howard v. Merriam, 5 Cush. (Mass.) 563; Anderson v. Prindle, 23 Wend. (N. Y.) 616. Where a tenant under a lease for a term assents to the termination of his lease and continues to hold from day to day under a new arrangement, he is not entitled to a month's notice to quit; Lane v. Ruhl, 94 Mich. 474, 54 N. W. 175; a tenant or subtenant holding over is not entitled to notice to quit; Frank v. Taubman, 31 Ill. App. 592. Difficulties sometimes arise as to the period of the commencement of the tenancy; and when a regular notice to quit on any particular day is given, and the time when the term began is unknown, the effect of such notice, as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery; if the tenant, having been applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of such information a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into error; Ad. Ej. 141; 2 Esp. 635; 2 Phill. Ev. 186. In like manner, if the tenant at the time of delivery of the notice assent to the terms of it, it will waive any irregularity as to the period of its expiration; but such assent must be strictly proved; 4 Term 361. When the landlord is ignorant of the time when the term commenced, a notice to quit may be given not specifying any particular day, but ordering the tenant in general terms to quit and deliver up the possession of the premises at the end of the current year of his tenancy thereof, which shall expire next after the end of three months from the date of the notice. See 2 Esp. 589. Where a notice to quit is necessary, the day named therein must be the day of, or corresponding to the day of, the conclusion of the tenancy; Finkelstein v. Herson, 55 N. J. L. 217, 26 Atl. 688.

What will amount to a waiver of the notice. The acceptance of rent accruing subsequently to the expiration of the notice is the most usual means by which a waiver of it may be produced; but the acceptance of such rent is open to explanation; and it is the province of the jury to decide with what views and under what circumstances the rent is paid and received; Ad. Ej. 139; 2 Campb. 387. If the money be taken with an express declaration that the notice is not thereby intended to be waived, or accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the accept-

ance; the rent must be paid and received *as rent*, or the notice will remain in force; Cowp. 243. The notice may also be waived by other acts of the landlord; but they are generally open to explanation, and the particular act will or will not be a waiver of the notice, according to the circumstances which attend it; 2 East 236; 1 Term 53. It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease,—that is, to clear and fence the land and pay the taxes; 1 Binn. 333. In cases, however, where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover in an action for use and occupation, the notice of course will be waived; Ad. Ej. 141; 1 H. Bla. 311; Prindle v. Anderson, 19 Wend. (N. Y.) 391.

A tenant becomes a trespasser at the expiration of the time specified in a due notice to quit; and the landlord has a right during the tenant's absence to re-enter and take possession, and eject the tenant's goods and to keep the possession so obtained; Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921. A tenant at will, after a notice to quit, has a reasonable time in which to vacate the premises; Amsden v. Blaisdell, 60 Vt. 386, 15 Atl. 332.

See LANDLORD AND TENANT; LEASE.

NOTING. A term denoting the act of a notary in minuting on a bill of exchange, after it has been presented for acceptance or payment, the initials of his name, the date of the day, month, and year when such presentment was made, and the reason, if any has been assigned, for non-acceptance or non-payment, together with his charge. The noting is not indispensable, it being only a part of the protest; it will not supply the protest; 4 Term 175.

NOTIO. The power of hearing and trying a matter of fact. Calv. Lex.

NOTORIOUS. As used in defining adverse possession, it means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. Watrous v. Morrison, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139. See Straus v. Ins. Co., 94 Mo. 187, 6 S. W. 698, 4 Am. St. Rep. 368.

NOTORIOUSLY. Well and generally understood. Martinez v. Moll, 46 Fed. 724.

NOTOUR. In Scotch Law. Open; notorious.

NOVA CUSTOMA. An imposition or duty. See ANTIQUA CUSTOMA.

NOVA STATUTA. English acts beginning with Edward III. are so called. Earlier acts are called *vetera statuta*, or *antiqua statuta*. The division is due to the accidental arrangement of the earliest printed copies of the statute. The former were first printed in 1497; the latter in 1588. 2 Holdsw. Hist. E. L. 175. Between them were *statuta incerti temporis*, which came to be regarded as of the last year of Edward II.; but some were certainly older and some were never issued but were merely lawyers' notes. "apochryphal statutes," like the Apochrypha in the Bible. Maitland, 2 Sel. Essays, Anglo-Am. Leg. Hist. 81.

NOVÆ NARRATIONES. New counts or talys. A book of such pleadings, as were then in use, published in the reign of Edw. III. 3 Bla. Com. 297; 3 Reeve, Hist. Eng. Law 439.

NOVATION (from Lat. *novare*, *novus*, new). The substitution of a new obligation for an old one, which is thereby extinguished.

A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor. Griggs v. Day, 136 N. Y. 152, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. Rep. 704.

It is a mode of extinguishing one obligation by another—the substitution, not of a new paper or note, but of a new obligation in lieu of an old one—the effect of which is to pay, dissolve, or otherwise discharge it. McDonnell v. Ins. Co., 85 Ala. 401, 5 South. 120.

In Civil Law. There are three kinds of novation.

First, where the debtor and creditor remain the same, but a *new debt* takes the place of the old one. Here, either the subject-matter of the debt may be changed, or the conditions of time, place, etc., of payment.

Second, where the debt remains the same, but a *new debtor* is substituted for the old. This novation may be made without the intervention or privity of the old debtor (in this case the new agreement is called *expromissio*, and the new debtor *expromissor*), or by the debtor's transmission of his debt to another, who accepts the obligation and is himself accepted by the creditor. This transaction is called *delegatio*. Domat lays down the essential distinction between a delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt. See DELEGATION.

Third, where the debt remains the same, but a *new creditor* is substituted for the old This also is called *delegatio*, for the reason adduced above, to wit: that all three parties must assent to the new bargain. It differs from the *cessio nominis* of the civil law by completely cancelling the old debt,

while the *cessio nominis* leaves the creditor a claim for any balance due after assignment.

In every novation the old debt is wholly extinguished by the new. To effect such a transformation, several things are requisite.

First, there must be an *anterior obligation* of some sort, to serve as a basis for the new contract. If the old debt be void, as being, *e. g.*, *contra bonos mores*, then the new debt is likewise void; because the consideration for the pretended novation is null. But if the old contract is only voidable, in some cases the new one may be good, operating as a ratification of the old. Moreover, if the old debt be conditional, the new is also conditional unless made otherwise by special agreement,—which agreement is rarely omitted.

Second, the parties innovating must *consent* thereto. In the modern civil law, every novation is voluntary. Anciently, a novation not having this voluntary element was in use. And not only consent is exacted, but a *capacity* to consent. But capacity to make or receive an absolute payment does not of itself authorize an agreement to innovate.

Third, there must be an *express intention* to innovate,—the *animus novandi*. A novation is never presumed. If an intent to destroy the old debt be not proved, two obligations now bind the debtor,—the old and the new. Conversely, if the new contract be invalid, without fraud in the transaction, the creditor has now lost all remedy. The anterior obligation is destroyed without being replaced by a new one.

An important rule of novation is that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the ancient agreement, they are cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms is the action *ex stipulatu* to be brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties.

Obviously, a single creditor may make a novation with two or more debtors who are each liable *in solido*. In this case any one debtor may make the contract to innovate; and if such a contract be completed, all his fellow-debtors are discharged with him from the prior obligation. Therefore Pothier says that, under the rule that novation cancels all obligations subsidiary to the main one, *sureties* are freed by a novation contracted by their principal. The creditor must specially stipulate that codebtors and guarantors shall consent to be bound by the novation, if he wish to hold them liable. If they do not consent to such novation, the parties all remain, as before, bound under the old debt. So in Louisiana the debt due to a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgages to secure its payment; Rachel v. Rachel, 11 La. Ann. 687.

It follows that the new debtor, in a delegation, can claim nothing under the old contract, since he has consented to the destruction of that contract. For the same reason, a creditor cannot proceed against the discharged debtor. And this is true though the new debtor should become insolvent while the old remains solvent. And even though at the time of the novation the new debtor was insolvent, still the creditor has lost his remedy against the old debtor. But the rule, no doubt, applies only to a *bona fide* delegation. And a suit brought by the creditor against a delegated debtor is not evidence of intention to discharge the original debtor; Jackson v. Williams, 11 La. Ann. 93.

In a case of *mistake*, the rule is this: If the new debtor agree to be substituted for the old, under the belief that he himself owes so much to the discharged debtor, although he do not in fact owe the amount, yet he is bound to the creditor on the novation; because the latter has been induced to discharge the old debtor by the contract of the new, and will receive only his due in holding the new debtor bound. But where the supposed creditor had really no claim upon the original debtor, the substitute contracts no obligation with him; and even though he intended to be bound, yet he may plead the fact of no former debt against any demand of the creditor, as soon as this fact is made known to him.

A novation may be made dependent on a condition. In that case the parties remain bound, as before, until the condition is fulfilled. The new debtor is not freed from a conditional novation as to the creditor until the condition happens; and he is not liable in an action to the old debtor until it is performed.

Any obligation which can be destroyed at all may be destroyed by novation. Thus, legacies, judgments, etc., with mortgages, guarantees, and similar accessories, are as much the subjects of novation as simple contract debts. But a covenant by the obligee of a bond not to sue the obligor within a certain time is not an example of the civil-law novation. The agreement was not a release, not a substituted contract, but a covenant merely, for the breach of which the obligee has his action; Chandler v. Herrick, 19 Johns. (N. Y.) 129.

At Common Law. The common-law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it.

The term novation is rarely employed. The usual common-law equivalent is assignment, and sometimes merger. Still, this form of contract found its way into common-law treatises as early as Fleta's day, by whom it was called *innovatio. Item, per innovationem, ut si transfusa sit obligatio de una persona in aliam, quæ in se susceperit obligationem.* Fleta, lib. 2, c. 60, § 12. The same words here quoted are also in Bracton, lib. 3, c. 2, § 13, but we have *novatio* for *innovatio.* In England, recently, the term novation has been revived in some cases.

A case of novation is put in Tatlock v. Harris, 3 Term 180. "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover that sum against A."

The requisites of a novation are (1) a valid prior obligation to be displaced; (2) the consent of all the parties to the substitution; (3) a sufficient consideration; (4) the extinction of the old obligation; and (5) the creation of a valid new one; In re Ransford, 194 Fed. 658.

If a creditor orally directs his debtor to pay a third party and the debtor mutually agrees with the third party to do so, it is a novation; Castle v. Persons, 117 Fed. 844, 54 C. C. A. 133.

The subject of novation has been much before the courts in reference to the transfers of the business of life assurance companies. In order to constitute a novation the old obligation must be discharged; and it has often been the interest of claimants on the transferror company, where the transferee company has become insolvent, to contend that there is no "novation," but that the old obligation is still in force. In England the questions which have arisen on this matter are for the most part set at rest by the stat. 35 & 36 Vict. c. 41, s. 7, providing that no policy-holder shall be deemed to have abandoned any claim against the original company, and to have accepted in lieu thereof the liability of the new company, unless such abandonment and acceptance shall have been signified by some writing signed by him, or by his agent lawfully authorized. Moz. & W.

There must always be a debt once existing and now cancelled, to serve as a *consideration* for the new liability. The action in all cases is brought on the new agreement. But in order to give a right of action there must be an extinguishment of the original debt; 1 M. & W. 124; Short v. New Orleans, 4 La. Ann. 281; Warren v. Batchelder, 15 N. H. 129; Caswell v. Fellows, 110 Mass. 52; Black v. De Camp, 78 Ia. 718, 43 N. W. 625; Brewer v. Winston, 46 Ark. 163.

Where there is a substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy; Guichard v. Brande, 57 Wis. 534, 15 N. W. 764; and the previous obligation of which novation is sought must be a valid one; Clark v. Billings, 59 Ind. 509.

No mere agreement for the transformation of one contract into another is of effect until actually carried into execution and the consent of the parties thereto obtained. A good novation is an accord executed; 5 B. & Ad. 925; Cox v. Baldwin, 1 La. 410; Goodrich v. Stanley, 24 Conn. 621; otherwise, if there be no satisfaction; 2 Scott N. R. 938. But as to the distinction between novation and accord and satisfaction, see that title. The discharge of the old debt must be contemporaneous with, and result from the consummation of, an arrangement with the new debtor; Cornwell v. Megins, 39 Minn. 407, 40 N. W. 610.

But where an agreement is entered into by deed, that deed gives in itself a substantial cause of action; and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt; Co. Litt. 212 *b;* 1 Burr. 9; Jones v. Johnson, 3 W. & S. (Pa.) 276, 38 Am. Dec. 760; Snyder v. Sponable, 1 Hill (N. Y.) 567.

In the civil law *delegatio,* no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity there must be a new promise founded on sufficient consideration; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; 5 Ad. & E. 115; Cornwell v. Megins, 39 Minn. 407, 40 N. W. 610; Spycher v. Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414; Gails v. The Osceola, 14 La. Ann. 54.

But in equity a creditor may assign his claim fully to another without any intervention of the debtor; and the assignee is not even compelled to sue in his assignor's name; Vanbuskirk v. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Moseley v. Boush, 4 Rand. (Va.) 392.

The extinction of the prior debt is consideration enough to support a novation. If A holds B's note, payable to A, and assigns this for value to C, B is by such transfer released from his promise to A, and this is sufficient consideration to sustain his promise to C; Ans. Contr. 220; Bacon v. Daniels, 37 Ohio St. 279; Parsons v. Tillman, 95 Ind. 452; Bacon v. Bates, 53 Vt. 30. And a consideration need not be expressed in the contract of novation; though one must be proved in order to defend in a suit brought by creditors of the assignor.

When assent or consideration is wanting, the novation operates only as a species of collateral security. The transferee cannot sue in his own name, and will be subject

to all the equitable defences which the debtor had against the original creditor. This assent on the debtor's part is said to be essential, for the reason that he may have an account with his assignor, and he shall not be barred of his right to a set-off. Still, if anything like an assent on the part of a holder of money can be inferred, he will be considered as the debtor; 4 Esp. 203; McNeil v. McCamley, 6 Tex. 163; if the debtor's assent be not secured, the order of transfer may be revoked before it is acted on.

In a delegation, if the old debtor agree to provide a substitute, he must put his creditor into such a position that the latter can claim full satisfaction from the delegated debtor, or otherwise the original liability remains, and there is no novation; Coy v. De Witt, 19 Mo. 322; Appleton v. Kennon, *id.* 637. See 2 M. & W. 484; Sheehy v. Mandeville, 6 Cra. (U. S.) 253, 3 L. Ed. 215; Arnold v. Camp, 12 Johns. (N. Y.) 409, 7 Am. Dec. 328; Guichard v. Brande, 57 Wis. 534, 15 N. W. 764.

One who has contracted to pay the debts of another, and has been notified by a creditor that he accepts the arrangement, cannot be released from liability to such creditor by rescinding the contract without his consent; Hume v. Brower, 25 Ill. App. 130.

The existing Louisiana law is based upon the doctrines of the Civil Code considered above. It is held in numerous cases that "novation is not to be presumed:" hence the receipt of a bill or note is not necessarily a novation, or extinguishment of the debt for which it is given. An express declaration to that effect is required in most of our states, or else acts tantamount to a declaration. An intention to discharge the old debt must be shown in all cases; and this intention is sufficient to work a novation; Smith v. Brown, 12 La. Ann. 299. "The delegation by which the debtor gives to the creditor another debtor, who obliged himself towards such creditor, does not operate as a novation unless the creditor has expressly declared his intention to discharge the debtor who made the delegation." Choppin v. Gobbold, 13 La. Ann. 238.

One of the most common of modern novations is the surrender and destruction of an old promissory note or bill of exchange, and the receipt of a new one in payment thereof. The rules of novation apply as completely to debts evidenced by mercantile paper as to all other obligations; Story, Bills § 441; Pothier, *de Change*, n. 189. Hence, everywhere, if the parties *intend* that a promissory note or bill shall be absolute payment, it will be so considered; Ans. Contr. 273, n.; 10 Ad. & E. 593; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Torrey v. Baxter, 13 Vt. 452. In some states, the receipt of a negotiable promissory note is *prima facie* payment of the debt upon which it is given, and no action lies upon the account unless the presumption is controverted; Parham Sewing Mach. Co. v. Brock, 113 Mass. 194; Bunker v. Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Ricker v. Adams, 59 Vt. 154, 8 Atl. 278; Nixon v. Beard, 111 Ind. 137, 12 N. E. 131; Matasce v. Hughes, 7 Or. 39, 33 Am. Rep. 696. "If a creditor gives a receipt for a draft in payment of his account, the debt is novated;" Hunt v. Boyd, 2 La. 109. But see the cases cited *supra* for the full Louisiana law. In most states, however, the rule is, as in England, that, whether the debt be pre-existing or arise at the time of giving the note, the receipt of a promissory note is *prima facie* a conditional payment only, and works no novation.

It is payment only on fulfilment of the condition, *i. e.* when the note is paid; 5 Beav. 415; Sheehy v. Mandeville, 6 Cra. (U. S.) 264, 3 L. Ed. 215; Murray v. Gouverneur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Smith v. Smith, 27 N. H. 253; Brewster v. Bours, 8 Cal. 501; Hart v. Boller, 15 S. & R. (Pa.) 162, 16 Am. Dec. 536.

If a vendor transfer his vendee's note, he can only sue on the original contract when he gets back the note, and has it in his power to return it to his vendee; Parker v. U. S., 1 Pet. C. C. 262, Fed. Cas. No. 10,750; Townsends v. Stevenson, 4 Rich. (S. C.) 59.

Where the holder of a note agrees to accept another as debtor in place of the maker, there is a complete novation of the debt, and the indorsers are discharged; 22 Can. S. C. R. 479.

A novation is not a promise to pay the debt of another, within the statute of frauds, and need not be in writing; Roehl v. Porteous, 47 La. Ann. 1582, 18 South. 646. See Eden v. Chaffee, 160 Mass. 225, 35 N. E. 675; Hamlin v. Drummond, 91 Me. 175, 39 Atl. 551.

See Dixon, Substituted Liabilities; Discharge; Payment; Mortgage; Merger.

NOVEL ASSIGNMENT. See New Assignment.

NOVEL DISSEISIN. The name of an old remedy which was given for a new or recent disseisin.

When a tenant in fee-simple, fee-tail, or for term of life, was put out and disseised of his lands or tenements, rents, and the like, he might sue out a writ of assize or novel disseisin; and if, upon trial, he could prove his title and his actual seisin, and the disseisin by the present tenant, he was entitled to have judgment to recover his seisin and damages for the injury sustained; 3 Bla. Com. 187. Now obsolete.

NOVELLÆ LEONIS. The ordinances of the Emperor Leo, which were made from the year 887 till the year 893, are so called. These novels changed many rules of the Justinian law. This collection contains one hundred and thirteen novels, written orig-

inally in Greek, and afterwards, in 1560, translated into Latin by Agilæus.

NOVELS, NOVELLÆ CONSTITUTIONES. **In Civil Law.** The name given to the constitutions or laws of Justinian and his immediate successors, which were promulgated soon after the Code of Justinian.

It appears to have been the intention of Justinian, after the completion of the second and revised edition of the Code, to supply what had not been foreseen in the preceding laws, together with any necessary amendments or alterations, not by revising the Code, but by supplementary laws. Such laws he promulgated from time to time; but no official compilation of them is known to have been made until after his death, when his laws, 159 in number, with those of the reigns of Justin II. and Tiberias, nine in number, were collected, together with some local edicts, under this name. They belong to various times between 535 and 565.

Although the Novels of Justinian are the best known, and when the word Novels only is mentioned those of Justinian are always intended, he was not the first who used that name. Some of the acts of Theodosius, Valentinian, Leo, Severus, Authennius, and others, were also called Novels. But the Novels of the emperors who preceded Justinian had not the force of law after the legislation of that emperor. Those Novels are not, however, entirely useless: because, the Code of Justinian having been compiled to a considerable extent from the Theodosian Code and the earlier Novels, the latter frequently remove doubts which arise on the construction of the Code

The original language of the Novels was for the most part Greek: but they are represented in the Corpus Juris Civilis by a Latin translation of 134 of them. These form the fourth part of the Corpus Juris Civilis. They are directed either to some officer, or an archbishop or bishop, or to some private individual of Constantinople; but they all had the force and authority of law.

The 118th Novel is the foundation and groundwork of the English Statute of Distribution of Intestates' Effects, which has been copied in many states of the Union. See 1 P. Wms. 27; Prec. in Chanc. 593; CIVIL LAW; CODE.

NOVELTY. **In Patent Law.** See PATENT.

NOVIGILD. A pecuniary satisfaction for an injury, amounting to nine times the value of the thing for which it was paid. Spelman.

NOVUS HOMO (Lat. a new man). This term is applied to a man who has been pardoned of a crime, by which he is restored to society and is rehabilitated.

NOW. At this time, or at the present moment; or at a time contemporaneous with something done. Pike v. Kennedy, 15 Or. 426, 15 Pac. 637. At the present time. Nutt v. U. S., 26 Ct. Cl. 15. In a will the word *now* is construed to mean at the death of the testator; 53 L. J. Ch. 1163 (reversed on other grounds, 30 Ch. D. 50); except where persons or classes must be ascertained or a description of property fixed; 30 L. J. Ex. 230; 6 H. & N. 583, where the word *now* is held to refer to the date of the will.

NOXA (Lat.). **In Civil Law.** Damage resulting from an offence committed by an irresponsible agent. The offence itself. The punishment for the offence. The slave or animal who did the offence, and who is delivered up to the person aggrieved (*datur noxæ*) unless the owner choose to pay the damage. The right of action is against whoever becomes the possessor of the slave or animal (*noxa caput sequitur*). D. *de furt.* L. 41; Vicat, Voc. Jur.; Calv. Lex.

NOXÆ DEDITIO. The surrender of a slave who has committed a misdeed. The master may elect whether he will pay the damages assessed or surrender the slave. *Noxa* is the body that has done the *harm; i. e.* the slave. Hunter, Rom. Law, 166.

NOXAL ACTION. See NOXA.

NOXIOUS. Hurtful; offensive. Within the meaning of a statute prohibiting noxious or offensive trade or manufactures, brickmaking is not included. 32 L. J. M. C. 135; 13 C. B. N. S. 479.

A thing is noxious if capable of doing harm. And if noxious as administered, although innoxious if differently administered; 49 L. J. M. C. 44; 5 Q. B. Div. 307; 13 Cox 547; 12 *id.* 463.

NUBILIS (Lat.). **In Civil Law.** One who is of a proper age to be married. Dig. 32, 51.

NUDE. Naked. Figuratively, this word is now applied to various subjects.

Nude matter is a bare allegation of a thing done, without any evidence of it.

NUDUM PACTUM. **In Roman Law.** Informal agreements not coming within any of the privileged classes. They could not be sued on. The term was sometimes used with a special and rather different meaning to express the rule that a contract without delivery will not pass property. Pollock, Contracts 743. See CONSIDERATION; Salmond, Jurisprudence 640.

It is now commonly used to express a contract made without a consideration.

NUISANCE. Anything that unlawfully worketh hurt, inconvenience, or damage. 3 Bla. Com. 5, 216. See Cooley, Torts 670.

That class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or to the right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood, Nuisance.

A *private* nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or a few persons, and cannot be said to be public; Ely v. Board, 36 N. Y. 297; State v. Paul, 5 R. I. 185; Ad. Eq. 210; 3 Bla. Com. 215; Webb, Poll. Torts 484.

A *public* or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general and not merely some particular person. It pro-

duces no special injury to one more than another of the people; 1 Hawk. Pl. Cr. 197; 4 Bla. Com. 166.

A *mixed* nuisance is one which, while producing injury to the public at large, does some special damage to some individual or class of individuals; Wood, Nuisance 35.

It is difficult to say what degree of annoyance constitutes a nuisance. If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance; 3 Jur. N. S. 571. In relation to offensive trades, it seems that when such a trade renders the enjoyment of life and property uncomfortable it is a nuisance; 1 Burr. 333; Wesson v. Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181; 116 E. C. L. 608; Requena v. Los Angeles, 45 Cal. 55; State v. Kaster, 35 Ia. 221; Allen v. State, 34 Tex. 230; for the neighborhood has a right to pure and fresh air; 2 C. & P. 485; Duncan v. Hayes, 22 N. J. Eq. 26; 4 B. & S. 608. Every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the use of their property; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305.

It is not a defence that a business is in the best place possible for the defendant or that it is conducted in the proper manner with the latest devices, when the evidence shows that when so conducted it still results in very great damage to, if not the total destruction of, the property of complainants who reside in the vicinity, the rights of habitation being superior to the rights of trade: American S. & R. Co. v. Godfrey, 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8.

A thing may be a nuisance in one place which is not so in another; therefore the situation or *locality* of the nuisance must be considered. A tallow-chandler, for example, setting up his business among other tallow-chandlers, and increasing the noxious smells of the neighborhood, is not guilty of setting up a nuisance unless the annoyance is much increased by the new manufactory; Peake 91. Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics where no such business was carried on; Dennis v. Eckhardt, 3 Grant (Pa.) 390. The same doctrine obtains as regards other trades or employments. Persons living in populous manufacturing towns must expect more noise, smoke, and disturbance than those living elsewhere, and the circumstances of every case must govern; Whitney v. Bartholomew, 21 Conn. 213. A private hospital in a fashionable square in Dublin is an offensive trade; [1896] 1 I. R. 76. A private lunatic asylum is not an offensive trade; 2 A. & E. 161.

Coal burning was at one time decided to be a nuisance, and on petition Edw. II. issued a proclamation against the using it in London; Chamb. Encyc. tit. *Coal*, cited in 8 Ont. Q. B. Div. 583, where it was held that a barbed wire fence is not a nuisance. A city ordinance declaring a public laundry to be a nuisance if carried on in a city except in designated parts of it, is unconstitutional as contravening the XIVth amendment; In re Hong Wah, 82 Fed. 623. Carrying on an offensive trade for several years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood. Formerly the contrary doctrine obtained, on the ground that the complainants were in fault in *coming to a nuisance*. This doctrine is now exploded, as it is manifest that an observance of it would interfere greatly with the growth of cities; Com. v. Upton, 6 Gray (Mass.) 473; 2 C. & P. 483; Brady v. Weeks, 3 Barb. (N. Y.) 157; Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 441; People v. White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; 11 H. L. Cas. 642; Bushnell v. Robeson, 62 Ia. 540, 17 N. W. 888; Woodruff v. Min. Co., 18 Fed. 753.

The trade may be offensive for *noise;* McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659; L. R. 4 Ch. App. 388; 2 Sim. N. S. 133; L. R. 8 Ch. App. 467; Com. v. Smith, 6 Cush. (Mass.) 80; Leete v. Congregational Soc., 14 Mo. App. 590 (as to noise, see 40 Am. L. Rev. 301); or *smell;* 2 C. & P. 485; Allen v. State, 34 Tex. 230; Bishop v. Banks, 33 Conn. 121, 87 Am. Dec. 197; State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163; Shirely v. R. Co., 74 Ia. 169, 37 N. W. 133, 7 Am. St. Rep. 471; or for other reasons; People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; L. R. 5 Eq. Ca. 166; Thompson v. R. Co., 51 N. J. L. 42, 15 Atl. 833; Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 South. 593.

To constitute a *public* nuisance, there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance; 1 Burr. 337; Hackney v. State, 8 Ind. 494; Harrower v. Ritson, 37 Barb. (N. Y.) 301. Where pugilistic entertainments were given at a club and crowds collected outside, and men whistled for cabs during late hours, it was held a nuisance which would be enjoined; 63 L. T. 65.

Public nuisances arise in consequence of following *particular trades*, by which the air is rendered offensive and noxious; Cro. Car. 510; 1 Burr. 333; 4 B. & S. 608; State v. Woodward, 23 Vt. 92; Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 441; also where rendered offensive from stagnant ponds; Rochester v. Simpson, 134 N. Y. 414, 31 N. E. 871; from acts of public *indecency*, as bathing in a public river in sight of the neighboring houses; 2 Campb. 89; State v. Taylor, 29 Ind. 517; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Miller v. People, 5 Barb. (N. Y.) 203; or for acts tending to a *breach of the public peace*, as for drawing

a number of persons into a field for the purpose of pigeon-shooting, to the disturbance of the neighborhood; 3 B. & Ald. 184; or for rude and riotous sports or pastimes; 6 C. & P. 324; or keeping a *disorderly house;* Com. v. Howe, 13 Gray (Mass.) 26; State v. Williams, 30 N. J. L. 103; or a *gaming house;* Hawk. Pl. Cr. b. 1, c. 75, § 6; or a *bawdy-house;* Darling v. Hubbell, 9 Conn. 350; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; State v. Osgood, 85 Me. 288, 27 Atl. 154; or a *merry-go-round;* Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906; or a *dangerous animal,* known to be such, and suffering him to go at large, as a large bulldog accustomed to bite people; Kertschacke v. Ludwig, 28 Wis. 430; Oakes v. Spaulding, 40 Vt. 317, 94 Am. Dec. 404; or *exposing a person having a contagious disease,* as the smallpox, in public; 4 M. & S. 73, 472; and the like. The bringing a horse infected with the glanders into a public place, to the danger of infecting the citizens, is a misdemeanor at common law; 2 H. & N. 299; Fisher v. Clark, 41 Barb. (N. Y.) 329. The selling of tainted and unwholesome food is likewise indictable; 4 Bla. Com. 162; State v. Smith, 10 N. C. 378, 14 Am. Dec. 594; 3 M. & S. 11. The leaving unburied the corpse of a person for whom the defendant was bound to provide Christian burial, as a wife or child, is an indictable nuisance, if he is shown to have been of ability to provide such burial; 2 Den. Cr. Cas. 325. So of storing combustible articles in undue quantities or in improper places; Bradley v. People, 56 Barb. (N. Y.) 72; 3 East 192; Henderson v. Sullivan, 159 Fed. 46, 86 C. C. A. 236, 16 L. R. A. (N. S.) 691, 14 Ann. Cas. 590; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; or the placing of a powder magazine in dangerous proximity to a city; Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App. 364; or the erection and maintenance of purprestures; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; State v. Woodward, 23 Vt. 92; or the keeping of a coal-shed by a railroad in a thickly settled part of a city; Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673; or maintaining a powder magazine within the city limits, against an ordinance; Hazard Powder Co. v. Volger, 58 Fed. 152, 7 C. C. A. 130, 12 U. S. App. 665; or bull-fighting; State v. Canty, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; or using property for a prize fight; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; or a stable; Oehler v. Levy, 234 Ill. 595, 85 N. E. 271, 17 L. R. A. (N. S.) 1025, 14 Ann. Cas. 891; or the storage of tons of dynamite; Henderson v Sullivan, 159 Fed. 46, 86 C. C. A. 236, 16 L. R. A. (N. S.) 691, 14 Ann. Cas. 590; or the keeping, standing, or exhibiting of stallions and jacks in a public place; Ex parte Foote, 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63; or maintaining in a public place a house where pools are sold on horse races; Respass v. Com., 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. (N. S.) 836; or the erection of a water tank by a railroad on a populous public place; Chicago, G. W. R. Co. v. Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; or maintaining in Havana, Cuba, a public slaughter house from which offal ran into the harbor; O'Reilly De Camara v. Brooke, 142 Fed. 858, affirmed in 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676.

One who has been divested of littoral rights cannot maintain a suit to enjoin obstructions to his access to navigable waters in front of his land under the rule that individuals are not entitled to redress against a *public nuisance;* McCloskey v. Coast Co., 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

Private nuisances may be to *corporeal* inheritances: as, for example, if a man should build his house so as to throw the rain-water which fell on it on my land; Fitzherbert, Nat. Brev. 184; Aiken v. Benedict, 39 Barb. (N. Y.) 400; 5 Rep. 101; have a tree projecting over the land of another; Poll. Torts 62; keep hogs or other animals so as to incommode his neighbor and render the air unwholesome; 9 Co. 58; Com. v. Perry, 139 Mass. 198, 29 N. E. 656; or to *incorporeal* hereditaments; as, for example, obstructing a right of way by ploughing it up or laying logs across it, and the like; Fitzherbert, Nat. Brev. 183; 2 Rolle, Abr. 140; Holmes v. Jones, 80 Ga. 659, 7 S. E. 168; or obstructing a spring; 1 Campb. 463; or "shooting" a gas well; Tyner v. Gas Co., 131 Ind. 408; or making musical and other sounds, for the purpose of vexing and annoying the next door neighbor; [1893] 1 Ch. 316; interfering with a franchise, as a ferry or railroad, by a similar erection unlawfully made; or with a navigable stream by a railroad bridge erected without authority; South Carolina R. Co. v. Moore, 28 Ga. 398, 73 Am. Dec. 778. Any annoyance arising from odors, smoke, unhealthy exhalations, noise, interference with water power, etc., etc., whereby a man is prevented from fully enjoying his own property, may be ranked as a private nuisance. See Adams v. Car Co., 131 Ind. 375, 31 N. E. 57; Hauck v. Pipe Line Co., 153 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 34 Am. St. Rep. 710; Fogarty v. Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756; Pach v. Geoffroy, 67 Hun 401, 22 N. Y. Supp. 275; [1893] 2 Ch. 447; polluting a stream by discharge of drainage; Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499; Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; lowering the grade of a highway; 17 U. C. Q. B. 165; building a railway across it unlawfully; Com. v. R. Co., 4 Gray (Mass.) 22; failing to keep a street railway in repair;

Railway Co. v. State, 87 Tenn. 746, 11 S. W. 946. So making noises in the street and thereby occasioning damage to citizens; Com. v. Smith, 6 Cush. (Mass.) 80; and making a great outcry and clamor in the streets, by which people are drawn together and the highway obstructed; Com. v. Harris, 101 Mass. 29; and even though the noise disturbed but a single person; Com. v. Oaks, 113 Mass. 8; and a continuous and daily beating of drums on the street; In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529; if it be so troublesome as to annoy the whole community; State v. Hughes, 72 N. C. 27.

Generally, obnoxious vapors and smoke from a gas manufactory constitute a private nuisance; Brown v. Illius, 25 Conn. 583; Ottawa G. L. & C. Co. v. Thompson, 39 Ill. 598; Farley v. Gas Light Co., 105 Ga. 323, 31 S. E. 193; Cleveland v. Gas Light Co., 20 N. J. Eq. 201; Rosenheimer v. Gas Light Co., 39 App. Div. 482, 57 N. Y. Supp. 330; also gas works so operated that the percolations from the refuse matter therefrom contaminate the waters of neighboring wells; Farley v. Gas Light Co., 105 Ga. 323, 31 S. E. 193; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711; Keiser v. Gas Co., 143 Pa. 276, 22 Atl. 759 (and it is no excuse that the company has legislative authority to make gas; Bohan v. Gaslight Co., 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711); or to contaminate the waters of a stream with tarry or oily substances from gas works; Carhart v. Gas Light Co., 22 Barb. (N. Y.) 297.

Railroad terminals needlessly located near to private property; Rainey v. R. Co., 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580; driving a current of foul air against the windows of another; Vaughan v. Bridgham, 193 Mass 392, 79 N. E. 739, 9 L. R. A. (N. S.) 695; the keeping of barking and howling dogs and whining puppies; Herring v. Wilton, 106 Va. 171, 55 S. E. 546, 7 L. R. A. (N. S.) 349, 117 Am. St. Rep. 997, 10 Ann. Cas. 66; may be nuisances; but the noises and odors issuing from chicken houses; Wade v. Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820; public dances and picnics, in their nature; Com. v. R Co., 139 Ky. 429, 112 S. W. 613, 18 L. R. A. (N. S.) 699, Ann. Cas. 1912B, 427 (otherwise of an acrobat performing on a wire on a public street; Wheeler v. Ft. Dodge [Ia.] 108 N. W. 1057, 9 L. R. A. [N. S.] 146); the display of fireworks in a city street of itself; Melker v. New York, 190 N. Y. 487, 83 N. E. 565, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544; the burning of brick; Phillips v. Tile Co., 72 Kan. 643, 82 Pac. 787, 2 L. R. A. (N. S.) 92; and the unavoidable noises of an ice plant; Le Blanc v. Mfg. Co., 121 La. 249, 46 South. 226, 17 L. R. A. (N. S.) 287; are not nuisances.

Noise made by hogs kept for slaughter is not such a nuisance as to justify the destruction of a slaughter house business; Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321; the noise of carefully switched railroad trains to a religious society whose services are disturbed by them is not a nuisance; Church of Latter-Day Saints v. R. Co., 36 Utah, 238, 103 Pac. 243, 23 L. R. A. (N. S.) 860, 140 Am. St. Rep. 819.

The vibration due to a gas engine which injures adjoining premises and affects the comfort of its occupant may be enjoined, though in an industrial district of Glasgow; [1912] S. C. 156 (Sc. Ct. q. Sess.); but residents in large industrial cities must put up with a certain amount of noise which accompanies the reasonable recreations of a crowded population. The question in each case is whether such noises amount to a substantial interference with the comfort of neighbors upon ordinary sober common sense standards; New Imper. Hotel Co. v. Johnson, [1912] 1 I. R. 327.

See several full notes on nuisances in 39 L. R. A.; and see MUNICIPAL CORPORATIONS; ORDINANCE.

A person is not liable in damages for a nuisance erected on land by his grantor until after a request to abate; Rouse v. R. Co., 42 Ill. App. 421; but see Whitenack v. R. Co., 57 Fed. 901.

The remedies are by an *action* for the damage done, by the owner, in the case of a private nuisance; 3 Bla. Com. 220; or by any party suffering special damage, in the case of a public nuisance; Lansing v. Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; Pittsburgh v. Scott, 1 Pa. 309; Vaugh. 341; 3 M. & S. 472; 2 Bingh. 283; Hatch v. R. Co., 28 Vt. 142; Yolo County v. Sacramento, 36 Cal. 193; Hughes v. R. Co., 2 R. I. 493; San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Ison v. Manley, 76 Ga. 804; Knowles v. R. Co., 175 Pa. 623, 34 Atl. 974, 52 Am. St. Rep. 860; by *abatement* by the owner, when the nuisance is private; 2 Rolle, Abr. 565; 3 Dowl. & R. 556; Rhea v. Forsyth, 37 Pa. 503, 78 Am. Dec. 441; and in some cases when it is *public;* Add. Torts 71. But in neither case must there be any riot, and very pressing exigency is requisite to justify summary action of this character, particularly in the case of a public nuisance; Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525; Harvey v. Dewoody, 18 Ark. 252; 16 Q. B. 546; by *injunction,* which is the most usual and efficacious remedy; see INJUNCTION; or by *indictment* for a public nuisance; 2 Bish. Cr. L. § 856; Whart. Cr. L. § 1410, etc.; State v. R. Co., 57 Vt. 144; State v. Railroad, 91 Tenn. 445, 19 S. W. 229. A private individual cannot abate a nuisance in a public highway, unless it does him special injury, and then only so far as is necessary to the exercise of his right of passing along the highway; The

Brinton, 66 Fed. 71, 13 C. C. A. 331, 26 U. S. App. 486; 9 Co. 55; 3 Bla. Com. 5; Shaw v. R. Co., 159 Mass. 597, 35 N. E. 92; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332. The courts have had some difficulty in determining what was a sufficient special injury to enable a citizen to sue for a public nuisance obstructing a navigation right; Thayer v. R. Co., 125 Mass. 253; Frost v. R. Co., 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68; Steamboat Co. v. R. Co., 46 S. C. 329, 24 S. E. 337, 33 L. R. A. 541, 57 Am. St. Rep. 688; Lammers v. Brennan, 46 Minn. 209, 48 N. W. 766; he may abate a public nuisance only when it is also a private nuisance as to him, or incommodes him more than the general public; Brown v. Perkins, 12 Gray (Mass.) 89.

Every continuance of a nuisance or recurrence of the injury is an additional nuisance forming in itself the subject-matter of a new action; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

Relief in equity by abatement is not the necessary sequence of the establishment of the charge of nuisance. Criminal nuisances are abatable by criminal process, and where this process is adequate, jurisdiction in equity fails, either because adequate legal remedy precludes jurisdiction in equity or the subject-matter is beyond the scope of equity jurisdiction. If a nuisance, purely criminal, injures or affects a private plaintiff in certain respects, he may resort to equity for relief; but the existence of neither a civil nor criminal public nuisance necessarily calls for the interposition of equity. A private person cannot abate it unless it is specially prejudicial to him, and the state cannot proceed against it in equity if it be merely a criminal nuisance, unattended by injury to a personal or property right of some sort, creating a necessity for the prevention of irreparable injury; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691; People v. Condon, 102 Ill. App. 449.

Obstructions to highways, public grounds, harbors, landings, etc., are classed by the old writers as "purprestures," signifying enclosures. In such cases the attorney general may proceed in equity to abate the nuisance. Whether it be a criminal nuisance or not is wholly immaterial. If it is indictable as a crime, it does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. The decisions awarding injunctions to abate purprestures are numerous. Of this character was the injunction granted in the Debs Case, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and also Raritan Tp. v. R. Co., 49 N. J. Eq. 11, 23 Atl. 127; People v. Beaudry, 91 Cal. 213, 27 Pac. 610; State v. Power Co., 82 S. C. 181, 63 S. E. 884, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343.

Equity will not restrain the keeping of an unlicensed dram shop, though the keeping of it is a public nuisance; State v. Uhrig, 14 Mo. App. 413; or restrain gambling; Cope v. District Fair Ass'n, 99 Ill. 489, 39 Am. Rep. 30; or pool selling; People v. Condon, 102 Ill. App. 449; or keeping a gaming house; State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691; or the keeping of slaughter houses on the banks of a running stream or placing dead animals therein; Tiede v. Schneidt, 99 Wis. 201; nor will it restrain the breach of a covenant on the ground that the act covenanted against was criminal, injury to property resulting therefrom having been waived; Ocean City Ass'n v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914.

Equity will consider the comparative injury which will result from the granting or refusing of an injunction, and it will not be granted where it will be inequitable and oppressive, as where it would cause a large loss to defendant and others, while the injury, if it is refused, would be comparatively slight and can be compensated by damages; Mountain Copper Co. v. U. S., 142 Fed. 625, 73 C. C. A. 621.

See Wood, Nuisance, as to municipal authority to abate a nuisance; 9 L. R. A. 711, note.

According to the principles of equity as recognized in the courts of the United States, a state can obtain relief by a suit in equity to restrain a public nuisance; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537.

NUL AGARD (L. Fr. no award). A plea to an action on an arbitration bond, when the defendant avers that there was no legal award made. 3 Burr. 1730.

NUL DISSEISIN. No disseisin A plea in a real action, by which the defendant denies that there was any disseisin. It is a species of the general issue.

NUL TIEL RECORD (Fr. no such record). A plea which is proper when it is proposed to disprove the existence of the *record* on which the plaintiff founds his action. Andr. Steph. Pl. 234.

Any matters may be introduced under it which tend to destroy the validity of the record as a record, provided they do not contradict the recitals of the record itself; Bennett v. Morley, 10 Ohio 100. It is frequently used to enable the defendant to deny the jurisdiction of the court from which the alleged record emanates; Jacquette v. Hugunon, 2 McLean, 129, Fed. Cas. No. 7,169.

It is said to be the proper plea to an action on a foreign judgment, especially if of a sister state; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; though it is held that *nil debet* is sufficient; Clark

v. Mann, 33 Me. 268; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; especially if the judgment be that of a justice of the peace; Graham v. Grigg, 3 Harr. (Del.) 408. It has been held that it is an inappropriate plea to suits upon foreign judgments, since such judgments do not create a merger, and are only *prima facie* evidence of an indebtedness; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158.

See CONFLICT OF LAWS.

NUL TORT (L. Fr. no wrong). A plea to a real action, by which the defendant denies that he committed any wrong. It is a species of general issue.

NUL WASTE. The general issue in an action of waste. Co. 3d Inst. 700 *a*, 708 *a*. The plea of *nul waste* admits nothing, but puts the whole declaration in issue; and in support of this plea the defendant may give in evidence anything which proves that the act charged is no waste, as that it happened by tempest, lightning, and the like; Co. Litt. 283 *a*; 3 Wms. Saund. 238, n. 5.

NULL. Properly, that which does not exist; that which is not in the nature of things. In a figurative sense it signifies that which has no more effect than if it did not exist. 8 Toullier, n. 320.

NULLA BONA (L. Lat. no goods). The return made to a writ of *fieri facias* by the sheriff, when he has not found any goods of the defendant on which he could levy.

NULLITY. An act or proceeding which has absolutely no legal effect whatever. See Chitty, Contr., 12th ed. 671.

NULLITY OF MARRIAGE. The requisites of a valid and binding marriage have been considered in the article on that subject. If any of these requisites are wanting in a given case, the marriage is either absolutely void, or voidable at the election of one or both of the parties. The more usual imperfections which thus render a marriage void or voidable are: 1. Unsoundness of mind in either of the parties. 2. Want of age, *i. e.* fourteen in males and twelve in females. 3. Fraud or error; but these must relate to the *essentials* of the relation, as personal identity, and not merely to the *accidentals*, as character, condition, or fortune. 4. Duress. 5. Physical impotence, which must exist at the time of the marriage and be incurable. 6. Consanguinity or affinity within the prohibited degrees. 7. A prior subsisting marriage of either of the parties. The fifth and sixth are termed canonical, the remainder, civil, impediments.

The distinction between the two is important,—the latter rendering the marriage absolutely *void*, while the former only renders it *voidable*. In the one case, it is not necessary (though it is certainly advisable) to bring a suit to have nullity of the marriage ascertained and declared: it may be treated by the parties as no marriage, and will be so regarded in all judicial proceedings. In the other case, the marriage will be treated as valid and binding until its nullity is ascertained and declared by a competent court in a suit instituted for that purpose; and this must be done during the lifetime of both parties: if it is deferred until the death of either, the marriage will always remain good. But the effect of such sentence of nullity, when obtained, is to render the marriage null and void from the beginning, as in the case of civil impediments.

For the origin and history of this distinction between void and voidable marriages, see 1 Bish. Mar. Div. & Sep. § 252.

A suit for nullity is usually prosecuted in the same court, and is governed by substantially the same principles, as a suit for divorce; 2 Bish. Mar. Div. & Sep. § 39.

In its consequences, a sentence of nullity differs materially from a divorce. The latter assumes the original validity of the marriage, and its operation is entirely prospective. The former renders the marriage void from the beginning, and nullifies all its legal results. The parties are to be regarded legally as if no marriage had ever taken place: they are single persons, if before they were single; their issue are illegitimate; and their rights of property as between themselves are to be viewed as having never been operated upon by the marriage. Thus, the man loses all right to the property, whether real or personal, which belongs to the woman; and the woman loses her right to dower; 2 Bish. Mar. Div. & Sep. §§ 907, 1597.

A woman domiciled in England at the time of her marriage with a foreigner may,—after he has debarred her from claiming any relief in the courts of his (foreign) domicile by obtaining there a decree of nullity,—petition the court of her own domicile to which she has reverted and obtain a decree there dissolving her marriage; [1913] P. 46.

The jurisdiction where the ceremony was performed creates the marriage and alone can annul it; Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; [1908] P. 46. Entire absence of cohabitation or incapacity to consummate marriage is ground for nullity; [1905] P. 231.

Where a woman of 56 married a man of 69 and lost her pension by the marriage, a decree of nullity on the ground of his physical incapacity was refused; the court saying that as she had lost her pension by gaining a husband, she could not exchange again; Hatch v. Hatch, 58 Misc. 54, 110 N. Y. Supp. 18.

As to venereal diseases in the law of marriage and divorce, see 37 Am. L. Rev. 226.

A woman, upon a sentence of nullity, is not entitled to permanent alimony; though

the better opinion is that she is entitled to alimony *pendente lite;* 2 Bish. Mar. Div. & Sep. §§ 907, 1597.

See ALIMONY; MARRIAGE; DIVORCE; Burge, Col. Law, Renton & Phillimore's ed.

NULLIUS FILIUS (Lat.). The son of no one; a bastard.

A bastard is considered *nullius filius* as far as regards his right to inherit. But the rule of *nullius filius* does not apply in other respects, and has been changed by statute in most states so as to make him the child of his mother, in respect of inheritance.

The mother of a bastard, during its age of nurture, is entitled to the custody of her child, and is bound to maintain it; Com. v. Fee, 6 S. & R. (Pa.) 255; People v. Landt, 2 Johns. (N. Y.) 375; Wright v. Wright, 2 Mass. 109; 4 B. & P. 148. But see 5 East 224, n.

The putative father, too, is entitled to the custody of the child as against all but the mother; Com. v. Anderson, 1 Ashm. (Pa.) 55. And it seems that the putative father may maintain an action, as if his child were legitimate, for marrying him without his consent, contrary to law; Macklin v. Taylor, Add. (Pa.) 212. See BASTARD; CHILD; FATHER; MOTHER; PUTATIVE FATHER.

NULLUM ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an action on an arbitration bond for not fulfilling the award, by which the defendant asserts that there is *no award*

NULLUM FECERUNT ARBITRIUM (Lat.). **In Pleading.** The name of a plea to an actior of debt upon an obligation for the performance of an award, by which the defendant denies that he submitted to arbitration, etc. Bac. Abr. *Arbitr. etc.* (G).

NULLUM TEMPUS ACT. The statute 3 Geo. III. c. 16. See 32 Geo. III. c. 58, and 7 Will. IV, c. 3. It was so called because the right of the crown to sue, etc., was limited by it to sixty years, in contradiction to the maxim, *Nullum tempus occurrit regi.* 3 Chitty, Stat. 63.

NULLUM TEMPUS OCCURRIT REGI. See LIMITATIONS.

NUMBER. A collection of units.

In pleading, numbers must be stated truly when alleged in the recital of a record, written instrument, or express contract; 4 Term 314; Cro. Car. 262; 2 W. Bla. 1104. But in other cases it is not, in general, requisite that they should be truly stated; because they are not required to be strictly proved. If, for example, in an action of trespass the plaintiff proves the wrongful taking away of any part of the goods duly described in his declaration, he is entitled to recover *pro tanto;* Bac. Abr. *Trespass* (I 2); Lawes, Pl. 48.

And sometimes, when the subject to be described is supposed to comprehend a multiplicity of particulars, a general description is sufficient. A declaration in trover alleging the conversion of "a library of books," without stating their number, titles, or quality, was held to be sufficiently certain; 3 Bulstr. 31; Carth. 110; Bac. Abr. *Trover* (F 1); and in an action for the loss of goods by burning the plaintiff's house, the articles may be described by the simple denomination of "goods" or "divers goods"; 1 Kebl. 825; Plowd. 85, 118, 123; Cro. Eliz. 837; 1 H. Bla. 284. The singular number may be included within the plural; State v. Nichols, 83 Ind. 228, 43 Am. Rep. 66; Carpenter v. Lippitt, 77 Mo. 246; Bish. Stat. Crimes § 213.

NUMERATA PECUNIA (Lat.). **In Civil Law.** Money counted or paid; money given in payment by count. See PECUNIA NUMERATA and PECUNIA NON-NUMERATA; L. 3, 10, C. *de non numerat. pecun.*

NUNC PRO TUNC (Lat. now for then). A phrase used to express that a thing is done at one time which ought to have been performed at another.

A *nunc pro tunc* entry is an entry made now, of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake. Perkins v. Hayward, 132 Ind. 95, 31 N. E. 670.

Leave of court must be obtained to act in legal proceedings *nunc pro tunc;* and this is granted to answer the purposes of justice, but never to do injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court; 3 C. B. 970. See 1 V. & B. 312; 1 Moll. 462; 13 Price 604; Brooks v. Brooks, 52 Kan. 562, 35 Pac. 215. But perhaps this rule is not always strictly enforced. Entering a decree *nunc pro tunc*, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal; Monson v. Kill, 144 Ill. 218, 33 N. E. 43; Monson v. Jacques, 144 Ill. 651, 33 N. E. 757.

A decree *nunc pro tunc* presupposes a decree allowed or ordered, but not entered through inadvertence of the court; or a decree under advisement when the death of a party occurs; Cuebas y Arredondo v. Cuebas y Arredondo, 223 U. S. 376, 32 Sup. Ct. 277, 56 L. Ed. 476.

A plea *puis darrein* continuance may be entered *nunc pro tunc* after an intervening continuation, in some cases; Rangely v. Webster, 11 N. H. 299; and lost pleadings may be replaced by new pleadings made *nunc pro tunc;* Chambers v. Astor, 1 Mo. 327. See

The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185, 40 L. Ed. 306.

NUNCIATIO. In Civil Law. A formal proclamation or protest. It may be by acts (*realis*) or by words. Mackeldey, Civ. Law § 237. Thus, *nunciatio novi operis* was an injunction which one man could place on the erection of a new building, etc., near him, until the case was tried by the prætor. *Id.*; Calv. Lex. An information against a criminal. Calv. Lex.

NUNCIO. The name given to the pope's ambassador. Nuncios are ordinary or extraordinary; the former are sent upon usual missions, the latter upon special occasions.

NUNCIUS. In International Law. A messenger; a minister; the pope's legate, commonly called a *nuncio*. See LEGATE.

NUNCUPATIVE WILL. An oral will, declared by a testator *in extremis*, or under circumstances considered equivalent thereto, before witnesses, and afterwards reduced to writing. 4 Kent 576; 2 Bla. Com. 500; 1 Jarm. Wills, 6th Am. ed. *78.

When a man lieth languishing for fear of sudden death, dareth not stay the writing of his testament, and therefore he prayeth his curate and others to bear witness of his last will, and declareth by word what his last will is. Perk. Conv. § 476; Bac. Abr. 305; Male's Case, 49 N. J. Eq. 266, 24 Atl. 370.

In early times this kind of will was very common, and before the statute of frauds, by which it was virtually abolished, save in the case of soldiers and sailors, was of equal efficacy, except for lands, tenements, and hereditaments, with a written testament. Such wills are subject to manifest abuses and by stat. 1 Vict. c. 26, §§ 9, 11 (preceded by 1 Will. IV. c. 20), the privilege is confined to soldiers in actual service, and sailors at sea, and extends only to personal estate. Similar provisions have been enacted in Massachusetts, Minnesota, New York, Rhode Island, Virginia, West Virginia, and Montana. In Georgia, the statute embraces both real and personal property. In California and the Dakotas, the decedent must have been in actual military service, or at sea, and in immediate fear of death. In the other states, nuncupative wills by persons *in extremis* are still recognized, subject to restrictions as to amount of property bequeathed, similar to those of the English statute of frauds.

Statutes relating to nuncupative wills are strictly construed; 2 Phillim. 194; Morgan v. Stevens, 78 Ill. 287; Appeal of Taylor, 47 Pa. 31; Lucas v. Goff, 33 Miss. 629. The testator must be *in extremis*, overtaken by violent sickness, in contemplation of death, and without time to make a written will; 1 Addams 389; Prince v. Hazleton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; Werkheiser v. Werkheiser, 6 W. & S. (Pa.) 184; Scaife v. Emmons, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; but see Johnston v. Glasscock, 2 Ala. 242; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; the deceased must have clearly intimated by word or sign to those present that he intended to make the will; Dockum v. Robinson, 26 N. H. 372; Babineau's Heirs v. Le Blanc, 14 La. Ann. 729; Biddle v. Biddle, 36 Md. 630; Morgan v. Stevens, 78 Ill. 287; Mulligan v. Leonard, 46 Ia. 694; Smith v. Smith, 63 N. C. 637; testamentary capacity must be most clearly proved; Dorsey v. Sheppard, 12 Gill. & J. 192, 37 Am. Dec. 77; Morgan v. Stevens, 78 Ill. 287. In "actual military service," is held to mean during warfare, and while on an expedition; 3 Curt. 531; Leathers v. Greenacre, 53 Me. 561; but this rule has been somewhat freely treated; Gould v. Safford's Estate, 39 Vt. 498. Sailors must be *serving* on shipboard; 2 Curt. 339; Warren v. Harding, 2 R. I. 133. The term mariner applies to every one in the naval or mercantile service; Ex parte Thompson, 4 Bradf. (N. Y.) 154. See note to Sykes v. Sykes, 20 Am. Dec. 44; Male's Case, 49 N. J. Eq. 266, 24 Atl. 370. See MILITARY TESTAMENT.

NUNDINÆ (Law Lat.). **In Civil and Old English Law.** Fair or fairs. Dion. Halicarnass. lib. 2, p. 98; Law Fr. & Lat. Dict. Hence *Nundination*, traffic at fairs.

NUNQUAM INDEBITATUS (Lat. never indebted). **In Pleading.** A plea to an action of indebitatus assumpsit, by which the defendant asserts that he is not indebted to the plaintiff. McKelv. Pl. 31; 6 C. & P. 545; 1 M. & W. 542; 1 Q. B. 77.

In England, this plea has been substituted for *nil debet*, *q. v.*, as the general issue in debt on a simple contract.

NUNTIUS, NUNCIUS. In Old English Practice. One who made excuse for absence of one summoned. An apparitor, beadle, or sergeant. Cowell. A messenger or legate: *e. g.* pope's nuncio. Jacob, L. Dict. *Essoniator* was sometimes wrongly used for *nuntius* in the first sense. Bracton, fol. 345, § 2.

NUPER OBIIT (Lat. he or she lately died). **In Practice.** The name of a writ which in the English law lay for a sister coheiress dispossessed by her coparcener of lands and tenements whereof their father, brother, or any common ancestor died seized of an estate in fee-simple. Fitzh. N. B. 197. Abolished in 1833.

NURSE. Statutes have been passed in many states providing for the regulation and registration of trained nurses. See also HOSPITAL; CHARITABLE USES.

NURSERY. On a sale of peach trees by a nurseryman which turned out to be the

wrong variety, it was held, reversing the court below, that the real intent of a guarantee in the case of fruit trees, though not not stated, is that the tree will produce a certain variety of fruit, and this cannot be determined until the tree begins bearing. Supreme Court of Washington (newspaper of February, 1914). See MEASURE OF DAMAGES.

NURTURE. The act of taking care of children and educating them. See CHILD.

NURUS (Lat.). A daughter-in-law. Dig. 50. 16. 50.

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O. K. These letters, followed by the signature of the person writing them, written on an order for goods, held sufficient contract to pay for them; Penn Tobacco Co. v. Leman, 109 Ga. 428, 34 S. E. 679. Mere "O. K." indorsements on bills by architects are sufficient compliance with provisions of contract for payments on their written certificates; Getchell & M. L. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550. A stipulation waiving a jury filed in court, signed by counsel after the characters O. K., is an agreement; Citizens' Bank of Wichita v. Farwell, 56 Fed. 571, 6 C. C. A. 24.

O. Ni. In the exchequer, when the sheriff made up his account for issues, amerciaments, etc., he marked upon each head O. Ni., which denoted *oneratur, nisi habeat sufficientem exoneracionem*, and presently he became the king's debtor, and a debet was set upon his head; whereupon the parties paravaile became debtors to the sheriff, and were discharged against the king, etc.; 4 Inst. 116. But sheriffs now account to the commissioners for auditing the public accounts; Whart. Lex.

OATH. An outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler, Oaths 15.

The term has been variously defined: as, "a solemn invocation of the vengeance of the Deity upon the witness if he do not declare the whole truth, so far as he knows it;" 1 Stark. Ev. 22; or, "a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth;" 2 Leach 482; or, as "a religious act by which the party invokes God not only to witness the truth and sincerity of his promise, but also to avenge his imposture or violated faith, or, in other words, to punish his perjury if he shall be guilty of it;" 10 Toullier, n. 343; Puffendorff, b. 4, c. 2, § 4. The essential idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws.

In its broadest sense, the term is used to include all forms of attestation by which a party signifies that he is bound in conscience to perform the act faithfully and truly. In a more restricted sense, it excludes all those forms of attestation or promise which are not accompanied by an imprecation.

Assertory oaths are those required by law other than in judicial proceedings and upon induction to office: such, for example, as custom-house oaths.

Extra-judicial oaths are those taken without authority of law. Though binding *in foro conscientiæ*, they do not, when false, render the party liable to punishment for perjury.

Judicial oaths are those administered in judicial proceedings.

Promissory or *official* oaths are oaths taken, by authority of law, by which the party declares that he will fulfil certain duties therein mentioned: as, the oath which an alien takes, on becoming naturalized, that he will support the constitution of the United States: the oath which a judge takes that he will perform the duties of his office. The breach of this does not involve the party in the legal crime or punishment of perjury; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270. Where an appointee neglects to take an oath of office when required by statute to do so, he cannot be considered qualified, nor justify his doings as an officer; Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 50.

Qualified oaths are circumstantial oaths. Rap. & L. Dict.

The *form* of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience; 4 Bla. Com. 43; 1 Whart. Ev. §§ 386–8; Com. v. Buzzell, 16 Pick. (Mass.) 154; McKinney v. People, 2 Gilman (Ill.) 540, 43 Am. Dec. 65; 7 Ill. Ry. & M. 77. The most common form is upon the gospel, by taking the book in the hand: the words commonly used are, "You do swear that," etc., "so help you God," and then kissing the book; 9 C. & P. 137. The oath was in common use long prior to the Christian era; Willes 545, 1744; the oath and Christianity became associated during the reign of Henry VIII. in England; 3 Robertson's Charles V. 257. The origin of this oath may be traced to the Roman law; Nov. 8, tit. 3; Nov. 74, cap. 5; Nov. 124, cap. 1. In ancient times a Bible containing the Gospels was placed upon a stand in view of the prisoner. The jurors placed their hands upon the book, and then the accused had a full view of "the peer" who was to try him. This was called the "corporal oath" because the hand of the person sworn touched the book. Probably, out of reverence, the book may have been kissed sometimes, as a Catholic priest now kisses it in a mass; but it is doubtful if kissing the book was ever essential to the validity of the "corporal oath"; 22 Law Mag. & Rev. 59.

The terms "corporal oath" and "solemn oath" are synonymous, and an oath taken with the uplifted hand is properly described by either term in an indictment for perjury; Jackson v. State, 1 Ind. 184. In New England, New York, and in Scotland the gospels

are not generally used, but the party taking the oath holds up his right hand and repeats the words here given; 1 Leach 412, 498.

Kissing the book has been abolished by statute (1895) in Pennsylvania.

Where a justice asks affiant if he swears to the affidavit, and he replies that he does, the oath is sufficient though he does not hold up his hands and swear; Dunlap v. Clay, 65 Miss. 454, 4 South. 118.

Another form is by the witness or party promising holding up his right hand while the officer repeats to him, "You do swear by Almighty God, the searcher of hearts, that," etc., "and this as you shall answer to God at the great day."

In another form of attestation, commonly called an affirmation (*q. v.*), the officer repeats, "You do solemnly, sincerely, and truly declare and affirm that;" which is the form prescribed in England by 8 Geo. I. ch. 6.

A general oath that the evidence "shall be the truth, the whole truth, and nothing but the truth," etc., is all that is necessary for a witness who testifies to the signing of an instrument in his presence, and translates the language of such instrument for the benefit of the jury; Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

A Jew is sworn on the Pentateuch, or Old Testament, with his head covered; Stra. 821, 1113; a Mohammedan, on the Koran; 1 Leach 54; a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest; Wils. 549; 1 Atk. 21; a Chinaman, by breaking a china saucer; 1 C. & M. 248. See State v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704.

After a witness has taken the oath according to the custom and religion of his country, it is not error to require him to take the statutory oath; State v. Gin Pon, 16 Wash. 425, 47 Pac. 961.

The requirement of an "oath" as used in any act or resolution of congress shall be deemed complied with by making affirmation in the judicial form; U. S. R. S. § 1.

The form and time of administering oaths, as well as the person authorized to administer are usually fixed by statute. See Herman v. Herman, 4 Wash. C. C. 555, Fed. Cas. No. 6,407; U. S. v. Bailey, 9 Pet. (U. S.) 238, 9 L. Ed 113; Oaks v. Rodgers, 48 Cal. 197; Arnold v. Middletown, 41 Conn. 206. The administering of unlawful oaths is an offence against the government; Whart. Lex.

By the Promissory Oaths Act (31 & 32 Vict. c. 72) a number of unnecessary oaths have been abolished, and declarations substituted. The same act provides a new form of the oath of allegiance, and forms of a judicial oath and an official oath to be taken by particular officers. See also Promissory Oaths Act of 1871.

In Arkansas, California, Florida, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, and Wisconsin there are constitutional provisions intended to exclude any religious test for the competency of witnesses.

The Bible is not an indispensable requisite in the administration of an oath; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

See KISSING THE BOOK.

OATH AGAINST BRIBERY. One which could have been administered to a voter at an election for members of parliament. Abolished in 1854. Whart. Lex.

OATH OF CALUMNY. **In Civil Law.** An oath which a plaintiff was obliged to take that he was not actuated by a spirit of chicanery in commencing his action, but that he had *bona fide* a good cause of action. Pothier, Pand. lib. 5, tt. 16, 17, s. 124. This oath is somewhat similar to our affidavit of a cause of action. See Dunl. Adm. Pr. 289, 290; JURAMENTUM CALUMNIÆ.

OATH DECISORY. **In Civil Law.** An oath which one of the parties defers or refers back to the other for the decision of the cause.

It may be deferred in any kind of civil contest whatever, in questions of possession or of claim, in personal actions, and in real. The plaintiff may defer the oath to the defendant whenever he conceives he has not sufficient proof of the fact which is the foundation of his claim; and in like manner the defendant may defer it to the plaintiff when he has not sufficient proof of his defence. The person to whom the oath is deferred ought either to take it or refer it back; and if he will not do either, the cause should be decided against him. Pothier, Obl. pt. 4, c. 3, s. 4.

The decisory oath has been practically adopted in the district court of the United States for the district of Massachusetts; and admiralty causes have been determined in that court by the oath decisory. But the cases in which this oath has been adopted have been where the tender has been accepted; and no case is known to have occurred there in which the oath has been refused and tendered back to the adversary. Dunl. Adm. Pr. 290.

It was familiar to the Roman tribunals, and could be administered by the court to either party for the satisfaction of his conscience, when in doubt. 3 Greenl. Ev., Lewis ed. § 412.

OATH EX OFFICIO. The oath by which a clergyman charged with a criminal offence was formerly allowed to swear himself to be innocent; also the oath by which the compurgators swore that they believed in his innocence. 3 Bla. Com. 101, 447; Moz. & W.

OATH IN LITEM. An oath which in the civil law was deferred to the complainant as to the value of the thing in dispute, on failure of other proof, particularly when there was a fraud on the part of the defendant and he suppressed proof in his possession. See Greenl. Ev. § 348; 1 Eq. Cas. Abr. 229; Herman v. Drinkwater, 1 Greenl. (Me.) 27; Sneider v. Geiss, 1 Yeates (Pa.) 34.

In general, the oath of the party cannot, by the common law, be received to establish his claim, but is admitted in two classes of cases: *first*, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages. See Smiley v. Dewey, 17 Ohio, 156; as, for example, where a trunk of goods was delivered to a shipmaster at one port to be carried to another, and on the passage he broke the trunk open and rifled it of its contents, in an action by the owners of the goods against the shipmaster, the facts above mentioned having been proved *aliunde*, the plaintiff was held a competent witness to testify as to the contents of the trunk; Herman v. Drinkwater, 1 Greenl. (Me.) 27. And see Clark v. Spence, 10 Watts (Pa.) 335; 1 Greenl. Ev. § 348. *Second*, the oath *in litem* is also admitted on the ground of public policy where it is deemed essential to the purposes of justice; Tayloe v. Riggs, 1 Pet. (U. S.) 596, 7 L. Ed. 275; 6 Mood. 137. But this oath is admitted only on the ground of necessity. An example may be mentioned of a case where a statute can receive no execution unless the party interested be admitted as a witness; U. S. v. Murphy, 16 Pet. (U. S.) 203, 10 L. Ed. 937. Parties in interest are now everywhere, and in most cases, permitted to testify.

OATH PURGATORY. An oath by which one destroys the presumptions which were against him, for he is then said to purge himself, when he removes the suspicions which were against him: as, when a man is in contempt for not attending court as a witness, he may purge himself of the contempt, by swearing to a fact which is an ample excuse. See PURGATION.

OATH SUPPLETORY. In Civil and Ecclesiastical Law. An oath required by the judge from either party in a cause, upon half-proof already made, which being joined to half-proof, supplies the evidence required to enable the judge to pass upon the subject. See 3 Bla. Com. 270.

OBEDIENCE. The performance of a command.

Officers who obey the command of their superiors, having jurisdiction of the subject-matter, are not responsible for their acts. A sheriff may, therefore, justify a trespass under an execution, when the court has jurisdiction, although irregularly issued; 3 Chitty, Pr. 75; Hamm. N. P. 48.

A child, an apprentice, a pupil, a mariner, and a soldier owe respectively obedience to the lawful commands of the parent, the master, the teacher, the captain of the ship, and the military officer having command; and in case of disobedience submission may be enforced by correction. See ASSAULT; CORRECTION.

OBEDIENTARIUS. A monastic officer. Du Cange. See 1 Poll. & Maitl. 417.

OBEDIENTIAL OBLIGATION. See OBLIGATION.

OBIT. That particular solemnity or office for the dead which the Roman Catholic church appoints to be read or performed over the body of a deceased member of that communion before interment; also, the office which upon the anniversary of his death was frequently used as a commemoration or observance of the day. Dy. 313.

OBITER DICTUM. See DICTUM.

OBJECT. That which is perceived, known, thought of, or signified; that toward which a cognitive act is directed. Cent. Dict. The term includes whatever may be presented to the mind as well as to the senses; whatever also is acted upon or operated upon affirmatively or intentionally influenced by anything done, moved, or applied thereto; Wells v. Shook, 8 Blatchf. 257, Fed. Cas. No. 17,406; it may be used as having the sense of effect; Harland v. Territory, 3 Wash. T. 131, 13 Pac. 453; and for all practical purposes the words subject and object are synonymous; *id.* But the subject of action cannot be the object of action; the latter is the remedy demanded, the relief prayed for, and is no part of the subject of action or the causes of action; Scarborough v. Smith, 18 Kan. 406.

OBJECTION. Where evidence is objected to at the trial, the nature of the objections must be distinctly stated, whether an exception be entered on the record or not, and, on either moving for a new trial on account of its improper admission, or on arguing the exception, the counsel will not be permitted to rely on any other objections than those taken at *nisi prius;* 3 Tayl. Ev., Chamb. ed. § 1881 *d;* objections must state the specific ground; Carroll v. Benicia, 40 Cal. 390; Forbing v. Weber, 99 Ind. 588; Massenberg v. Denison, 107 Fed. 18, 46 C. C. A. 120; and counsel cannot change his ground on the argument in the appellate court; Tooley v. Bacon, 70 N. Y. 34; general objections, such as irrelevant, incompetent, and the like, are said to be too general in their terms; Peck v. Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; Bundy v. Hyde, 50 N. H. 121; the general objection that evidence is incom-

petent, irrelevant and immaterial is sufficient when the reason for the objection is readily discernible. But where the ground for the objection is not suggested thereby, it will not avail; Sparks v. Oklahoma, 146 Fed. 371, 76 C. C. A. 594; evidence to which such objections are made will be held in the appellate court to have been properly admitted, if admissible for any purpose; Voorman v. Voight, 46 Cal. 397; one who has not objected to evidence when introduced is not entitled to have the court instruct the jury to disregard it; Maxwell v. R. Co., 85 Mo. 106; nor will an objection be heard if made for the first time on the motion for a new trial; Harvey v. State, 40 Ind. 516; or in the appellate court; Clark v. Fredericks, 105 U. S. 4, 26 L. Ed. 938.

When testimony was received without objection, the court should not sign a bill of exceptions; if it does, it will be disregarded above; Duvall's Ex'r v. Darby, 38 Pa. 56; the court may refuse to strike out the answer to a question asked a witness where no objection was made to it when it was asked; Bailey v. Warner, 118 Fed. 395, 55 C. C. A. 329.

Ordinarily, where an objection has been made and overruled, it is not necessary to repeat it to each succeeding question open to the same objection; Thomp. Trials § 705.

Objecting to a judge's instruction is said to be regarded as having the same force as excepting; Elsner v. K. & L. of Honor, 98 Mo. 640, 11 S. W. 991. See BILL OF EXCEPTIONS.

Where objections have been twice presented and regularly allowed, it is not necessary that they should be renewed at the termination of the testimony of a witness; Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

OBJECTS OF A POWER. The persons who are intended to be benefited by the distribution of property settled subject to a power.

OBJURGATRICES. Scolds or unquiet women punished with the cucking stool (*q. v.*).

OBLATE ROLLS. Chancery Rolls (1199-1641), called also Fine Rolls, containing records of payments to the king by way of oblate or fine for the grant of privileges, or by way of amercement for breach of duty. 2 Holdsw. Hist. E. L. 141.

OBLATIO (Lat.). **In Civil Law.** A tender of money in payment of debt made by debtor to creditor. L. 9, C. *de solut.* Whatever is offered to the church by the pious. Calv. Lex.; Vicat, Voc. Jur.

OBLATION. In Ecclesiastical Law. Offerings; obventions. See OBVENTIONS.

OBLIGATIO. In Roman Law. A legal bond which obliges us to the performance of something in accordance with the law of the land. Ortolan, Inst. 2, § 1179.

It corresponded nearly to our word contract. Justinian says, "*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura.*" Pr. J. 3. 13.

The Romans considered that obligations derived their validity solely from positive law. At first the only ones recognized were those established in special cases in accordance with the forms prescribed by the strict *jus civilis*. In the course of time, however, the prætorian jurisdiction, in mitigation of the primitive rigor of the law, introduced new modes of contracting obligations and provided the means of enforcing them: hence the twofold division made by Justinian of *obligationes civiles* and *obligationes prætoriæ*. Inst. 1. 3. 13. But there was a third class, the *obligationes naturales*, which derived their validity from the law of nature and nations, or the natural reason of mankind. These had not the binding force of the other classes, not being capable of enforcement by action, and are, therefore, not noticed by Justinian in his classification; but they had, nevertheless, a certain efficacy even in the civil law: for instance, though a debt founded upon a natural obligation could not be recovered by an action, yet if it was voluntarily paid by the debtor he could not recover it back, as he might do in the case of money paid by mistake, etc., where no natural obligation existed. L. 38, pr. D. 12. 6. And see Ortolan 2, § 1180.

The second classification of obligations made by Justinian has regard to the way in which they arise. They were, in this aspect, either *ex contractu* or *quasi ex contractu*, or *ex maleficio* or *quasi ex maleficio;* Inst. 2. 3. 13. These will be discussed separately.

Obligationes ex contractu, those founded upon an express contract, are again subdivided into four classes, with reference to the mode in which they are contracted. The contract might be entered into *re, verbis, literis*, or *consensu*.

A contract was entered into *re* by the actual transfer of a *thing* from one party to the other. Though in such cases the understanding of the parties as to the object of the transfer, and the conditions accompanying it, formed an essential part of the contract, yet it was only by the actual delivery of the thing that the contract was generated. The only contracts which could be entered into in this way were those known to our law as bailments,—a term derived from the French word *bailler*, to deliver, and evidently pointing to the same characteristic feature in the translation which the Romans indicated by the word *re*. These were the *mutuum*, or loan of a thing to be consumed in the using and to be returned in kind, the *commodatum*, or gratuitous loan of a thing

to be used and returned, the *depositum*, or delivery of a thing to be kept in safety for the benefit of the depositor, and the *pignus*, or delivery of a thing in pledge to a creditor, as security for his debt. See MUTUUM; COMMODATUM; DEPOSITUM; PIGNUS; Ortolan, Inst. § 1208; Mackeldey, Röm. Recht § 396. Besides the above named *contractus reales*, a large class of contracts which had no special names, and were thence called *contractus innominati*, were included under this head, from the fact that they, like the former, gave rise to the *actio præscriptis verbis*. Some of these were the contracts of exchange, of mutual compromise, of doubtful or contested claims (somewhat resembling our accord and satisfaction), of factorship, etc. See Mackeldey § 409.

Contracts were entered into *verbis*, by a formal interrogation by one party and response by the other. The interrogation was called *stipulatio*, and the party making it, *reus stipulandi*. The response was called *promissio*, and the respondent, *reus promittendi*. The contract itself, consisting of the interrogation and response, was often called *stipulatio*. In the time of the earlier jurists, the stipulation could only be entered into by the use of certain formulary words by the parties: as, for instance, *Spondes?* do you promise? *Spondeo*, I promise; *Dabis?* will you give? *Dabo*, I will give; *Facies?* will you do this? *Faciam*, I will do it, etc., etc. But by a constitution of the emperor LEO, A. D. 469, the obligation to use these particular words was done away, and any words which expressed the meaning of the parties were allowed to create a valid stipulation, and any language understood by the parties might be used with as much effect as Latin. Such contracts were called *verbis*, because their validity depended entirely upon the use of the words. The mere agreement of the parties without using the question and response could not beget a stipulation; and, on the other hand, if the question and response had been used, the obligation was created although there might be an absence of consent. In this latter case, however, equitable relief would be granted by the prætor; Ortolan, Inst. § 1250. Stipulations, and, indeed, all other forms of contracts, might be made either *pure*, *i. e.* absolutely, or *in diem*, *i. e.* to take effect at a future day, or *sub conditione*, *i. e.* conditionally. But some kinds of conditions, such as those physically impossible, were inadmissible, and invalidated the contract; while others, such as those which were absurd, were themselves invalidated, and the contract was considered as having been made absolutely. Mackeldey §§ 415–421; Ortolan, Inst. § 1235; Inst. 3. 13.

Contracts entered into *literis* were obsolete in the reign of Justinian. In the earlier days of Roman jurisprudence, every citizen kept a private account-book. If a creditor, *at the request of his debtor*, entered in such book his charge against his debtor, such entry, in pursuance of the request, constituted not merely evidence of a contract, but the contract itself. This was the contract formed *literis*, in writing. The debtor, on his part, might also make a corresponding entry of the transaction in his own book. This was in fact, expected of him, and was generally done; but it seems not to have been necessary to the validity of the contract. The entry was made in the form of a fictitious payment; it was allowable only in pecuniary transactions; it must be simple and unconditional, and could not be made to take effect at a future day. The charge might be made against the original debtor, *a re in personam*, or against a third person who agreed to take his place, *a persona in personam*. This species of literal contract was called *nomina*, *nomina transcriptitia* or *acceptilatio et expensilatio*. Ortolan, Inst. § 1414. This species of contract seems never to have been of great importance; they had disappeared entirely before the time of Justinian; Hadley, Rom. Law 216.

There were two other literal contracts known to the early jurisprudence, called *syngraphia* and *chirographia*; but these even in the times of Gaius had become so nearly obsolete that very little is known about them. All these, it must be borne in mind, were contracts themselves, not merely evidences of a contract; and this distinguishes them from the instruments of writing in use during the latter ages of the civil law. Ortolan, Inst. § 1414; Mackeldey § 422.

Contracts were made *consensu*, by the mere agreement of the contracting parties. Although such agreement might be *proved* by a written instrument, as well as in other ways, yet the writing was only evidence of the contract, not the contract itself. This species of consensual contracts are *emptio et venditio*, or sale, *locatio et conductio*, or hiring, *emphyteusis*, or conveyance of land reserving a rent, *societas*, or partnership, and *mandatum*, or agency. See these words; HERR.

Obligationes quasi ex contractu. In the Roman law, persons who had not in fact entered into a contract were sometimes treated as if they had done so. Their legal position in such cases had considerable resemblance to that of the parties to a contract, and is called an *obligatio quasi ex contractu*. Such an obligation was engendered in the cases of *negotiorum gestio*, or unauthorized agency, of *communio incidens*, a sort of tenancy in common not originating in a contract, of *solutio indebiti*, or the payment of money to one not entitled to it, of the *tutela* and *cura*, resembling the relation of guardian and ward, of the *additio hereditatis* and *agnitio bonorum possessionis*, or the acceptance of an heirship, and many oth-

ers. Some include in this class the *constitutio dotis*, settlement of a dower. Ortolan, Inst. § 1522; Mackeldey § 457.

Obligationes ex maleficio or *ex delicto*. The terms *maleficium*, *delictum*, embraced most of the injuries which the common law denominates torts, as well as others which are now considered crimes. This class includes *furtum*, theft, *rapina*, robbery, *damnum*, or injury to property, whether direct or consequential, and *injuria*, or injury to the person or reputation. The definitions here given of *damnum* and *injuria* are not strictly accurate, but will serve to convey an idea of the distinction between them. All such acts, from the instant of their commission, rendered the perpetrator liable for damages to the party injured, and were, therefore, considered to originate an *obligatio*. Inst. 4. 1; Ortolan, Inst. § 1715.

Obligationes quasi ex delicto. This class embraces all torts not coming under the denomination of *delicta* and not having a special form of action provided for them by law. They differed widely in character, and at common law would in some cases give rise to an action on the case, in others to an action on an implied contract. Ortolan, Inst. § 1781.

Obligationes ex variis causarum figuris. Although Justinian confined the divisions of obligations to the four classes which have been enumerated, there are many species of obligations which cannot properly be reduced within any of these classes. Some authorities have, consequently, established a fifth class, to receive the odds and ends which belonged nowhere else, and have given to this class the above designation, borrowed from Gaius, l. 1, pr. § 1, D. 44, 7. See Mackeldey § 474. See, generally, Hadley, Rom. Law 209, etc.

OBLIGATION (from Lat. *obligo*, *ligo*, to bind). A duty.

A tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made. Inst. 3, 14.

"The relation which exists between two persons of whom one has a private and peculiar right (that is not a mere public or official right, or a right incidental to ownership or a family relation) to control the other's action by calling upon him to do or forbear some particular thing." Poll. Contr. 4.

The obligation is the bond or chain with which the law joins together persons or groups of persons in consequence of certain voluntary acts. The acts which have the effect of attracting an obligation are chiefly those classed under the heads of Contract and Delict, of agreement and crime. Maine, Anc. Law 323.

A bond containing a penalty, with a condition annexed, for the payment of money, performance of covenants, or the like, and which differs from a bill, which is generally without a penalty or condition, though it may be obligatory. Co. Litt. 172.

A deed whereby a man binds himself under a penalty to do a thing. Com. Dig. *Obligation* (A); Taylor v. Glaser, 2 S. & R. (Pa.) 502; Denton v. Adams, 6 Vt. 40; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Cantey v. Duren, Harp. (S. C.) 434; Harman v. Harman, Baldw. 129, Fed. Cas. No. 6,071. The word has a very broad and comprehensive legal signification and embraces all instruments of writing, however informal, whereby one party contracts with another for the payment of money or the delivery of specific articles. State v. Campbell, 103 N. C. 344, 9 S. E. 410; Morrison v. Lovejoy, 6 Minn. 353 (Gil. 224); Sinton v. Carter Co., 23 Fed. 535.

An *absolute* obligation is one which gives no alternative to the obligor, but requires fulfilment according to the engagement.

An *accessory* obligation is one which is dependent on the principal obligation; for example, if I sell you a house and lot of ground, the principal obligation on my part is to make you a title for it; the accessory obligation is to deliver you all the title-papers which I have relating to it, to take care of the estate till it is delivered to you, and the like.

An *alternative* obligation is where a person engages to do or to give several things in such a manner that the payment of one will acquit him of all.

Thus, if A agrees to give B, upon a sufficient consideration, a horse, or one hundred dollars, it is an *alternative* obligation. Pothier, Obl. pt. 2, c. 3, art. 6, no. 245.

In order to constitute an alternative obligation it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any of them.

The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that it shall belong to the creditor; Dougl. 14; 1 Ld. Raym. 279; Galloway v. Legan, 4 Mart. N. S. (La.) 167. If one of the acts is prevented by the obligee or the act of God, the obligor is discharged from both. See 2 Evans, Pothier, Obl. 52; Viner, Abr. *Condition* (S b); CONJUNCTIVE; DISJUNCTIVE; ELECTION.

A *civil* obligation is one which has a binding operation in law, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. Sturges v. Crowninshield, 4 Wheat. (U. S.) 197, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. (U. S.) 318, 337, 6 L. Ed. 606.

Civil obligations are divided into express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, or mixed.

A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished, and subject to which it has been contracted.

A *contractual obligation* is one which arises from a contract or agreement. See that title.

A *determinate* obligation is one which has for its object a certain thing: as, an obligation to deliver a certain horse named Bucephalus. In this case the obligation can only be discharged by delivering the identical horse.

A *divisible* obligation is one which, being a unit, may nevertheless be lawfully divided, with or without the consent of the parties.

It is clear that it may be divided by consent, as those who made it may modify or change it as they please. But some obligations may be divided without the consent of the obligor: as where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire; yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars and the seller the other hundred. See APPORTIONMENT.

Express or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation.

Imperfect obligations are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only: such as charity or gratitude. In this sense an obligation is a mere duty. Pothier, Obl. art. prél. n. 1.

An *implied* obligation is one which arises by operation of law: as, for example, if I send you daily a loaf of bread, without any express authority, and you make use of it in your family, the law raises an obligation on your part to pay me the value of the bread.

An *indeterminate* obligation is one where the obligor binds himself to deliver one of a certain species: as, to deliver a horse, where the delivery of any horse will discharge the obligation.

An *indivisible* obligation is one which is not susceptible of division: as, for example, if I promise to pay you one hundred dollars, you cannot assign one-half of this to another, so as to give him a right of action against me for his share. See DIVISIBLE.

A *joint* obligation is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint, and the obligors do not promise separately to fulfil their engagement, they must be all sued, if living, to compel the performance: or, if any be dead, the survivors must all be sued. See PARTIES.

A *natural* or *moral* obligation is one which cannot be enforced by action, but which is binding on the party who makes it in conscience and according to natural justice.

As, for instance, when the action is barred by the act of limitation, a natural obligation still subsists, although the civil obligation is extinguished; Jones v. Moore, 5 Binn. (Pa.) 573, 6 Am. Dec. 428. Although natural obligations cannot be enforced by action, they have the following effect. *first*, no suit will lie to recover back what has been paid or given in compliance with a natural obligation; 1 Term 285; Rosenda v. Zabriskie, 4 Rob. (La.) 493; *second*, a natural obligation has been held to be a sufficient consideration for a new contract; Greeves v. McAllister, 2 Binn. (Pa.) 591; Clark v. Herring, 5 *id.* 33; Yelv. 41 *a*, n. 1; Cowp. 290; 2 Bla. Com. 445; 3 Bos. & P. 249, n.; 2 East 506; 3 Taunt. 311; 5 *id.* 36; Mills v. Wyman, 3 Pick. (Mass.) 207; Chitty, Contr., 12th ed. 38; Hare, Contr. 264; Poll. Contr. 168; but see MORAL OBLIGATION; CONSIDERATION.

Obedicntial obligations. Such obligations as are incumbent on parties in consequence of the situation or relationship in which they are placed. Ersk. Prin. 60.

A *penal* obligation is one to which is attached a penal clause, which is to be enforced if the principal obligation be not performed. See LIQUIDATED DAMAGES.

A *perfect* obligation is one which gives a right to another to require us to give him something or not to do something. These obligations are either natural or moral, or they are civil.

A *personal* obligation is one by which the obligor binds himself to perform an act, without directly binding his property for its performance.

It also denotes an obligation in which the obligor binds himself only, not including his heirs or representatives.

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should itself be the first fulfilled.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties.

A *pure* or simple obligation is one which is not suspended by any condition, either because it has been contracted without condition, or, having been contracted with one, it has been fulfilled.

A *real* obligation is one by which real estate, and not the person, is liable to the obligee for the performance.

A familiar example will explain this. When an estate owes an easement as a right of way, it is the thing, and not the owner, who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage: he is not liable for the debt, though the estate is. In these cases the owner has an interest only because he is seized of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is both personal and real when the obligor has bound himself and pledged his estate for the fulfilment of the obligations.

A *secondary* obligation is one which is contracted and is to be performed in case the *primitive* cannot be. For example, if I sell you my house, I bind myself to give a title: but I find I cannot, as the title is in another: then my *secondary* obligation is to pay you damages for my non-performance of my obligation.

A *several* obligation is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement. In this case each obligor may be sued separately; and if one or more be dead, their respective executors may be sued. See PARTIES.

A *single* obligation is one without any penalty: as where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal.

OBLIGATION OF CONTRACTS. A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage; Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93. The subject is treated under IMPAIRING THE OBLIGATIONS OF CONTRACTS.

OBLIGATORY PACT. In Civil Law. An informal obligatory declaration of consensus, which the Roman law refused to acknowledge. Sohm, Rom. L. 321.

OBLIGATORY RIGHTS. In the Civil Law. One class of private rights between debtors and creditors.

OBLIGEE. The persons in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something. La. Code, art. 3522, no. 11.

Obligees are either several or joint. An obligee is several when the obligation is made to him alone; obligees are joint when the obligation is made to two or more; and in that event each is not a creditor for his separate share, unless the nature of the subject or the particularity of the expression in the instrument lead to a different conclusion. 2 Pothier, Obl., Evans ed. 56; Hob. 172; Cro. Jac. 251. The words obligee and payee have been held to have a technical and definite meaning under an act relative to promissory notes, bonds, etc., and apply only to notes, bonds, or bills whether given for the payment of money or for the performance of covenants and conditions, and not to mortgages; Hall v. Byrne, 1 Scam. (Ill.) 142.

OBLIGOR. The person who has engaged to perform some obligation. La. Code, art. 3522, no. 12. One who makes a bond.

Obligors are joint and several. They are joint when they agree to pay the obligation jointly: and then the survivors only are liable upon it at law, but in equity the assets of a deceased joint obligor may be reached; 1 Bro. C. C. 29; 2 Ves. 101, 371. They are several when one or more bind themselves and each of them separately to perform the obligation. In order to become an obligor, the party must actually, either himself or by his attorney, enter into the obligation and execute it as his own. If a man sign and seal a bond as his own and deliver it, he will be bound by it although his name be not mentioned in the bond; Williams v. Greers' Adm'rs, 4 Hayw. (Tenn.) 239; Stone v. Wilson, 4 McCord (S. C.) 203; Smith v. Crooker, 5 Mass. 538; Blakey v. Blakey, 2 Dana (Ky.) 463; Vanhook v. Barnett, 15 N. C. 272. When the obligor signs between the penal part and the condition, still the latter will be a part of the instrument; Reed v. Drake, 7 Wend. (N. Y.) 345; Argenbright v. Campbell, 3 Hen. & M. (Va.) 144.

The execution of a bond by the obligor, in blank, with verbal authority to fill it up, does not bind the obligor, though it is afterwards filled up, unless the bond is redelivered or acknowledged or adopted; Boyd v. Boyd, 2 N. & MC. (S. C.) 125; U. S. v. Nelson, 2 Brock. 64, Fed. Cas. No. 15,862; Ayres v. Harness, 1 Ohio 368, 13 Am. Dec. 629; Peebles v. Mason, 13 N. C. 369; Byers v. McClanahan, 6 Gill & J. (Md.) 250. But see, *contra*, Wiley v. Moor, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; and see Sigfried v. Levan, 6 S. & R. (Pa.) 308, 9 Am. Dec. 427; Franklin Bk. v. Bartlet, Wright (Ohio) 742; BLANK.

All obligors in a joint bond are presumed to be principals, except such as have the word "security" opposite their names; Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193.

OBLITERATION. In the absence of statutory provisions to the contrary, the obliteration of part of a will, leaving it otherwise complete, with the intention by the testator to annul only what was cancelled, leaves the residue valid; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32. A line drawn through the writing is, doubtless, an obliteration,

though it may leave it as legible as it was before; Appeal of Evans, 58 Pa. 244. See note to 25 Am. Rep. 35; WILLS.

OBLOQUY. Censure; reproach. Bettner v. Holt, 70 Cal. 275, 11 Pac. 713.

OBREPTION. Acquisition of escheats, etc., from a sovereign, by making false representations. Bell, Dic. *Subreption;* Calv. Lex.

OBROGATION. The annulling a law, in whole or in part, by passing a law contrary to it. The alteration of a law. Calv. Lex.

OBSCENE. Something which is offensive to chastity; something that is foul and filthy, and for that reason is offensive to a pure-minded person. U. S. v. Clarke, 38 Fed. 732. That which is offensive to chastity and modesty. U. S. v. Harmon, 45 Fed. 414; U. S. v. Martin, 50 *id.* 918. See OBSCENITY.

OBSCENITY. In Criminal Law. Such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is that form of indecency which is calculated to promote the general corruption of morals. U. S. v. Males, 51 Fed. 41. In all cases an indictment for obscenity must aver exposure and offence to the community generally; mere private indecency is not indictable at common law; 2 Whart. Cr. L. § 1431.

The test is: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall;" L. R. 3 Q. B. 371; it is no defence that it was done with the idea of accomplishing a good purpose; *id.;* L. R. 7 C. P. 261; or that the matter is an accurate report of a judicial proceeding; *id.*

The exhibition of an obscene picture is an indictable offence at common law, although not charged to have been exhibited in public, if it be averred that the picture was exhibited to sundry persons for money; Arch. Cr. Pr. 1034; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632. The stat. 20 and 21 Vict. c. 83, gives summary powers for the searching of houses in which obscene books, etc., are suspected to be kept, and for the seizure and destruction of such books. By various acts of congress, the importation and circulation, through the mails or in interstate commerce, of obscene literature or articles of any kind is rendered punishable with fine or imprisonment: R. S. §§ 2101, 3893, 5389; Act of Aug. 5, 1909; Act of March 4, 1909. See Com. v. Landis, 8 Phila. (Pa.) 453; Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652; Fuller v. People, 92 Ill. 182; U. S. v. Males, 51 Fed. 41. R. S. § 3893, as amended by act of congress (19 Stat. L. p. 90), prohibiting the mailing of obscene papers, is not in contravention of the first amendment to the constitution providing that the freedom of the press shall not be abridged; Re Jackson, 96 U. S. 727, 24 L. Ed. 877; Harman v. U. S., 50 Fed. 921. An obscene book or paper within the act relating to nonmailable matter means one which contains immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those in whose hands the publication might fall, and whose minds are open to such immoral influences; U. S. v. Clarke, 38 Fed. 732. Mailing a private sealed letter containing obscene matter is an offence within the statute; Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; U. S. v. Gaylord, 50 Fed. 410.

It is not essential to the commission of the offence that the defendant personally mailed the objectionable matter; Burton v. U. S., 142 Fed. 57, 73 C. C. A. 243; nor that the entire contents of a newspaper or parcel deposited in the mail be objectionable; Demolli v U. S., 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121.

Where the necessary inference from the language used in a letter was obscene, it was held immaterial that the words used were not themselves obscene; U. S. v. Moore, 129 Fed. 159.

The character of a publication as to whether obscene or otherwise is not to be determined by the motives of the author or sender in making or sending it; U. S. v. Clarke, 38 Fed. 500. An indictment for selling an obscene book need not set out the obscene matter nor even describe the same in general terms, if it identifies the book and states that the contents are too indecent to be placed upon the record; People v. Kaufman, 14 App. Div. 305, 43 N. Y. Supp. 1046.

The fact that a woman, in whose presence obscene language is used, is herself in the habit of using such language, can in no case constitute a justification, but may mitigate the offence; Golson v. State, 86 Ala. 601, 5 South. 799.

See INDECENT EXPOSURE; LETTER.

OBSERVE. In Civil Law. To perform that which has been prescribed by some law or usage. Dig. 1. 3. 32.

OBSOLETE. A term applied to laws which have lost their efficacy without being repealed.

A positive statute, unrepealed, can never be repealed by non-user alone; Respublica v. County Com'rs, 4 Yeates (Pa.) 181; Wright v. Crane, 13 S. & R. (Pa.) 447. The disuse of a law is at most only presumptive evidence that society has consented to such a repeal; however this presumption may operate on an unwritten law, it cannot, in general, act upon one which remains as a legisla-

tive act on the statute-book; because no presumption can set aside a certainty. A written law may indeed become obsolete when the object to which it was intended to apply, or the occasion for which it was enacted, no longer exists; 1 P. A. Bro. App. 28; Williamson v. Bacot, 1 Bay 62. "It must be a very strong case," says Tilghman, C. J., "to justify the court in deciding that an act standing on the statute-book, unrepealed, is obsolete and invalid. I will not say that such case may not exist,—where there has been a non-user for a great number of years,—where, from a change of times and manners, an ancient sleeping statute would do great mischief if suddenly brought into action,—where a long practice inconsistent with it has prevailed, and especially where from other and later statutes it might be inferred that in the apprehension of the legislature the old one was not in force." Wright v. Crane, 13 S. & R. (Pa.) 452; Rutherford, Inst. b. 2, c. 6, s. 19; Merlin, *Répert. Desuetude.* In Appeal of Porter, 30 Pa. 496, it was held that a statute is not repealed by non-user, but that the usage and customs of an advancing people may displace a statute which has become unfitted for modern use. It may be repealed by long non-user, especially where the current of legislation shows that it was regarded by the legislature as being no longer in force; Pearson v. Distillery, 72 Ia. 348, 34 N. W. 1; *contra*, Snowden v. Snowden, 1 Bland (Md.) 550. An act of Congress enacted in 1874 cannot be regarded as obsolete because recourse has not often been had to it since its passage; Costello v. Palmer, 20 App. D. C. 210. The fact that a penal statute has been on the statute books for over 40 years, and has not been applied in a particular manner, does not preclude the application and enforcement of the statute in that manner if it may properly be so applied and enforced; State v. Nease, 46 Or. 433, 80 Pac. 897.

"Neither contrary practice nor disuse can repeal the positive enactment of a statute; L. R. 3 P. C. 650, per Hatherly, L. C.; whatever be the law in Scotland; McCl. & Y. 119. In the civil law, according to Julianus, laws were abrogated through disuse; Taylor, Jurispr. 491.

OBSTA PRINCIPIIS. Withstand beginnings. It is the duty of the court to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* Boyd v. U. S., 116 U. S. 635, 6 Sup. Ct. 524, 29 L. Ed. 746.

OBSTANTE. Withstanding; hindering. See NON OBSTANTE.

OBSTRUCTING A STREET. To block up; to hinder or impede. To omit, after notice, to remove an obstruction, is to wilfully obstruct a highway; 12 Q. B. D. 121; as is the leaving on the side of a highway anything calculated to frighten horses; 12 *id.* 110.

See STREET NUISANCE; HIGHWAY.

OBSTRUCTING JUSTICE. The act by which one or more persons attempts to prevent, or do prevent, the execution of lawful process. It applies also to obstructing the administration of justice in any way—as by hindering witnesses from appearing.

The officer must be prevented by actual violence, or by threatened violence accompanied by the exercise of force, or by those having capacity to employ it, by which the officer is prevented from executing his writ. The officer is not required to expose his person by a personal conflict with the offender; U. S. v. Lowry, 2 Wash. C. C. 169, Fed. Cas. No. 15,636. See Crumpton v. Newman, 12 Ala. 199, 46 Am. Dec. 251; State v. Welch, 37 Wis. 196; Pierce v. State, 17 Tex. App. 232; Whart. Cr. L. § 652.

This is an offence against public justice of a very high and presumptuous nature; and more particularly so where the obstruction is of an arrest upon criminal process. A person opposing an arrest upon criminal process becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in high treason; 4 Bla. Com. 128; 1 Russ. Cr. 360. See U. S. v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14,490; State v. Noyes, 25 Vt. 415; State v. Hailey, 2 Strobh. (S. C.) 73; State v. Henderson, 15 Mo. 486; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

The fact that a person whom a mayor attempts to arrest does not know that he is authorized by the charter of the city to make arrests, does not change his responsibility for acts committed in resisting arrest; State v. Williams, 36 S. C. 493, 15 S. E. 554; one who resists an officer trying to arrest him, knowing him to be such, does so at his peril; State v. Russell (Ia.) 76 N. W. 653; if a peace officer making an arrest use undue force, yet if the person resist, not in self-defence, but to escape arrest, it is an offence; State v. Dennis, 2 Marv. (Del.) 433, 43 Atl. 261; so is pointing an unloaded gun at an officer making an arrest; State v. Russell (Ia.) 76 N. W. 653; but where a person, who is not vested by law with authority to make an arrest, attempts to do so, he acts as a private citizen, and one who opposes him therein is not guilty of opposing an officer; U. S. v. Baird, 48 Fed. 554.

Witnesses may be hindered by persuasion, advice or threats; State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716.

OBSTRUCTING THE MAIL. See POSTAL SERVICE.

OBSTRUCTING PUBLIC WORSHIP. See DISTURBANCE OF PUBLIC WORSHIP.

OBSTRUCTING RAILWAYS. Acts constituting the obstruction of railroad tracks a crime exist in many states, *e. g.* Alabama, California, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New York, and Tennessee and in England. The motive with which it is done is not material; Clifton v. State, 73 Ala. 473; it need not appear that an obstruction maliciously placed on the track did actually hinder the trains; State v. Clemens, 38 Ia. 257. It is the intent of the act and not the natural consequences which makes a crime; 25 Alb. L. J. 419. A driver of a vehicle who refuses to turn off a street railway track, when notified, may be guilty of obstructing a railway track; Com. v. Temple, 14 Gray (Mass.) 69. In Texas it must be shown that the obstruction was such as would endanger human life; Bullion v. State, 7 Tex. App. 462. If a person's wagon accidentally becomes caught in a crossing, he is not liable on an indictment for obstructing the track, though he was negligent; 3 L. T. 665.

Permitting cars to remain for an unnecessarily long time on a highway is a nuisance; State v. R. Co., 95 N. C. 602; whether it be in bad faith or not; State v. R. Co., 120 Ind. 298, 22 N. E. 307.

See NUISANCE; RAILROAD.

OBVENTIO (Lat. *obvenire*, to fall in). **In Civil Law.** Rent or profit accruing from a thing, or from industry. It is generally used in the plural.

In Old English Law. The revenue of spiritual living, so called. Cowell. Also, in the plural, offerings. Co. 2d Inst. 661.

OBVIOUS. Apparent; evident; manifest. An obvious imitation of a patent does not mean obvious to an uneducated or unskilled eye, but obvious to a judge or jury, sitting as experts; 15 Ch. D. 181; 50 L. T. 420. See 15 Ct. Sess. Cas., 4th ser. 660.

OCCASIO. A tribute imposed by the lord on his vassals or tenants.

OCCUPANCY. The taking possession of those things corporeal which are without an owner, with an intention of appropriating them to one's own use.

Pothier defines it to be the title by which one acquires property in a thing which belongs to nobody, by taking possession of it with design of acquiring it. *Tr. du Dr. de Propriété*, n. 20. The Civil Code of Louisiana, art. 3375, nearly following Pothier, defines occupancy to be "a mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with an intention of acquiring a right of ownership in it." The basis of its origin seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuation of that institution, that everything should have an owner. Maine, Anc. L. 249. Occupancy is sometimes used in the sense of occupation or holding possession; indeed it has come to be very generally so used in this country in homestead laws, public-land laws, and the like; Walters v. People, 21 Ill. 178; Redfield v. R. Co., 25 Barb. (N. Y.) 54; Act of Cong. May 29, 1830 (4 Stat. at L. 420); Weisbrod v. Daenicke, 36 Wis. 73; see Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390; 12 Q. B. Div. 356; 2 *id.* 588; but this does not appear to be a common legal use of the term, as recognized by English authorities.

To constitute occupancy, there must be a taking of a thing corporeal, belonging to nobody, with an intention of becoming the owner of it; Co. Litt. 416.

A right by occupancy attaches in the finder of lost goods unreclaimed by the owner; in the captor of beasts *ferœ naturæ*, so long as he retains possession; 2 Bla. Com. 403; the owner of lands by accession, and the owner of goods acquired by confusion.

It was formerly considered, also, that the captor of goods contraband of war acquired a right by occupancy; but it is now held otherwise, such goods being now held to be primarily vested in the sovereign, and as belonging to individual captors only to the extent and under such regulations as positive laws may prescribe; 2 Kent 290. See PRIZE.

OCCUPANT. One who has the actual use or possession of a thing. See Lechler v. Chapin, 12 Nev. 65.

When the occupiers of a house are entitled to a privilege in consequence of such occupation, as to pass along a way, to enjoy a pew, and the like, a person who occupies a part of such house, however small, is entitled to some right, and cannot be deprived of it; 2 B. & Ald. 164; 1 Chitty, Pr. 209; 4 Comyns, Dig. 64; 5 *id.* 199. See Fleming v. Maddox, 30 Ia. 242; 3 Q. B. 449.

OCCUPATIO. "The advisedly taking possession of that which is at the moment the property of no man, with a view of acquiring property in it for yourself." Maine, Anc. L. 245. The advised assumption of physical possession. *Id.* 256.

OCCUPATION. Use or tenure: as, the house is in the occupation of A B. A trade, business, or mystery: as, the occupation of a printer. See Schuchardt v. People, 99 Ill. 506, 39 Am. Rep. 34.

It is synonymous with possession as commonly used, but as used in a fire insurance policy the word *unoccupied*, is not synonymous with *vacant*, but is that condition where no one has the actual use or possession of the thing or property in question; Yost v. Ins. Co., 38 Pa. Super. Ct. 594; Hardiman v. Fire Ass'n, 212 Pa. 383, 61 Atl. 990.

A putting out of a man's freehold in time of war. Co. Litt. s. 412. See MILITARY OCCUPATION.

OCCUPATION TAX. See TAX.

OCCUPAVIT (Lat.). **In Old Practice.** The name of a writ which lies to recover the possession of lands when they have been

taken from the possession of the owner by occupation. (*q. v.*)

OCCUPIER. One who is in the enjoyment of a thing.

A tenant, though absent, is, generally speaking, the occupier of premises; 1 B. & C. 178; but not a servant or other person who may be there *virtute officii;* 26 L. J. C. P. 12; 47 L. J. Ex. 112; L. R. 1 Q. B. 72.

OCCUPY. To hold in possession; to hold or keep for use: as, to occupy an apartment. Missionary Society v. Dalles, 107 U. S. 343, 2 Sup. Ct. 672, 27 L. Ed. 545. In legal acceptation, actual use, possession, and cultivation. Jackson v. Sill, 11 Johns. (N. Y.) 202, 6 Am. Dec. 363; Inhabitants of Phillipsburgh v. Bruch's Ex'r, 37 N. J. Eq. 486.

OCCUR. To happen. Johnson v. Ins. Co., 91 Ill. 95, 33 Am. Rep. 47.

OCHLOCRACY. A government where the authority is in the hands of the multitude; the abuse of a democracy. Vaumène, *Dict. du Langage Politique.* Mob rule. See GOVERNMENT.

OCTAVE (Law Lat. *utas*). **In Old English Practice.** The eighth day inclusive after a feast. 3 Bla. Com. 277.

OCTO TALES (Lat. eight such). If, when a trial at bar is called on, the number of jurors in attendance is too small, the trial must be adjourned, and a *decem* or *octo tales* awarded, according to the number deficient; as, at common law, namely, a writ to the sheriff to summon eight more such men as were originally summoned. 3 Bla. Com. 364.

OCTROI (Fr.). Toll or a duty paid on entering a city.

ODHAL RIGHT. An allodial right. See ALOD.

ODIO ET ATIA. See DE ODIO ET ATIA.

OF. The word has been held equivalent to after; 10 L. J. Q. B. 10; at; belonging to; Davis v. State, 38 Ohio St. 506; manufactured by; 2 Bing. N. C. 668; by; Hannum v. Kingsley, 107 Mass. 355; residing at; Porter v. Miller, 3 Wend. (N. Y.) 329; 8 A. & E. 232.

OF COUNSEL. A phrase commonly applied in practice to the counsel employed by a party in a cause.

OF COURSE. That which may be done in the course of legal proceedings without making any application to the court; that which is granted by the court, without further inquiry, upon its being asked: as, a rule to plead is a matter of course.

OFFENCE. The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense, it may be considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable, but punishable summarily by the forfeiture of a penalty; 1 Chitty, Pr. 14.

OFFER. A proposal to do a thing.

An offer, as an element of a contract, is a proposal to make a contract. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way it is made, it is not in law an offer until it comes to the knowledge of the person to whom it is made; Langd. Contr. § 151; 6 H. L. Cas. 112. While an offer remains in force, it confers upon the offeree the power to convert it into a promise by accepting it. The offerer may state how long it shall remain in force; and it will then remain in force during the time so stated, unless sooner revoked; Boston & M. R. Co. v. Bartlett, 3 Cush. (Mass.) 224. But see *infra.* In the absence of any specification by the offerer, an offer will remain in force a reasonable time unless sooner revoked; Leake, Contr. 33; Minneapolis & St. L. R. Co. v. Rolling Mill, 119 U. S. 151, 7 Sup. Ct. 168, 30 L. Ed. 376. As to what will be a reasonable time, no uniform positive rule can be laid down. When an offer is made personally, it will *prima facie* continue until the interview or negotiation terminates, and longer; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262. In commercial transactions, when an offer is made by mail, the general rule is that the offerer is entitled to an answer by return mail; but this will not apply in all cases, *e. g.* when there are several mails each day. In transactions which are not commercial, much less promptitude in answering is required; Langd. Contr. § 152.

Where the offer contemplates a unilateral contract, the length of time that the offer will continue in force depends upon different considerations. The question is no longer one of accepting the offer orally or by letter, but of performing the consideration. The duration of such an offer, therefore, in the absence of any express limitation, will be measured by the length of time which may be reasonably required for the performance of the consideration. When performance of the consideration has been begun in good faith, it seems that the offer will continue, in the absence of actual revocation, until the performance is either completed or abandoned, especially when the performance of the consideration is constantly within the knowledge of the offerer; Langd. Contr. § 155. An offer which contains no stipulation as to how long it shall continue is revocable at any moment; Poll. Contr. 27. A stipulation that an offer shall remain open for a specified time must be supported by a sufficient consideration, or be contained in an in-

strument under seal, in order to be binding; Langd. Contr. § 178; 3 Term 653. When thus made binding, the offer is not irrevocable, but the only effect is to give the offerer a claim for damages if the stipulation be broken by revoking the offer. When an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding; an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479.

As an offer can only be made by communication from the offerer to the offeree, so it can only be revoked in the same manner. But the death or insanity of the offerer during the pendency of the offer, revokes it: Langd. Contr. § 180.

An offer can only be accepted in the terms in which it is made; an acceptance, therefore, which modifies the offer in any particular, goes for nothing; L. R. 7 Ch. App. 587; Minneapolis & St. L. R. Co. v. Rolling Mill Co., 119 U. S. 151, 7 Sup. Ct. 168, 30 L. Ed. 376. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it; First N. Bk. v. Hall, 101 U. S. 50, 25 L. Ed. 822; Minneapolis & St. L. R. Co. v. Rolling Mill Co., 119 U. S. 151, 7 Sup. Ct. 168, 30 L. Ed. 376.

A mere proposal to sell may be revoked at any time before acceptance; Miller v. Douville, 45 La. Ann. 214, 12 South. 132. It is withdrawn by the death of the maker; 2 Ch. Div. 475.

Where an offer of sale of land stands for twenty years, and until after the death of the party to whom it is made, without compliance with its terms, the widow and sole devisee of such party cannot accept the proposition, and offer to perform it, and thereby make a contract binding on the proposer; Marr v. Shaw, 51 Fed. 860.

A man may change his mind at any time, if it is not to the injury of another; he may, therefore, revoke or recall his offers at any time before they have been accepted; and, in order to deprive him of this right, the offer must have been accepted on the terms in which it was made; 10 Ves. 438; 2 C. & P. 553. See Ans. Contr. 31.

A general proposal by public advertisement may be effectually revoked by an announcement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it had been revoked; Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697; said in Poll. Contr. 23, to be judicial legislation.

Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the party who made it; Ellason v. Henshaw, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Poll. Contr. 38; *i. e.* there is no contract entered into.

When the offer has been made, the party is presumed to be willing for the time limited, to enter into the contract and, if the time be not fixed by the offer, then until it be expressly revoked or rendered nugatory by a contrary presumption; Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262. See McCulloch v. Ins. Co., 1 Pick. (Mass.) 278; Tucker v. Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; 1 Bell, Com. 326; an offer is considered as continuously made until it is brought to the notice of the person to whom it was made that it is withdrawn. That person's refusal or counter-offer puts an end to the original offer; Poll. Contr. 30.

And see ASSENT; BID; OPTION; LETTER.

An offer must be communicated, but in many classes of contracts it need not be made to an ascertained person: as, auction sales; an offer of a reward (whether the service must have been rendered after knowledge of the offer of a reward is unsettled; see Ans. Contr. *24); an advertisement in railroad time tables; letters of credit; offers to receive subscriptions for stocks or bonds. An offer of a stock of goods for sale on bids is not such an offer that a person who makes the highest bid is entitled to them (L. R. 5 C. P. 561). An offer may be determined—by lapse of a specified time; by lapse of a reasonable time for accepting; by failure to comply with the terms of the offer as to the mode of acceptance; by the death of either party before acceptance; by revocation before acceptance; Hollingsworth, Contr. 11.

The announcement of a scholarship competition is not an offer; [1895] 1 Ch. 480. A quotation of a price is not, ordinarily, an offer, but an invitation to make one; [1905] 2 Ir. 617; see [1893] A. C. 552.

A signed order for goods given to a traveling salesman and sent to his employers, who had the right to accept or reject it, was, until acceptance, merely an offer to buy, and the shipment of the goods alone with an invoice making different terms of payment did not constitute a contract; Baird v. Pratt, 148 Fed. 825, 78 C. C. A. 515, 10 L. R. A. (N. S.) 1116; Northwest Thresher Co. v. Kubicek, 82 Neb. 485, 118 N. W. 94.

A mental determination to accept an offer, and acts done in pursuance thereof, do not constitute an acceptance; New v. Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245.

If a person making an offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance to him, performance of the condition is acceptance without notification; [1877] 2 A. C. 690.

The ordinary rules of proposal and acceptance do not apply to promises embodied in a deed; Poll. Contr. 52; such promise is oper-

ative without acceptance; L. R. 2 H. L. 296; but if the promisee refuses his assent without formality when the promise comes to his knowledge, the contract is avoided; Poll. Contr. 53, on the authority of 3 Co. Rep. 26; L. R. 2 H. L. 312. If the proposer dies before his proposal is accepted, that is a revocation of the offer; Poll. Contr. 41; though there is said to be no distinct authority to show whether notice to the other party is material or not; *id.*

There is a material distinction between the acceptance of an offer which asks for a promise and of an offer which asks for an act as the condition for the offer becoming a promise; the acceptance of the former must be communicated to the proposer, but the latter, it seems, need not. In the former case the proposed contract is called bilateral, in the latter unilateral; Poll. Contr. 34.

The settled rule of law is said to be that if a person communicates his acceptance of an offer within a reasonable time after the offer has been made, and if within a reasonable time of the acceptance being communicated no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken to be simultaneous with the offer, and both together as constituting such an agreement as the court will execute; 3 Mer. 441, per Lord Eldon, quoted in the preface to 6th Edition, Leake, Contracts.

OFFERINGS. See OBVENTIO.

OFFICE. A right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Shelf. Mortm. 797; Cruise, Dig. Index; Com. v. Sutherland, 3 S. & R. (Pa.) 149. An office is a public charge or employment; U. S. v. Maurice, 2 Brock. 102, Fed. Cas. No. 15,747, per Marshall, C. J. An office may exist without an incumbent; People v. Stratton, 28 Cal. 382.

An office is a legal entity and may exist in fact although it be without an incumbent; Childs v. State, 4 Okl. Cr. 474, 113 Pac. 545, 33 L. R. A. (N. S.) 563. Compensation is no part of an office; it is merely incident thereto; *id.*

Judicial offices are those which relate to the administration of justice, and which should be exercised by persons of sufficient skill and experience in the duties which appertain to them.

Military offices are such as are held by soldiers and sailors for military purposes.

Ministerial offices are those which give the officer no discretion as to the matter to be done, and require him to obey the mandates of a superior. Vose v. Deane, 7 Mass. 280. See Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Waldo v. Wallace, 12 Ind. 569. It is a general rule that a judicial office cannot be exercised by deputy, while a ministerial may.

Political offices are such as are not connected immediately with the administration of justice or the execution of the mandates of a superior officer: the offices of the president of the United States, of the heads of departments, of the members of the legislature, are of this number.

In the United States, all offices, according to the above definition, are public; but in another sense employments of a private nature are also called offices: for example, the office of president of a bank, the office of director of a corporation.

Subject to constitutional provisions or prohibitions the authority of the legislature over public offices is complete and absolute; Lee v. Board of Com'rs, 3 Wyo. 52, 31 Pac. 1045.

Where the appointment or election is made for a definite term or during good behavior and the removal is to be for cause, it is said that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing; but that the existence of the cause for which the power is to be exercised must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard; Mechem, Pub. Officers, § 454; Coleman v. Glenn, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108; Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128. But, where the statute gives such authority, officers may be removed without notice; Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; Trimble v. People, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; People v. Whitlock, 92 N. Y. 191; State v. McGarry, 21 Wis. 496; State v. Cheetham, 19 Wash. 330, 53 Pac. 349.

The prevailing rule is that title to a public office will not be tried by mandamus; State v. Callahan, 4 N. D. 481, 61 N. W. 1025; People v. Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381; State v. John, 81 Mo. 13; Hartwig v. Manistee, 134 Mich. 615, 96 N. W. 1067; Gorley v. Louisville, 104 Ky. 372, 47 S. W. 263; Hagan v. Brooklyn, 126 N. Y. 643, 27 N. E. 265; but *contra*, Keough v. Board of Aldermen, 156 Mass. 403, 31 N. E. 387; Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; Harwood v. Marshall, 9 Md. 83. Where the writ is invoked to enforce a specific duty and remedies at law are not adequate, aid will not be refused merely because occupancy or incumbency or title is incidently involved. The court will act under such circumstances as does equity and inquire into and determine rights so far as, but no further than, may be necessary to the relief sought; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644.

For the incompatibility of office, see INCOMPATIBILITY; OFFICER.

See 3 Kent 362; MANDAMUS; QUO WARRANTO.

For word "office" as used of a place for transacting public business, see Com. v. White, 6 Cush. (Mass.) 181.

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Officers are required to exercise the functions which belong to their respective offices. The neglect to do so may, in some cases, subject the offender to an indictment; Respublica v. Montgomery, 1 Yeates (Pa.) 419; and in others he will be liable to the party injured; Work v. Hoofnagle, 1 Yeates (Pa.) 506.

Public office in the constitution means a permanent public trust or employment, not merely transient, occasional, or incidental; In re Hathaway, 71 N. Y. 238. The term embraces the ideas of tenure, duration, emoluments, and duties; U. S. v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830; but it has been held that duration and salary are not of the essence of public office, and that the duty of acting for and on behalf of the state constitutes an office; People v. Bledsoe, 68 N. C. 457; even though it expires as soon as a single act is done; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488. The true test is

that it is a parcel of the administration of government; Eliason v. Coleman, 86 N. C. 241; though it is a clerkship in a department and the duties are confined within narrow limits; Vaughn v. English, 8 Cal. 39.

An office commonly requires something more than a single transitory act or transaction to call it into being; Carrington v. U. S., 208 U. S. 1, 28 Sup. Ct. 203, 52 L. Ed. 367, where an army officer received $3,500 from civil sources to be used by him in connection with his military duties; it was held that he was not amenable to the Philippine penal code punishing a public official for falsification of a public document.

A public officer is one who renders a public service—a service in which the general public is interested; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913B, 1078. One who exercises some portion of the sovereign power of the state, either in making, administering or executing the laws; Olmstead v. New York, 10 Jones & S. (N. Y.) 481; Eliason v. Coleman, 86 N. C. 235. It is said to depend upon the greater importance and dignity of the position; the requirement of an oath and perhaps of a bond, and usually upon the tenure; People v. Langdon, 40 Mich. 673.

Officers of the United States are those nominated by the president and confirmed by the senate or those who are appointed under an act of congress, by the president alone, a court of law, or a head of a department; U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482; see U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463. The notification of the secretary of the navy is a valid appointment as a passed assistant surgeon; U. S. v. Moore, 95 U. S. 762, 24 L. Ed. 588. It is generally true that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169. Not every employment under the government is an office; U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747. The distinction between officer and placeman is that the former must take an oath of office, the latter not; Worthy v. Barrett, 63 N. C. 199.

Who are officers. The following have been held to be officers: All persons entrusted with the receipt of public money; Com. v. Evans, 74 Pa. 124; the receiver of a national bank; Platt v. Beach, 2 Ben. 303, Fed. Cas. No. 11,215; clerks in an executive department of the federal government; Talbot v. U. S., 10 Ct. Cl. 426; a collector of city taxes, within the bankruptcy act of 1841; Morse v. Lowell, 7 Metc. (Mass.) 152; a representative in a state legislature; Morrill v. Haines, 2 N. H. 246 (see *infra*); members of the boards of public safety and public works; secretaries of such boards; assistant bailiff of the police court; and the stenographer of the said court, within the meaning of a constitutional provision that the salaries of public officers shall be neither increased nor diminished during their term of office; Louisville v. Wilson, 99 Ky. 598, 36 S. W. 944; a notary public, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office; People v. Rathbone, 11 Misc. 98, 32 N. Y. Supp. 108, affirmed in 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384; a representative in congress; People v. Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; a selectman; State v. Boody, 53 N. H. 610; the president of a city council; State v. Anderson, 45 Ohio St. 196, 12 N. E. 656; a city superintendent of streets; State v. May, 106 Mo. 488, 17 S. W. 660; an assistant of the board of aldermen; Collins v. New York, 3 Hun (N. Y.) 680; a deputy county clerk; Gibbs v. Morgan, 39 N. J. Eq. 126; a county solicitor duly elected; Lancaster County v. Fulton, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; notary public; Governor v. Gordon, 15 Ala. 72; a passed assistant surgeon in the navy; U. S. v. Moore, 95 U. S. 760, 24 L. Ed. 588; a cadet engineer, a graduate of the naval academy; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449, 29 L. Ed. 700; a clerk appointed by an assistant treasurer; U. S. v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830; a postmaster; Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69; judges and members of a state senate and house and state directors in corporations; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488; justices of the peace; Ex parte Henshaw, 73 Cal. 487, 15 Pac. 110; attendants of courts; Rowland v. New York, 83 N. Y. 372; a marshal of the United States; U. S. v. Strobach, 48 Fed. 902, 4 Woods 592; a deputy marshal; U. S. v. Martin, 17 Fed. 150; a sheriff; Worthy v. Barrett, 63 N. C. 199; Coite v. Lynes, 33 Conn. 109; a deputy state treasurer; State v. Brandt, 41 Ia. 593; trustees of the state university and directors of a state institution for the deaf and dumb, penitentiary, etc.; People v. Bledsoe, 68 N. C. 457.

So of the superintendent of a county penitentiary; Porter v. Pillsbury, 11 How. Pr. (N. Y.) 240; the medical superintendent of a hospital for the insane; State v. Wilson, 29 Ohio St. 347; trustees of a state library; People v. Sanderson, 30 Cal. 160; a deputy constable; State v. Dierberger, 90 Mo. 369, 2 S. W. 286. As to a policeman, see Farrell v. Bridgeport, 45 Conn. 191; Shanley v. Brooklyn, 30 Hun (N. Y.) 396; Wilkes-Barre v. Meyers, 113 Pa. 395, 6 Atl. 110; a fire marshal; People v. Scannel, 22 Misc. 298, 49 N. Y. Supp. 1096; a fireman; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913B, 1078; Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; Padden v. New York, 45 Misc. 517, 92 N. Y. Supp. 926 (*contra*, Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775, 101

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that it is a parcel of the administration of government; Eliason v. Coleman, 86 N. C. 241; though it is a clerkship in a department and the duties are confined within narrow limits; Vaughn v. English, 8 Cal. 39.

An office commonly requires something more than a single transitory act or transaction to call it into being; Carrington v. U. S., 208 U. S. 1, 28 Sup. Ct. 203, 52 L. Ed. 367, where an army officer received $3,500 from civil sources to be used by him in connection with his military duties; it was held that he was not amenable to the Philippine penal code punishing a public official for falsification of a public document.

A public officer is one who renders a public service—a service in which the general public is interested; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913B, 1078. One who exercises some portion of the sovereign power of the state, either in making, administering or executing the laws; Olmstead v. New York, 10 Jones & S. (N. Y.) 481; Eliason v. Coleman, 86 N. C. 235. It is said to depend upon the greater importance and dignity of the position; the requirement of an oath and perhaps of a bond, and usually upon the tenure; People v. Langdon, 40 Mich. 673.

Officers of the United States are those nominated by the president and confirmed by the senate or those who are appointed under an act of congress, by the president alone, a court of law, or a head of a department; U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482; see U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463. The notification of the secretary of the navy is a valid appointment as a passed assistant surgeon; U. S. v. Moore, 95 U. S. 762, 24 L. Ed. 588. It is generally true that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169. Not every employment under the government is an office; U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747. The distinction between officer and placeman is that the former must take an oath of office, the latter not; Worthy v. Barrett, 63 N. C. 199.

Who are officers. The following have been held to be officers: All persons entrusted with the receipt of public money; Com. v. Evans, 74 Pa. 124; the receiver of a national bank; Platt v. Beach, 2 Ben. 303, Fed. Cas. No. 11,215; clerks in an executive department of the federal government; Talbot v. U. S., 10 Ct. Cl. 426; a collector of city taxes, within the bankruptcy act of 1841; Morse v. Lowell, 7 Metc. (Mass.) 152; a representative in a state legislature; Morrill v. Haines, 2 N. H. 246 (see *infra*); members of the boards of public safety and public works; secretaries of such boards; assistant bailiff of the police court; and the stenographer of the said court, within the meaning of a constitutional provision that the salaries of public officers shall be neither increased nor diminished during their term of office; Louisville v. Wilson, 99 Ky. 598, 36 S. W. 944; a notary public, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office; People v. Rathbone, 11 Misc. 98, 32 N. Y. Supp. 108, affirmed in 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384; a representative in congress; People v. Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; a selectman; State v. Boody, 53 N. H. 610; the president of a city council; State v. Anderson, 45 Ohio St. 196, 12 N. E. 656; a city superintendent of streets; State v. May, 106 Mo. 488, 17 S. W. 660; an assistant of the board of aldermen; Collins v. New York, 3 Hun (N. Y.) 680; a deputy county clerk; Gibbs v. Morgan, 39 N. J. Eq. 126; a county solicitor duly elected; Lancaster County v. Fulton, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; notary public; Governor v. Gordon, 15 Ala. 72; a passed assistant surgeon in the navy; U. S. v. Moore, 95 U. S. 760, 24 L. Ed. 588; a cadet engineer, a graduate of the naval academy; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449, 29 L. Ed. 700; a clerk appointed by an assistant treasurer; U. S. v. Hartwell, 6 Wall. (U. S.) 385, 18 L. Ed. 830; a postmaster; Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69; judges and members of a state senate and house and state directors in corporations; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488; justices of the peace; Ex parte Henshaw, 73 Cal. 487, 15 Pac. 110; attendants of courts; Rowland v. New York, 83 N. Y. 372; a marshal of the United States; U. S. v. Strobach, 48 Fed. 902, 4 Woods 592; a deputy marshal; U. S. v. Martin, 17 Fed. 150; a sheriff; Worthy v. Barrett, 63 N. C. 199; Coite v. Lynes, 33 Conn. 109; a deputy state treasurer; State v. Brandt, 41 Ia. 593; trustees of the state university and directors of a state institution for the deaf and dumb, penitentiary, etc.; People v. Bledsoe, 68 N. C. 457.

So of the superintendent of a county penitentiary; Porter v. Pillsbury, 11 How. Pr. (N. Y.) 240; the medical superintendent of a hospital for the insane; State v. Wilson, 29 Ohio St. 347; trustees of a state library; People v. Sanderson, 30 Cal. 160; a deputy constable; State v. Dierberger, 90 Mo. 369, 2 S. W. 286. As to a policeman, see Farrell v. Bridgeport, 45 Conn. 191; Shanley v. Brooklyn, 30 Hun (N. Y.) 396; Wilkes-Barre v. Meyers, 113 Pa. 395, 6 Atl. 110; a fire marshal; People v. Scannel, 22 Misc. 298, 49 N. Y. Supp. 1096; a fireman; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913B, 1078; Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; Padden v. New York, 45 Misc. 517, 92 N. Y. Supp. 926 (*contra*, Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775, 101

Am. St. Rep. 361; State v. Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723; State v. Anaconda, 41 Mont. 577, 111 Pac. 345). See Worthy v. Barrett, 63 N. C. 199, where a long list of public officers is given.

It has been said that members of the bar are "public officers and ministers of justice;" Barn. Ch. 478; see also In re Cooper, 22 N. Y. 67 (which gives a very learned argument by Prof. Dwight); Seymour v. Ellison, 2 Cow. (N. Y.) 13; *contra*, In re Attorneys' Oaths, 20 Johns. (N. Y.) 492; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62. An attorney-at-law is not, indeed, in the strictest sense a public officer, but he comes very near it; In re Robinson, 131 Mass. 376, 41 Am. Rep. 239, citing 6 Mod. 18; Re Bradley, 7 Wall. (U. S.) 364, 19 L. Ed. 214.

The following have been held *not* to be officers: A special deputy sheriff; Kavanaugh v. State, 41 Ala. 399; a civil surgeon appointed by the commissioner of pensions to examine applicants for pensions; U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482; a lamp inspector; Peck v. Belknap, 130 N. Y. 394, 29 N. E. 977; a paymaster's clerk in the navy; U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; a United States agent of fortifications; U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; the keeper of a county jail; In re Birdsong, 39 Fed. 599, 4 L. R. A. 628; the chief clerk in a city assessor's office; People v. Langdon, 40 Mich. 673; a mail carrier; Sawyer v. Corse, 17 Gratt. (Va.) 243, 94 Am. Dec. 445 (*contra*, Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206); an agent appointed by a state to receive an extradited person; Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; patrolmen on the police force of a city; Shanley v. Brooklyn, 30 Hun (N. Y.) 396 (*semble*); firemen of cities and villages; People v. Pinckney, 32 N. Y. 377; State v. Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723; a pilot; Dean v. Healy, 66 Ga. 503; a night watchman of a post-office building; Doyle v. Aldermen of Raleigh, 89 N. C. 133, 45 Am. Rep. 677; members of the legislature; Worthy v. Barrett, 63 N. C. 199; a college professor; Union County v. James, 21 Pa. 525. Nine-tenths of the employés of the United States government are said not to be officers; U. S. v. Germaine, 99 U. S. 509, 25 L. Ed. 482. So of a special officer appointed to suppress the liquor traffic among the Indians; U. S. v. Van Wert, 195 Fed. 974. County commissioners are not officers for the purpose of impeachment; In re Opinion of the Justices, 167 Mass. 599, 46 N. E. 118. A United States senator elect is not a member of congress until he has assumed the duties of his office; U. S. v. Dietrich, 126 Fed. 676.

See McCornick v. Thatcher, 8 Utah 294, 30 Pac. 1091, 17 L. R. A. 243.

Public officers are public agents or trustees and have no proprietary interest or property in their office beyond the lawful term and salary (if any) prescribed; State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690. Their official rights and duties may be changed at the discretion of the legislature during their term of office; State v. Dews, R. M. Charlt. (Ga.) 397; but it has been held that a clerk's office, to be held during good behavior, and many other public offices are, under certain limitations, the subject of property; Hoke v. Henderson, 15 N. C. 18, 25 Am. Dec. 677; the emoluments are private property; *id.*

The profits of a public office cannot be assigned for the benefit of creditors; 8 Cl. & F. 295.

The buying and selling of offices was forbidden by 5 & 6 Edw. VI. c. 15, under which it has been held that an officer having a certain salary or certain annual profits may make a deputation of it, reserving a sum not exceeding the amount of his profits, or the deputy may lawfully agree to pay so much out of the uncertain fees of an office; but if the office have uncertain fees or profits, an agreement by the deputy to pay a fixed sum annually is a sale within the statute; and so is an agreement to give the deputy all the profits; 3 Kent 456.

An agreement by an applicant for an office to divide the fees with another applicant if the latter withdraw his application for it, is void; Gray v. Hook, 4 N. Y. 449; so is a contract for the sale of an office; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; whether made by the appointing power or the incumbent; Hall v. Gavitt, 18 Ind. 390. An agreement for compensation for procuring the appointment or resignation of a public officer is void; Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463. So is the sale by the owners of a vessel of the position of master; 2 B. & C. 661; and the promises of a stockholder that he will secure to the buyer of his stock the office of treasurer; Guernsey v. Cook, 120 Mass. 501.

Any bargain whereby, in advance of his appointment to an office with a salary, the appointee agreed with the individual making the appointment that he would waive all salary or accept something less than the statutory sum, is contrary to public policy and void; Miller v. U. S., 103 Fed. 413; Glavey v. U. S., 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247; People v. Board of Police, 75 N. Y. 38.

The eligibility of an officer is ordinarily to be determined at the time of taking the office; State v. Moores, 52 Neb. 770, 73 N. W. 299; Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944; Kirkpatrick v. Brownfield, 97 Ky. 558, 31 S. W. 137, 29

L. R. A. 703, 53 Am. St. Rep. 422; State v. Van Beek, 87 Ia. 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397 (where naturalization intervened after election and before induction). That the election is the test, see Roane v. Matthews, 75 Miss. 94, 21 South. 665; State v. Lake, 16 R. I. 511, 17 Atl. 552. Where residence in a district was required, it was held that this qualification must exist at the time of election; State v. Holman, 58 Minn. 219, 59 N. W. 1006.

The tenure of office is never more permanent than during good behavior; 3 Kent 454; if not protected by the constitution, it may be changed by the legislature; Com. v. Weir, 165 Pa. 284, 30 Atl. 835; but its term cannot be extended when fixed by the constitution; State v. Brewster, 44 Ohio St. 589, 9 N. E. 849. In England, servants of the crown, civil as well as military, except in special cases otherwise provided by law, hold their office only during the pleasure of the crown; [1896] 1 Q. B. 116, 121.

The right to appoint to a public office, when no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or hearing; State v. Archibald, 5 N. D. 359, 66 N. W. 234.

The suspension of an officer by the governor does not deny him the equal protection of the laws because the governor refuses to produce to him the evidence against him, or to confront him with his accusers. He is not entitled to a jury trial; Wilson v. North Carolina, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865.

An officer cannot be removed from office during his second term for a violation of duty committed during his first term; Thurston v. Clark, 107 Cal. 285, 40 Pac. 435.

The power to remove a corporate officer for reasonable and just cause is one of the common-law incidents of all corporations; Dill. Mun. Corp. § 179; L. R. 23 Ch. D. 1; but not for pre-existing cause affecting his capacity to hold the office; *id.*

The subject is generally regulated by legislation, though there are cases in which the rule has been applied to officers of municipal corporations in the absence of statutory provisions; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693; State v. New Orleans, 107 La. 632, 32 South. 22; State v. Noblesville, 157 Ind. 31, 60 N. E. 704.

It was held that, in the absence of statutory provisions relating to their removal, public officers could not be removed by a vote of the town either with or without a hearing before the town or a committee thereof; Attorney General v. Stratton, 194 Mass. 51, 79 N. E. 1073, 9 L. R. A. (N. S.) 572, 120 Am. St. Rep. 527, 10 Ann. Cas. 883. Where the charter of a borough provided that its president be elected by the electors, and that officer was removed by the governor and afterwards was appointed by the board of aldermen to fill the vacancy caused by his own removal, he was held eligible to fill it; People v. Ahearn, 60 Misc. 613, 113 N. Y. Supp. 876.

The act of a *de facto* officer is binding on the public; McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271. Persons coming into a public office to transact business, who find a person in charge of it, are not bound to ascertain his authority so to act. To them he is an officer *de facto*, and so far as they are concerned, *de jure;* Nofire v. U. S., 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; though there was no power to appoint him; Erwin v. Jersey City, 60 N. J. L. 141, 37 Atl. 732, 64 Am. St. Rep. 584. A municipal corporation who has paid a salary to a *de facto* officer who has performed the duties of an office while the right to it was in litigation, cannot be held liable therefor again to one who may thereafter establish his title to the office; Fuller v. Roberts Co., 9 S. D. 216, 68 N. W. Rep. 308; the remedy is against the *de facto* officer; *id.;* Com'rs of Saline Co. v. Anderson, 20 Kan. 298, 27 Am. Rep. 171. See Dolan v. New York, 68 N. Y. 279, 23 Am. Rep. 168; but see Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52. It is no defence to a prosecution for bribery that the act under which the officer was bribed was unconstitutional; State v. Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660. See De Facto.

Where the settlement of a question involves the exercise of discretion and judgment, the duty is not ministerial and is beyond the review of the judicial department; Enterprise Sav. Ass'n v. Zumstein, 67 Fed. 1000, 15 C. C. A. 153, 37 U. S. App. 71.

A town collector is responsible as a debtor and not merely as a bailee; Muzzy v. Shattuck, 1 Den. (N. Y.) 233. It is the policy of public laws to hold all receivers of public money to a very strict accountability; U. S. v. Thomas, 15 Wall. (U. S.) 346, 21 L. Ed. 89. The obligation to keep safely the public money was said to be absolute, without any condition express or implied; U. S. v. Prescott, 3 How. (U. S.) 587, 11 L. Ed. 734; but this was considered in U. S. v. Thomas, 15 Wall. (U. S.) 347, 21 L. Ed. 89; as being too generally expressed, the court intimating there that loss of funds under special circumstances, as by an earthquake, would probably exonerate the official. In the same case it was said that it appears from all the cases (except that in Muzzy v. Shattuck, 1 Den. [N. Y.] 233) that the official bond of an officer is regarded as laying the foundation of a more stringent responsibility; but the court held that the forcible seizure by the rebel authorities in 1861 of public moneys in the hands of a loyal government agent, against his will and without fault on his part, was

a discharge from his obligation in reference to such moneys, three judges dissented.

The responsibility of a public officer is determined, not by the law of bailment, but by the condition of his bond; Com. v. Comly, 3 Pa. 372.

Where public money is lost by the failure of a bank; State v. Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840; (*contra*, Tillinghast v. Merrill, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612); or a city treasurer is robbed; Healdsburg v. Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461; (*contra*, Board of Education v. Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586); the official being free from fault is not liable; but in Fairchild v. Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851; an officer was held liable for the safety of public moneys, lost in an insolvent bank, even though he was not negligent; and in New York the liability is very strictly maintained; Tillinghast v. Merrill, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678, 56 Am. St. Rep. 612. The weight of authority seems to be in favor of a strict accountability; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223, 58 Am. St. Rep. 673; Fairchild v. Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851.

A United States officer giving a bond for the safe-keeping of public moneys is liable in case of loss, unless it was due to overruling necessities or the public enemy; loss by fire is no defence; his obligation determined by his bond; it is not a bailment; Smythe v. U. S., 188 U. S. 156, 23 Sup. Ct. 279, 47 L. Ed. 425.

Where a subordinate officer takes the place of his superior in the case of death or disability, he is entitled to the same salary; State v. La Grave, 23 Nev. 216, 45 Pac. 243, 35 L. R. A. 233.

There is no federal statute expressly bearing upon removals from office, except § 13 of the act of January 16, 1883—the Civil Service Act, relating to removal, etc., by reason of giving or refusing political contributions. The civil service rules of the executive are but regulations imposed by him upon his own actions or those of heads of departments, and do not confer upon an employé any property right in his office; Morgan v. Nunn, 84 Fed. 551. Equity has no jurisdiction over the appointment and removal of public officers, whether the power is vested in executive or administrative boards or officers, or in a judicial tribunal; jurisdiction belongs exclusively to courts of law; White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199.

Equity has no jurisdiction over the appointment or removal of public officers; the jurisdiction belongs exclusively to courts of law; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Moulton v. Reid, 54 Ala. 320; Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; Muhler v. Hedekin, 119 Ind. 481, 20 N. E. 700. But equity will prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right, affecting injuriously the property rights of individuals, and falling under one of the acknowledged heads of equity jurisprudence; People v. Canal Board, 55 N. Y. 390; Morgan v. Nunn, 84 Fed. 554; and it is said that equity will protect the position of officers *de facto* against the interference of adverse claimants; High, Inj. § 1315; as by enjoining the dispossession of an officer, by force and unlawfully, and compelling the defendant to resort to a remedy at law; Morgan v. Nunn, 84 Fed. 555.

The president may remove a district attorney within four years of his appointment; Parsons v. U. S., 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185; where the history of the question is reviewed. By the repeal (act of 1887) of the Tenure of Office Act, congress intended to concede to the president the power of removal, if it ever took it from him; *id.*

In the absence of constitutional or statutory regulation, the power of appointment carries with it, as an incident, the power of removal; Parsons v. U. S., 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185.

The Civil Service Act of 1891 is constitutional; Butler v. White, 83 Fed. 578.

Department regulations cannot enlarge or restrict the liability of an officer on his bond; Meads v. U. S., 81 Fed. 684, 26 C. C. A. 229.

The postmaster-general, when in the discharge of his duties, is not liable for damages on account of official communications made by him within those duties, by reason of any personal motive that might be alleged to have prompted his action; Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780.

The United States is not liable for the non-feasance or misfeasance or neglect of its officers; German Bk. v. U. S., 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564.

A person holding two different federal offices cannot draw pay for both for the same period; Talbot v. U. S., 10 Ct. Cls. 426.

Congress cannot exercise the power of appointment to office; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. It may vest in the president the power to appoint a vice-consul; U. S. v. Eaton, 169 U. S. 331, 18 Sup. Ct. 374, 42 L. Ed. 767.

The act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a proceeding of the court, with which courts of concurrent jurisdiction will not interfere; American Ass'n v. Hurst, 59 Fed. 1, 7 C. C. A. 598, 16 U. S. App. 325.

An act directing the employment of veterans in the labor service of the common-

wealth, etc., in preference to other persons, if such veterans are qualified for the work, is constitutional; Opinion of the Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58, three judges dissenting.

One who accepts an office incompatible with one already held, *ipso facto* vacates the first office; Northway v. Sheridan, 111 Mich. 18, 69 N. W. 82; People v. Board of Fire Com'rs, 76 Hun 146, 27 N. Y. Supp. 548. Where the mayor of Detroit was elected governor of Michigan, it was held that he thereby vacated the former office; Attorney General v. Common Council, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. In Louisiana a constitutional officer may also hold a municipal office; State v. Montgomery, 25 La. Ann. 138. See OFFICE.

A woman is eligible to the office of court clerk where there is no provision expressly requiring such clerk to be a man, though the word "he" is used in the constitution of the state in declaring who is eligible to office; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515.

The officers of a corporation are not, as regards their criminal liability, a single person in respect to corporate acts, and therefore they may be guilty of conspiracy; People v. Duke, 19 Misc. 292, 44 N. Y. Supp. 330.

The word "vacant" has no technical nor peculiar meaning; it means empty, unoccupied; as applied to an office—without an incumbent. An existing office without an incumbent is vacant, whether it be an old or a new one; Stocking v. State, 7 Ind. 326; Com. v. McAfee, 232 Pa. 36, 81 Atl. 85. Where a new office has been created and has not been filled, a vacancy exists; State v. Irwin, 5 Nev. 111; Stocking v. State, 7 Ind. 326; but see O'Leary v. Adler, 51 Miss. 28. Where a newly appointed officer fails to qualify as required by law, there is usually not a vacancy, if, by law, the last incumbent holds over; State v. Brewster, 44 Ohio St. 589, 9 N. E. 849; State v. Bowden, 92 S. C. 399, 75 S. E. 866; but it has been held that in such case there is a vacancy; State v. Beard, 34 La. Ann. 273.

Statutory provisions requiring a bond and oath of office are usually only directory; it will suffice if the oath be taken and the bond given before a vacancy has been declared; Sprowl v. Lawrence, 33 Ala. 674; Cawley v. People, 95 Ill. 249; Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182; but see People v. McKinney, 52 N. Y. 374; Johnson v. Mann, 77 Va. 265; State v. Ruff, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140.

At common law, the refusal of a public officer to accept office was indictable; 4 Term 778; such is still the rule; People v. Williams, 145 Ill. 573. Mandamus will lie to compel a person to enter upon the discharge of the duties of an office; Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314; People v. Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514.

The term of office and the functions of a public officer may be ended by resignation but he cannot resign until he is qualified; Miller v. Board of Sup'rs, 25 Cal. 93. A resignation of an office should be tendered to the officer or body having authority to fill the vacancy by appointing a successor; Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314; Thompson v. U. S., 103 U. S. 480, 26 L. Ed. 521; State v. Poliner, 18 Ohio Cir. Ct. R. 304; State v. Super. Ct., 46 Wash. 616, 91 Pac. 4, 12 L. R. A. (N. S.) 1010, 123 Am. St. Rep. 948, 13 Ann. Cas. 870; People v. Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514; and it is held in many cases that an acceptance of the resignation is necessary; *id.;* State v. Stickley, 80 S. C. 64, 61 S. E. 211, 128 Am. St. Rep. 855, 15 Ann. Cas. 136; Coleman v. Sands, 87 Va. 689, 13 S. E. 148 (this was a registrar of elections who after resignation not being accepted was compelled by mandamus to register a voter); U. S. v. Green, 53 Fed. 769 (where an alderman resigned after service of mandamus to secure payment of a judgment against the city and as the constitution provided that all elective and appointive officers should hold until their successors were appointed and qualified, the alderman was held guilty of contempt); Patrick v. Hagins, 41 S. W. 31, 19 Ky. L. Rep. 482 (police judge, who after resignation appeared not to have been accepted, was compelled by mandamus to put a name on the official ballot); so it was held under a Kentucky statute that a resignation not tendered to one having power to appoint the successor is a nullity; Shacklett v. Island, 146 Ky. 798, 143 S. W. 369, Ann. Cas. 1913C, 602; and in another jurisdiction that it is the general rule that to make a resignation effective, in the absence of statute, it should be tendered to the appointing power, or if the office is elective to the power authorized to call an election to fill the vacancy; Nome v. Rice, 3 Alaska 602; and a resignation implies an expression by the incumbent in some form, express or implied of the intention to surrender, renounce, or relinquish the office, and an acceptance by competent and lawful authority; *id.*

The common law rule that the resignation of a public officer is not complete until the proper authority accepts it or does something equivalent thereto, is held to be the rule; State v. Clayton, 27 Kan. 442, 41 Am. Rep. 418. Where no particular mode of resignation is prescribed by statute and the appointment is not by deed, a resignation may be by parol; Clark v. Board of Education, 112 Mich. 656, 71 N. W. 177; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; State v. Ferguson, 31 N. J. L. 107 (overseer of highways), where Beasley, C. J., referring to U. S. v. Wright, 1 McLean 512, Fed. Cas. No. 16,775, said that the remark of McLean, J., to the

effect that a civil officer could resign at any time and the executive could not compel him to remain in office, could hardly be applied "to the class of officers who are elected by the people and whose services are absolutely necessary to carry on local government." He considered that the common law rule was in force that a person elected could not decline to serve. The view that a resignation must be accepted by "the proper authority" was followed in Fryer v. Norton, 67 N. J. L. 537, 52 Atl. 476, where the officer was a member of a borough council, an elective office, with power in the mayor to fill vacancies with concurrence of the council. It was held that both must concur in accepting the resignation. The appointment of a successor will be deemed an acceptance of the resignation; Gates v. Delaware County, 12 Ia. 405.

On the other hand it is held in many cases that the acceptance is not necessary and that a civil officer has the right to resign at any time, without consent of the President, who has no power to refuse it and to require the officer to continue in office; U. S. v. Wright, 1 McLean 509, Fed. Cas. No. 16,775. It is said that an unconditional resignation of an officer, transmitted with the intent that it be delivered to the authority entitled to receive it, becomes complete without any acceptance; State v. Fitts, 49 Ala. 402; People v. Porter, 6 Cal. 26; and that such an unconditional resignation to take effect immediately becomes effective when deposited in the post office properly addressed to the person authorized to receive it; State v. Clarke, 3 Nev. 566 (United States district attorney). In the case of a drainage commissioner (appointed by a county judge) who resigned, no acceptance was required and the law continuing an officer until his successor is qualified was held to apply only to the expiration of the term and not to the resignation; Olmsted v. Dennis, 77 N. Y. 378. The moment his resignation was given to the officer who appointed him it was effective and the office became vacant; *id.*

A civil officer has the right to resign his office and had such right at common law and it is recognized in the constitution; State v. Blakemore, 104 Mo. 340, 15 S. W. 960, reversing 40 Mo. App. 406; and any doubt in other jurisdictions as to the right to resign without concurrence of the officer or body which has the power to act upon it is removed in this state by the constitutional recognition of the right of resignation; State v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. In that case a school director was appointed a deputy sheriff and it was held that the acceptance of a second office operated as a resignation of the first if they were incompatible. Whether they were so was the main question and it was decided that they were not.

In most of the cases which hold that an acceptance is necessary to complete the resignation stress is laid upon the common law doctrine that not only offices of local character, the creation of a vacancy in which would cause public inconvenience, were not lightly to be abandoned at the mere will of the incumbent but frequent allusion is made to the fact that it was compulsory to serve in such offices and that not only was it made difficult to resign an office but also to decline accepting one. This view is strongly presented by the United States Supreme Court in Edwards v. U. S., *supra*, and also in the New Jersey cases.

In the cases which hold that an acceptance is not necessary, the offices in question were both elective, as of a county judge, and appointive, as United States district attorney or collector of internal revenue, and there seems to be no distinction drawn between them, nor is any expressed with respect to the character or importance of the office since the cases which adhere to the right of resignation without acceptance include such offices as school director and drainage commissioners. No distinct theory therefore can be evolved from the cases which will reconcile them though it has been suggested by one writer on the subject that the rule requiring acceptance is usually applied to local offices in which vacancies would occasion special public inconvenience and that the acceptance is not necessary where the public interest is not directly involved; Am. & Engl. Enc. 1403. While this suggestion has the merit of plausibility, it cannot be said to have the support of any judicial authority and the cases cannot be aligned in accordance with it or indeed with any general rule.

An unconditional resignation transmitted with intent that it be delivered to the proper authority cannot be recalled; State v. Fitts, 49 Ala. 402; or withdrawn after it has been received; State v. Hauss, 43 Ind. 105, 13 Am. Rep. 384; but a contingent or prospective resignation can be withdrawn at any time before acceptance; State v. Fowler, 160 Ala. 186, 48 South. 985, 135 Am. St. Rep. 91; State v. Murphy, 30 Nev. 409, 97 Pac. 391, 720, 18 L. R. A. (N. S.) 1210; or after acceptance, with the consent of the authority accepting, where no new rights have intervened; Biddle v. Willard, 10 Ind. 62; Bunting v. Willis, 27 Grat. (Va.) 144, 21 Am. Rep. 338; State v. McGrath, 64 Mo. 139; State v. Beck, 24 Nev. 92, 49 Pac. 1035; but where the office is once surrendered or vacated by the acceptance of a second office in violation of law the officer cannot be restored by resigning the second; Bishop v. State, 149 Ind. 223, 48 N. E. 1038, 39 L. R. A. 279, 63 Am. St. Rep. 270.

A resignation may be withdrawn if not accepted, and is not effective though a successor has been appointed, if transmitted

without the officer's consent, and a conditional resignation cannot be accepted except on the terms made by it, and in the absence of a corrupt bargain an officer may attach, as a condition, the appointment of a certain other person as his successor; State v. Huff, 172 Ind. 1, 87 N. E. 141, 139 Am. St. Rep. 355. One who resigns an office, manifesting his intention by an unequivocable act, may retract or withdraw it before it is accepted or any act done to fill the vacancy; People v. Board of Police, 26 Barb. (N. Y.) 487; and where there is no formal resignation there must be some conduct inconsistent with the retention of office and a formal acceptance of the resignation or the appointment of another to fill the vacancy; *id.* A mere intention to resign is ineffective until properly manifested; State v. Pollner, *supra*. There must be an intention to relinquish a part of the term, accompanying the act of relinquishment; State v. Ladeem, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058; and if obtained by duress the resignation is voidable and may be repudiated by an immediate refusal to surrender the office; *id.*

A resignation of a public office by implication may take place by abandonment of official duties and to complete it the acceptance may be manifested by an appointment of another to fill the place; People v. Spencer, 101 Ill. App. 61. An officer may resign pending proceedings for his removal for malfeasance in office; State v. Dart, 57 Minn. 261, 59 N. W 190; Roberts v. Paul, 50 W. Va. 528, 40 S. E. 470.

Term of office means "a fixed and definite period of time;" 30 Am. & E. Corp. Cas. 351. When no time is mentioned in the law from which the term of office begins, it runs from the date of election; State v. Constable, 7 Ohio 7, pt. 1.

Officers who are compelled to rely upon and act through subordinate officers and employers are not ordinarily responsible to the government for their misfeasance or nonfeasance; People v. Coler, 31 App. Div. 523, 52 N. Y. Supp. 197.

It is now generally agreed that, in the absence of any statute to the contrary, the president, together with the secretary or cashier, are presumed, in favor of third persons purchasing in good faith and for value, to have power to convey property of the corporation in its name, in the ordinary course of its business. Other officers have not this power; Abbott's Trial Evidence 52; Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081. The president of a corporation is recognized as its business head, and any contracts pertaining to its affairs, within the general power of such officer, executed by him on its behalf, will, in the absence of proof to the contrary, be presumed to have been done by authority; Lloyd & Co. v. Matthews, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346; Little Sawmill Val. T. or P. Road Co., 194 Pa. 144, 45 Atl. 66, 75 Am. St. Rep. 690. But in some cases it is held that general authority to act for the corporation must be shown; Lyndon Mill Co. v. Biblical Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783; Mathias v. Springs Ass'n, 19 Mont. 359, 48 Pac. 624.

As to officers of a corporation as parties in patent cases, see INFRINGEMENT. As to service on corporation officers, see FOREIGN CORPORATIONS.

See MANDAMUS; QUO WARRANTO.

See Mechem, Publ. Off.; SERVICE; TENURE OF OFFICE; OFFICE; CASHIER; DIRECTOR; LONGEVITY PAY; LOAN; NATIONAL BANKS, and the titles of various public and corporation officials.

OFFICER DE FACTO. One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law; 6 East 368. See DE FACTO.

OFFICIAL. **In Old Civil Law.** The person who was the minister of, or attendant upon, a magistrate.

In Canon Law. The person to whom the bishop generally commits the charge of his spiritual jurisdiction bears this name. Wood, Inst. 30, 505; Merlin, *Répert.*

OFFICIAL PRINCIPAL. See COURT OF ARCHES.

OFFICIAL SOLICITOR TO THE COURT OF CHANCERY. An officer in England whose function is to protect the suitors' fund, and to administer under the direction of the court, so much of it as comes under the spending power of the court.

OFFICIAL TRUSTEES OF CHARITIES. Charity commissioners in England, created by 16 & 17 Vict. c. 137, and amended by 18 & 19 Vict. c. 24.

OFFICIAL USE. An active use before the statute of uses, which imposed some duty on the legal owner or feoffee to uses, as a conveyance to A with directions for him to sell the estate and distribute the proceeds amongst B, C, and D. To enable A to perform this duty he had the legal possession of the estate to be sold. Wharton.

OFFICIARIIS NON FACIENDIS VEL AMOVENDIS. A writ addressed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the office he has, until inquiry is made of his manners, etc. Reg. Orig. 126.

OFFICINA JUSTITIÆ. The workshop or office of justice. **In English Law.** The chancery was formerly so called, because all writs issued from it, under the great seal, returnable into the courts of common law. See CHANCERY.

OFFICIO, EX, OATH OF. An oath whereby a person might be obliged to make

any presentment of any crime or offence, or to confess or accuse himself of any criminal matter whereby he might be liable to any censure, penalty, or punishment. 3 Bla. Com. 447.

OFFICIOUS WILL. A testament by which a testator leaves his property to his family. Sand. Just. Inst. 207.

OFFSET. See SET-OFF.

OFFSPRING. The word offspring in its proper and natural sense extends to any degree of lineal descendants and has the same meaning as *issue*. 32 L. J. Ch. 373.

OHIO. One of the states of the American Union.

Massachusetts, Connecticut and Virginia claimed, under their respective charters, the territory lying northwest of the river Ohio. At the solicitation of the continental congress, these claims were, soon after the close of the war of independence, ceded to the United States. Virginia, however, reserved the ownership of the soil of three million seven hundred thousand acres between the Scioto and the Little Miami rivers, for military bounties to the soldiers of her line who had served in the revolutionary war; and Connecticut reserved three million six hundred and sixty-six thousand acres in northern Ohio, now usually called the "Western Reserve." The history of these reservations, and of the several "purchases" under which land-titles have been acquired in various parts of the state, will be found in Albachi's Annals of the West, in the Preliminary Sketch of the History of Ohio, in the first volume of Chase's Statutes of Ohio, and in Swan's Land Laws of Ohio. The conflicting titles of the states having been extinguished, congress, on July 13, 1787, passed the celebrated ordinance for the government of the territory northwest of the river Ohio. 1 Curw. Rev. Stat. of Ohio 86. It provided for the equal distribution of the estates of intestates among their children, gave the widow dower as at common law, regulated the execution of wills and deeds, secured perfect religious toleration, the right of trial by jury, judicial proceedings according to the course of the common law, the benefits of the writ of *habeas corpus*, security against cruel and unusual punishments, the right of reasonable bail, the inviolability of contracts and of private property, and declared that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

These provisions have been, in substance, incorporated into the constitution and laws of Ohio, as well as of the other states which have since been formed within "the territory." The ordinance has been held to be a mere temporary statute, which was abrogated by the adoption of the constitution of the United States. Palmer v. Cuyahoga Co., 3 McLean 226, Fed Cas. No. 10,688; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Strader v. Graham, 10 How. (U. S.) 82, 13 L. Ed. 337. See ORDINANCE OF 1787.

On the 30th of October, 1802, congress passed an act making provision for the formation of a state constitution, under which, in 1803, Ohio was admitted into the Union, under the name of "the State of Ohio." This constitution was never submitted to a vote of the people. It continued to be the organic law of Ohio until September 1, 1851, when it was abrogated by the adoption of the present constitution.

The bill of rights which forms a part of this constitution contains the provisions common to such instruments in the constitutions of the different states. Such are the prohibitions against any laws impairing the right of peaceably assembling to consult for the common good, to bear arms, to have a trial by jury, to worship according to the dictates of one's own conscience, to have the benefit of the writ of *habeas corpus*, to be allowed reasonable bail, to be exempt from excessive fines and cruel and unusual punishment, not to be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, to have a copy of the indictment, the aid of counsel, compulsory process for witnesses, a speedy and public trial, to be privileged from testifying against one's self, or from being twice put in jeopardy for the same offence. Provision is also made against the existence of slavery, against transporting offenders out of the state, against imprisonment for debt unless in cases of fraud, against granting hereditary honors, against quartering soldiers in private houses, for the security of persons from unreasonable arrest or searches, and for the freedom of speech and the press. Extensively amended in 1912.

OIL. Petroleum or rock oil is a mineral substance obtained from the earth by process of mining, and the land from which it is obtained is called mining land; Kelly v. Oil Co., 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; Gill v. Weston, 110 Pa. 313, 1 Atl. 921. It is a part of the realty; *id.*; Appeal of Stoughton, 88 Pa. 198. It was held not a mineral; 23 L. D. 222. This was reversed by act of congress which made oil lands patentable the same as placers; 23 L. D. 222, reversed by 25 L. D. 351.

But it is held that a reservation of "all timber suitable for sawing, also all minerals," will not include petroleum, the ordinary meaning of the word mineral overcoming the technical meaning; Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696.

A property owner has a right to drill for oil through a stratum of coal belonging to another; Chartiers B. C. Co. v. Mellon, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645. A contract giving the right to explore for oil, and if any be found, to sink wells, is a license only; Dark v. Johnston, 55 Pa. 164, 93 Am. Dec. 732. A lease of land with the right to bore for oil is a lease and not a sale of the oil; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566.

Title under an oil and gas lease is inchoate and for purposes of exploration only until oil or gas is found. If none is found no estate vests in the lessee, and his title ends when the unsuccessful search is abandoned. If found then the right to produce becomes a vested right.

Where a lessee drilled a dry well, and removed substantially all his machinery therefrom, and did nothing further in the search, and asserted no title for nine years, until after a lease has been made to other parties, it was assumed as matter of law that the first lease was abandoned; Calhoon v. Neely, 201 Pa. 97, 50 Atl. 967.

Oil produced from wells on lands leased for oil purposes during the owner's life is income; Woodburn's Estate, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932. Where a life tenant united with a remainder-man in leasing *new* oil territory, the court appointed

a trustee to hold and invest the royalties and pay the income to the life tenant, and at her death, the principal to the remainderman; Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564. A life tenant cannot lease *new* oil territory, never operated before her title accrued; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601.

When oil reaches a well and is produced at the surface, it becomes personal property; Kelly v. Oil Co., 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721. As to whether one holding oil on storage who converts it to his use is guilty of larceny as bailee, see Hutchison v. Com., 82 Pa. 472.

It is a proper subject for police regulation; Red "C" Oil Co. v. Board of Agriculture, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240.

See Bryan, Petroleum and Natural Gas; as to oil leases, see Evans v. Trust Co. (Ind.) 29 N. E. 398, 31 L. R. A. 673; as to liability for rent on oil leases, see Kunkle v. Gas Co., 165 Pa. 133, 30 Atl. 719, 33 L. R. A. 847; as to assignment of an oil lease, see Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. See NATURAL GAS; EMINENT DOMAIN; PIPE LINES; MINES AND MINING; WASTE.

OKLAHOMA. One of the United States, admitted to the Union November 16, 1907.

By the enabling Act of June 16, 1906, a constitution was adopted and a state government established covering the territory previously known as Oklahoma and the Indian Territory. The enabling act contains the provision that nothing contained in the state constitution shall be construed to limit or affect the right or authority of the government of the United States to make any law or regulation respecting the Indians, their lands, property or other rights by treaties, agreement, law or otherwise which it would have been competent to make if the act had never been passed. The purpose of this proviso was held not to repeal by implication existing laws made for Indian Territory; Ex parte Webb, 225 U. S. 683, 32 Sup. Ct. 769, 56 L. Ed. 1248. The portion of the state which had been called Indian Territory did not cease to be Indian country, U. S. Exp. Co. v. Friedman, 191 Fed. 679, 112 C. C. A. 219; Hallowell v. U. S., 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750. It includes all that portion of the United States known as the Indian Territory.

See INDIAN TRIBE.

OLD AGE PENSIONS. See PENSION.

OLD BAILEY. A prison in London, so called from the ancient bailey between Ludgate and Newgate. Bailey was the external wall of defence about a feudal castle.

OLD NATURA BREVIUM. The title of an English book, so called to distinguish it from Fitzherbert's work entitled Natura Brevium, after the publication of the latter. The Old Natura Brevium contains the writs most in use in the reign of Edward III., together with a short comment on the application and properties of each of them.

OLD STYLE. The mode of reckoning time in England until the year 1752, when the New Style, at present in use, and which had prevailed in the Roman Catholic countries of the continent since 1582, was introduced. According to the O. S., the year commenced on the 25th of March and every fourth year was a leap-year, instead of, as now, but 97 leap years in 400 years; Moz. & W.

OLD TENURES. The title of a small tract, which contains an account of the various tenures by which land was holden in the reign of Edward III. It was published in 1719, with notes and additions, with the 11th edition of the First Institutes, and reprinted in 8vo in 1764, by Serjeant Hawkins, in a selection of Coke's Law Tracts.

OLEOMARGARINE. Artificial butter made out of animal fat, milk, and other substances; imitation butter. Anderson's L. Dict.

Oleomargarine is a recognized article of food and commerce, and being thus a lawful article of commerce it cannot be wholly excluded from importation into a state from another state where it was manufactured, though the former state may so regulate the introduction as to insure purity, without having the power totally to exclude it; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49. This case was followed in People v. Crawford Co., 62 Misc. 240, 114 N. Y. Supp. 945, where it was held that the law may validly prescribe that it shall be sold for what it actually is and that the introduction of substances merely to make it resemble butter and sell therefor may be prohibited.

The New Hampshire act prohibiting the sale of oleomargarine unless it is of a pink color is invalid as being, in necessary effect, prohibitory. The act is not an inspection law, it provides for no inspection, and apparently none was intended. It is an absolute prohibition of the sale of an article of commerce; Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60.

The Massachusetts act of March 10th, 1891, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artificially colored and brought into Massachusetts, is in conflict with the commerce clause of the federal constitution; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223.

An act prohibiting the manufacture and sale of oleomargarine of any shade or tint of yellow is invalid, it appearing that the product was perfectly healthful and free from coloring matter and that the result of the act was not to prevent fraud or to aid the public health, but to prohibit making a wholesome article; State v. Hanson, 118 Minn. 85, 136 N. W. 412, 40 L. R. A. (N. S.) 865, Ann. Cas. 1913E, 405.

An act forbidding the manufacture and sale of oleomargarine, made in imitation of

yellow butter, is a valid exercise of the police power; Com. v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

A state has the power to determine whether to permit the manufacture and sale of oleomargarine within the state or entirely to forbid the same, so long as the legislation is therein confined; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, explained in Schollenberger v. Pennsylvania, 171 U. S. 16, 18 Sup. Ct. 757, 43 L. Ed. 49.

Under its taxing power and in connection with the internal revenue system, congress has passed a law defining butter and oleomargarine and imposing a tax upon and regulating the sale, etc., of oleomargarine. See U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591.

Such legislation does not infringe the constitutional guaranty of due process of law because its effect may be to suppress the manufacture of the article; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Cliff v. U. S., 195 U. S. 159, 25 Sup. Ct. 1, 49 L. Ed. 139.

In many of the states the manufacture and sale of this substance are prohibited by statute, unless made in a specified form and in such manner as will inform the buyer as to its real character.

In England, all packages must be marked, as must each parcel exposed for sale. See [1895] 2 Q. B. 657.

See ORIGINAL PACKAGE.

OLERON, LAWS OF. See CODE.

OLIGARCHY (Gr. ὀλίγος and ἀρχή. The government of a few). A name given to designate the power which a few citizens of a state have usurped, which ought by the constitution to reside in the people. Among the Romans, the government degenerated several times into an oligarchy,—for example, under the decemvirs, when they became the only magistrates in the commonwealth. See GOVERNMENT.

OLOGRAPH. See HOLOGRAPH; WILL.

OMISSION. The neglect to perform what the law requires.

When a public law enjoins on certain officers duties to be performed by them for the public, and they omit to perform them, they may be indicted: for example, supervisors of the highways are required to repair the public roads; the neglect to do so will render them liable to be indicted.

When a nuisance arises in consequence of an omission, it cannot be abated, if it be a private nuisance, without giving notice, when such notice can be given. See COMMISSION; NUISANCE.

OMNIA PERFORMAVIT (Lat. he has done all). **In Pleading.** A good plea in bar where all the covenants are in the affirmative. Bailey v. Rogers, 1 Greenl. (Me.) 189.

OMNIBUS. For all; containing two or more independent matters. Applied to a count in a declaration, and to a bill of legislation, and perhaps to a clause in a will, which comprises more than one general subject. Yeager v. Weaver, 64 Pa. 428; Parkinson v. State, 14 Md. 193, 74 Am. Dec. 522. See IN OMNIBUS.

OMNIUM (Lat.). **In Mercantile Law.** A term used to express the aggregate value of the different stock in which a loan is usually funded. 2 Esp. 361; 7 Term 630.

ON. As denoting contiguity or neighborhood, it may denote near to as well as at; Burnam v. Banks, 45 Mo. 349; and has been held to be interchangeable with upon. Sutton v. Com., 85 Va. 128, 7 S. E. 323. It is not equivalent to immediately on; Masters v. McHolland, 12 Kan. 25.

ON ACCOUNT OF WHOM IT MAY CONCERN, FOR WHOM IT MAY CONCERN. A clause in policies of insurance, under which all are insured who have an insurable interest at the time of effecting the insurance and who were then contemplated by the party effecting the insurance. 2 Pars. Marit. Law 30.

ON ALL FOURS. A phrase used to express the idea that a case at bar is in all points similar to another. The one is said to be on all fours with the other when the facts are similar and the same questions of law are involved. See IN OMNIBUS.

ON BEHALF. Where security is to be given on behalf of a person it cannot be given by the person himself. L. R. 4 C. P. 235.

ON BOARD. A devise of goods on board a ship may pass goods on board at the date of the will, but afterwards removed. 1 Ves. Sen. 271.

ON CALL. There is no legal difference between an obligation payable "on demand" and one payable "on call." Bowman v. McChesney, 22 Gratt. (Va.) 609.

ON DEMAND. A promissory note payable on demand is a present debt and is payable without demand. Young v. Weston, 39 Me. 494. It is payable the instant the note is signed; no demand is necessary prior to bringing an action; 2 M. & W. 461; 34 Ch. D. 566.

ON STAND. A term used in the law of landlord and tenant. A tenant of a farm who cannot carry away manure but has the right to sell it to his successor, is said to have the right of *on stand* on the farm for it till he can sell it; he may maintain trespass for the taking of it by the incoming tenant before it is sold. See 16 East 116.

ONE MAN COMPANY. See PROMOTERS.

ONERANDO PRO RATA PORTIONIS. A writ that lay for a joint tenant, or tenant

in common, who was distrained for more rent than his proportion of the land came to. Reg. Orig. 182.

ONERARI NON (Lat. ought not to be burdened). **In Pleading.** The name of a plea by which the defendant says that he ought not to be charged. It is used in an action of debt; 1 Saund. 290, n. *a*.

ONERATIO. A lading; a cargo.

ONERIS FERENDI JUS (Lat. of bearing a burden). **In Civil Law.** The name of a servitude by which the wall or pillar of one house is bound to sustain the weight of the buildings of the neighbor.

The owner of the servient building is bound to repair and keep it sufficiently strong for the weight it has to bear. Dig. 8. 2. 23.

ONEROUS CAUSE. In Civil Law. A valuable consideration.

ONEROUS CONTRACT. In Civil Law. One made for a consideration given or promised, however small. La. Civ. Code, art. 1767.

ONEROUS GIFT. The gift of a thing subject to certain charges imposed by the giver on the donee. Pothier, Obl.

ONEROUS TITLE. Under the Spanish and Mexican law that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or payment of charges to which the property was subject. See Scott v. Ward, 13 Cal. 458.

ONOMASTIC. A term applied to a signature which is in a different handwriting from the body of the instrument. 2 Benth. Jud. Ev. 460.

ONUS EPISCOPALE. Ancient customary payments from the clergy to their diocesan bishop, of synods, pentacostals, etc.

ONUS IMPORTANDI. The charge of importing merchandise, mentioned in 12 Car. II. c. 28.

ONUS PROBANDI (Lat.). **In Evidence.** The burden of proof.

It is a general rule that the party who alleges the affirmative of any proposition shall prove it. It is also a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact: for example, when to a plea of infancy the plaintiff replies a promise after the defendant had attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to show that he was not of age at the time; 1 Term 648. But where the negative involves a criminal omission by the party, and, consequently, where the law, by virtue of the general principle, presumes his innocence, the affirmative of the fact is also presumed. See Hartwell v. Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; Hicks v. Martin, 9 Mart. O. S. (La.) 48, 13 Am. Dec. 304; Morgan v. Mitchell, 3 Mart. N. S. (La.) 576. The burden of proof of the want of mental capacity of a person at the time of his marriage is on those asserting it, in the absence of proof of a confirmed condition of lunacy or idiocy prior to such marriage; Nonnemacher v. Nonnemacher, 159 Pa. 634, 28 Atl. 439.

In general, wherever the law presumes the affirmative, it lies on the party who denies the fact to prove the negative; as when the law raises a presumption as to the continuance of life, the legitimacy of children born in wedlock, or the satisfaction of a debt.

The party on whom the *onus probandi* lies is entitled to begin, notwithstanding the technical form of the proceedings; 1 Stark. Ev. 584. See BURDEN OF PROOF; OPENING AND CLOSING; NEGATIVE.

OÖPHORECTOMY. The removal of the ovaries in which the female germinal element or ovum is produced. See VASECTOMY.

OPEN. To begin. He begins or opens who has the affirmative of an issue. 1 Greenl. Ev. § 74.

To open a case is to make a statement of the pleadings in a case, which is called the opening. This should be concise, very distinct, and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case and the points in issue; 1 Stark. 439; 2 *id.* 317.

To vacate; to relieve a party who has an equitable right to such relief against a proceeding which is to him a formal or legal bar; to allow a re-discussion on the merits.

For example, to open a rule of court. 2 Chitty, Bail 265; 1 Mann. & G. 555; 7 Ad. & E. 519. To open a judgment or default; Taylor v. Place, 4 R. I. 324; Rogan v. Walker, 1 Wis. 631. See OPENING A JUDGMENT. To open an account; to make a judicial announcement, that a party, *e. g.* an executor, shall not be absolutely bound by the account he has rendered, but may show that it contains errors to his prejudice. To open a marriage settlement or an estate-tail; *i. e.* to allow a new settlement of the estate. To open biddings; *i. e.* to allow a re-sale. See OPENING BIDDINGS. To open a contract; Tucker v. Madden, 44 Me. 206; a highway; State v. County Ave. Com'rs, 37 N. J. L. 14.

OPEN A CREDIT. To accept or pay the draft of a correspondent who has not furnished funds. Pardessus, n. 296.

OPEN ACCOUNT. A running or unsettled account; not completely settled, but subject to future adjustment. Sheppard v. Wilkins, 1 Ala. 62; Dolhonde v. Laurans, 21 La. Ann. 406; Purvis v. Kroner, 18 Or. 414, 23 Pac 260.

OPEN COMMISSION. A commission without written interrogatories issued out of any one of certain courts of record, an issue of fact having been joined in that court, to take the testimony of witnesses, not within the state, but within the United States and Canada; N. Y. Code Civ. Proc. §§ 893, 894, 897. The application for an open commission will be denied where there is reason to believe that a commission with interrogatories will develop all the facts bearing upon the case. Dickinson v. Bush, 17 Weekly Dig. (N. Y.) 17.

OPEN COURT. A court formally opened and engaged in the transaction of all judicial functions. Hobart v. Hobart, 45 Ia. 501.

A court to which all persons have free access as spectators while they conduct themselves in an orderly manner.

The term is used in the first sense as distinguishing a court from a judge sitting in chambers or informally for the transaction of such matters as may be thus transacted. See CHAMBERS; COURT.

In the second sense, all courts in the United States are open; but in England, formerly, while the parties and probably their witnesses were admitted freely in the courts, all other persons were required to pay in order to obtain admittance. Stat. 13 Edw. I. cc. 42, 44; Barr. on the Stat. 126, 127. See Prin. of Pen. Law 165.

In most of the states the constitution provides that persons accused shall have a speedy public trial; Stimson, Am. Stat. L. § 131. This has been construed to mean that "the doors of the court-room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects . . . with due regard to the size of the court-room and the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial;" People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; in this case a conviction of assault with intent to commit rape was reversed because against defendant's objection all persons were excluded except the officers of the court and the defendant; *id.* In a trial of a civil case of trespass for adultery the judgment was reversed because all but parties and witnesses were excluded; Williamson v. Lacy, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506.

In California the court may direct the trial of issues of fact in private; Cal. Code, C. P. § 125; but this act does not authorize the court to forbid the publication of the testimony, and when such an order was made, an order of contempt against a newspaper publisher was reversed; In re Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78. On a trial for assault with intent to kill, all persons were excluded except officers of the court, press reporters, and friends of defendant; the order was made on behalf of defendant, who was liable to be excited by a crowd, as well as to preserve order, and it was held that her right to a public trial was not violated; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849.

In a suit for an injunction against the use of secret processes it was held error to exclude evidence of the details, as accurate knowledge on the subject is required before granting an injunction, but the embodiment of the secret in the injunction is not necessary; testimony taken *in camera* may be sealed, and used only when it becomes necessary to determine whether there has been a violation; Taylor I. & S. Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753.

It was said by Lord Eldon that it was the uniform practice in chancery, as long as the court had existed, in the case of family disputes, on the application of counsel on both sides, to hear the same in the chancellor's private room, and that what was so done was not the act of the judge but of the parties; Coop. *t.* Eldon 106; in a later case, on application for a private hearing relating to the custody of a young lady who was a ward of the court, Lord Brougham directed the case to be heard in private on the assurance of counsel that such course was proper, notwithstanding that one party withheld his consent; 2 Russ. & M. 688; and it is noted that this course was frequently followed by the same judge; *id.* In a patent case, the court being of opinion that the patent was valid, permitted the defendant to state his secret process *in camera;* 24 Ch. D. 156; an application for an injunction to restrain a solicitor from disclosing confidential information was ordered to be heard in private without consent of defendant, upon the statement of plaintiff's counsel that in his opinion a public hearing would defeat the object of the action; 31 Ch. D. 55; 9 Ch. App. 522; but this will not be done without consent of both parties unless it is clear that such would be the result of a public hearing; *id.*

It has been held that suits for nullity of marriage or judicial separation may be heard *in camera*, but not a petition for dissolution of marriage; L. R. 1 P. & D. 640; this case was put upon the ground that the matter was controlled, to that result, by 20 & 21 Vict. c. 85, § 22; but in a later case there was a distinct disapproval of the limitation, and it was said that as the ecclesiastical courts had the power to hear nullity suits in private when it was desirable for the sake of public decency, the same power must exist in other cases where it was required for the same reason; L. R. 3 P. & M. 230. It was held that under the English practice, a law court had power to try a case *in camera*, without a jury, when the parties consent; 53 J. P. 822.

In 4 Ch. D. 174, Jessel, M. R., considered "that the High Court of Justice had no power to hear cases in private even with the

consent of the parties, except cases affecting lunatics or wards of court, or where a public trial would defeat the object of the action." The report of the case contains many interesting interpellations of the court during the argument.

Lord Esher, M. R., said in Pittard v. Oliver that as to proceedings in courts of justice it was for the interest of all the public to hear what takes place in court; [1891] 1 Q. B. 474, where it was held that where matters discussed *in camera* were privileged, the presence of reporters did not take away the privilege. And in another case the same judge said that "public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret;" [1893] 1 Q. B. 65. Again, it was said by North, J., in holding the publication of proceedings in open court to be privileged, that "the general rule is an excellent one, that legal proceedings should be in public;" [1894] 3 Ch. 193, where it was held contempt to publish any account however meagre, and whether accurate or inaccurate, of a hearing *in camera*.

As long ago as 1829, Mr. Justice Bayley declared "that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed,—have a right to be present for the purpose of hearing what is going on"; 10 B. & C. 237; it was there held that an action would be against a justice of the peace for excluding from his court the attorney of an absent defendant.

The subject was fully argued and considered in Scott v. Scott, [1913] A. C. 417, in the House of Lords and certain questions were finally settled. It was there held that a suit for nullity of marriage cannot be heard *in camera*. The only exceptions to the general rule prescribing publicity of courts are suits affecting wards, those in relation to lunatics, and thirdly, those where secrecy (as a secret process or discovery) is of the essence of the cause. The consent of the parties to try a case *in camera* does not give jurisdiction. Here, after a hearing *in camera* in the court below, one of the parties had exhibited to three persons copies of the testimony, and was adjudged to be in contempt. This judgment was reversed above. In his opinion Lord Shaw quoted Hallam as saying that "he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guaranty of public security" and proceeds: "There is no greater danger than that which proceeds little by little, under cover of rules of procedure, and at the instance of the judges themselves."

It has been pointed out that as to two of the exceptions above stated, infancy and lunacy, the jurisdiction of the court is parental or administrative. Even here Lord Shaw, partially disagreeing with the other judges, was of opinion that neither infants nor lunatics should be prohibited from publishing facts relating to themselves merely because they were elicited at a trial *in camera*. The English Children's Act 1908 and the Incest Act 1908 both provide that certain criminal trials under those acts should be held *in camera*.

The settled judgment of our ancestors and ourselves is that publicity in the administration of the law is on the whole worth more to society than it costs. Pollock, Expansion of C. L. 32.

A hearing *in camera* differs from one at chambers (*q. v.*); the former being a private hearing by a court and the latter a hearing by a judge not in a regular session of court.

See 15 Am. L. Rev. 427; People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294, where the subject is fully discussed. See IN CAMERA.

The subject is further treated under TRIAL.

OPEN ENTRY. See ENTRY.

OPEN FOR BUSINESS. A store is open for business when, according to custom, the door is locked after dark, but customers can get in by knocking. Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034.

OPEN INSOLVENCY. The condition of a person having no property, within the reach of the law, applicable to the payment of any debt. Hardesty v. Kinworthy, 8 Blackf. (Ind.) 305.

OPEN LAW. The waging of law. Magna Carta, c. 21.

OPEN POLICY. An open policy is one in which the amount of the interest of the insured is not fixed by the policy, and is to be ascertained in case of loss. See POLICY.

OPEN SHOP. See LABOR UNION.

OPENING. In American Practice. The beginning. The commencement. The first address of the counsel.

The opening is made immediately upon the impanelling of the jury: it embraces the reading of such of the pleadings as may be necessary, and a brief outline of the case as the party expects to prove it, where there is a trial, or of the argument, where it is addressed to the court.

OPENING A COMMISSION. See COURTS OF ASSIZE AND NISI PRIUS.

OPENING A JUDGMENT. An act of the court by which a judgment is so far annulled that it cannot be executed, although it still retains some qualities of a judgment: as, for example, its binding operation or lien upon the real estate of the defendant.

The opening of the judgment takes place when some person having an interest makes affidavit to facts which, if true, would render the execution of such judgment inequitable. The judgment is opened so as to be in effect an award of a collateral issue to try the facts alleged in the affidavit; Lowrey v. Tracey, 6 W. & S. (Pa.) 493.

The rule to open judgment and let defendant into a defence is peculiar to Pennsylvania practice, and is a clear example of the system of administering equity under common-law forms. By practice it is confined to judgments by default and those entered on warrants of attorney to confess, etc. It was, however, devised in the absence of a court of chancery, as a substitute for a bill in equity, to enjoin proceedings at law; Mitchell's Motions and Rules; Cochran v. Eldridge, 49 Pa. 365.

OPENING A RULE. The act of restoring or recalling a rule which has been made absolute to its conditional state, as a rule *nisi*, so as to re-admit of cause being shown against the rule. Brown.

OPENING AND CLOSING. After the evidence is all in, the plaintiff has the privilege of the opening and closing or summing up speeches to the jury; in the closing address he should confine himself to a reply to defendant's speech. It seems doubtful whether it is within the discretion of the court to interfere with this established mode of procedure; at least it should only be done with great caution; Barden v. Briscoe, 36 Mich. 254; Millerd v. Thorn, 56 N. Y. 402; Royal Ins. Co. v. Schwing, 87 Ky. 410, 9 S. W. 242. But in some courts it is the practice for the defendant's counsel to open to the jury, followed by the plaintiff's counsel.

Under the federal practice the right rests in the discretion of the court and is not the subject of error; where the defendant pleaded a partial defense in an action for the price of machinery, but did not, in his answer, unequivocally admit its sale and delivery, it was not an abuse of discretion to permit the plaintiff to open and close; Florence Oil & R. Co. v. Farrar, 109 Fed. 254, 48 C. C. A. 345, Caldwell and Sanborn, C. JJ., and Adams, D. J. Where the burden of proof was upon one of two defendants, and as to the other it was on the plaintiff, the right to open was in the discretion of the trial judge; Simons v. Pearson, 61 S. W. 259, 22 Ky. L. Rep. 1707; so in the distribution of an intestate's estate where several claimed as next of kin, to the exclusion of all others; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; where defendant offers no proof, he is entitled to open and close; Moore v. Carey, 116 Ga. 28, 42 S. E. 258; *contra*, in a personal injury case; De Maria v. Cramer, 70 N. J. L. 682, 58 Atl. 341.

See Best's Right to Begin and Reply; 14 Yale L. J. 54; TRIAL; Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 674 (will cases).

In English Practice. The address made immediately after the evidence is closed. Such address usually states—*first*, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; *second*, at least an outline of the evidence by which those claims are to be established; *third*, the legal grounds and authorities in favor of the claim or of the proposed evidence; *fourth*, an anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and the reasons why it ought to fail. But the court will sometimes restrict counsel from an anticipation of the defence; 3 Chitty, Pr. 881.

OPENING BIDDINGS. Ordering a re-sale. When estates are sold under decree of equity to the highest bidder, the court will, on notice of an offer of a sufficient advance on the price obtained, *open the biddings*, *i. e.* order a re-sale. But this will not generally be done after the confirmation of the certificate of the highest bidder. So, by analogy, a re-sale has been ordered of an estate sold under bankruptcy. Sugd. Vend. 90; Lefevre v. Laraway, 22 Barb. (N. Y.) 167; Wright v. Cantzon, 31 Miss. 514.

In England, by stat. 30 & 31 Vict. c. 48, s. 7, the opening of biddings is now allowed only in cases of fraud or misconduct in the sale; Wms. R. P. The courts of this country also will not generally open the biddings merely to obtain a higher price, but require irregularity, fraud, or gross inadequacy of price to be shown.

OPENING OF A POLICY OF INSURANCE. The question has been made whether, and in what cases, if any, the valuation in a valued policy shall be opened. The valuation, being a part of the agreement of the parties, is not to be set aside as between them in any case. The question is, how shall it be treated where only a part of the subject insured and valued is put at a risk, and also in the settlement of a particular average? and the answer is the same in both cases: viz., when the proportion or rate per centum put at risk or lost is ascertained, the agreed valuation of the whole is to be applied to the part put at risk or the proportion lost, *pro rata*. 2 Phill. Ins. 1203.

OPERA. See COPYRIGHT; MUSICAL COMPOSITIONS.

OPERARI. Such tenants under feudal tenures, as held some portion of land by the duty of performing bodily labor and servile works for their lord.

OPERATING EXPENSES. They are, broadly speaking, those which it is reasona-

bly necessary to incur for the purpose of keeping up a railroad (to which the term is commonly applied) as a going concern, or, as it is sometimes expressed, those which conduce to the conservation of the property. Short, Railw. Bonds § 653.

The term, when used in a reorganization plan, does not include money spent on steel rail betterments, or on steamers owned by the company to make them more efficient, or on the purchase of freight engines and coal cars; Mackintosh v. R. Co., 34 Fed. 582. Under a Massachusetts statute, it was held that damage to property at a railroad crossing must be considered as operating expenses; Smith v. R. Co., 124 Mass. 154. Judgments against a receiver for damages to persons by negligence are a part of the operating expenses; St. Louis S. W. R. Co. v Holbrook, 73 Fed. 112, 19 C. C. A. 385. All outlays made by a receiver in the ordinary course, with a view to advance and promote the business of the road and render it profitable and successful, are fairly within the receiver's discretion; this will include not only keeping the road and rolling stock in repair, but also providing such additional accommodations, stock, and instrumentalities as the necessities of the business may require; Cowdrey v. R. Co., 1 Woods 331, Fed. Cas. No. 3,293. The court will authorize the purchase of new rails; Phinizy v. R. Co., 62 Fed. 771; and the payment of reasonable office rent; Cowdrey v. R. Co., 1 Woods 331, Fed. Cas. No. 3,293; and the payment of interest on money which a receiver has been obliged to borrow; *id.;* and of traffic balances on connecting roads; Meyer v. Johnston, 64 Ala. 603; and rebates on freight; Cowdrey v. R. Co., 1 Woods 331, Fed. Cas. No. 3,293.

Damages paid to the owners of goods lost in transportation and for injury to property during a receivership will be allowed in the receiver's account of earnings; Cowdrey v. R. Co., 93 U. S. 352, 23 L. Ed. 950; such claims stand upon the same footing as the other expenses of administration; Short, Railw. Bonds § 669; Mobile & O. R. Co. v. Davis, 62 Miss. 271; Kain v. Smith, 80 N. Y. 458.

Earnings diverted to the payment of interest on receiver's certificates made payable out of the *corpus*, or to the costs or allowances in the foreclosure suit or any other matter not properly operating expenses, must be returned to the current earnings fund; Blair v. R. Co., 25 Fed. 232. See MORTGAGE; REORGANIZATION.

OPERATION OF LAW. The obligation of law. U. S. v. Hammond, 1 Cra. C. C. 19; Fed. Cas. No. 15,293; its practical working and effect. Geebrick v. State, 5 Ia. 496. A term applied to indicate the manner in which a party acquires rights without any act of his own: as, the right to an estate of one who dies intestate is cast upon the heir at law, by operation of law; when a lessee for life enfeoffs him in reversion, or when the lessee and lessor join in a feoffment, or when a lessee for life or years accepts a new lease or demise from the lessor, there is a surrender of the first lease by operation of law; 5 B. & C. 269; 2 B. & Ad. 119. See DESCENT; PURCHASE.

OPERATIVE. A workman; one employed to perform labor for another. See 3 C. Rob. 237; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 270, 2 L. Ed. 266. See FACTORY ACTS; MASTER AND SERVANT.

OPERATIVE PART. That part of a conveyance, lease, mortgage or other instrument, which carries out its main object.

OPERATIVE WORDS. In a deed, or lease, the words which effect the transaction of which the instrument is the evidence; the terms generally used in a lease are "demise and lease," but any words clearly indicating an intention of making a present demise will suffice; Wms. R. P. 196; Bacon, Abr. (K) 161.

OPINION. In Evidence. An inference or conclusion drawn by a witness as distinguished from facts known to him as facts.

It is the province of the jury to draw inferences and conclusions; and if witnesses were in general allowed to testify what they believe as well as what they know, the verdict would sometimes prove not the decision of the jury, but that of the witnesses. Hence the rule that, in general, the witness cannot be asked his opinion upon a particular question; Patterson v. Colebrook, 29 N. H. 94; Dawson v. Callaway, 18 Ga. 573; Morehouse v. Mathews, 2 N. Y. 514; De Witt v. Barly, 17 N. Y. 340.

Where all the facts of a transaction are clearly stated by a witness, his inference therefrom is inadmissible; Gentry v. Singleton, 128 Fed. 679, 63 C. C. A. 231.

While it is incompetent for a witness to state his opinion upon a question of law, where the intent with which an act done by him is drawn in question he may testify as to such intent; 12 Reptr. 664.

Some confusion in the application of this rule arises from the delicacy of the line which divides that which is to be regarded as matter of observation from that which is matter of judgment founded upon observation. Thus, it is held that an unprofessional witness may testify to the fact that a person whom he saw was intoxicated, whether he is able to state all the constituent facts which amount to drunkenness or not; People v. Eastwood, 14 N. Y. 562; Stanley v. State, 26 Ala. 26; McKillop v. Ry. Co., 53 Minn. 532, 55 N. W. 739; he may also testify as to the apparent condition of a party as to sobriety, shortly before the commission of an offence; People v. Monteith, 73 Cal. 7, 14 Pac. 373. He is also competent to testify

whether a person with whom he is familiarly associated is in good or bad health and hearing, is lame or has the natural use of his limbs, and also whether on certain occasions he was unconscious; Chicago City Ry. Co. v. Van Vleck, 143 Ill. 480, 32 N. E. 262; also whether a certain person has African blood in his veins; Hare v. Board of Education, 113 N. C. 9, 18 S. E. 55. But, on the other hand, insanity or mental incapacity cannot, in general, be proved by the mere assertion of an unprofessional witness; De Witt v. Barly, 17 N. Y. 340; Gehrke v. State, 13 Tex. 568; but the opinion of non-expert witnesses may be given as to mental capacity where the facts upon which the opinions are based are disclosed; Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740; State v. Potts, 100 N. C. 457, 6 S. E. 657; Frizzell v. Reed, 77 Ga. 724; Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. 575.

So handwriting may be proved by being recognized by a witness who has seen other writings of the party in the usual course of business, or who has seen him write; Steph. Ev. § 51; Titford v. Knott, 2 Johns. Cas. (N. Y.) 211; Snider v. Burks, 84 Ala. 53, 4 South. 225. See Brown v. Hall, 85 Va. 146, 7 S. E. 182. But, on the other hand, the authorship of an anonymous article in a newspaper cannot be proved by one professing to have a knowledge of the author's style; Lee v. Bennett, How. App. Cas. 187.

The mere opinions of witnesses, without the facts on which they are based, are of very little value, especially where the witnesses are constitutionally or by interest biased and not impartial; Pannell v. Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

From necessity, an exception to the rule of excluding opinions is made in questions involving matters of science, art, or trade, where skill and knowledge possessed by a witness, peculiar to the subject, give a value to his opinion above that of any inference which the jury could draw from facts which he might state; People v. Bodine, 1 Denio (N. Y.) 281; Reed v. Hobbs, 2 Scam. (Ill.) 297; Woodman v. Barker, 2 N. H. 480; Alfonso v. U. S., 2 Story 421, Fed. Cas. No. 188. Such a witness is termed an expert; and he may give his opinion in evidence; Whart. Ev. 440. Experts alone can give an opinion based on facts shown by others, assuming them to be true; State v. Potts, 100 N. C. 457, 6 S. E. 657.

The following reference to some of the matters in which the opinions of expert witnesses have been held admissible will illustrate this principle. The unwritten or common law of foreign countries may be proved by the opinion of witnesses possessing professional knowledge; Strother v. Lucas, 6 Pet. (U. S.) 763, 8 L. Ed. 573; Packard v. Hill, 2 Wend. (N. Y.) 411; Raynham v. Canton, 3 Pick. (Mass.) 293; Frith v. Sprague, 14 Mass. 455; Dennison v. Hyde, 6 Conn. 508; Dougherty v. Snyder, 15 S. & R. (Pa.) 87, 16 Am. Dec. 520; the degree of hazard of property insured against fire; Hobby v. Dana, 17 Barb. (N. Y.) 111; whether a picture is a good likeness or not; Barnes v. Ingalls, 39 Ala. 193; handwriting; Hopkins v. Megquire, 35 Me. 78; Bowman v. Sanborn, 25 N. H. 87; mechanical operations, the proper way of conducting a particular manufacture, and the effect of a certain method; Price v. Powell, 3 N. Y. 322; negligence of a navigator, and its effect in producing a collision; Cook v. Parham, 24 Ala. 21; sanity; Stuckey v. Bellah, 41 Ala. 700; People v. Lake, 12 N. Y. 358; impotency; 3 Phill. Eccl. 14; value of chattels; Dixon v. Barclay, 22 Ala. 370; Carpenter v. Walt, 11 Cush. (Mass.) 257; Nickley v. Thomas, 22 Barb. (N. Y.) 652; value of land: Dwight v. County Com'rs, 11 Cush. (Mass.) 201; Clark v. Baird, 9 N. Y. 183; value of services; Beekman v. Platner, 15 Barb. (N. Y.) 550; speed of a railway train; Salter v. R. Co., 59 N. Y. 631; benefit to real property by laying out a street adjacent thereto; Shaw v. Charlestown, 2 Gray (Mass.) 107; survey marks identified as being those made by United States surveyors; Brantly v. Swift, 24 Ala. 390; as to the location of surveys; Jackson v. Lambert, 121 Pa. 182, 15 Atl. 502; Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737; seaworthiness; 10 Bingh. 57; whether a person appeared sick or well; Higbie v. Ins. Co., 53 N. Y. 603; of the effect of a personal injury; Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865; Reed v. R. Co., 56 Fed. 184; whether fright would produce heart trouble; Illinois C. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7; whether a child would have been born alive if he had received medical assistance in time; Western U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; as to the distance at which it is safe to stop before going upon a crossing; New York, C. & St. L. R. Co. v. R. Co., 116 Ind. 60, 18 N. E. 182. So an engineer may be called to say what, in his opinion, is the cause of a harbor having been blocked up; 3 Dougl. 158. Opinion evidence as to the age of a person, from his appearance, is not admissible; Morse v. State, 6 Conn. 9; but see Walker v. State, 25 Tex. App. 448, 8 S. W. 644; Elsner v. K. & L. of Honor, 98 Mo. 640, 11 S. W. 991; nor is it in cases involving adultery, on the question of guilt or guilty intent; see Cox's Adm'r v. Whitfield, 18 Ala. 738; nor can an opinion be given as to the meaning of an instrument where the words or phrases are not technical; Hill v. Mfg. Co., 79 Ga. 105,

3 S. E. 445; Brendon v. Worley, 8 Misc. 253, 28 N. Y. Supp. 557; nor in a matter requiring no peculiar knowledge or experience; Ft. Pitt Gas Co. v. Contract Co., 123 Fed. 63, 59 C. C. A. 281; nor as to the technical meaning of a word used in a written instrument; Butte & B. C. M. Co. v. Ore Purchasing Co., 121 Fed. 524, 58 C. C. A. 634.

It is to be observed, however, that the principle of admitting such opinions is taken with the qualifications necessary to make, as far as possible, the judgment of the jury, and not that of the witness, the final means of determining the issue. Thus opinions of experts are not admissible upon the question of damages; Lincoln v. R. Co., 23 Wend. (N. Y.) 425; Chandler v. Bush, 84 Ala. 102, 4 South. 207; nor whether damages were occasioned by negligence; East Tennessee, V. & G. R. R. v. Wright, 76 Ga. 532; Hughes v. Doyle, 91 Tex. 422, 44 S. W. 64; National Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; and experts are always confined to opinions within the scope of their professions, and are not allowed to give opinions on things of which the jury can as well judge; Gibson v. Williams, 4 Wend. (N. Y.) 320; Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Rochester v. Chester, 3 N. H. 349; Law v. Scott, 5 Harr. & J. (Md.) 438; Lynch v. U. S., 138 Fed. 536, 71 C. C. A. 59; a physician will not be permitted to give his opinion based entirely on statements out of court made to him by persons other than the patient; Heald v. Thing, 45 Me. 392; Wetherbee's Ex'rs v. Wetherbee's Heirs, 38 Vt. 454.

A distinction is also to be observed between a feeble impression and a mere opinion or belief; Crowell v. Bank, 3 Ohio St. 406; Brown v. Cady, 19 Wend. (N. Y.) 477. The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen; De Berry v. R. Co., 100 N. C. 310, 6 S. E. 723. The opinions of a witness are not admissible as to one's agency; Larson v. Inv. Co., 51 Minn. 141, 53 N. W. 179.

Upon an issue, in a suit upon a life insurance policy, as to the insanity of the insured at the time he took his own life, the opinion of a non-professional witness as to his mental condition, in connection with a statement of the facts and circumstances, within his personal knowledge, upon which that opinion is based, is competent evidence; Connecticut M. L. Ins. Co. v. Lathrop, 111 U. S. 613, 4 Sup. Ct. 533, 28 L. Ed. 536; and also to disprove a representation in an insurance policy that applicant was temperate, witnesses may state whether he was temperate or intemperate, after giving the source of their information; Taylor v. Annuity Co., 145 N. C. 383, 59 S. E. 139, 15 L. R. A. (N. S.) 583, 13 Ann. Cas. 248.

Opinion evidence is not admissible as to whether the mode of coupling cars was careless and not the best way of performing the act; Seese v. R. Co., 39 Fed. 487. There are cases where the opinion of witnesses may be asked as to distance and other circumstances, but such questions are not permissible when it is practicable to draw out with exactness the data upon which a judgment must be founded; Slack v. Black, 109 Mass. 499. It must be left somewhat to the trial court; Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 948, 7 C. C. A. 581, 22 L. R. A. 620. Whether a particular position on a wharf is a safe place for a wharfinger to stand while a steamboat is approaching is not matter for expert testimony; Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

Opinion evidence is admissible upon a question concerning the effect of grading a street on the value of the abutting property; Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404; so as to the opening of a public highway; Lowe v. Ryan, 94 Ind. 450.

Mere declarations of opinion, which would be inadmissible if the declarant were a witness, are inadmissible as dying declarations; State v. Burnett, 47 W. Va. 731, 35 S. E. 983; State v. O'Shea, 60 Kan. 772, 57 Pac. 970.

See EXPERTS.

In Practice. The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case. The judgment itself is sometimes called an opinion; and sometimes the opinion is spoken of as the judgment of the court.

The ultimate step taken by the court is commonly called a *decision*, or, in common law cases, a *judgment;* and in equity cases, a *decree;* where the opinion is unanimous it is, in America, often termed a "*per curiam* opinion."

In England *judgment* is commonly used for *opinion*, and "*per curiam*" is sometimes applied to any opinion of the whole court. Brief Making, by Lile and others, 2d Ed. by R. W. Cooley, 102.

A declaration, usually in writing, made by a counsel to the client of what the law is, according to his judgment, on a statement of facts admitted to him.

An opinion is in both the above cases a decision of what principles of law are to be applied in the particular case, with the difference that judicial opinions pronounced by the court are law and of authority, while the opinions of counsel, however eminent are merely advice to his client or argument to the court.

Where there are several judges, and they do not all agree in the disposition of the cause, the opinion of the majority is termed the opinion of the court. The opinion of the minority is termed the dissenting opinion. The opinions of the courts, collected and provided with such preliminary statements of facts and of the arguments of counsel as

may be necessary in each case to an understanding of the decision, make up the books of reports.

Opinions are said to be judicial or extra-judicial. A judicial opinion is one which is given on a question which is actually involved in the matter brought before the judge for his decision; an extra-judicial opinion is one which, although given by a judge in deciding a case, is not necessary to the judgment; Vaugh. 382; 1 Hale, Hist. 141; and, whether given in or out of court, is no more than the *prolatum* of him who gives it, and has no legal efficacy; Steiner v. Coxe, 4 Pa. 28. Where a point is essential to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court. But if it appears from the report of the case that such point was not taken or inquired into at all, there is no ground for this presumption, and the authority of the case is proportionably weakened; Molony v. Dows, 8 Abb. Pr. (N. Y.) 316.

Where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would sustain the judgment pronounced by the court, the judges concurring in the judgment must be presumed to have concurred in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion; James v. Patten, 6 N. Y. 9, 55 Am. Dec. 376. Where a judgment is reversed upon a part only of the grounds on which it went, it is still deemed an authority as to other grounds not questioned.

The opinion of the court assigning reasons for its conclusions cannot be treated as a special finding; British Q. Min. Co. v. Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147.

Counsel should, in giving an opinion, as far as practicable, give, *first*, a direct and positive opinion, meeting the point and effect of the question, and, if the question proposed is properly divisible into several, treating it accordingly. *Second*, his reasons, succinctly stated, in support of such opinion. *Third*, a reference to the statutes or decisions on the subject. *Fourth*, when the facts are susceptible of a material difference in statement, a suggestion of the probability of such variation. When an opinion is sought as a guide in respect to maintaining an action or defence, some other matters should be noticed: as, *Fifth*, any necessary precautionary suggestions in reference to the possibility of a fatal defect in the evidence, arising from the nature of the case. Thus, where some important fact is stated as resting principally on the statement of the party interested, if by the law of the place such party is incompetent to testify respecting it, a suggestion ought to be made to inquire how that fact is to be proved. *Sixth*, a suggestion of the proper mode of proceeding, or the process or pleadings to be adopted.

In English and American law, the opinions of counsel, however eminent, are not entitled to any weight with the court, as *evidence* of the law. While the court will deem it their duty to receive such opinions as arguments, and as such entitled to whatever weight they may have, they will not yield to them any authority; Steiner v. Coxe, 4 Pa. 28, per Gibson, C. J. In many cases, where a client acts in good faith under the advice of counsel, he may on that ground be protected from a liability which the law might otherwise have imposed upon him.

The attorney-general of the United States gives to the president his opinion and advice upon questions of law whenever required; and upon the request of the head of any of the executive departments of the government, he is required to give his opinion on questions of law arising in the administration of the department; R. S. §§ 354, 356. See JUDGE; EXPERT; OPINION OF JUDGES; PRECEDENT; LEGISLATIVE POWER.

OPINION OF JUDGES. The federal judiciary can be called upon only to decide controversies brought before them in legal form.

The constitution of Massachusetts authorizes each branch of the legislature and the governor and council to call on the supreme court justices for opinions "upon important questions, and upon solemn occasions," and substantially the same provision occurs in the constitutions of Colorado, Florida, Maine, New Hampshire, Rhode Island, South Dakota and Hawaii. Such opinions have been given with reluctance; 63 Mass. 604; and they are generally held to be purely advisory and not binding as precedents, although they have been held such; In re Constitutionality of Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478. A Minnesota statute authorizing advisory opinions was held unconstitutional as devolving upon the judges duties not strictly judicial; In re Senate of State, 10 Minn. 78 (Gil. 56).

There have been refusals by the courts to give opinions even where required by the constitution of the state; In re Construction of Constitution, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575; In re Constitutionality of Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478; Answer of Justices, 122 Mass. 600; *id.*, 148 Mass. 623, 21 N. E. 439; *id.*, 150 Mass. 598, 24 N. E. 1086. The general basis of these refusals has been that it is for the judges to determine whether the occasion is within the constitutional provision.

The Delaware constitution formerly had a provision authorizing the governor to enquire of the judges touching questions of constitutional law; the legislature, by reso-

lution, asked their opinion as to its powers to change the basis of representation for the legislature. The judges gave separate opinions (Laws 1883), but one or more of them stated that they did so only out of respect.

Where a coroner came into court and asked the opinion of the court as to his official duties, Thayer, P. J., said: "I have no hesitation in expressing my opinion in regard to the question which the coroner has propounded to the court." Com. v. Taylor, 11 Phila. (Pa.) 387. This was followed in Coroners Duties, 20 D. R. (Pa.) 685, by Sulzberger, P. J.

In Idaho, the constitution requires the supreme court judges to report annually to the governor as to defects and omissions in existing laws.

It has been held that the courts are the judges of whether the questions presented to them for their opinion fall within the scope of the law, and, generally, whether the exigency requires them to act. The court usually require that the questions shall be matters of public law and not those involving merely private rights; see Thayer, Leg. Essays 45; Story, Const.; 6 A. & E. Encyc. 1065.

See LEGISLATIVE POWER.

They have no judicial force and cannot bind the body receiving them; Green v. Com., 12 Allen (Mass.) 163; Taylor v. Place, 4 R. I. 362. A contrary view was taken in 70 Me. 583; but see, *contra*, State v. Cleveland, 58 Me. 573; Opinion of the Justices, 72 Me. 562; and see In re Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478; 24 Am. L. Rev. 369, a full article by Hugo A. Dubuque.

The Judicial Committee of the Privy Council may be asked questions by authority of the Crown. The House of Lords, when exercising judicial functions, may summon the judges and ask them questions; though its right to do so in its legislative capacity probably has ceased to exist. Any practice by which the Crown could question the judges, even if it ever existed, is now almost, or altogether, obsolete. The last instance was in 1760, when Lord Mansfield furnished answers to questions with reluctance. 106 L. T. 916 (Privy Council).

It is said that it is not easy to see how the opinion of the judges could govern the opinion of the House of Lords; MacQueen, App. Jurisd. of H. of L. 49.

A Canadian statute authorizing the Governor in Council to call upon the Supreme Court to answer questions of law or fact is not *ultra vires*. 106 L. T. 916 (Privy Council).

In an interesting article in 13 Harv. L. Rev. 358, by Mr. Veeder, he states that from 1827 to 1899 there were 125 cases in which the judges assisted the House of Lords and that of this number there are hardly more than a score of cases which are in any sense landmarks. Though the judges are called upon to advise, yet the decision rests with the House alone; 10 Cl. & F. 413, citing an instance where the 12 judges had given their opinion, and the Lord Chancellor satisfied the House that they were all wrong.

OPIUM. The importation of opium into the United States is made unlawful after April 1, 1909, except for medicinal purposes.

The prohibition or regulation of the sale of opium is within the police power of a state; State v. Lee, 137 Mo. 143, 38 S. W. 583.

OPPOSITE. Over against, standing in front or facing. Bradley v. Wilson, 58 Me. 360. See Sunbury S. F. & T. B. Co. v. Grant (Pa.) 15 Atl. 706; 23 L. J. Ch. 45.

OPPRESSION. An act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. U. S. v. Deaver, 14 Fed. 597.

OPPRESSOR. One who having public authority uses it unlawfully to tyrannize over another: as, if he keep him in prison until he shall do something which he is not lawfully bound to do. To charge a magistrate with being an oppressor is actionable; 1 Stark. Sl. 185.

OPPROBRIUM. **In Civil Law.** Ignominy; shame; infamy.

OPTION. Choice; election.

A contract by which A, in consideration of the payment of a certain sum to B, acquires the privilege of buying from or selling to B, specified securities or property at a fixed price within a certain time. Story v. Salomon, 71 N. Y. 420; Harris v. Tumbridge, 83 N. Y. 93, 38 Am. Rep. 398.

"A unilateral agreement, binding upon the optioner from the date of its execution, but [which] does not become a contract *inter partes*, in the sense of an absolute contract to convey on the one side and to purchase on the other, until exercised by the optionee;" Barnes v. Rea, 219 Pa. 279, 68 Atl. 836. An option is not a sale, but a right to exercise a privilege, and only when that privilege has been exercised in the manner provided in the agreement does it become a binding contract; *id.* It is said that options have been universally construed by the courts as binding agreements to keep an offer open; 18 Harv. L. Rev. 457; Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; but Prof. Langdell takes the view that an option is a complete unilateral contract, which can never become a bilateral contract, and differs entirely from an offer; 18 Harv. L. Rev. 1, 11.

As to how far an option to buy land works a conversion, see *id.* 1.

Where notes are given to cover losses on deals in options in grain, a part of which is to be delivered, the illegality of a part taints the whole, the consideration being entire; Miles v. Andrews, 40 Ill. App. 155. See Dwight v. Badgley, 75 Hun 174, 27 N. Y.

Supp. 107; [1892] 2 Q. B. 484; Scott v. Brown, 54 Mo. App. 606. The sale of commodities to be delivered at a future day is not *per se* unlawful where the parties intend in good faith to comply with the terms of the contract; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. See WAGER; CONTRACTS.

These options are of three kinds, viz.: "calls," "puts," and "straddles," or "spread eagles." A call gives A the option of calling or buying from B or not certain securities. A put gives A the option of selling or delivering to B or not. A straddle is a combination of a put and a call, and secures to A the right to buy of, or sell to, B or not. Where neither party, at the time of making the contract, intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void either by virtue of statute or as contrary to public policy; 11 C. B. 538. In each transaction the law looks primarily at the intention of the parties; and the form of the transaction is not conclusive; Story v. Salomon, 71 N. Y. 420; 5 M. & W. 466; North v. Phillips, 89 Pa. 250. Option contracts are not *prima facie* gambling contracts; Story v. Salomon, 71 N. Y. 420. But see Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349. See Dos Passos, Stock-Brokers.

OPTIONAL WRIT. An original writ in the alternative, commanding either to do a thing or show cause why it has not been done. 3 Bla. Com. 274; Finch, Law 257.

OPUS LOCATUM (Lat.). **In Civil Law.** A work (*i. e.* the result of work) let to another to be used. A work (*i. e.* something to be completed by work) hired to be done by another. Vicat, Voc. Jur. *Opus, Locare;* L. 51, § 1, D. *Locat.;* L. 1, § 1, D. *ad leg. Rhod.*

OPUS MANIFICIUM (from Lat. *opus*, work, *manus*, hand). Manual labor. Fleta, l. 2, c. 48, § 3.

OR. A disjunctive particle.

As a particle, *or* is often construed *and*, and *and* construed *or*, to further the intent of the parties, in legacies, devises, deeds, bonds, and writings; Watkins v. Sears, 3 Gill (Md.) 492; 3 Greenl. Ev. §§ 18, 25; 1 Wills. Exrs. 932; 5 Co. 112 *a*; Cro. Jac. 322; Courter v. Stagg, 27 N. J. Eq. 305; Dumont v. U. S., 98 U. S. 143, 25 L. Ed. 65; Kanne v. R. Co., 33 Minn. 419, 23 N. W. 854; but its more natural meaning, when used as a connective, is to mark an alternative and present a choice, implying an election to do one of two things; New Haven Young Men's Institute v. New Haven, 60 Conn. 32, 22 Atl. 447. It sometimes has the same effect as the word "nor"; In re Cody's Estate, 20 N. Y. Supp. 16.

Where an indictment is in the alternative, as forged or caused to be forged, it is bad for uncertainty; 1 Y. & J. 22. But a description of a horse as of a brown or bay color, in an indictment for larceny of such horse, is good; State v. Gilbert, 13 Vt. 647; and so an indictment describing a nuisance as in the highway or road; Respublica v. Caldwell, 1 Dall. (Pa.) 150, 1 L. Ed. 77. See State v. R. Co., 28 Vt. 583. So, "break or enter," in a statute defining burglary, means "break and enter"; Rolland v. Com., 82 Pa. 326, 22 Am. Rep. 758; Com. v. Griffin, 105 Mass. 185.

The word *or* is used in the sense of *to wit*, that is, in explanation of what precedes, and making it signify the same thing. Thus, in an indictment, bank bills *or* promissory notes, they meant the same thing; Brown v. Com., 8 Mass. 59.

ORACULUM (Lat.). **In Civil Law.** The name of a kind of decision given by the Roman emperors. Thus, adoption by the emperor's divine wisdom (*per sacrum oraculum*).

ORAL. Spoken, in contradistinction to written: as, oral evidence, which is evidence delivered verbally by a witness. Steph. Ev. 135. Formerly pleadings were put in *viva voce*, or orally; Kerr's Act. Law. When a pleading sets up a contract, and does not allege it was in writing, it will be taken to be oral; Schreiber v. Butler, 84 Ind. 583.

ORANDO PRO REGE ET REGNO. An ancient writ which issued, while there was no regular collect for a sitting parliament, to pray for the peace and good government of the realm.

ORATOR. The party who files a bill. *Oratrix*, is used of a female plaintiff. These words are disused in England, the customary phrases now being plaintiff and petitioner.

In Roman Law. An advocate. Code 1. 3. 33. 1.

ORCINUS LIBERTUS. In Roman Law. A freedman who obtained his liberty by the direct operation of the will or testament of his deceased master was so called, being the freedman of the deceased (*orcinus*), not of the *hæres*. Hunter, Rom. L. 176.

ORDAIN. To make an ordinance, to enact a law.

The preamble to the constitution of the United States declares that the people "do ordain and establish this constitution for the United States of America." The third article of the same constitution declares that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See Martin v. Hunter, 1 Wheat. (U. S.) 304, 324, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 403, 4 L. Ed. 579.

To confer on a person the holy orders of

priest or deacon. Kibbe v. Antram, 4 Conn. 134.

ORDAINERS. An elected body of 21 members appointed by Parliament in 1310 to make ordinances for the good of the realm. The whole administration passed into their hands. Stubbs, Early Plantagenets.

ORDEAL. An ancient superstitious mode of trial.

When in a criminal case the accused was arraigned, he might select the mode of trial either by God and his country, that is, by jury, or by God only, that is, by ordeal.

The trial by ordeal was either by fire or by water, and perhaps in less important forms. Those who were tried by the former passed barefooted and blindfolded over nine hot glowing ploughshares, or were to carry burning irons in their hands, and accordingly as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water, the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt, they were taken to be innocent of the crime.

It was supposed that God would, by the mere contrivance of man, exercise his power in favor of the innocent. 4 Bla. Com. 342; See Hurtado v. California, 110 U. S. 529, 4 Sup. Ct. 111, 292, 28 L. Ed. 232

It is said to have opened the door to corruption, and that convictions were hard to get. It was condemned by the Lateran Council of 1215 and prohibited in England by writ addressed to certain itinerant justices in 1219. 1 Holdsw. Hist. E. L. 143.

For a detailed account of the trial by ordeal, see Herbert, Antiq. of Inns of Court 146.

See Lea, Superstition and Force; Thayer, Evidence; 2 Poll. & Maitl. Hist. E. L.; 2 Besant, London.

A man of good repute could usually clear himself by oath; but circumstances of grave suspicion or previous bad character would drive the defendant to stand trial by ordeal. Trial by battle was a late, or Norman institution. Pollock, Sel. Essays in Anglo-Amer. L. Hist. 93.

ORDEFFE or ORDELFE. A liberty whereby a man claims the ore found in his own land; also, the ore lying under land. Cowell.

ORDELS. A kind of purgation, one by fire and one by water. Cowell.

ORDENAMIENTO. In Spanish Law. An order from the sovereign and differing from a *cedula* in form and in the mode of its promulgation. Schm. Civ. L. Introd. 93, n.

ORDER. Command; direction.

An informal bill of exchange or letter of request requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described.

A designation of the person to whom a bill of exchange or negotiable promissory note is to be paid. See Treat v. Stanton, 14 Conn. 445; Dakin v. Graves, 48 N. H. 45; Hinnemann v. Rosenback, 39 N. Y. 98. This order, in the case of negotiable paper, is usually by indorsement, and may be either express, as, "Pay to C D," or implied merely, as by writing A B [the payee's name].

See INDORSEMENT; STORE ORDERS.

In French Law. The act by which the rank of preferences of claim, among creditors who have liens over the price which arises out of the sale of an immovable subject, is ascertained. Dalloz, Dict.

In the Practice of Courts. An order is any direction of a court or judge made or entered in writing, and not included in a judgment. N. Y. Code of Proc. § 400; Berryhill v. Smith, 51 Ia. 127, 50 N. W. 495. But a decree is often called an order. See DECREE. For distinction between order and requisition, see Mills v. Martin, 19 Johns. (N. Y.) 7.

In Governmental Law. By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders: namely, that of the senators, that of the patricians, and that of the plebeians.

In the United States there are no orders of men; all men are equal in the eye of the law. See RANK.

ORDER IN COUNCIL. An order by the sovereign with the advice of the privy council.

Orders in council are either prerogative, or issued under parliamentary authority. The former, if derogating from an act of parliament, are void, but, subject to this rule, the ancient rights of the crown, so far as they have actually been exercised with fairly definite continuity, still remain. Any exercise of the prerogative in new directions might not be tolerated by parliament. As to the other class, statutes frequently delegate either to the crown (the executive) or even to the minister of a department charged with carrying out an act, the power to make rules and orders under it. The difference between orders in council and those made by a single minister is more apparent than real; the form and contents are usually settled by the departments concerned; the approval by the privy council is a pure formality. Jenks, Hist. E. L. 187.

See PRIVY COUNCIL.

ORDER NISI. A conditional order, which is to be confirmed *unless* something be done, which has been required, by a time specified. Eden, Inj. 122.

ORDER OF DISCHARGE. In England, an order made under the Bankruptcy Act of 1869, by a court of bankruptcy, the effect of which is to discharge a bankrupt from all debts, claims, or demands provable under the bankruptcy. Robson, Bkcy.; Whart. Lex.

ORDER OF FILIATION. The name of a judgment rendered by two justices, having jurisdiction in such case, in which a man therein named is adjudged to be the putative father of a bastard child, and it is further adjudged that he pay a certain sum for its support.

The order must bear upon its face—*first*, that it was made upon the complaint of the township, parish, or other place where the child was born and is chargeable; *second*, that it was made by justices of the peace having jurisdiction; 1 Salk. 122, pl. 6; 2 Ld. Raym. 1197; *third*, the birthplace of the child; *fourth*, the examination of the putative father and of the mother, but it is said the presence of the putative father is not requisite if he has been summoned; Cald. 308; *fifth*, the judgment that the defendant is the putative father of the child; Dougl. 662; *sixth*, that he shall maintain the child as long as he shall be chargeable to the township, parish, or other place, which must be named; 1 Salk. 121, pl. 2; but the order may be that the father shall pay a certain sum weekly as long as the child is chargeable to the public; Ventr. 210; *seventh*, it must be dated, signed, and sealed by the justices. Such order cannot be vacated by two other justices; Carpenter v. Whitman, 15 Johns. (N. Y.) 208. See Donely v. Rockfeller, 4 Cow. (N. Y.) 253; Harrington v. Ferguson, 2 Blackf. (Ind.) 42.

ORDER OF REVIVOR. In English Practice. An order as of course for the continuance of an abated suit. It superseded the bill of revivor. See 15 & 16 Vict. c. 86, s. 52. Whart. Lex.

ORDERS. Rules made by a court or other competent jurisdiction. The formula is generally in these words: *It is ordered*, etc.

The instructions given by the owner to the captain or commander of a ship, which he is to follow in the course of the voyage.

Rules regulating the procedure of the High Court of Justice in England. They were made by judges under statutory powers and have the force of a statute.

ORDERS OF THE DAY. Matters which the house of commons may have agreed beforehand to consider on any particular day, are called the "orders of the day," as opposed to original motions. May's Parl. Prac. Orders of the day are also known to the parliamentary practice of this country; Cush. Pr. Leg. Assemblies 1512.

ORDINANCE. A law; a statute; a decree.

Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term *ordinance* is now the usual denomination of such acts, although in England and in some states, the technically more correct term *by-law* is in common and approved use. The main feature of such enactments is that they are local, as distinguished from the general applicability of the state laws; hence, the word *law*, with the prefix *by*, should in strictness be preferred to the word *ordinance;* Horr. & Bemis, Mun., Pol. Ord. 1. See Bills v. Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; By-Laws.

They are not in a constitutional sense, public laws, but mere local rules or by-laws, police or domestic regulations, devoid in many respects of the characteristics of public or general laws; McInerney v. Denver, 17 Colo. 302, 29 Pac. 516.

This word is more usually applied to the laws of a corporation than to the acts of the legislature. The following account of the difference between a statute and an ordinance is from Bacon's Abridgment, *Statute* (A). "Where the proceeding consisted only of a petition from parliament and an answer from the king, these were entered on the *parliament roll;* and if the matter was of a public nature, the whole was then styled an *ordinance;* if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the *statute roll.*" See Co. Litt. 159*b*, Butler's note; 3 Reeve, Hist. Eng. Law 146.

According to Lord Coke, the difference between a statute and an ordinance is that the latter has not had the assent of the king, lords, and commons, but is made merely by two of these powers. Co. 4th Inst. 25. See Barrington, Stat. 41, note (x).

A *resolution* of a council is but another name for an *ordinance*, and if it is a legislative act it is immaterial whether it is called a resolution or an ordinance, so long as the requirements essential to the validity of an ordinance be observed; Waln's Heirs v. Philadelphia, 99 Pa. 330; but if the action is merely declaratory of the will of the corporation, it is proper to act by *resolution*, which is more in the nature of a ministerial act; Alma v. Bank, 60 Fed. 203. 8 C. C. A. 564, 19 U. S. App. 622.

A municipal ordinance not passed under legislative authority, is not a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts; Hamilton G. L. & C. Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; but if properly adopted under a power granted by the state legislature, it is to be regarded as an act of the state within the fourteenth amendment; North American C. S. Co. v. Chicago, 211 U.

S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 270.

Equity will not restrain a city council from passing an ordinance allowing a gas company to lay pipes in its streets, although it has granted the exclusive privilege to do so to another company; Montgomery G.-L. Co. v. Montgomery, 87 Ala. 245, 6 South. 113, 4 L. R. A. 616. An illegal ordinance may be enjoined before passage; Roberts v. Louisville, 92 Ky. 95; 17 S. W. 216, 13 L. R. A. 844; or the enforcement of an invalid ordinance; Rushville v. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

While it is not *per se* negligence for a railroad company to run its cars at a higher rate of speed than the limit specified in a city ordinance, yet the fact that it did so in the particular case may be taken into consideration by the jury, with other evidence, in ascertaining whether or not the defendant was negligent; Lederman v. R. Co., 165 Pa. 118, 30 Atl. 725, 44 Am. St. Rep. 644. In Mahan v. Transfer Co., 34 Minn. 29, 24 N. W. 293, it was held that running a railroad train at a speed exceeding the limit fixed by ordinance was evidence of negligence which should go to the jury. That it is negligence *per se* is held in Schlereth v. R. Co., 96 Mo. 509, 10 S. W. 66; South & N. A. R. Co. v. Donovan, 84 Ala. 141, 4 South. 142; Chicago & A. R. Co. v. Esten, 178 Ill. 197, 52 N. E. 954. (Also where the rate of speed is fixed by statute; Dodge v. R. Co., 34 Ia. 276.) An ordinance as to the right of way between two street cars is not conclusive of the question of negligence; it is merely evidence of negligence on the part of the driver of a car whose duty under it was to give way; Connor v. Traction Co., 173 Pa. 602, 34 Atl. 238.

An ordinance requiring an opening in a street to be guarded is admissible in evidence in an action against a city for injuries sustained by falling into such opening; McNerney v. Reading City, 150 Pa. 611, 25 Atl. 57.

An ordinance which has the effect of denying to the owner of property the right to conduct a lawful business thereon is invalid, unless the business is of such a noxious or offensive character that the health, safety, or comfort of the community require its exclusion from the neighborhood; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; this does not extend to an asylum for the treatment of mild forms of insanity; *id.;* or to a laundry; In re Hong Wah, 82 Fed. 623.

The burden of proving the unreasonableness of an ordinance is upon him who denies its validity; Trenton Horse R. Co. v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A 410; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408.

A copy of an ordinance having the seal of the city attached is admissible in evidence without further proof; 113 Mo. 395.

See MUNICIPAL CORPORATIONS; NUISANCE; POLICE POWERS; McQuillin, Ordinances.

ORDINANCE OF 1647. A law passed by the Colony of Massachusetts, still in force, in a modified form, whereby the state owns the great ponds within its confines, which are held in trust for public uses. Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466. See LAKE.

ORDINANCE OF 1648. A law of England relating to admiralty jurisdiction. See Bened. Adm. § 99. It expired in 1660.

ORDINANCE OF 1681. An ordinance of France relating to maritime affairs. See Bened. Adm. § 173.

ORDINANCE OF 1787. A statute for the government of the Northwest Territory. See OHIO.

It has no force in Illinois except as incorporated in its constitution; Dixon v. People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116.

ORDINANCES OF EDWARD I. Two laws and ordinances published by Edward I. in the second year of his reign, at Hastings, relating to admiralty jurisdiction. These are said to have been the foundation of a consistent usage for a long time. See Bened. Adm. § 55.

ORDINARY. In Ecclesiastical Law. An officer who had original jurisdiction in his own right, and not by deputation.

In England, the ordinary was an officer who has immediate jurisdiction in ecclesiastical causes. Co. Litt. 344. A bishop is an ordinary, and archbishops are the ordinaries of the whole province. Also an archdeacon; and an officer of the royal household.

The executor *legitimus* "deriveth his authoritie from the law," who is the bishop or ordinary of every diocese. The executor *dativus* "deriveth his authoritie from the bishop or ordinarie," who is the person usually known as the administrator. 2 Holdsw. Hist. E. L. 447. It was not the ordinary who administered the estate, but his representative.

See EXECUTORS AND ADMINISTRATORS.

In the United States, the ordinary possesses, in those states where such officer exists, powers identical with those usually vested in the courts of probate. In South Carolina, the ordinary was a judicial officer; Hays v. Harley, 1 Mill, Const. (S. C.) 267; Boggs v. Hamilton, 2 Mill, Const. (S. C.) 384; but the office no longer exists in South Carolina, where they have now a probate court. Georgia retains courts of ordinary; also New Jersey. See COURTS OF ORDINARY.

ORDINARY CALLING. Those things which are repeated daily or weekly in the course of business. Ellis v. State, 5 Ga. App. 615, 63 S. E. 588.

ORDINARY CARE. That degree of care which men of ordinary prudence exercise in taking care of their own persons or property. Story, Bailm. 11; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529, 36 Am. St. Rep. 359; Cohn v. Kansas City, 108 Mo. 387, 18 S. W. 973; Cronk v. R. Co., 3 S. D. 93, 52 N. W. 420. It can only be determined by the circumstances of each particular case whether ordinary care was used. This degree of care is said to be required of bailees for the mutual benefit of bailor and bailee; Whitney v. Lee, 8 Metc. (Mass.) 91; Bizzell v. Booker, 16 Ark. 308; Neal v. Gillett, 23 Conn. 437, 443; Foster v. Goddard, 40 Me. 64; The Farmer v. McCraw, 26 Ala. 203, 72 Am. Dec. 718; 36 E. L. & E. 506. See Bird v. Everard, 4 Misc. 104, 23 N. Y. Supp. 1008; Zell v. Dunkle, 156 Pa. 353, 27 Atl. 38; BAILEE; NEGLIGENCE; CARE.

ORDINARY NEGLIGENCE. The want of such care and diligence as reasonably prudent men, generally, in regard to the subject-matter of inquiry, would use to prevent or avoid an injury. Chicago, K. & W. R. Co. v. Fisher, 49 Kan. 460, 30 Pac. 462. See GROSS NEGLIGENCE.

ORDINARY SKILL. Such skill as a person conversant with the matter undertaken might be reasonably supposed to have. 11 M. & W. 113; Percy v. Millaudon, 8 Mart. N. S. (La.) 68, 75; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032. See NEGLIGENCE.

One who undertakes to act in a professional or other clearly defined capacity is bound to exercise the skill appropriate to such capacity; Webb, Pollock, Torts 26; though the undertaking be gratuitous; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323.

ORDINATION. The act of conferring the orders of the church upon an individual. See ORDAIN.

ORDINATIONE CONTRA SERVIENTES. A writ that lay against a servant for leaving his master contrary to the ordinance of 23 & 24 Edw. III.

ORDINIS BENEFICIUM. See BENEFICIUM ORDINIS.

ORDINUM FUGITIVI. Those of the religious who deserted their houses, and, throwing off the habits, renounced their particular order in contempt of their oath and other obligations. Par. Antiq. 388.

ORDNANCE DEBENTURES. Bills which were issued by the Board of Ordnance on the treasurer of that office for the payment of stores, etc.

ORDO JUDICIORUM. The order of judgment; the rule by which the due course of hearing each cause was prescribed. 4 Reeves, Hist. Eng. L. 17.

ORDONNANCE DE LA MARINE. See CODE.

ORE LEAVE. A right to dig and take ore from land. Ege v. Kille, 84 Pa. 340.

ORE TENUS (Lat.). Verbally; orally.

Formerly the pleadings of the parties were *ore tenus;* and the practice is said to have been retained till the reign of Edward III. 3 Reeve, Hist. Eng. Law 95; Steph. Pl., Andr. ed. § 59. And see Bracton 372 *b*.

In chancery practice, a defendant may demur at the bar *ore tenus;* 3 P. Wms. 370; if he has not sustained the demurrer on the record; 1 Swanst. 288; Mitf. Pl., Tyler's ed. 310; 6 Ves. 779; 8 *id.* 405; 17 *id.* 215.

OREGON. One of the Pacific coast states of the American Union, and the thirty-third state admitted therein.

The territory called Oregon from the early name of its principal river—now called the Columbia—originally included all the country on the Pacific coast west of the Rocky mountains, and north of the 42d and south of the 49th parallel of north latitude. From 1818 to 1846, this country was subject to the joint occupancy of the subjects and citizens of Great Britain and the United States, under a disputed claim of title, which was settled by the treaty of June 15, of the latter year, in favor of the United States.

As early as 1811 the American and British occupants west of the Cascade mountains commenced to organize a government for their protection. These efforts resulted in the establishment of the "Provisional Government of Oregon" by a popular vote on July 5, 1845, consisting of an executive, legislative (one house), and judicial department, the officers of which were chosen and supported by the voluntary action of the citizens and subjects of both nations. On March 3, 1849, this government was superseded by the territorial government provided by congress in the act of August 14, 1848. On September 27, 1850, congress passed the "donation act," giving the settlers the land held by them under the provisional government—640 acres to a married man and his wife, and 320 to a single man.

In 1857 a state constitution was formed and ratified by the people, under which a portion of the territory was admitted into the Union on February 14, 1859, on an equal footing with the other states. There were amendments in 1902, 1906 and 1908. The initiative, referendum and recall are adopted.

ORFGILD (Sax. *orf*, cattle, *gild*, payment. Also called *cheapgild*). A payment for cattle, or the restoring them. Cowell.

A restitution made by the hundred or county of any wrong done by one that was in pledge. Lambard, Archaion 125, 126.

A penalty for taking away cattle. Blount.

ORGANIC LAW. The fundamental law or constitution of a state or nation. See LAW. An act of congress providing for the admission of a new state is usually termed an *organic act*, and sometimes an *enabling act*.

ORIGINAL. An authentic instrument which is to serve as a model or example to be copied or imitated.

Originals are single or duplicate: single when there is but one; duplicate, when there are two. In the case of printed documents, all the impressions are *originals*,

or in the nature of *duplicate originals*, and any copy will be primary evidence; 2 Stark. 130. But see Sweigart v. Lowmarter, 14 S. & R. (Pa.) 200. See TELEGRAPH; PHOTOGRAPH; PRESS COPY.

When an original document is not evidence at common law, and a copy of such original is made evidence by an act of the legislature, the original is not therefore made admissible evidence by implication; 2 Campb. 121, n.

Not deriving authority from any other source: as, original jurisdiction, original writ, original bill, and the like.

ORIGINAL AND DERIVATIVE ESTATES. An original estate is the first of several estates, bearing to each other the relation of a particular estate and a reversion. It is contrasted with a derivative estate, which is a particular interest carved out of another estate of larger extent. 1 Pres. Est. *123.

ORIGINAL BILL. A bill relating to a matter not before brought before the court by the same parties, standing in the same interests. Mitf. Eq. Pl. 33.

Proceedings in a court of chancery are either commenced by way of information, when the matter concerns the state or those under its protection, or by original petition or bill when the matter does not concern the state or those under its protection. The original bill states simply the cause of complaint, and asks for relief. It is composed of nine parts; Story, Eq. Pl. 7; and is the foundation of all subsequent proceedings before the court. See 1 Dan. Ch. Pr., 6th Am. ed. *314; BILL.

ORIGINAL CONSTRUCTION. This term, as distinguished from repairs, has a technical meaning in relation to railroads, and is that construction of bridges, etc., that is necessary to be done before the railroad can be opened, not such structures as are intended to replace worn-out counterparts. Cleveland, C. & S. Ry. Co. v. Trust Co., 86 Fed. 73.

ORIGINAL CONVEYANCES (sometimes called primary conveyances). Those conveyances by means whereof the benefit or estate is created or first arises: viz. feoffment, gift, grant, lease, exchange, partition. 2 Bla. Com. 309; 1 Steph. Com., 11th ed. 464.

ORIGINAL ENTRY, BOOKS OF. The first entry made by a merchant, tradesman, or other person in his account-books, charging another with merchandise, materials, work, or labor, or cash, on a contract made between them.

Such an entry, to be admissible as evidence, must be made in a proper book. In general, the books in which the first entries are made, belonging to a merchant, tradesman, or mechanic, in which are charged goods sold and delivered or work and labor done, are received in evidence. There are many books which are not evidence, a few of which will be here enumerated. A book made up by transcribing entries made on a slate by a journeyman, the transcript being made on the same evening, or sometimes not until nearly two weeks after the work was done, was considered as not being a book of original entries; Kessler v. McConachy, 1 Rawle (Pa.) 435; Hartley v. Brookes, 6 Whart. (Pa.) 189. A book purporting to be a book of original entries, containing an entry of the sale of goods when they were ordered, but before delivery, is not a book of original entries; Rhoads v. Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277. And unconnected scraps of paper, containing, as alleged, original entries of sales by an agent, on account of his principal, and appearing on their face to be irregularly kept, are not to be considered as a book of original entries; Thomson v. McKelvey, 13 S. & R. (Pa.) 126; *contra*, Smith v. Smith's Ex'x, 4 Harring. (Del.) 532. A notched stick kept as a tally was admitted to prove items of different amounts indicated by different cuts and notches; Rowland v. Burton, 2 Harring. (Del.) 288.

The entry must be made in the course of business, and with the intention of making a charge for goods sold or work done; it ought not to be made after the lapse of one day; Petrie v. Lynch's Adm'r, 1 N. & McC. (S. C.) 130; Curren v. Crawford, 4 S. & R. (Pa.) 5. Memoranda of sales found in an account-book are competent, when made contemporaneously with orders, by a witness knowing them to state correctly the facts; The Sylvan Stream, 35 Fed. 314.

The entry must be made in an intelligible manner and not in figures or hieroglyphics which are understood by the seller only; Rhoads v. Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277. A charge made in the gross as "190 days work;" Petrie v. Lynch's Adm'r, 1 N. & McC. (S. C.) 130; or "for medicine and attendance," or "thirteen dollars for medicine and attendance on one of the General's daughters in curing the hooping-cough;" Hughes v. Hampton, 2 Tread. Const. (S. C.) 745, were rejected. An entry of goods without carrying out any prices proves, at most, only a sale; and the jury cannot, without other evidence, fix any price; Hagaman v. Case, 4 N. J. L. 370. The charges should be specific and denote the particular work or service charged as it arises daily, and the quantity, number, weight, or other distinct designation of the materials or articles sold or furnished, and attach the price and value to each item; Hughes v. Hampton, 2 Tread. Const. (S. C.) 745; Petrie v. Lynch's Adm'r, 1 N. & McC. (S. C.) 130.

The entry must, of course, have been made by a person having authority to make it; Rhoads v. Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277; and with a view to charge the party; Walter v. Bollman, 8 Watts (Pa.) 545.

The entry must be made contemporaneously with the delivery of the goods; Burley v. Bank, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406; Wells v. Hobson, 91 Mo. App. 379; McKnight v. Newell, 207 Pa. 562, 57 Atl. 39; Schnellbacher v. Plumbing Co., 108 Ill. App. 486; if made before the property in the goods has passed, the book is not admissible in evidence; Laird v. Campbell, 100 Pa. 159; nor is it if made subsequently; Schnellbacher v. Plumbing Co., 108 Ill. App. 486.

The proof of the entry must be made by the person who made it. If made by the seller, he is competent to prove it from the necessity of the case, although he has an interest in the matter in dispute; Beach v. Mills, 5 Conn. 496; Vosburgh v. Thayer, 12 Johns. (N. Y.) 461; Poultney v. Ross, 1 Dall. (Pa.) 239, 1 L. Ed. 117. When made by a clerk, it must be proved by him. But in either case, when the person who made the entry is out of the reach of the process of the court, as in the case of death, or absence from the state, the handwriting may be proved by a person acquainted with the handwriting of the person who made the entry; Hay v. Kramer, 2 W. & S. (Pa.) 137; if he is absent, proof must first be made that he cannot be found; Railway Co. v. Henderson, 57 Ark. 402, 21 S. W. 878. But the plaintiff was not competent to prove the handwriting of a deceased clerk who made the entries; 1 Bro. App. liii. A book containing entries in defendant's handwriting of payments by him to payee in her lifetime, on the note in action, is not admissible as evidence in defendant's favor; Wells' Adm'r v. Ayers, 84 Va. 341, 5 S. E. 21.

The books and original entries, when proved by the supplementary oath of the party, are *prima facie* evidence of the sale and delivery of goods, or of work and labor done; Ducoign v. Schreppel, 1 Yeates (Pa.) 347; May v. Brownell, 3 Vt. 463; Herlock's Adm'rs v. Riser, 1 McCord (S. C.) 481; Bowers v. Dunn, 2 Root (Conn.) 59. But they are not evidence of money lent or cash paid; Bradley v. Goodyear, 1 Day (Conn.) 104; or of the time a vessel lay at the plaintiff's wharf; Wilmer v. Israel, 1 Browne (Pa.) 257; or of the delivery of goods to be sold on commission; Murphy v. Cress, 2 Whart. (Pa.) 33.

These entries are sometimes evidence in suits between third parties; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; 2 P. & D. 573; Welsh v. Barrett, 15 Mass. 380; Halliday v. Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262; New-Haven County Bk. v. Mitchell, 15 Conn. 206; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116; 1 Y. & C. 53; and also in favor of the party himself; Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Slade v. Teasdale, 2 Bay (S. C.) 172; Lamb v. Hart, *id.* 362; Burnham's Adm'r v. Adams, 5 Vt. 313; Anchor Mill Co. v. Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600.

ORIGINAL JURISDICTION. See JURISDICTION.

ORIGINAL PACKAGE. The casing in which imported merchandise is kept and handled in course of transportation, whether hogsheads, bales, bottles, or boxes.

The package delivered by the shipper to the carrier at the initial point of shipment in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together and marked, or are together in a box, etc., such box, etc., constitutes the original package; Guckenheimer v. Sellers, 81 Fed. 997; State v. Winters, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616.

An original package is a bundle put up for transportation and usually consists of a number of things bound together and convenient for handling; State v. Board of Assessors, 46 La. Ann. 145, 15 South. 10, 49 Am. St. Rep. 318, a case of imports and not of interstate commerce.

An original package, trade in which is protected by the federal constitution, is such form and size of package as is used by purchasers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of commerce; Com. v. Schollenberger, 156 Pa. 201, 27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32.

"The term *original package* is not defined by any statute and is simply a convenient form of expression * * * to indicate that a license tax could not be exacted of an importer of goods from a foreign country, who disposes of such goods in the form in which they were imported." Cook v. Marshall Co., 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471. The size of the package does not seem to be capable of definition, but it cannot be held that any package which could not be commercially transported from one state to another as a separate importation could be considered as an original package. *Id.*

A definition which is quoted as "commonly accepted and believed by us to be correct" is that "it is a bundle put up for transportation or commercial handling and usually consisting of a number of things bound together convenient for handling and conveyance"; McGregor v. Cone, 104 Ia. 465, 73 N. W. 1041, 39 L. R. A. 484, 65 Am. St. Rep. 522; where there is possibly as good an expression of the matter as may be found: "The original package then, is that package which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped."

The phrase "original package," though more in common use in connection with litigation over the state liquor laws, was in fact originated by Marshall, C. J., in Brown v.

Maryland, where it was held that a "license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported"; Brown v. Maryland, 12 Wheat. (U. S.) 419, 442, 6 L. Ed. 678, where it was held that a license tax for disposing of the property "in the original form or package in which it was imported is a duty on imports and unconstitutional."

That case related to imports from a foreign country, and it was also held that the thing imported did not lose its distinctive character as an import until it had become "incorporated and mixed up with the mass of property in the country." The same doctrine was afterwards applied to interstate commerce and was expressed in very nearly the same terms in Vance v. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100. In that case the court stated as elementary propositions, entirely concluded by previous adjudications: (a) The states have plenary power to regulate the sale of intoxicating liquors within their borders depending solely on the judgment of the legislatures, provided always they do not invade rights secured by the United States constitution, or discriminate against the rights of residents or citizens of other states. (b) The right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof is committed to congress, and, hence, a state law which denies such a right, or substantially interferes with or hampers the same, is unconstitutional. (c) An incident of the power to ship merchandise from one state into another is the right, in the receiver of the goods, to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, the goods received by interstate commerce remain under the shelter of the commerce clause until by a sale in the original package they have been commingled with the general mass of property in the state. This last phraseology, first expressed by Marshall, C. J., and repeated almost in the same words 70 years after, has been criticised as unsatisfactory; Cooke, Commerce Clause, sec. 17. But the expression would seem to have been repeated in effect too often to make it probable that it would be abandoned. It occurs as late as 1906 in Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 595.

The form and size of a package the importer determines for himself, and its size has no bearing on the question whether it is "original"; In re Beine, 42 Fed. 545; State v. Winters, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616. It has varied from the small boxes containing ten cigarettes; Iowa v. McGregor, 76 Fed. 956; McGregor v. Cone, 104 Ia. 465, 73 N. W. 1041, 39 L. R. A. 484, 65 Am. St. Rep. 522; In re May, 82 Fed. 422; to carload lots of coal; McNeill v. R. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; but where liquor in casks was shipped in carload lots the cask was the original package; U. S. v. Liquid Extracts, 170 Fed. 449, where it was said: "The idea of the original package may well be made to cover certain forms of property which do not ordinarily admit of being packed or incased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines and other bulky articles."

Where an agent procured orders for enlarging photographs and delivered them with frames fitted to them which he tried to sell, the pictures having been ordered and the frames not, he was convicted of peddling without a license, the picture and frame together not being an original package; State v. Montgomery, 92 Me. 433, 43 Atl. 13.

Labelling a bottle or small bundle "original package" has no effect; Keith v. State, 91 Ala. 2, 8 South. 353, 10 L. R. A. 430, where small bottles of liquor, wrapped in paper and so labelled, were packed in an open box, the box was the original package and not the bottle. But where cigarettes were transported in small paper packages containing ten each not being boxed but thrown loosely into baskets, held that such paper parcels were not original packages, and that the importations were made for the purpose of evading the law of the state prohibiting their sale; Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, where it was established that the court may consider the *bona fides* of the construction of the packages and refuse to permit an intentional invasion of the state law; and to the same effect; Com. v. Zelt, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602; Haley v. State, 42 Neb. 556, 60 N. W. 962, 47 Am. St. Rep. 718; State v. Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432; Smith v. State, 54 Ark. 248, 15 S. W. 882. The case of Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, affirmed Blaufield v. State, 103 Tenn. 593, 53 S. W. 1090, on the point stated *supra*, but disagreed with the decision of the Tennessee court that cigarettes are not legitimate objects of commerce and their sale in original packages is not protected by the commerce clause; on this point it was also held *contra* in State v. Lowry, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350.

Where the goods are in bottles, or small packages contained in boxes or crates, the bottles were held to be the original packages in Com. v. Bishman, 138 Pa. 642, 21 Atl. 12; State v. Coonan, 82 Ia. 400, 48 N. W. 921 (sealed bottles in open barrels and boxes); State v. Miller, 86 Ia. 638, 53 N. W. 330 (the same; in both cases the act was prior to Aug. 14, 1890, date of Wilson Act); and the small packages in Re May, 82 Fed. 422;

Sawrie v. Tennessee, 82 Fed. 615 (all cases applying to cigarettes in small boxes); but the cases generally hold that the box is the original package; Guckenheimer v. Sellers, 81 Fed. 997; Smith v. State, 54 Ark. 248, 15 S. W. 882 (bottles of liquor in open and closed boxes); Haley v. State, 42 Neb. 556, 60 N. W. 962, 47 Am. St. Rep. 718 (small bottles of liquor in closed boxes); State v. Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432 (open box); In re Harmon, 43 Fed. 372; May v. New Orleans, 51 La. Ann. 1064, 25 South. 959 (small packages in packing boxes, box furnished by carrier and to be returned); State v. Parsons, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457 (medicine); McGregor v. Cone, 104 Ia. 465, 73 N. W. 1041, 39 L. R. A. 484, 65 Am. St. Rep. 522 (cigarettes). In the case of patent medicines, it is the small individual package or bottle and not the box in which they are packed; Kentucky Board of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730, 25 Ky. L. Rep. 102. There is said to be no difference whether the box be covered or uncovered; Keith v. State, 91 Ala. 2, 8 South. 353, 10 L. R. A. 430 (*supra*); and if the shipment is in bottles, its character is not changed by the carrier's putting it in a box or boxes for his own accommodation; Tinker v. State, 96 Ala. 115, 11 South. 383. The fact that the box was owned by the carrier is immaterial; Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703; *id.*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, where packages of cigarettes were shipped in open baskets, the latter held the original package. A ten pound package of oleomargarine, made and packed in one state and sent into another, is an original package, and the importer may sell it personally or by an agent directly to the consumer. The protection of the commerce clause does not depend on whether the package is suitable for retail trade or not; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, reversing Com. v. Paul, 170 Pa. 284, 33 Atl. 82, 30 L. R. A. 396, 50 Am. St. Rep. 776. The right to import a lawful article of commerce from another state continues until the sale in the original package; Schollenberger v. Pennsylvania, 171 U. S. 1, 23, 18 Sup. Ct. 757, 43 L. Ed. 49.

The interstate commerce protection ceases when the package is opened, and separate packages removed before sale; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; People v. Roberts, 158 N. Y. 162, 52 N. E. 1102; In re Wilson, 8 Mackey (D. C.) 341, 12 L. R. A. 624; In re Pringle, 67 Kan. 364, 72 Pac. 864; Kimmell v. State, 104 Tenn. 184, 56 S. W. 854; Com. v. Paul, 148 Pa. 559, 24 Atl. 78; State v. Parsons, 124 Mo. 436, 27 S. W. 1102, 46 Am. St. Rep. 457; Hopkins v. Lewis, 84 Ia. 690, 51 N. W. 255, 15 L. R. A. 397, where it was held that liquor sold over a bar from a bottle handed to a customer, with a glass to help himself, was not a sale in the original package; it was a sale of the contents of the original packages and not the packages themselves. But in another case, where, before the date of the Wilson Act, beer in sealed bottles packed in boxes was sent into the state, consigned to an agent, who removed the bottles from the box, furnished corkscrew and tumbler, and allowed the customer to help himself, the sale was held to be in the original package; State v. Miller, 86 Ia. 638, 53 N. W. 330. A sale of the package for ten days' trial and the privilege of return if not satisfactory, destroys its "original" character; Wasserboehr v. Boulier, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344.

The rule that the protection is ended by breaking does not apply where it is merely for the purpose of inspection by the purchaser; Greek-American Sponge Co. v. Drug Co., 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961; In re McAllister, 51 Fed. 282; Wind v. Iler, 93 Ia. 316, 61 N. W. 1001, 27 L. R. A. 219.

Goods brought in original packages from another state after they have arrived at their destination and are at rest within the state may be taxed without discrimination like other property within the state, although stored for distribution and delivery in the same packages to purchasers in various states; American S. & W. Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; which was followed and applied in Merchants' Transfer Co. v. Board of Review, 128 Ia. 732, 105 N. W. 211, 2 L. R. A. (N. S.) 662, 5 Ann. Cas. 1016. It is otherwise as to imports. See that title.

A state tax on all sales of goods brought from another state is valid; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; otherwise as to imports of foreign goods; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015. So a general state tax laid upon all property may include commodities received from another state and held for sale; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. Credits or bills receivable, the proceeds of sale of imported goods in original packages, are taxable by the state as invested capital; People v. Wells, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370, affirming 184 N. Y. 275, 77 N. E. 19, 12 L. R. A. (N. S.) 905, 121 Am. St. Rep. 840.

State regulations as to labels (stating contents) as applied to original packages do not interfere with interstate commerce as to contents; McDermott v. State, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315; or weight; In re Agnew, 89 Neb. 306, 131 N. W. 817, 35 L. R. A. (N. S.) 836, Ann. Cas. 1912C, 676; otherwise, as to protecting domestic manu-

facturers against lawful competition in other states by discriminating regulations; as by requiring the marking of convict-made goods brought into the state; Opinion of Justices, 211 Mass. 605, 98 N. E. 334, Ann. Cas. 1913B, 815.

The use of the words "original package" in a state statute forbidding the sale of black powder except in original sealed packages of a certain weight, does not prohibit the importation from other states of packages of other weights; Williams v. Walsh, 222 U. S. 415, 32 Sup. Ct. 137, 56 L. Ed. 253; but the state may forbid the sale of it except in original packages; In re Williams, 79 Kan. 212, 98 Pac. 777.

Congress may lawfully provide for the confiscation of adulterated food, by a proceeding *in rem* in federal courts, while in the hands of consignees in unbroken packages; Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364.

As to the correct use of the word "imports" as meaning only goods brought from a foreign country and not from another state, see IMPORTS.

The power to regulate or forbid the sale of a commodity after it has been brought into a state does not carry with it the right and power to prevent its introduction by transportation from another state; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700. This was followed by Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, where it was held (three judges dissenting), that a state statute prohibiting the sale of intoxicating liquors, except for medicinal, etc., purposes, and under a license, is, as applied to a sale by an importer and in the original packages or kegs unbroken and unopened, of such liquor brought from another state, unconstitutional and void as repugnant to the commerce clause of the constitution. See 4 Harv. L. Rev. 221, for a criticism of this case. The rule established in Leisy v. Hardin, does not justify the contention that a state is powerless to prevent the sale of foods made in or brought from another state, if their sale may cheat the people into buying something they do not intend to buy, and which is wholly different from what its condition and appearance import; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, upholding the Massachusetts Oleomargarine Act.

Subsequently the passage of the Wilson Act secured the right of state regulation after the breaking or sale of the original package. See *supra* and also LIQUOR, where that act is treated.

A state may regulate or prohibit the sale of liquor even in the original package; Vance v. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; but it cannot impose a penalty on a carrier for transporting such goods within the state and before their delivery; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.

See COMMERCE; LIQUOR LAWS; OLEOMARGARINE.

ORIGINAL PROCESS. Process to compel an appearance by the defendant.

ORIGINAL WRIT. In English Practice. A mandatory letter issued in the king's name, sealed with his great seal, and directed to the sheriff of the county wherein the injury was committed or supposed to have been done, requiring him to command the wrongdoer, or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. This writ is deemed necessary to give the courts of law jurisdiction. Andr. Steph. Pl. 62; Gould, Pl. 14.

This writ is now disused, the writ of summons being the process prescribed by the Uniformity of Process Act for commencing personal actions; and under the Judicature Act, 1873, all suits, even in the court of chancery, are to be commenced by such writs of summons; Brown. But before this, in modern English practice, the original writ was often dispensed with, by recourse to a fiction and a proceeding *by bill* substituted. In this country, our courts derive their jurisdiction from the constitution, and require no original writ to confer it. Improperly speaking, the first writ which is issued in a case is sometimes called an original writ; but it is not so in the English sense of the word. See 3 Bla. Com. 273; Walker, Am. Law, *passim.*

ORIGINALIA (Lat.). **In English Law.** The transcripts and other documents sent to the office of the treasurer-remembrancer in exchequer are called by this name to distinguish them from *recorda*, which contain the judgments of the barons. The treasurer-remembrancer's office was abolished in 1833.

ORIGINALITY. In Patent Law. The finding out, the contriving, the creating of something which did not exist and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind. Conover v. Roach, 4 Fish. Pat. Cas. 16, Fed. Cas. No. 3,125.

ORPHAN. A minor or infant who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents. 2 S. & S. 93; Heiss v. Murphey, 40 Wis. 276. See 14 Hazzard, Penn. Reg. 188, 189, for a correspondence between Joseph Hopkinson and ex-president J. Q. Adams as to the meaning of the word *orphan;* see also, Hob. 247; Jackman v. Nelson, 147 Mass. 300, 17 N. E. 529.

ORPHANAGE. The share reserved to an orphan by the custom of London. See LEGITIME; DEAD'S PART.

ORPHANOTROPHI. **In Civil Law.** Persons who have the charge of administering the affairs of houses destined for the use of orphans. *Clef des Lois Rom. Administrateurs.*

ORPHANS' COURT. Courts of more or less extended jurisdiction, relating to probate, estates of decedents, etc., in Delaware, Maryland, New Jersey, and Pennsylvania.

OSCULI, JUS. The right to kiss. According to the old phraseology there could be no marriage within the circle of the *jus osculi*—the seventh degree. Second cousins (sixth degree) could not marry. Muirhead, Rom. L. 26.

OSTENSIBLE PARTNER. One whose name appears in a firm as a partner, and who is really such. Pars. Part. 27. See PARTNERS.

OSTEOPATHY. See PHYSICIAN.

OSWALD'S LAW. The law by which was effected the ejection of married priests, and the introduction of monks into churches. Named from Oswald, Bishop of Worcester, about 964. Whart. Lex.

OTHER CASUALTY. In a lease providing that rent shall cease if the premises become untenantable by fire or other casualty, it refers to some fortuitous interruption of the use. Crystal Spring Distillery Co. v. Cox, 49 Fed. 555, 1 C. C. A. 365, 6 U. S. App. 42.

OTHER WRONGS. See ALIA ENORMIA.

OTHESWORTHE (Sax. *eoth*, oath). Worthy to make oath. Bract. 185, 192.

OUGHT. The word is generally directory, but may be taken as mandatory if the context requires it. Bract. fol. 185, 292 *b*.

OUSTER (L. Fr. *outre, oultre;* Lat. *ultra*, beyond). Out; beyond; besides; farther; also; over and more. *Le ouster*, the uppermost. Over: *respondeat ouster*, let him answer over. Britton, c. 29. *Ouster le mer*, over the sea. Jacob, L. Dict. *Ouster eit*, he went away. 6 Co. 41 *b;* 9 *id.* 120.

To put out; to oust. *Il oust*, he put out or ousted. *Oustes*, ousted. 6 Co. 41 *b*.

In Torts. The actual turning out or keeping excluded the party entitled to possession of any real property corporeal.

It is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof; ouster of one cotenant by another is produced by the some acts as any other ouster; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658.

An ouster can properly be only from real property corporeal, and cannot be committed of anything movable; 1 C. & P. 123; 1 Chitty, Pr. 148; nor is a mere temporary trespass considered as an ouster. Any continuing act of exclusion from the enjoyment constitutes an ouster, even by one tenant in common of his co-tenant; Co. Litt. 199 *b*, 200 *a*. See 3 Bla. Com. 167; Webb, Poll. Torts 447; 1 Chitty, Pr. 374, where the remedies for an ouster are pointed out. A demand of possession by a tenant in common from his co-tenant, and refusal by the latter, constitutes an ouster from the joint possession; Jordan v. Surghnor, 107 Mo. 520, 17 S. W. 1009. In an action of *quo warranto*, the judgment rendered, if against an officer or individuals, is called *judgment of ouster;* if against a corporation by its corporate name, it is *ouster* and seizure. See JUDGMENT; RESPONDEAT OUSTER; 2 Crabb, R. P. § 2154 *a;* Washb. R. P.

OUSTER LE MAIN (L. Fr. to take out of the hand). **In Old English Law.** A delivery of lands out of the hands of the lord after the tenant came of age. If the lord refused to deliver such lands, the tenant was entitled to a writ to recover the same from the lord: this recovery out of the hands of the lord was called *ouster le main.* Abolished by 12 Car. II. c. 24. Also, a livery of land out of the king's hands by judgment given in favor of the petitioner in a *monstrans de droit;* 3 Steph. Com. 657.

OUSTER LE MER. Beyond the sea. A cause of excuse, if a person, being summoned, did not appear in court. Cowell.

OUT OF COURT. A plaintiff in an action at common law must have declared within one year after the service of the summons, otherwise he was *out of court* unless the court had, by special order, enlarged the time for declaring. See Jud. Act. 1875, Ord. xxi. r. 1. Whart. Lex.

Also used as a colloquial phrase applied to a litigant party when his case breaks down, equivalent to saying, "he has not a leg to stand on;" Moz. & W.

OUT OF THE STATE. Beyond sea, which title see.

OUT OF TIME. Generally speaking, a ship may be said to be missing or out of time when she has not been heard of after the longest ordinary time in which the voyage is safely performed. 1 Arn. Ins., 6th ed. 536; 2 Duer, Ins. 469, n.

OUTER BAR. See UTTER BARRISTER.

OUTER HOUSE. See COURTS OF SCOTLAND.

OUTFANGTHEF. A liberty in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor and taken for felony in another place out of his fee, to judgment in his own court. Du Cange. See INFANGTHEF.

OUTFIT. An allowance made by the government of the United States to an ambassador, a minister plenipotentiary, or *chargé d'affaires*, on going from the United States to any foreign country.

The outfit can in no case exceed one year's full salary. No outfit is allowed to a consul. See MINISTER.

As to the meaning of "outfit" in the whaling business, see Macy v. Ins. Co., 9 Metc. (Mass.) 354.

OUTBUILDING. Something used in connection with a main building. Com. v. Intoxicating Liquors, 140 Mass. 287, 3 N. E. 4. While a stable may be a necessary outbuilding, yet when erected for use in connection with a tent placed temporarily on land, it is not so, within a restriction against the erection of a building other than dwellings of a specified value with necessary outbuildings; Blakemore v. Stanley, 159 Mass. 6, 33 N. E. 689. See OUTHOUSES.

OUTHOUSES. Buildings adjoining or belonging to dwelling-houses.

Buildings subservient to, yet distinct from, the principal mansion-house, located either within or without the curtilage. State v. Brooks, 4 Conn. 446; Jones v. Hungerford, 4 Gill & J. (Md.) 402; 2 Cr. & D. 479.

It is not easy to say what comes within and what is excluded from the meaning of outhouse. It has been decided that a *schoolroom*, separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house (the two buildings, together with some other, and the court which inclosed them, being rented by the same person), was properly described as an outhouse; Russ. & R. Cr. Cas. 295. See, for other cases, Co. 3d Inst. 67; 1 Leach 49; 2 East Pl. Cr. 1020; 5 C. & P. 555; 8 B. & C. 461; 1 Mood. Cr. Cas. 323, 336; State v. Brooks, 4 Conn. 446; Swallow v. State, 20 Ala. 30; White v. Com., 87 Ky. 454, 9 S. W. 303; Price v. Com. (Ky.) 25 S. W. 1062.

OUTLAND. Land lying beyond the demesnes and granted out to tenants at the will of the lord, like copyholds. Spelman.

OUTLAW. In English Law. One who is put out of the protection or aid of the law. 22 Viner, Abr. 316; 1 Phill. Ev. Index; Bacon Abr. *Outlawry;* 2 Sell. Pr. 277; Doctr. Plac. 331; 3 Bla. Com. 283, 284.

As used in the Alabama act of December 28, 1868, § 1, declaring counties liable for persons killed by an "outlaw," it is not used in the strict common-law sense of the term, but merely refers in a loose sense to the disorderly persons then roving through the state, committing acts of violence; Dale Co. v. Gunter, 46 Ala. 118, 137. See Drew v. Drew, 37 Me. 389.

If a party, after indictment, could not be found, the first process against him was a *capias*, in cases of treason or felony, or in misdemeanors, a *venire facias*, and then a capias. Following this is an *alias* and then a pluries writ. After this the offender is put in the "*exigent*" and is proclaimed four times in four successive county courts. Upon the fifth, he is adjudged an outlaw. It is said that no man may kill an outlaw wilfully, but only in an effort to arrest him. A judgment of outlawry was a grave matter; it involved, not merely escheat and forfeiture, but a sentence of death. If the outlaw was captured, the justices sent him to the gallows upon proof of the mere fact of outlawry. There were all manner of cases in which a man might be outlawed without being guilty of any crime or any intentional contumacy. The exaction might take place in a county distant from his home. There was therefore great need for royal writs for inlawing an outlaw and many were issued. 2 Poll. & Maitl. 581. Outlawry for a misdemeanor does not amount to a conviction for the offense itself. 4 Steph. Com. 317. The "minor outlawry" for "trespasses" did not involve sentence of death; otherwise of the higher crimes. 2 Poll. & Maitl. 581. See EXIGENT.

It is still possible in England for a person accused of a criminal charge to be made an "outlaw"; Odgers, C. L. 1418; in civil actions it is abolished (1879); 4 Steph. Com. 317.

When used with reference to a claim, as, a debt due on a promissory note, "outlawed" means barred by the statute of limitations; Drew v. Drew, 37 Me. 392.

OUTLAWRY. In English Law. The act of being put out of the protection of the law, by process regularly sued out against a person who is in contempt in refusing to become amenable to the court having jurisdiction. The proceedings themselves are also called the outlawry.

Outlawry may take place in criminal or in civil cases; 3 Bla. Com. 283; Co. Litt. 128.

In the United States, outlawry in civil cases is unknown, and if there are any cases of outlawry in criminal cases they are very rare; Dane, Abr. ch. 193 *a*, 34.

OUTPARTERS. Stealers of cattle. Cowell.

OUTPUTERS. Such as set watches for the robbing any manor house. Cowell.

OUTRAGE. A grave injury; a serious wrong. This is a generic word which is applied to everything which is injurious in a great degree to the honor or rights of another. McKinley v. R. Co., 44 Ia. 314, 24 Am. Rep. 748.

OUTRIDERS. In English Practice. Bailiffs employed by the sheriffs and their deputies to ride to the farthest places of their counties or hundreds, to summon such as they thought good to attend their county or hundred court. Jacob.

OUTROPER. A person to whom the business of selling by auction was confined by statute. 2 H. Bla. 557.

OUTSTANDING. Unpaid; uncollected; remaining undischarged.

OUTSTANDING CROP. One not harvested or gathered. It is outstanding from the day it commences to grow until gathered and taken away. Sullins v. State, 53 Ala. 474.

OUTSTANDING DEBT. Due but not paid; overdue; uncollected, as an outstanding draft, bond, premium, or other demand or indebtedness.

OUTSTANDING TERM. A term in gross at law, which, in equity, may be made attendant upon the inheritance, either by express declaration or by implication.

OUTSUCKEN MULTURES. Quantities of corn paid by persons voluntarily grinding corn at any mill to which they are not thirled or bound by tenure. Jacob.

OUVERTURE DES SUCCESSIONS. In French Law. The right of succession which arises to one upon the death, whether natural or civil, of another. Brown.

OVERCYTED; OVERCHYSED. Proved guilty or convicted. Blount.

OVERDRAFT. See OVERDRAW.

OVERDRAW. To draw bills or checks upon an individual, bank, or other corporation, for a greater amount of funds than the party who draws is entitled to. See State v. Jackson, 21 S. D. 494, 113 N. W. 880, 16 Ann. Cas. 87.

When a person has overdrawn his account without any intention to do so, and afterwards gives a check on a bank, the holder is required to present it, and on refusal of payment to give notice to the maker, in order to hold him bound for it; but when the maker has overdrawn the bank knowingly, having no funds there between the time the check is given and its presentment, the notice is not requisite; Edwards v. Moses, 2 N. & McC. (S. C.) 433, 10 Am. Dec. 615; True v. Thomas, 16 Me. 36. A bank may properly refuse to pay a check which will overdraw the depositor's account, though on the bank books his balance seems to be larger than the amount of the check, because a check of his, paid by the bank two days before, had not yet been charged to such depositor; American Exch. N. Bk. v. Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171. The president of a bank who directs the payment of checks of a customer who has no money in the bank, drawn in payment of property purchased by the customer, has no such interest in the property as will support an action by him for its conversion; Kollock v. Emmert, 43 Mo. App. 566.

An overdraft on a bank is in the nature of a loan; it is considered a fraud on the part of the depositor; Peterson v. Bank, 52 Pa. 206, 91 Am. Dec. 146. See Merchants' Bank v. Bank, 10 Wall. (U. S.) 647, 19 L. Ed. 1008. *Indebitatus assumpsit* will lie against the depositor to recover the overdraft; Bank of U. S. v. Macalester, 9 Pa. 475; Thomas v. Bank, 46 Ill. App. 461.

A cashier who knowingly permits an overdraft is guilty of a breach of trust, and liable to an action to make good the amount, even though the directors had been wont to countenance him in a custom of allowing good depositors to overdraw; Morse, Bank., 3d ed. § 357.

If an overdraft on a national bank is properly made and allowed, or even if improperly allowed, the entry of the transaction on the books of the bank just as it occurred is not a false entry, under R. S. § 5209; Dow v. U. S., 82 Fed. 904, 27 C. C. A. 140. The mere payment of a check which creates an overdraft is not a fraudulent misapplication of the funds; *id.;* and where a national bank officer arranges with a depositor in good faith to give him credit beyond his deposit and makes proper entries of his overdrafts, it is not a false entry under R. S. § 5209; Graves v. U. S., 165 U. S. 323, 17 Sup. Ct. 393, 41 L. Ed. 732. But where the president of a bank, not acting in good faith, permitted overdrafts which he did not believe and had no reasonable ground to believe would be repaid, and it appeared that he intended by the transaction to injure and defraud the bank, the act becomes a crime; Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109.

It is not an overdraft, if the bank owes the depositor more money than is standing to his credit; Hubbard v. Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509, affirmed without opinion 101 Tex. 643.

A bank may refuse to pay a check if it overdraws; Spokane & E. T. Co. v. Huff, 63 Wash. 225, 115 Pac. 80, 33 L. R. A. (N. S.) 1023, Ann. Cas. 1912D, 491. One who has been permitted to overdraw in the past acquires no right to do so; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 574, 10 Sup. Ct. 390, 33 L. Ed. 683. It is not required to pay a check which overdraws; but if it pays out the credit balance on such check it may take up the check as evidence of such payment; Harrington v. Bank, 85 Ill. App. 212. The holder of a check which overdraws has no right to the actual balance unless the bank agrees to pay it; Dana v. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216.

OVERDUE. A bill, note, bond, or other contract for the payment of money at a particular day, when not paid upon the day, is overdue.

The indorsement of a note or bill overdue is equivalent to drawing a new bill payable at sight; Bishop v. Dexter, 2 Conn. 419; Colt v. Barnard, 18 Pick. (Mass.) 260, 29 Am. Dec. 584.

A note when passed or assigned after it is overdue, is subject to all the equities between the original contracting parties; Nevins v. Townsend, 6 Conn. 5; Cumberland Bk. v. Hann, 18 N. J. L. 222; Byles, Bills 190.

The transferor's legal title passes and maturity acts as notice of such equities; see Fisher v. Leland, 4 Cush. (Mass.) 456, 50 Am. Dec. 805. The creation of a better title than that of the transferor is prevented; 4 B. & C. 330; Northampton N. Bk. v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; where five out of nine successively maturing notes were transferred after their maturity, it was held that a counterclaim for breach of warranty by the payee could be set up against them all; Rowe v. Scott, 28 S. D. 145, 132 N. W. 695.

OVERHAUL. To inquire into. The merits of a judgment can never be overhauled by an original suit. 2 H. Bla. 414.

OVER-INSURANCE. See DOUBLE INSURANCE.

OVERISSUE. *Bonds.* Where there is an agreement that a railroad company shall issue only a fixed number of bonds per mile, bonds issued in excess of the limit will be postponed in lien and payment to those within the limit; McMurray v. Moran, 134 U. S. 159, 10 Sup. Ct. 427, 33 L. Ed. 814; and one who buys bonds within the limit upon the faith of this agreement is fully entitled to the benefit of it; *id.;* where bonds are issued, secured by a mortgage which recites the amount of the bonds and that part of them were to be used to take up bonds of a prior issue, the lien of the mortgage will be confined to an amount of bonds which, added to the specified incumbrances, shall not exceed the limit fixed; Claflin v. R. Co., 8 Fed. 118; where the question was raised by subsequent bondholders.

Where an issue of railroad bonds was limited in amount, and the governor of a state indorsed on them a recital that they were issued in pursuance of law, it was held that a *bona fide* purchaser was not bound to look beyond his certificate and that the bonds so certified in excess of the authorized issue were entitled to share *pro rata* with the other bonds; Stanton v. R. Co., 2 Woods 523, Fed. Cas. No. 13,297. Bonds are numbered for mere convenience, and holders of those of a higher number stand on the same footing, in a distribution of a fund, as those of lower numbers; *id.*

Where a mortgage was given to secure a specified issue of bonds and by mistake a larger number were issued and the excess came into the hands of a *bona fide* holder, there being nothing to put him on inquiry, the company was held estopped to set up that they were not secured by the mortgage, and it was held that the excess bonds had a prior lien as against income bonds not secured by a recorded mortgage, but not against a subsequent recorded mortgage; Stephens v. Benton, 1 Duv. (Ky.) 112. Where a statute limited the issue of bonds to the amount of the capital stock actually paid in, it was held that bonds issued in excess of this amount were illegal, and that a second mortgage bondholder could take advantage of their illegality, though the company itself did not seek to repudiate them; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; but see Peatman v. Power Co., 100 Ia. 245, 69 N. W. 541; where bonds issued in excess were held to be valid to the extent of the consideration received for them. Where a railroad company was authorized to issue bonds to a certain amount in relation to the amount of the capital stock, and a mortgage was executed for a larger amount than was authorized, it was held that between *bona fide* holders of the mortgage bonds and the company, the bonds were entitled to the lien of the mortgage, and that subsequent creditors with notice of the bonds occupied no better position than the company; Fidelity Co. v. R. Co., 138 Pa. 494, 21 Atl. 21, 21 Am. St. Rep. 911. A constitutional provision forbidding the fictitious increase of corporate indebtedness will not be enforced where mortgage bonds are sold at par to innocent purchasers, for construction and equipment; *id.*

Stock. Any issue of stock of a corporation in excess of that authorized by statute or charter is void; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; even in the hands of a *bona fide* purchaser; People's Bank v. Kurtz, 99 Pa. 344, 44 Am. Rep. 112; Appeal of Mount Holly Paper Co., 99 Pa. 513. A *bona fide* holder of overissued stock, purporting to be signed by an authorized corporate officer, and actually issued by the corporation, may sue the corporation in tort and recover damages; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30 (the leading case); Appeal of Mt. Holly Paper Co., 99 Pa. 513; Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. (Pa.) 180, 216; the doctrine of estoppel applying; Kisterbock's Appeal, 127 Pa. 601, 18 Atl. 383, 14 Am. St. Rep. 868; and the same rule applies where the overissued stock is held as collateral for notes; Appeal of Mt. Holly Paper Co., 99 Pa. 513; not so, as to a purchaser not in good faith for full value; Ryder v. R. Co., 134 N. Y. 83, 31 N. E. 251; although the signature of one corporate officer had been forged by another; Fifth Ave. Bank v. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712.

If statutory or charter provisions authorize an increase of the capital stock, but the formalities prescribed for making the increase are not complied with, it is termed an irregular issue, and is voidable; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

The authorized corporate officers and the corporation are jointly and severally liable to immediate or subsequent purchasers (buying upon the faith of certificates) of an overissue or irregular issue of stock, who have sustained damage thereby; Bruff v. Mali, 36 N. Y. 200; Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

Equity will enjoin the transfer of spurious stock, the payment of dividends thereon, or the voting thereof by the pretended owners; Kent v. Min. Co., 78 N. Y. 159. Such stock is a cloud upon the title of the genuine stock, which a court of equity will remove at the suit of the corporation or the stockholders; Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654; and the holder thereof who knew it to be overissued, at the time of the subscription, can defeat an action at law on his subscription therefor; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; or an action upon a promissory note given therefor; Merrill v. Reaver, 50 Ia. 404.

Failure by a holder of valid stock for six years to complain of an overissue of stock is laches; Jutte v. Hutchinson, 189 Pa. 218, 42 Atl. 123.

Whatever might be the rule as to a bona fide purchaser of or subscriber for an overissue of shares of stock in a corporation, one who procures the overissue without consideration by false representations will not be heard to assert that a stockholder who voted therefor relying on such representations is estopped to question the validity of the shares; Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

OVERPLUS. What is left beyond a certain amount; the residue; the remainder of a thing. The same as surplus.

The overplus may be certain or uncertain. It is certain, for example, when an estate is worth three thousand dollars, and the owner asserts it to be so in his will, and devises of the proceeds one thousand dollars to A, one thousand dollars to B, and the overplus to C, and in consequence of the deterioration of the estate, or from some other cause, it sells for less than three thousand dollars, each of the legatees, A, B, and C, shall take one-third. The overplus is uncertain where, for example, a testator does not know the value of his estate and gives various legacies, and the *overplus* to another legatee: the latter will be entitled only to what may be left; 18 Ves. 466. See RESIDUE; SURPLUS.

OVERRATE. In its strictest signification, a rating by way of excess and not one which ought not to have been made at all. 2 Ex. 352.

OVERREACHING CLAUSE. In a resettlement, a clause which saves the powers of sale and leasing annexed to the estate for life created by the original settlement, when it is desired to give the tenant for life the same estate and powers under the resettlement.

OVERRULE. To annul; to make void.

This word is frequently used to signify that a case has been decided directly opposite to a former case; when this takes place, the first-decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority.

It also signifies that a majority of the judges of a court having decided against the opinion of the minority, in which case the latter are said to be overruled.

See PRECEDENTS.

OVERSAMESSA. A forfeiture for contempt or neglect in not pursuing a malefactor. 3 Inst. 116.

OVERSEERS OF HIGHWAYS. Officers having supervision of highways in some of the states. See COMMISSIONERS OF HIGHWAYS.

OVERSEERS OF THE POOR. Persons appointed or elected to take care of the poor with moneys furnished to them by the public authority.

The duties of these officers are regulated by local statutes. In general, the overseers are bound to perform those duties, and the neglect of them will subject them to an indictment. See 1 Bla. Com. 360; 16 Viner, Abr. 150; Freeport v. Edgecumbe, 1 Mass. 159; Gould v. Bailley, 2 N. J. L. 6; Shotwell v. Thornall, *id.* 136; Com. Dig. *Justice of the Peace* (B 63).

OVERT. Open.

An overt act in treason is proof of the intention of the traitor, because it opens his designs: without an overt act, treason cannot be committed; 2 Chitty, Cr. Law 40. An overt act is one which manifests the intention of the traitor to commit treason; Archb. Cr. Pl. 379; 4 Bla. Com. 79; Co. 3d Inst. 12; Respublica v. Malin, 1 Dall. (U. S.) 33, 1 L. Ed. 25; U. S. v. Vigol, 2 Dall. (U. S.) 346, 1 L. Ed. 409; Re Bollman, 4 Cra. (U. S.) 75, 2 L. Ed. 554; U. S. v. Pryor, 3 Wash. C. C. 234, Fed. Cas. No. 16,096. In order to sustain a conviction for treason under the U. S. constitution, there must be the testimony of two witnesses to the same overt act or a confession in open court. A conspirator can be tried in any place where his coconspirators perform an overt act; R. S. § 440. The phrase is used in relation to the Fugitive Slave Act in Jones v. Van Zandt, 5 How. (U. S.) 215, 12 L. Ed. 122.

In conspiracy, no overt act is needed to complete the offence; 11 Cl. & F. 155; Landringham v. State, 49 Ind. 186. See U. S. v. Goldberg, 7 Biss. 175, Fed. Cas. No. 15,223.

The mere contemplation or intention to commit a crime, although a sin in the sight of Heaven, is not an act amenable to human

laws. The mere speculative wantonness of a licentious imagination, however dangerous or even sanguinary in its object, can in no case amount to a crime. But the moment that any overt act is manifest, the offender becomes amenable to the laws. See Cro. Car. 577; ATTEMPT; CONSPIRACY; SOLICITATION.

OWELTY. The difference which is paid or secured by one coparcener or cotenant to another for the purpose of equalizing a partition. Littleton § 251; Co. Litt. 169 *a;* Long v Long, 1 Watts (Pa.) 265; 16 Viner, Abr. 223, pl. 3. See Barkley v. Adams, 158 Pa. 396, 27 Atl. 868; Reed v. Deposit Co., 113 Pa. 578, 6 Atl. 163.

A charge on land for owelty of partition follows the land into the hands of a purchaser from the person to whom it was allotted; and the statute of limitation does not run against it, as the possession is not adverse; Dobbin v. Rex, 106 N. C. 444, 11 S. E. 260.

OWING. Something unpaid. A debt, for example, is owing while it is unpaid, and whether it be due or not. See Succession of Guidry, 40 La. Ann. 671, 4 South. 893.

In affidavits to hold to bail it is usual to state that the debt on which the action is founded is due, owing, and unpaid; 1 Pa. L. J. 210.

OWLING. The offence of transporting wool or sheep out of the kingdom. The name is said to owe its origin to the fact that this offence was carried on in the night, when the owl was abroad.

OWNER. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. See Turner v. Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; Johnson v. Crookshanks, 21 Or. 339, 28 Pac. 78.

Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. See Park v. Willis, 2 Cra. C. C. 83, Fed. Cas. No. 10717. The right of the absolute owner is more extended than that of him who has only a qualified ownership: as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stone, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imports an absolute owner; but it has been held in Ohio that the word owner, in the mechanic's lien law of that state, includes the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the statute. Choteau v. Thompson, 2 Ohio St. 123.

The owner continues to have the same right although he perform no acts of ownership or be disabled from performing them, and although another perform such acts without the knowledge or against the will of the owner. But the owner may lose his right in a thing if he permit it to remain in the possession of a third person for a sufficient time to enable the latter to acquire a title to it by prescription or under the statute of limitations. See La. Civ. Code, b. 2, tit. 2, c. 1; *Encyclopédie d'Alembert, Proprietaire.*

When there are several joint owners of a thing,—as, for example, of a ship,—the majority of them have the right to make contracts in respect of such thing in the usual course of business or repair, and the like, and the minority will be bound by such contracts; Holt 586; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201. See PART-OWNER.

OWNERSHIP. The right by which a thing belongs to some one in particular, to the exclusion of all others. La. Civ. Code, art. 480.

The entirety of the powers of use and disposal allowed by law. It implies that there is some power of disposal; but the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal. *Owner* is not strictly a technical term in the common law. Pollock, First Book of Jurispr. 175. Ownership is broader than both or possession; Fleming v. Sherwood, 24 N. D. 144, 139 N. W. 101, 43 L. R. A. (N. S.) 945. See J. B. Ames on The Nature of Ownership, in Lect. Leg. Hist. 192.

OWNER'S RISK. An expression employed by carriers with the object of relieving them from responsibility. The carrier is held not to be liable if he uses ordinary diligence; otherwise, if he displays gross negligence or malfeasance; [1906] T. S. 973 (So. Afr.).

OXGANG (fr. Sax. *gang*, going, and ox; Law Lat. *bovata*). So much land as an ox could till. In the north of England a division of a carucate. According to some, fifteen acres. Co. Litt. 69 *a;* Crompton, Jurisd. 220. According to Balfour, the Scotch *oxengang*, or *oxgate*, contained twelve acres; but this does not correspond with ancient charters. See Bell, Dict. *Ploughgate.* Skene says thirteen acres. Cowell. See 1 Poll. & Maitl. 347.

OYER (Lat. *audire;* through L. French *oyer*, to hear).

A prayer or petition to the court that the party may hear read to him the deed, etc., stated in the pleadings of the opposite party, and which deed is by intendment of law in court when it is pleaded with a profert. The same end is now generally attained by giving a copy of the deed of which oyer is asked, or, in other instances, by setting forth the instrument in full in the plaintiff's statement of his case. Oyer as it existed at common law seems to be abolished in England; 1 B. & P. 646; 3 *id.* 398; 25 E. L. & E. 304. Oyer may be demanded of any specialty or other written instrument, as, bonds of all sorts, deeds-poll, indentures, letters testamentary and of administration, and the like, which the adverse party is obliged to plead with a *profert in curia;* Gould, Pl. 408. But pleading with a profert unnecessarily does not give a right to demand oyer; 1 Salk. 497; and it may not be had except when profert is made; Hempst. 265. Denial of oyer when it should be granted is ground for error; Andr. Steph. Pl. 59; Osborne v. Reed, 1 Blackf. (Ind.) 126. In such cases the party making the claim should move the court to have it entered on record, which is in the nature of a plea, and the plaintiff may counterplead the right of oyer, or strike out the rest of the pleading following the oyer, and demur; 1 Saund. 9 *b*, n. 1; Bac. Abr. *Pleas* 1; upon which the judgment of the court is either that the defendant have oyer, or that he answer without it; *id.;* 2 Lev. 142; 6 Mod. 28. See PROFERT IN CURIA.

After craving oyer, the defendant may set forth the deed or a part thereof, or not, at his election; 1 Chitty, Pl. 372; and may afterwards plead *non est factum*, or any other plea, without stating the oyer; 2 Stra. 1241; 1 Wils. 97; and may demur if a material variance appear between the oyer and declaration; 2 Saund. 366, n.

See, generally, Com. Dig. *Pleader* (P), *Abatement* (I 22); 3 Bouvier, Inst. n. 2890.

OYER AND TERMINER. See ASSIZE; COURT OF OYER AND TERMINER.

OYEZ (Fr. hear ye). The introduction to any proclamation or advertisement by public crier. Used also by court officers in opening court. It is wrongly and usually pronounced oh yes. 4 Bla. Com. 340, n.

OYSTER. The right to take shell fish below high water mark from natural beds in tide waters is common to all citizens of the state, except as restrained by positive law or grants from the state; Brown v. De Groff, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794; Allen v. Allen, 19 R. I. 114, 32 Atl. 166, 30 L. R. A. 497, 61 Am. St. Rep. 738; Cook v. Raymond, 66 Conn. 285, 33 Atl. 1006. "A natural oyster-bed" is one not planted by man; State v. Willis, 104 N. C. 764, 10 S. E. 764. There is a right of property in artificial oyster beds planted in public or navigable waters, in spots designated by stakes or otherwise; State v. Taylor, 27 N. J. L. 117, 72 Am. Dec. 347; McCarty v. Holman, 22 Hun (N. Y.) 53; the owner must clearly mark out and define his beds; Brinckerhoff v. Starkins, 11 Barb. (N. Y.) 248; this right is in the nature of a license from the state, which the state may revoke; Fleet v. Hegeman, 14 Wend. (N. Y.) 42; Hess v. Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

A state has power to regulate the oyster industry although carried on under its tidal waters; Lee v. New Jersey, 207 U. S. 67, 28 Sup. Ct. 22, 52 L. Ed. 106. It may forbid the lease of oyster beds lying under certain tidal waters within the state to any person not a citizen and resident of such state unless he was using such bed at the time of the passage of the act, the right to cultivate and plant oysters not being a privilege or immunity, but a property right; State v. Corson, 67 N. J. L. 178, 50 Atl. 780; but it was held that an act making it a misdemeanor for one not a citizen of the United States and a resident and tax payer of the state to take oysters was invalid as in violation of the Texas bill of rights; Gustafson v. State, 40 Tex. Cr. R. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615.

An act requiring everyone engaged in packing oysters to pay a tax, which applies to oysters taken in and shipped from another state, is within the police power of the state. It is not an interference with interstate commerce; Applegarth v. State, 89 Md. 140, 42 Atl. 941. Deepening the channel, by which oyster beds were injured, is not a taking of the oyster beds within the fifth amendment of the United States constitution; Lewis B. P. O. C. Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083.

The state, subject to the paramount right of navigation, is the owner of the oyster-beds in its waters and can prohibit their taking by any but its own citizens, and prescribe the times, instruments, and conditions of taking them; Dize v. Lloyd, 36 Fed. 652; Boggs v. Com., 76 Va. 989.

One who plants oysters on a natural bed cannot recover against one who removes them with the natural growth; Cook v. Raymond, 66 Conn. 285, 33 Atl. 1006.

One who plants a bed of oysters in a bay or an arm of the sea, designating the bed, does not interfere with the common right of fishing, and may maintain trespass for an invasion of his property; Robins v. Ackerly, 91 N. Y. 98; 7 Q. B. D. 106. Oysters deposited artificially may obstruct navigation and be a nuisance; 7 Q. B. 339.

An act requiring oyster packers to pay a tax is constitutional, though they are shipped from another state; Applegarth v. State, 89 Md. 140, 42 Atl. 941.

An act authorizing the state oyster commission to fix the license tax imposed on

boats entitled to engage in oyster planting in certain tidal waters within the state according to the tonnage measurement of the boats does not violate the constitutional prohibition against levying tonnage duties, the tax being imposed on the business of oyster planting and not on the ship as an instrument of commerce; State v. Corson, 67 N. J. L. 178, 50 Atl. 780; so in Maryland; Dize v. Lloyd, 36 Fed. 651.

Oysters, although shipped unopened, as taken from the water, may come within the prohibition of the Food and Drugs Act, sec. 2, when, by reason of the condition of the waters in which they are grown, they contain harmful bacteria which constitutes adulteration within the act; U. S. v. Sprague, 208 Fed. 419.

A riparian owner has not the right to bed oysters along his entire water front; Hess v. Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

See FISHERY; NAVIGABLE WATERS; INSPECTION LAWS; LICENSE.

P

P. P. See PER PROCURATIONEM; IN PROPRIA PERSONA.

PAAGE. A toll for passage through another's land.

PACARE. To pay. Jacob.

PACE. A measure of length, containing two feet and a half. The geometrical pace is five feet long. The common pace is the length of a step; the geometrical is the length of two steps, or the whole space passed over by the same foot from one step to another.

PACIFIC BLOCKADE. A means of coercion short of war, usually adopted by the joint action of several nations. An instance of it occurred when Great Britain and Germany united to prevent the slave traffic and stop the importation of arms on the east coast of Africa; Snow, Int. Law 79. In 1827 Greece was blockaded by France, Russia, and Great Britain; in 1850 the Greek ports were blockaded by Great Britain, and again in 1855 by the combined fleets of the five Great Powers.

In the blockade of Mexico by France in 1838, neutral vessels as well as Mexican were both seized and condemned. In other cases both classes of ships were seized, but were restored without compensation at the termination of conflict. In the blockades of Greece in 1850 and 1886, only Greek vessels were sequestrated.

In 1887 the Institute of International Law unanimously declared in favor of the legality of pacific blockade, subject to these conditions: "(1) That the neutral flag can enter freely; (2) that there must, of course, be formal notice and a sufficient force; and (3) that ships of the blockaded country may be sequestrated, but should be restored with their cargoes at the end of the blockade, but without compensation." See 21 L. Mag. & Rev. 285; 2 Oppen. §§ 40–49; BLOCKADE.

PACIFICATION (Lat. *pax*, peace, *facere*, to make). The act of making peace between two countries which have been at war; the restoration of public tranquillity.

PACK. To deceive by false appearances; to counterfeit; to delude.

PACKAGE. A bundle put up for transportation or commercial handling. A parcel is a small package; U. S. v. Goldback, 1 Hugh. 529, Fed. Cas. No. 15,222; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; where a bale of cotton was held not a package; *contra*, Lamb v. Transp. Co., 2 Daly (N. Y.) 454. See L. R. 9 Ex. 67.

The word as used in the federal Food and Drugs Act refers to the immediate container of the article which is intended for consumption by the public; McDermott v. State, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754.

Certain duties charged in the port of London on the goods imported and exported by aliens. Now abolished. Whart. Lex. See ORIGINAL PACKAGE.

PACKED PARCELS. The name for a consignment of goods consisting of one large parcel made up of several small ones, collected from different persons by the immediate consignor, who united them into one for his own profit, at the expense of the carrier. Whart.

PACKER. A person employed in England by merchants to receive and (in some instances) to select goods from manufacturers, dyers, calenders, etc., and pack the same for exportation. Arch. Bankr., 11th ed. 37.

In the United States, one engaged in the business of slaughtering and packing cattle, sheep and hogs preparing their products for sale.

Their business is not interstate commerce; U. S. v. Boyer, 85 Fed. 425; merely because the yards are located in two states and it does business in both, though, as to stock shipped from one state to another, it may be interstate commerce and to that extent exempt from state regulation; Cotting v. Stock Yards Co., 79 Fed. 679.

The acts of congress (1 Supp. Rev. Stat. 937, and 2 Supp. Rev. Stat. 403) whereby the Secretary of Agriculture is empowered to have made a careful inspection of cattle, etc., at slaughter houses located in the several states, the products of which are intended for sale in other states or in foreign countries, were held unconstitutional in U. S. v. Boyer, 85 Fed. 425.

They may be subjected to a license tax by a state for doing business therein; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; though the greater portion of the business may be interstate in its character; *id.*; Smith v. Clark, 122 Ga. 528, 50 S. E. 480. Their business is of such a nature as to justify a state in imposing rules for their government; Cotting v. Stock Yards Co., 79 Fed. 679.

PACKING A JURY. Improperly and corruptly selecting a jury to be sworn and impanelled for the trial of a cause. Mix v. Woodward, 12 Conn. 289.

PACTIONS. In International Law. Contracts between nations which are to be performed by a single act, which done, the contract is at an end.

PACTUM. In Civil Law. An agreement made by two or more persons on the same

subject, in order to form some engagement, or to dissolve or modify one already made: *Conventio est duorum in idem placitum consensus de re solvenda, id est facienda vel præstanda.* Dig. 2. 14; *Clef des Lois Rom.;* Ayliffe, Pand. 558; Merlin, *Rép. Pacte.*

PACTUM COMMISSORIUM. An agreement of forfeiture. See LEX COMMISSORIA.

PACTUM CONSTITUTÆ PECUNIÆ (Lat.). **In Civil Law.** An agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay; or it may be defined simply an agreement by which a person promises a creditor to pay him.

When a person by this pact promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it; and by this multiplicity of obligations the right of the creditor is strengthened. Pothier, Obl. pt. 2, c. 6, s. 9.

There is a striking conformity between the *pactum constitutæ pecuniæ*, as above defined, and our *indebitatus assumpsit*. The *pactum constitutæ pecuniæ* was a promise to pay a subsisting debt, whether natural or civil, made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit* was brought upon a promise for the payment of a debt; it is not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished nor varied. 4 Co. 91, 95. See 1 H. Bla. 550, 850, Brooke, Abr. *Action sur le Case* (pl. 7, 69, 72); 4 B. & B. 295; 1 Chitty, Pl. 89.

PACTUM DE NON ALIENANDO. A clause inserted in mortgages in Louisiana which secures to the mortgage creditor the right to foreclose his mortgage by executory process directed solely against the mortgagor, and gives him the right to seize and sell the mortgaged property, regardless of any subsequent alienations. Avegno v. Schmidt, 35 La. Ann. 585; Shields v. Schiff, 124 U. S. 355, 8 Sup. Ct. 510, 31 L. Ed. 445. This rule applies to an alienation by condemnation in proceedings for confiscation, and as against the heirs-at-law of the person whose property is confiscated; Avegno v. Schmidt, 113 U. S. 293, 5 Sup. Ct. 487, 28 L. Ed. 976. If a mortgage debtor in Louisiana, in a suit to foreclose a mortgage containing this clause, waives the benefit of prescription, those who take through him are estopped from pressing it, as effectually as he is estopped; Shields v. Shiff, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. Ed. 445.

PACTUM DE NON PETENDO (Lat.). **In Civil Law.** An agreement made between a creditor and his debtor that the former will not demand from the latter the debt due. By this agreement the debtor is freed from his obligation. This is not unlike the *covenant not to sue*, of the common law. Wolff, *Dr. de la Nat.* § 755; Leake, Contr., 3d ed. 798.

PACTUM DE QUOTA LITIS (Lat.). **In Civil Law.** An agreement by which a creditor of a sum difficult to recover promises a portion—for example, one-third—to the person who will undertake to recover it. In general attorneys should abstain from making such a contract: yet it is not unlawful at common law. See CHAMPERTY.

PAIN FORTE ET DURE. See PEINE FORTE ET DURE.

PAINS AND PENALTIES. See BILL OF PAINS AND PENALTIES.

PAINTING. A likeness, image, or scene depicted with paints. Cent. Dict. The term does not necessarily mean anything upon which painting has been done by a workman, but rather something of value as a painting and something on which skill has been bestowed in producing it; 3 Exch. Div. 121. Whether certain articles fall within the description of paintings as used in a statute is a question of fact for a jury; *id.*

As to copyright in paintings, see COPYRIGHT.

PAIRING-OFF. A system in vogue both in parliament and in legislative bodies in this country, whereby a member agrees with a member on the opposite side that they shall both be absent from voting during a given time, or upon a particular question. It is said to have originated in the house of commons in Cromwell's time. In the House of Commons, it may be arranged by the "whips." See May, Parl. Prac.

PAIS, PAYS. A French word, signifying country. In law, matter *in pais* is matter of fact, in opposition to matter of record; a trial *per pais* is a trial by the country,—that is, by a jury. See IN PAIS.

PALACE CAR. See SLEEPING CAR.

PALACE COURT. See COURT OF THE STEWARD AND MARSHALL.

PALAGIUM. A duty to lords of manors for exporting and importing vessels of wine at any of their ports. Jacob.

PALATINE. See COUNTY PALATINE; COURTS OF COUNTY PALATINE.

PALLIO COOPERIRE. (To cover with a cloak.) See LEGITIMATION; MANTLE CHILDREN.

PALMARIUM. **In Civil Law.** A conditional fee for professional services in addition to the lawful charge. See ADVOCATE.

PALMISTRY. The art or practice of telling fortunes by a feigned interpretation of the lines and marks on the hand. The word is used by good writers in the sense of a trick with the hand. 2 Exch. Div. 268.

PAMPHLET. A small book usually printed in octavo form and stitched.

Pamphlet laws. The name given in some states to the publication of the acts of the legislature. In Pennsylvania and Delaware they are originally published from session to session, unbound, with continuous paging, and indexed and bound after a number of sessions.

PANAMA CANAL. The act of June 28, 1902, authorized (section 1) the purchase of the French Panama Canal Company and (section 2) the acquisition from the Republic of Colombia of the perpetual control of a strip of land not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, with the right to build and maintain a canal thereon, and the right to operate and maintain perpetually the Panama railroad, if its ownership or a control thereof shall have been acquired by the United States, and also jurisdiction over the same and the ports at the end thereof, etc. The President is authorized to acquire additional territory and rights from Colombia, in his discretion. By section 3, the President is authorized to construct the canal Section 7 creates the Isthmian Canal Commission of seven members appointed by the President, with the consent of the Senate, to serve until the completion of the canal, or unless sooner removed by the President. (By act of Aug. 24, 1912, the President is authorized to discontinue the commission and to complete, govern and operate the canal by a governor, who shall serve for four years.)

The act of April 28, 1904, authorized the President to take possession of the "Canal Zone" of the width of four miles on each side of the centre line of the canal, and extending three marine miles from low water mark at each end of the Zone, also a group of islands in the Bay of Panama. Ratifications of the treaty with the Republic of Panama were exchanged February 26, 1904. By act of Aug. 24, 1912, the Zone was made ten miles in width, excluding Panama and Colon and their harbors.

The title of the United States to the Canal Zone is not imperfect because the treaty does not contain technical terms of conveyance, or because the boundaries are not sufficient for identification, the ceded territory having been practically identified by the concurrent action of the two nations; Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Congress has power to create interstate highways, including canals, and also those within territories and outside of state lines; *id.*

PANDECTS. In Civil Law. The name of an abridgment or compilation of the civil law, made by Tribonian and others, by order of the emperor Justinian, and to which he gave the force of law, A. D. 533.

It is also known by the name of the Digest, because in his compilation the writings of the jurists were reduced to order and condensed *quasi digestæ.* The emperor, in 530, published an ordinance entitled *De Conceptione Digestorum,* which was addressed to Tribonian, and by which he was required to select some of the most distinguished lawyers to assist him in composing a collection of the best decisions of the ancient lawyers, and compile them in fifty books, without confusion or contradiction. The instructions of the emperor were to select what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and by the necessary changes, to produce a complete body of law. This work was a companion to the Code of Justinian, and was to be governed in its arrangement of topics by the method of the Code. Justinian allowed the commissioners, who were sixteen in number, ten years to compile it; but the work was completed in three years, and promulgated in 533. A list of the writers from whose works the collection was made, and an account of the method pursued by the commissioners, will be found in Smith's Dict. of Gr. & Rom. Antiq. About a third of the collection is taken from Ulpian; Julius Paulus, a contemporary of Ulpian, stands next: these two contributed one-half of the Digest. Papinian comes next. The Digest, although compiled in Constantinople, was originally written in Latin, and afterwards translated into Greek.

The Digest is divided in two different ways: the first into fifty books, each book in several titles, and each title into several extracts or *leges,* and at the head of each series of extracts is the name of the lawyer from whose work they were taken. The fifty books are allotted in seven parts.

The division into *digestum vetus* (book first to and including title second of book twenty-fourth), *digestum infortiatum* (title third of book twenty-fourth, to and including book thirty-eighth), and *digestum novum* (from book thirty-ninth to the end), has reference to the order in which these three parts appeared. As to the methods of citing them, see CITATION OF AUTHORITIES.

The style of the work is very grave and pure, and contrasts in this respect with that of the Code, which is very far from classical. On the other hand, the learning of the Digest stands rather in the discussing of subtle questions of law, and enumerations of the variety of opinions of ancient lawyers thereupon, than in practical matters of daily use, of which the Code so simply and directly treats. See Ridley, View, pt. 1, ch. 1, 2.

While the Pandects form much the largest fraction of the *Corpus Juris,* their relative value and importance are far more than proportional to their extent They are, in fact, the soul of the *Corpus Juris.* Hadley, Rom. L. 11.

It covered the domain of private law and the dealings of men with each other. "Its design was noble, but its execution was exceedingly imperfect." James C. Carter, The Law, etc., 288.

See CIVIL LAW.

PANEL (diminutive from either *pane,* apart, or *page, pagella.* Cowell). **In Practice.** A schedule or roll, containing the names of jurors summoned by virtue of a writ of *venire facias,* and annexed to the writ. It is returned into court whence the *venire* issued. Co. Litt. 158 *b;* 3 Bla. Com. 353; People v. Coyodo, 40 Cal. 586. See Beasley v. People, 89 Ill. 575. The word may be used to designate either the whole number of jurors summoned or those selected by the clerk by lot according to the connection in which it is used. State v. Gurlagh, 76 Ia. 141, 40 N. W. 141.

PANTOMIME. A dramatic performance in which gestures take the place of words. 3 C. B. 871.

PAPACY. See PAPIST; ROMAN CATHOLIC CHURCH; PAPAL SUPREMACY.

PAPAL SUPREMACY. The supremacy which the Pope claimed not only over the Emperor of the Holy Roman Empire, but over all other Christian princes. The theory was that they stood to the Pope as feudal vassals to a supreme lord; as such, the Pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties culminating in the absolution of the prince's subjects from the bonds of allegiance, and in the disposition of the sovereign himself. The papal supremacy was overthrown in England by acts of the Parliament which met in 1529 and was dissolved in 1536, ending in the Act of Supremacy. See Hannis Taylor, Science of Jurispr.; Boyce, Holy Rom. Emp.; Freeman, Sel. Hist. Essays; 2 Phill. Intern. Law.

PAPER. A manufactured substance composed of fibres (whether vegetable or animal) adhering together in forms consisting of sheets of various sizes and of different thicknesses, used for writing or printing or other purposes to which flexible sheets are applicable. 4 H. & N. 470. Books are not paper within the meaning of the tariff act; Pott v. Arthur, 104 U. S. 735, 26 L. Ed. 909.

In English Practice. The list of cases intended for argument. See PAPER-DAYS.

PAPER BLOCKADE. An ineffective blockade. See BLOCKADE.

PAPER-BOOK. In Practice. A book or paper containing an abstract of all the facts and pleadings necessary to the full understanding of a case.

The issues in actions, etc., upon special pleadings, made up by the clerk of the papers, who is an officer for that purpose. Upon an issue in law, it is termed the demurrer-book. The clerks of the papers of the court of K. B., in all copies of pleas and paper-books by them made up, shall subscribe to such paper-books the names of the counsel who have signed such pleas, as well on behalf of the plaintiff as defendant; and in all paper-books delivered to the judges of the court, the names of the counsel who did sign those pleas are to be subscribed to the books by the clerks or attorneys who deliver the same. Jac. L. Dict.; 2 Hill, Abr. 268.

The courts of error, and other courts, on arguments, require that the judges shall each be furnished with such a paper-book; Tr. & H. Pr. 867. In Pennsylvania the printed copy of the record, the argument, etc., used in the supreme and superior courts is so called.

In the court of king's bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined is an issue in fact, is called the *paper-book*. Steph. Pl. 95; 3 Bla. Com. 317; 3 Chitt. Pr. 521; 2 Stra. 1131, 1266; 2 Wils. 243.

PAPER CREDIT. Credit given on the security of any written obligation purporting to represent property.

PAPER-DAYS. In English Law. Days on which special arguments are to take place. Tuesdays and Fridays in termtime were paper-days appointed by the court. Lee, Dict. of Pr.; Archb. Pr. 101.

PAPER MONEY. The engagements to pay money which are issued by governments and banks, and which pass as money, Pardessus, Droit. Com. n. 9. Bank-notes are generally considered as cash, and will answer all the purposes of currency; but paper money is not a legal tender if objected to. But see LEGAL TENDER.

See NATIONAL BANKS; MONEY; GOLD.

PAPER OFFICE. An ancient office in the palace of Whitehall, wherein state papers are kept. Also an ancient office for the court records in the court of queen's bench, sometimes called the paper-mill, Moz. & W. See Jac. L. Dict.

PAPER TITLE. A title to land evidenced by one or more conveyances, the term generally implying that such title, while it has color or plausibility, is without substantial validity. See COLOR OF TITLE.

PAPERS. The term does not mean newspapers or perhaps even include them within the meaning of a statute, the object of which is to prevent a jury from receiving any evidence, papers, or documents not authorized by the court. State v. Jackson, 9 Mont. 508, 24 Pac. 216. In a will, "all my books and papers" include a promissory note; Perkins v. Mathes, 49 N. H. 107.

The constitution of the United States provides that the rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. See SEARCH WARRANT.

PAPIST. A term formerly applied in Great Britain to Roman Catholics.

By the act of 10 Geo. IV. c. 7, known as the Catholic Emancipation Act, Roman Catholics were restored in general to the full enjoyment of all civil rights, except that of holding ecclesiastical offices and certain high appointments in the state. Before that act their condition had been much ameliorated by various statutes, beginning with 18 Geo. III. c. 60. As to the right of holding property for religious purposes, the 2 & 3 Wm. IV. c. 115, placed them on a level with Protestant dissenters, and the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 49, repealed all enactments oppressive to Roman Catholics. See Whart. Lex.

See PAPAL SUPREMACY; ROMAN CATHOLIC CHURCH.

PAR. Equal. It is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value; *above* par, or

below par, when they sell for more or less; State of Illinois v. Delafield, 8 Paige (N. Y.) 527.

PAR DELICTUM. Equal guilt. See IN PARI DELICTO; PARI DELICTO.

PAR OF EXCHANGE. The par of the currencies of any two countries means the equivalence of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. Delafield v. Illinois, 26 Wend. (N. Y.) 224. The exchange between the two countries is said to be at par when bills are negotiated on this footing. Bowen, Pol. Econ. 321. See 11 East 267.

PAR ONERI. Equal to the burden or charge, or to the detriment or damage.

PAR VALUE. A current phrase having no other meaning than the value of the pound sterling formerly fixed by law for the purposes of revenue. Com. v. Haupt, 10 Allen (Mass.) 44. It is commonly used to indicate the face value of bonds or stock.

PARAGE. Equality of blood, name, or dignity, but more especially of land in the partition of an inheritance between co-heirs. Co. Litt. 166 *b*. See TENURE.

In Feudal Law. Where heirs took of the same stock and by same title, but, from right of primogeniture, or some other cause, the shares were unequal, the younger was said to hold of the elder, *jure et titulo paragii*, by right and title of parage being equal in everything but the quantity, and owing no homage or fealty. Calv. Lex. See 2 Poll. & Maitl. 261, 274, 289.

PARAGIUM (from the Latin adjective *par*, equal; made a substantive by the addition of *agium;* 1 Thomas Co. Litt. 681). Equality.

In Ecclesiastical Law. The portion which a woman gets on her marriage. Ayl. Par. 336.

In Domesday Book there are many instances in which slaves or soldiers held manors or fractions of manors '*pariter*' or '*in paragio.*' This feudal tenancy was fully developed on the continent. Seebohm, Tribal Customs in Anglo-Sax. Law 513.

PARAGRAPH. A distinct part of a discourse or writing relating to a particular point.

An entire or integral statement of a cause of action equivalent to a count at common law. Bailey v. Mosher, 63 Fed. 488, 11 C. C. A. 304.

The term paragraph in an act of congress will be construed to mean section whenever to do so accords with the legislative intent; Alfrey v. Colbert, 168 Fed. 231, 93 C. C. A. 517.

PARALLEL. Extending in the same direction, and in all parts equidistant; having the same direction or tendency. Postal Tel. C. Co. v. R. Co., 88 Va. 920, 14 S. E. 803. See Cronin v. R. Co., 144 Mass. 254, 10 N. E. 833.

In the specification of a patent the word was construed in its popular sense of going side by side and not in its purely mathematical sense; 2 App. Cas. 423; and so in Pratt v. Woodward, 32 Cal. 231, 91 Am. Dec. 573; Williams v. Jackson, 5 Johns. (N. Y.) 489; where it was held that parallel lines were not necessarily straight lines.

As to parallel and competing railroads, see MERGER; RAILROADS; RESTRAINT OF TRADE.

PARAMOUNT (*par*, by, *mounter*, to ascend). Above; upwards. Kelh. Norm. Dict. *Paramount especifié*, above specified. Plowd. 209 *a*.

That which is superior: usually applied to the highest lord of the fee of lands, tenements, or hereditaments. Fitzh. N. B. 135. Where A lets land to B, and he underlets them to C, in this case A is the paramount and B is the mesne landlord. See 2 Bla. Com. 90; 1 Thomas, Co. Litt. 484, n. 79, 485, n. 81; MESNE.

PARANOIA. A form of insanity which comes under the class of degenerative diseases. The main fundamental characteristic of this disease is a delusion which has become a part of the belief of the individual, and which he believes himself able to explain and defend. 3 Witth. & Beck. Med. Jur. 288.

It is sometimes characterized as logical perversion, and is said to have "misplaced the antiquated term monomania, which not only implied that the delusion was restricted to one subject, but was otherwise insufficient and misleading;" 2 Clevenger, Med. Jur. 860. The memory, emotions, judgment, and conceptions are in most cases unimpaired, though each of these mental divisions may be involved; *id.* It is characterized by systematized delusions, the term taking the place of "monomania" or "partial insanity"; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

The intellect is rarely much involved. In all other relations the individual may be able to carry on his business in life. There is little doubt but that they are thoroughly responsible for their own actions. But if the act be the result of their delusion it is not so much a question of their ability to control their actions, as that they do not attempt to do so. 3 Witth. & Beck. 289.

A belief in witches is not such an insane delusion as to excuse one from the consequences of his act in killing one he believed to be a witch responsible for deaths among his people and his tribe; Hotema v. U. S., 186 U. S. 413, 22 Sup. Ct. 895, 46 L. Ed. 1225.

Where a charge presents the general rule applicable to the defence of insanity, it is not necessary to use the term "paranoia," or "delusional insanity"; Minder v. Georgia, 183 U. S. 559, 22 Sup. Ct. 224, 46 L. Ed. 328.

PARAPHERNA (Lat.). **In Civil Law.** Goods brought by wife to husband over and above her dower (*dos*). Voc. Jur. Utr.; Fleta, lib. 5, c. 23, § 6; Mack. C. L. § 529.

In mediæval times the "*res paraphcrna*" were all the goods other than the "*dos*." These the husband did not own and of them the wife could make her will. 3 Holdsw. Hist. E. L. 426.

PARAPHERNALIA. Apparel and ornaments of a wife, suitable to her rank and degree. 2 Bla. Com. 435.

Those goods which a wife could bequeath by her testament. 2 Poll. & Maitl. 427.

It is property brought to the marriage by one of the spouses. There can be no such thing as paraphernal property prior to marriage; Le Boeuf v. Melancon, 131 La. 148, 59 South. 102.

These are subject to the control of the husband during his lifetime; 3 Atk. 394; but go to the wife upon his death, in preference to all other representatives; Cro. Car. 343; and cannot be devised away by the husband; Noy, Max. They are liable to be sold to pay debts on a failure of assets; 1 P. Wms. 730. See, also, 2 Atk. 642; 11 Vin. Abr. 176.

While a married woman may acquire title to articles of apparel by gift from her husband, yet her mere use and enjoyment of such articles purchased by her husband does not give title thereto as her separate property; State v. Pitts, 12 S. C. 180, 32 Am. Rep. 508. See, also, Pratt v. State, 35 Ohio St. 514, 35 Am. Rep. 617. The wearing apparel purchased by a married woman after her marriage, with her husband's money, or upon his credit, belongs to him as against her creditors; Smith v. Abair, 87 Mich. 62, 49 N. W. 509. In New York, by statute, a married woman may sue in her own name for injury to her paraphernalia; Rawson v. R. Co., 48 N. Y. 212, 8 Am. Rep. 543; but in the absence of proof of a gift to her, the husband can sue; Curtis v. R. Co., 74 N. Y. 116, 30 Am. Rep. 271.

In some states, the paraphernalia of a wife is protected by statute (in Georgia by name, and in Rhode Island and Colorado by description). The articles covered by one or more of the statutes are: wearing apparel of the wife and such ornaments, jewelry, silver, table ware, plate, and such articles of property as have been given to her for her own use and comfort. In Louisiana the property not declared to be brought in marriage by the wife, or given to her in consideration of the marriage, is paraphernalia, and she has a right to administer it without the assistance of her husband; but as to any which is administered by her husband without her opposition, he is accountable for it. See MARRIED WOMAN. These rules are largely changed by the married women's acts.

PARAPHERNAUX BIENS. **In French Law.** All the property of the wife which is not subject to the *régime dotal*.

PARATITLA (Lat.). **In Civil Law.** An abbreviated explanation of some titles or books of the Code or Digest.

PARATUM HABEO (Lat. I have ready). A return made by the sheriff to a *capias ad respondendum*, which signified that he had the defendant ready to bring into court. This was a fiction, where the defendant was at large. Afterwards he was required, by statute, to take bail from the defendant, and he returned *ccpi corpus* and bail-bond. But still he might be ruled to bring in the body; White v. Fitler, 7 Pa. 535.

PARAVAIL. Tenant paravail is the lowest tenant of the fee, or he who is the immediate tenant to one who holds of another. He is called tenant paravail because it is presumed he has the avails or profits of the land. Fitzh. N. B. 135; Co. 2d Inst. 296.

PARCEL. A part of an estate. Martin v. Cole, 38 Ia. 141; 1 Comyns, Dig. *Abatement* (H 51), *Grant* (E 10). Under a statute providing for an assessment of unplatted lands, synonymous with lot. Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468. To parcel is to divide an estate. Bac. Abr. *Conditions* (O).

The word "parcel" is not a sufficient description of the property alleged in an indictment to have been stolen. The prisoner was indicted for stealing "one parcel, of the value of one shilling, of the goods," etc. The parcel in question was taken from the hold of a vessel, out of a box broken open by the prisoner. Held an insufficient description; 7 Cox, C. C. 13. See PACKAGE.

PARCEL MAKERS. Two officers in the exchequer who formerly made the parcels of the escheator's accounts, wherein they charged them for everything they had levied for the sovereign's use within the time of their being in office, and delivered the same to the auditors to make up their accounts therewith. Whart. Law Lex.

PARCEL POST. It was provided for by act of August 24, 1912 (in effect January 1, 1913). It includes in fourth-class mail matter farm and factory products and all other mail matter not included in the first, second and third classes, not exceeding 11 pounds in weight nor 72 inches in length and girth combined. The rates of postage are fixed by eight zones of radial distances: 50 miles; 150; 300; 600; 1000; 1400; 1800; all beyond.

The postmaster general may, subject to the consent of the interstate commerce commission, reform the classification, weight limits, rates, zones or conditions, in order to promote the service or to insure revenue adequate to pay the cost of the service.

He may make regulations indemnifying shippers for shipments injured or lost, and

for the collection on delivery of the postage and price of the article.

PARCELS, BILL OF. See BILL OF PARCELS.

PARCENARY. The state or condition of holding title to lands jointly by parceners, before the common inheritance has been divided.

PARCENERS. The daughters of a man or woman seised of lands and tenements in fee-simple or fee-tail, on whom, after the death of such ancestor, such lands and tenements descend, and they enter. See ESTATE IN COPARCENARY.

PARCHMENT. Sheepskins dressed for writing, so called from *Pergamus*, Asia Minor, where they were invented. Used for deeds, and for writs of summons in England previous to the Judicature Act, 1875. Whart. Lex.

PARCO FRACTO (Lat.). **In English Law.** The name of a writ against one who violently breaks a pound and takes from thence beasts which, for some trespass done, or some other just cause, were lawfully impounded.

PARDON. An act of grace, usually proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime he has committed. U. S. v. Wilson, 7 Pet. (U. S.) 160, 8 L. Ed. 640; People v. Court of Sessions, 19 N. Y. Supp. 508.

It is a remission of guilt and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime; Territory v. Richardson, 9 Okl. 579, 60 Pac. 244, 49 L. R. A. 440.

Every pardon granted to the guilty is in derogation of the law; if the pardon be just, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But, as human actions are necessarily imperfect, the pardoning power must be vested somewhere, in order to prevent injustice when it is ascertained that an error has been committed.

An *absolute* pardon is one which frees the criminal without any condition whatever.

A *conditional* pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. Ex parte Hunt, 10 Ark. 284; State v. Fuller, 1 McCord (S. C.) 178.

A *general* pardon is one which extends to all offenders of the same kind. It may be express, as when a general declaration is made that all offenders of a certain class shall be pardoned, or implied, as in case of the repeal of a penal statute. Roberts v. State, 2 Over. (Tenn.) 423. See AMNESTY.

The pardoning power is lodged in the executive of the United States and of the various states, and extends to all offences except in cases of impeachment. In some states a concurrence of one of the legislative bodies is required; in other states, boards of pardon have been provided, whose recommendation of a pardon to the executive is a prerequisite to the exercise of the power. The constitutional power of pardon vested in the executive is not subject to legislative control, either to limit the effect of a pardon, or to exclude from its operation any class of offenders; Re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; State v. Todd, 26 Mo. 175; Diehl v. Rodgers, 169 Pa. 316, 32 Atl. 424, 47 Am. St. Rep. 908. In Pennsylvania, the act of March 31, 1860, provides that when any person convicted of a felony, etc., has endured his punishment, it shall have the same effect as a pardon, and he becomes a competent witness; this is a legislative pardon and has the same effect as an executive pardon; U. S. v. Hall, 53 Fed. 352. The pardoning power is by no means confined to the executive; it was possessed by parliament (4 Bla. Com. 401; U. S. v. Wilson, 7 Pet. [U. S.] 162, 8 L. Ed. 640); and from the very nature of government, in Pennsylvania it is vested in the legislative branch by the inherent supreme law-making power, and in the executive by constitutional provision; U. S. v. Hall, 53 Fed. 352.

The power of pardon conferred by the constitution upon the president is unlimited, except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. A pardon reaches the punishment prescribed for an offence, and the guilt of the offender. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching: if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It gives him a new credit and capacity. It blots out his guilt and makes him, in the eye of the law, as innocent as if he had never committed the offence. There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment; Re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366. See Cowan v. Prowse, 93 Ky. 156, 19 S. W. 407; Cook v. Board of Chosen Freeholders, 26 N. J. L. 326; Territory v. Richardson, 9 Okl. 579, 60 Pac. 244, 49 L. R. A. 440. It may be granted after conviction and before sentence while exceptions are pending; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699, where there is an extended discussion of the pardoning power by Gray, J., or before being charged with the crime; U. S. v. Burdick, 211 Fed. 492.

The granting of a full and unconditional pardon by the president to a person convicted of a felony restores his competency as a

witness, and this result is not affected by a recital in a pardon that it was granted for the reason, among others, that his testimony was desired by the government in a cause then pending in a federal court; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; and a pardon granted after the person has served his term of imprisonment has the same effect; Missouri, K. & T. R. Co. v. Howell (Tex.) 30 S. W. 98.

There are several ways (as given by Judge Cooley) in which the pardoning power of the president may be exercised: 1. A pardon may be given to a person under conviction by name, and this will take effect from its delivery, unless otherwise provided therein. 2. It may be given to one or more persons named, or to a class of persons, before conviction, and even before prosecution begun. Such a pardon is rather in the nature of an amnesty. 3. It may be given by proclamation, forgiving all persons who may have been guilty of the specified offence, or offences; Re Garland, 4 Wall. (U. S.) 380, 18 L. Ed. 366; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; and in this case the pardon takes effect from the time the proclamation is signed; Lapeyre v. U. S., 17 Wall. (U. S.) 191, 21 L. Ed. 606. See *infra*. 4. It may in any of these ways be made a pardon on conditions to be first performed, in which case it has effect only on performance; or on conditions to be thereafter performed, in which case a breach of the condition will place the offender in the position occupied by him before the pardon was issued; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; People v. James, 2 Caines (N. Y.) 57; Ex parte Marks, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684.

In Michigan it has been held that a pardoned convict charged with having violated the conditions of his release must be arrested and tried in the same manner as other offenders against the law; People v. Moore, 62 Mich. 496, 29 N. W. 80; but in South Carolina a convict who has broken the conditions of his pardon may be remanded to the penitentiary to serve out the remainder of his sentence, though the time in which he was to serve has expired; State v. Barnes, 32 S. C. 14, 10 S. E. 611, 6 L. R. A. 743, 17 Am. St. Rep. 832. A power to grant pardons on condition that the person pardoned shall leave the state and not return to it, is not in conflict with a constitutional provision which provides that no one shall be exiled from the state; Ex parte Hawkins, 61 Ark. 321, 33 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209.

Conditions attached to a parole or pardon by the board of pardons that are to extend beyond, or be performed after the expiration of, the term of the sentence are illegal; In re Prout, 12 Idaho, 494, 86 Pac. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 199. An unconditional pardon is irrevocable; Ex parte Rice (Tex.) 162 S. W. 891.

It is to be exercised in the discretion of the power with whom it is lodged.

As to promises of pardon to accomplices, see 1 Chitty, Cr. L. 83; 1 Leach 115.

In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven; 4 Bla. Com. 400; State v. McIntire, 46 N. C. 1, 59 Am. Dec. 566.

The effect of a pardon is to protect the criminal from punishment for the offence pardoned; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882; Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388; but for no other; State v. McCarty, 1 Bay (S. C.) 334. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon of the murder; Com. v. Roby, 12 Pick. (Mass.) 496. See Plowd. 401; People v. McLeod, 1 Hill (N. Y.) 426, 37 Am. Dec. 328. In general, the effect of a full pardon is to restore the convict to all his rights; Diehl v. Rodgers, 169 Pa. 319, 32 Atl. 424, 47 Am. St. Rep. 908; even though granted after he has served out his sentence, it restores his competency to testify; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; but to this there are some exceptions. *First*, it does not restore civil capacity; Com. v. Fugate, 2 Leigh (Va.) 724. See Jones v. Harris, 1 Strobh. (S. C.) 160; State v. Blaisdell, 33 N. H. 388. *Second*, it does not affect a *status* of other persons which has been altered or a right which has accrued in consequence of the commission of the crime or its punishment; In re Deming, 10 Johns. (N. Y.) 232; State v. Rowe, 2 Bay (S. C.) 565; Holliday v. People, 5 Gilm. (Ill.) 214; or third persons who, by the prosecution of judicial proceedings, may have acquired rights to a share in penalties or to property forfeited and actually sold; Kirk v. Lewis, 9 Fed. 645; but see U. S. v. Thomasson, 4 Biss. 336, Fed. Cas. No. 16,479; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882 (as to forfeiture to United States).

In England a pardon removes not only the punishment but the legal disabilities consequent on the crime, wherever the latter are the consequence of the judgment, but where it is declared by act of parliament to be a part of the punishment, as in case of perjury under the 5 Eliz. c. 9, pardon will not make the person competent; 2 Russ. Cr. 975, followed in Houghtaling v. Kelderhouse, 1 Park. Cr. Rep. (N. Y.) 241; Foreman v. Baldwin, 24 Ill. 298. But this distinction does not obtain here; Diehl v. Rodgers, 169 Pa. 316, 32 Atl. 424, 47 Am. St. Rep. 908; Re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366. It has been held in Ohio that a prisoner could not be tried on the charge of being a habitual criminal after having been pardoned by the governor for the previous offence; 56 Alb. L. J. 5.

When the pardon is general, either by an

act of amnesty, or by the repeal of a penal law, it is not necessary to plead it; because the court is bound to take notice of it; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. A criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him when it judicially appears there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted; and for this reason it must be specially pleaded; 4 Bla. Com. 401; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; and if he has obtained a pardon before arraignment, and, instead of pleading it in bar, he pleads the general issue, he shall be deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment; 1 Rolle 297. See 1 Dy. 34 *a*; T. Raym. 13; Evans v. Com., 3 Metc. (Mass.) 453.

The power to pardon extends to punishments for contempt: In re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911.

All contracts made for the buying or procuring a pardon for a convict are void.

The governor under his power to grant reprieves and pardons may grant a conditional pardon in the nature of a parole of the convict; Fuller v. State, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1. The board of pardons is a branch of the executive department of the state government and its powers and prerogatives as such are those of granting clemency to convicted prisoners, but it has no power to increase or extend penalties or punishments pronounced by sentence of the court; In re Prout, 12 Idaho, 494, 86 Pac. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 199.

One convicted of fraud in obtaining patents to public lands was pardoned on condition that he would make restitution of the lands. He filed a relinquishment thereof. Held that no right was wrested from him; Bradford v. U. S., 228 U. S. 446, 33 Sup. Ct. 576, 57 L. Ed. 912.

A mayor of a city may be vested with power to pardon one convicted of the violation of an ordinance. See In re Monroe, 46 Fed. 52.

See AMNESTY; EXECUTIVE POWER.

PARDONERS. Persons who carried about the pope's indulgences and sold them. Whart. Law Lex.

PARENS PATRIÆ (Lat.). Father of his country. In England, the king: 3 Bla. Com. 427; 2 Steph. Com. 528; in the United States the state, as sovereign, has power of guardianship over persons under disabilities. See Fontain v. Ravenel, 17 How. (U. S.) 393, 15 L. Ed. 80.

The state and not the general government is *parens patriæ;* American L. & T. Co. v. Grand Rivers Co., 159 Fed. 775; and is such for all her citizens for the protection of their aggregate rights; Louisiana v. Texas, 176 U. S. 1, 19, 20 Sup. Ct. 251, 44 L. Ed. 347.

See ESCHEAT.

PARENT AND CHILD. *Liability of either for support of the other.* In England, by 43 Eliz. c. 2, the father and mother, grandfather and grandmother of poor, old, blind, and impotent persons are obliged to furnish them with necessaries, if of sufficient ability. But not after majority; 1 Ld. Raym. 699.

Statutes of the same tenor have been enacted in some states. The English statute may be considered as a part of the common law in the United States; Schoul. Dom. Rel. *320; and see Wertz v. Blair Co., 66 Pa. 19.

In some states the failure to support, or the abandonment of, a minor child is a penal offence. Except under this statute, there appears to be no civil obligation on a parent to support his minor child; 11 C. B. 452; L. R. 3 Q. B. 559; or to pay his debts; 6 M. & W. 482. To the same effect; White v. Mann, 110 Ind. 74, 10 N. E. 629; Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399; Chilcott v. Trimble, 13 Barb. (N. Y.) 502; but the contrary view is held in many cases; Porter v. Powell, 79 Ia. 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 353. See Tiffany, Pers. & Dom. Rel. 233; 2 Kent 190. Where a parent, though able, neglects to provide the necessaries of life and necessary medical attendance for a minor child, and thereby causes its death, he is guilty of manslaughter, and, if wilfully done, of murder; Tiff. Pers. & Dom. Rel. 232; Clark, Cr. L. 177.

It is generally the duty of a mother to support her child when she is left a widow, until he becomes of age or is able to maintain himself; Cummings v. Cummings, 8 Watts (Pa.) 366; Dedham v. Natick, 16 Mass. 135; Riley v. Jameson, 3 N. H. 29, 14 Am. Dec. 325; Alling v. Alling, 52 N. J. Eq. 92, 27 Atl. 655; Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Girls' Industrial Home v. Fritchey, 10 Mo. App. 344; *contra*, Englehardt v. Yung's Heirs, 76 Ala. 531; Mowbry v. Mowbry, 64 Ill. 383; and even after he becomes of age, if he be chargeable to the public, she may, perhaps in all the states, be compelled, when she has sufficient means, to support him. But when the child has property sufficient for his support, she is not, even during his minority, obliged to maintain him; 1 Bro. Ch. 387; Whipple v. Dow, 2 Mass. 415; but will be entitled to an allowance out of the income of his estate, and, if need be, out of the principal, for his maintenance; Osborne v. Van Horn, 2 Fla. 360; 5 Ves. 194. During the life of the father she is not bound to support her child, though she have property settled to her separate use and the father be destitute; 4 Cl. & F. 323; 11 Bligh, N. S. 62.

A child is not bound at common law to

maintain his parents; Becker v. Gibson, 70 Ind. 239; Lebanon v. Griffin, 45 N. H. 558; Stone v. Stone, 32 Conn. 142; Herendeen v. De Witt, 49 Hun 53, 1 N. Y. Supp. 467; Dawson v. Dawson, 12 Ia. 512; though they are infirm and indigent; Edwards v. Davis, 16 Johns. (N. Y.) 281; any such liability must arise under statute; but under such statute an aged parent supported by one child with no threat of withdrawal cannot maintain an action against another child for support; Duffy v. Yordi, 149 Cal. 140, 84 Pac. 838, 4 L. R. A. (N. S.) 1159, 117 Am. St. Rep. 125, 9 Ann. Cas. 1017.

But in many states a liability to support indigent parents is imposed by statute, where they have the ability to do so; 2 Kent 208; Pothier, *Du Mariage*, 384, 389; Ex parte Hunt, 5 Cow. (N. Y.) 284; Howe v. Hyde, 88 Mich. 91, 50 N. W. 102; and in such case a third person may recover from the child for necessaries furnished to such parent; Howe v. Hyde, 88 Mich. 91, 50 N. W. 102; McCook Co. v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854.

The parent is not liable for necessaries furnished to a child unless he has refused to furnish them; Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098; or has omitted his duty; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; or has authorized it; Brown v. Deloach, 28 Ga. 486; or there is a proper exigency; Keaton v. Davis, 18 Ga. 457. A parent is not criminally liable for his child's acts; Tiffany, Pers. & Dom. Rel. 241.

The child may justify an assault in defence of his parent; 3 Bla. Com. 3.

If the father be without means to maintain and educate his children according to their future expectations in life, courts of equity will make an allowance for these purposes out of the income of their estates, and, in an urgent case, will even break into the principal, Watts v. Steele, 19 Ala. N. S. 656; 1 P. Wms. 493; In re Bostwick, 4 Johns. Ch. (N. Y.) 100; Pearce v. Olney, 5 R. I. 269. The father is not bound, without some agreement, to pay another for maintaining his children; 9 C. & P. 497; nor is he bound by their contracts, even for necessaries, unless an actual authority be proved, or a clear omission of his duty to furnish such necessaries; 20 Eng. L. & Eq. 281; Lefils v. Sugg, 15 Ark. 137; Eitel v. Walter, 2 Bradf. Surr. (N. Y.) 287; Keaton v. Davis, 18 Ga. 457; Ewell, Lead. Cas. 61, n.; Miller v. Davis, 45 Ill. App. 447; Manning v. Wells, 8 Misc. 646, 29 N. Y. Supp. 1044; or unless he suffers them to remain away with their mother, or forces them from home by hard usage; Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255; but, especially in America, very slight evidence may sometimes warrant the confidence that a contract for the infant's necessaries is sanctioned by the father; Tiffany, Per. & Dom. Rel. 233; thus he is held bound where he knows the circumstances and does not object; Swain v. Tyler, 26 Vt. 9; Thayer v. White, 12 Metc. (Mass.) 343; Fowlkes v. Baker, 29 Tex. 135, 94 Am. Dec. 270. Where the court takes away from the father the care and custody of the children, chancery directs maintenance out of their own fortunes, whatever may be their father's circumstances; 2 Russ. 1; Macphers. Inf. 224. And if their custody be given to the mother by a decree of divorce it has been held that the duty of supporting them devolves on her; Brow v. Brightman, 136 Mass. 187; but the father still remains liable; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542. His obligation for support of minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct which gives the custody of the children to her but which is silent as to their support, Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901; Keller v. St. Louis, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; Maddox v. Patterson, 80 Ga. 719, 6 S. E. 581; Dolloff v. Dolloff, 67 N. H. 512, 38 Atl. 19; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 10 L. R. A. 579, 67 Am. St. Rep. 820; Gibson v. Gibson, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; L. R. 3 Q. B. 559; *contra*, Dawson v. Dawson, 110 Ill. 279; Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Hall v. Green, 87 Me. 122, 32 Atl. 796, 17 Am. St. Rep. 311; McNees v. McNees, 97 Ky. 152, 30 S. W. 207; Brow v. Brightman, 136 Mass. 187; Rich v. Rich, 88 Hun 566, 34 N. Y. Supp. 854; Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680. In a note to the Minnesota case first cited, where the cases are collected, it is said that they are "pretty evenly balanced, though more recent authorities seem to sustain the obligation of the father"; 2 L. R. A. (N. S.) 851, note.

Where the wife was separated from her husband by reason of his fault and had legal custody of the child, the husband was held liable for its support as a part of her reasonable expenses, for which she could pledge his credit; L. R. 3 Q. B. 559.

The obligation of the father to maintain the child extends only to providing necessary support, and ceases as soon as the child is able to provide for itself, or it becomes of age, however wealthy the father may be; 2 Kent 190; unless the child becomes chargeable to the public as a pauper; 1 Ld. Raym. 699; or be physically or mentally incapable of self-support; Mt. Pleasant Overseers v. Wilcox, 12 Pa. C. C. R. 447. The obligation also ceases during the minority of the child, if the child voluntarily abandons the home of his father, either for the purpose of seeking his fortune in the world or to avoid pa-

rental discipline and restraint; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Hunt v. Thompson, 3 Scam. (Ill.) 179, 36 Am. Dec. 538. There is no legal obligation to educate the child, although some *dicta* and statements by textwriters are to the contrary; 1 Bla. Com. 150; 2 Kent 189; it is said that the duty is only a moral one, and that there is no case which enforces such an obligation; Tiff. Dom. Rel. 238; Huke v. Huke, 44 Mo. App. 308. See Schoul. Dom. Rel. 315. Where the child's fortune warrants a greater expenditure than the father's means will permit, or where the father is unable to support the child, an allowance to the father may be made by a court of equity out of the child's property for his maintenance and education; Coop. *t.* Eld. 52; In re Burke, 4 Sandf. Ch. (N. Y.) 617; Ela v. Brand, 63 N. H. 14; 2 Kent, Com. 191.

During the lifetime of the father, he is guardian by nature or nurture of his children. As such, however, he has charge only of the person of the ward, and no right to the control or possession either of his real or personal estate; Miles v. Boyden, 3 Pick. (Mass.) 213.

When the father dies without leaving a testamentary guardian at common law, the mother is entitled to be the guardian of the person and estate of the infant until he arrives at fourteen years, when he is able to appoint a guardian; Littleton § 123; 2 Atk. 14; Com. Dig. *Feme;* 7 Ves. 318. See Burk v. Phips, 1 Root (Conn.) 487; People v. Wilcox, 22 Barb. (N. Y.) 178; State v. Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676. The rights of the widowed mother to the earnings and services of her minor child does not appear to have been precisely determined; but it is by no means so absolute as that of the father; Pray v. Gorham, 31 Me. 240; Jenness v. Emerson, 15 N. H. 486; Com. v. Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; People v. Mercein, 3 Hill (N. Y.) 400, 38 Am. Dec. 644; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101.

In Pennsylvania, when the father dies without leaving a testamentary guardian, the orphans' court will appoint a guardian until the infant shall attain his fourteenth year.

Custody. The father, in general, is entitled to the custody of minor children; Taylor v. R. Co., 41 W. Va. 704, 24 S. E. 631; People v. Sinclair, 47 Misc. 230, 95 N. Y. Supp. 861; Donk Bros. C. & C. Co. v. Leavitt, 109 Ill. App. 385; it belongs to him as against the mother and particularly as against third persons; Johnson v. Terry, 34 Conn. 259; but under certain circumstances the mother will be awarded custody when the father and mother have separated; Com. v. Addicks, 5 Binn. (Pa.) 520; see Luck v. Luck, 92 Cal. 653, 28 Pac. 787. The father is the natural guardian of his child; Donk Bros. C. & C. Co. v. Leavitt, 109 Ill. App. 385; and as such, where there is no sufficient cause for depriving him of it, has the legal right to its custody; Hernandez v. Thomas, 50 Fla. 522, 39 South. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137, 7 Ann. Cas. 446; and where the husband and wife have separated, the father's right will be recognized; People v. Sinclair, 47 Misc. 230, 95 N. Y. Supp. 861.

In special cases, as when they are of tender years, or when the habits of the father render him an unsuitable guardian, the mother is allowed to have possession of them; Com. v. Addicks, 2 S. & R. (Pa.) 174; In re Waldron, 13 Johns. (N. Y.) 418.

A child will not be taken from the custody of its father and given to its mother when it does not appear that his welfare required the change; Day v. Day, 4 Misc. 235, 24 N. Y. Supp. 873.

The mother of a bastard child, as natural guardian, has a right to the custody and control of such child, even as against the putative father, and is bound to maintain it; Somerset v. Dighton, 12 Mass. 387; Petersham v. Dana, *id.* 433; Com. v. Fee, 6 S. & R. (Pa.) 255; but after her death the court will, in its discretion, deliver such child to the father in opposition to the claims of the maternal grandfather; Com. v. Anderson, 1 Ashm. (Pa.) 55; Stra. 1162.

The father may lose the right by unfitness or voluntary transfer; Bently v. Terry, 59 Ga. 555, 27 Am. Rep. 399; or if the child is of tender age and the parents are separated; Gray v. Field, 10 Ohio Dec. 170. His right is not an absolute one and the court will deal with the custody of the children solely upon considerations relating to their own welfare; U. S. v. Green, 3 Mas. 482, Fed. Cas. No. 15,256; the right of custody of the parents is subject to the paramount right of the state to interpose whenever required for the interest of the child; Wadleigh v. Newhall, 136 Fed. 941; State v. Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676; Merritt v. Swimley, 82 Va. 433, 3 Am. St. Rep. 115.

The unfitness which deprives a parent of the right of custody of the child must be positive and not comparative, and the mere fact that the child would be better cared for is not sufficient, but the degree of unfitness is a question for the court; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171.

The custody was given to paternal grandparents in comfortable circumstances and taken from the mother who had been deserted and was earning a scant living; Brown v. Brown, 2 Ala. App. 461, 56 South. 589. The English rule favoring the father has given place to the consideration of what is best for the child; Turner v. Turner, 93 Miss. 167, 46 South. 413. Between a parent and an outsider, the just claims of the parent and the child's duty to the parent must be

considered, if the parent can give proper care and is not unsuitable; Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375; Stapleton v. Poynter, 111 Ky. 264, 62 S. W. 730, 53 L. R. A. 784, 98 Am. St. Rep. 411; *contra*, Wood v. Wood, 77 N. J. Eq. 593, 77 Atl. 91; a remarriage does not deprive a mother of her right; Moon v. Children's Home Soc., 112 Va. 737, 72 S. E. 707, 38 L. R. A. (N. S.) 418.

Considerations as to the age and condition of the child weigh with the court. The well-being of the child, rather than the supposed right of either parent, controls; McKim v. McKim, 12 R. I. 462, 34 Am. Rep. 694; State v. Baird, 21 N. J. Eq. 384; Irwin v. Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417. The mother of an illegitimate child has a right to its custody; 10 Q. B. D. 454.

Agreements of a parent to transfer to another the custody of the child are in general against public policy and not binding; Hernandez v. Thomas, 50 Fla. 522, 39 South. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137, 7 Ann. Cas. 416; *contra*, Proctor v. Rhoads, 4 Ky. L. Rep. 453; but such transfers have been held valid to an aunt; Bently v. Terry, 59 Ga. 555; 27 Am. Rep. 399; to a grandfather (when the parents were living apart); Clark v. Bayer, 32 Ohio St. 299; 30 Am. Rep. 593; to a grandmother; State v. Barney, 14 R. I. 62; to a charitable institution (the parents living apart); Dumain v. Gwynne, 10 Allen (Mass.) 270; but when the mother paid a weekly sum out of wages due from the institution, it was not an absolute surrender; People v. Paschal, 68 Hun 311, 22 N. Y. Supp. 881. In some states a transfer of the custody by the parent is held voidable for want of mutuality and as a delegation of power; People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Foulke v. People, 4 Colo. App. 519, 36 Pac. 640; and a transfer has been held invalid of a child over fourteen and without his consent; State v. Smith, 6 Greenl. (Me.) 462, 20 Am. Dec. 324.

In one case it is held that where a transfer of custody is allowed, it is not revocable without sufficient cause shown; Janes v. Cleghorn, 54 Ga. 9; State v. Barney, 14 R. I. 62; or unless it is for the benefit of the child; People v. Erbert, 17 Abb. Pr. (N. Y.) 395; in such case the wish of the child is almost controlling unless it is of tender age, and then it must not be placed in jeopardy by immature judgment; Curtis v. Curtis, 5 Gray (Mass.) 535. When the child was placed in charge of the grandparents in infancy and educated and supported by them until the age of fourteen, there being no unfitness of either party, custody was refused to the parents and the child was left with the grandparents; Workman v. Watts, 74 S. C. 546, 54 S. E. 775; but an oral agreement by the father giving the child to its aunt to raise was held revocable by him; In re Galleher, 2 Cal. App. 364, 84 Pac. 352.

By many courts it seems to be held that, while a parent may relinquish the custody of a child to another, in such case there is no implication of finality and of loss of the right to reclaim; Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490, 114 Am. St. Rep. 86, 6 Ann. Cas. 936; Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; State v. Steel, 121 La. 215, 46 South. 215, 16 L. R. A. (N. S.) 1004; but there is a very strong presumption that a parent will not give away the right to a child's custody; Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490, 114 Am. St. Rep. 86, 6 Ann. Cas. 936; a contract of relinquishment must be established by a preponderance of evidence; Dunkin v. Seifert, 123 Ia. 64, 98 N. W. 558; the acquiescence of the parent may be considered with other facts tending to establish an express contract; Fletcher v. Hickman, 50 W. Va. 244, 40 S. E. 371, 55 L. R. A. 896, 88 Am. St. Rep. 862.

Some courts have recognized a right of contract as to the custody of the children as existing in the parents after divorce and enforceable against them; Courtright v. Courtright, 40 Mich. 633; Ackley v. Burchard, 11 Wash. 128, 39 Pac. 372; White v. White, 75 Ia. 218, 39 N. W. 277 (where the same custody was provided by the contract as by the decree); but such contracts are only enforced if deemed by the court consistent with the welfare of the children; Lowrey v. Lowrey, 108 Ga. 766, 33 S. E. 421; Slattery v. Slattery, 139 Ia. 419, 116 N. W. 608; Connett v. Connett, 81 Neb. 777, 116 N. W. 658; Pearce v. Pearce, 30 Mont. 269, 76 Pac. 289; but in other cases such contracts have not been treated as effectual to change the natural right of custody; Hunt v. Hunt, 4 G. Greene (Iowa) 216; Kremelberg v. Kremelberg, 52 Md. 553; Farr v. Emuy, 121 La. 91, 46 South. 112, 15 L. R. A. (N. S.) 744; or to control the action of the court with respect to care and custody; Cook v. Cook, 1 Barb. Ch. (N. Y.) 639; Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

Where, in divorce the custody of the child is awarded to the mother, after her death the right of the father has been held to be restored; In re Blackburn, 41 Mo. App. 622; People v. Erbert, 17 Abb. Pr. (N. Y.) 399; Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729; but where the custody was given to the father who had obtained the divorce on the ground of adultery, the court refused to restore the child to the mother; In re Steele, 107 Mo. App. 567, 81 S. W. 1182. Where the mother having custody of the child under the decree of divorce died, she could not, by will, deprive the father of his right to resume the custody; McKinney v. Noble, 38 Tex. 195; In re Neff, 20 Wash. 652, 56 Pac. 383; *contra*, Wilkinson v. Deming, 80 Ill. 342, 22 Am. Rep.

192. Where the children are placed in the care of the husband, the court is not precluded from making an order giving the divorced wife access to them; [1891] P. 124.

A petition of a benevolent society averring that a boy of seven years living with his parent would become a cripple for life unless subjected to a surgical operation, and praying that he should be committed to the society for that purpose, was refused; In re Tony Tuttendario, 21 Pa. Dist. R. 561.

Where there was an ante-nuptial agreement that children should be trained in the religious faith of the mother and after her death two infant children were taken by relatives of the father and trained in his religious belief, and after four years the father died, and applications for guardianship were made by relatives of both father and mother representing opposing beliefs, it was held that the relatives of the father should keep the children, and that notwithstanding the agreement, the four year period of training with the father's relatives had created attachments it was not wise to break, the decision being put squarely upon the modern view that in questions of custody the welfare of the child is the paramount consideration; In re Luck, 7 Ohio N. P. 49.

The rights of the father, while his children remain in his custody, are to have authority over them, to enforce all his lawful commands, and to correct them with moderation for disobedience; Johnson v. State, 2 Humphr. (Tenn.) 283, 36 Am. Dec. 322; and these rights, the better to accomplish the purposes of their education, he may delegate to a tutor or instructor; 2 Kent 205. See ASSAULT; CORRECTION.

Rights of action. There is no common law liability of a parent for torts committed by an infant; 8 C. B. N. S. 611; Chastain v. Johns, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; Tifft v. Tifft, 4 Denio (N. Y.) 175; Shockley v. Shepherd, 9 Houst. (Del.) 270, 32 Atl. 173; unless there is proof of actual service or agency; Brohl v. Lingeman, 41 Mich. 711, 3 N. W. 199; Broadstreet v. Hall, 168 Ind. 192, 80 N. E. 145, 10 L. R. A. (N. S.) 933, 120 Am. St. Rep. 356; or there is shown to have been authority; Ferguson v. Terry, 1 B. Mon. (Ky.) 96; or acquiescence; Cameron v. Heister, 10 Ohio Dec. 651; Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37; or ratification; Lamb v. Davidson, 69 Mo. App. 107; which, however, is not established by a voluntary offer of compromise; Paulin v. Howser, 63 Ill. 312; or compensation; Baker v. Morris, 33 Kan. 580, 7 Pac. 267.

But where a parent kept an automobile for the general use of his family, and plaintiff was injured by it while driven by his daughter for her own pleasure, it was held that the father was liable; Birch v. Abercrombie (Wash.) 133 Pac. 1020. To the same effect, Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; *contra:* Doran v. Thomsen, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677. See note in 12 Mich. L. Rev. 153, which states that this doctrine appears never to have been recognized outside of automobile cases.

If the relation of master and servant exists, the law of that relation must be applied; Dunks v. Grey, 3 Fed. 862; Andrus v. Howard, 36 Vt. 248, 84 Am. Dec. 680. No presumption of service or agency results from the relation of parent and child; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; 27 Ont. App. Rep. 468; *contra*, Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37; Gerhardt v. Swaty, 57 Wis. 24, 14 N. W. 851; but probably this is to be considered a question for the jury; Adams v. Swift, 172 Mass. 521, 52 N. E. 1068; Sacker v. Waddell, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374. The parent may be held liable if his negligence entered into the tortious act of the child; Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795; but allowing the latter to use fire arms is not necessarily negligent; Palm v. Ivorson, 117 Ill. App. 535; nor is keeping them within his reach; Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101.

In some states, usually those where the civil law prevails, there are statutes making the parent liable for the torts of the child; Marionneaux v. Brugier, 35 La. Ann. 13; Coats v. Roberts, *id.* 891; Miller v. Meche, 111 La. 143, 35 South. 491; 30 Low. Can. Jur. 166. See as to parent's liability, 10 L. R. A. (N. S.) 933, note, and as to the liability of an infant for torts, see 57 L. R. A. 674, note.

The father may maintain an action for the seduction of his daughter, or for any injury to the person of his child, so long as he has a right to its services; 2 M. & W. 539; Lee v. Hodges, 13 Gratt. (Va.) 726; Bolton v. Miller, 6 Ind. 262; Bayles v. Burgard, 48 Ill. App. 371; and may even be justified in committing a homicide in protecting his child; 1 Bla. Com. 450; and the fact that a child by her father as next friend has recovered damages for a personal injury does not bar a subsequent action by him for loss of service occasioned by the same injury; Wilton v. R. Co., 125 Mass. 130; Texas & P. R. Co. v. Morin, 66 Tex. 225, 18 S. W. 503. The authorities are not uniform as to whether the right of the father to recover for a tort committed against the child is to be limited to the theory of loss of service and therefore based entirely upon the doctrine of an implied relation of master and servant. Such would seem to be the English rule, which gives no remedy, even for expenses, when the child is of such tender age as to be incapable of service; 7 D. & R. 133. Some American cases follow the same principle; Matthews v. R. Co., 26 Mo. App. 75; Whitaker v. War-

ren, 60 N. H. 20, 49 Am. Rep. 302; but the trend of the authorities is otherwise, and as was said by the Circuit Court of Appeals, in a case of injury to a child of five years of age, "they approve a more reasonable doctrine, and, basing the right of action on the parental relation instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor;" Netherland-American Steam Nav. Co. v. Hollander, 8 C. C. A. 169, 59 Fed. 417; Cuming v. R. Co., 109 N. Y. 95, 16 N. E. 65; Sykes v. Lawlor, 49 Cal. 236; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; and see SEDUCTION; ENTICE.

As a general rule the mother of an illegitimate cannot recover damages for his death, under a statute giving a right of action to the relatives or representatives of one killed through the negligence of another; 2 Ont. 658; Marshall v. R. Co., 46 Fed. 269. See, *contra*, Marshall v. R. Co., 120 Mo. 275, 25 S. W. 179. See BASTARD.

Right to earnings of the child. Generally, the father is entitled to the services or earnings of his children during their minority, so long as they remain members of his family; Plummer v. Webb, 4 Mas. 380, Fed. Cas. No. 11,233; Emery v. Kempton, 2 Gray (Mass.) 257; Stovall v. Johnson, 17 Ala. 14; 1 Bla. Com. 453; Allen v. Allen, 60 Mich. 655, 27 N. W. 702; but he may relinquish this right in favor of his children; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; Lyon v. Bolling, 14 Ala. 753, 48 Am. Dec. 122; Bray v. Wheeler, 29 Vt. 514; Kauffelt v. Moderwell, 21 Pa. 222; and he will be presumed to have thus relinquished this right if he abandons or neglects to support and educate his children; Canovar v. Cooper, 3 Barb. (N. Y.) 115; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Clay v. Shirley, 65 N. H. 644, 23 Atl. 521; Guardianship of Vance, 92 Cal. 195, 28 Pac. 229; but where a father verbally agrees that his daughter shall reside in a stranger's house as a servant, he does not thereby surrender his parental control, so as to bar his right to recover for her seduction; Mohry v. Hoffman, 86 Pa. 358. An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, although he married without his father's consent; Com. v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255.

The emancipation of a minor may be proved by the act of the father in allowing him to draw his own wages, as well as by other acts, and no proof of a formal contract is necessary; Haugh, Ketcham & Co. I. W. v. Duncan, 2 Ind. App. 264, 28 N. E. 334. Living at home does not interfere with emancipation; Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115; and the wages of an infant emancipated by his parent, though living at home, are not subject to claims of father's creditors; Wisner v. Osborne, 64 N. J. Eq. 614, 55 Atl. 51; Costello v. Brewing Co., 52 N. J. Eq. 557, 30 Atl. 682; (if there be no fraud; Elfelt v. Hinch, 5 Or. 255); Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386; Stanley v. Bank, 115 N. Y. 122, 22 N. E. 29; Wambold v. Vick, 50 Wis. 456, 7 N. W. 438; *contra*, Stumbaugh v. Anderson, 46 Kan. 541, 26 Pac. 1045, 26 Am. St. Rep. 121; Bell v. Hallenback, 1 Wright (Ohio) 751.

As to his right to earnings and emancipation, see also Benson v. Remington, 2 Mass. 113; Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386, 2 Am. L. Reg. (N. S.) 715, with note by Judge Redfield; White v. Henry, 24 Me. 531; Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529. The father, as such, has no claim to any property acquired by the child other than earnings; Banks v. Conant, 14 Allen (Mass.) 497.

An agreement of the father, by which his minor child is put out to service, ceases to be binding upon the child after the father's death, unless made by indentures of apprenticeship; Campbell v. Cooper, 34 N. H. 49; De Garnett v. Harper, 45 Mo. App. 415; State v. Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676. The power of the father ceases on the arrival of his children at the age of twenty-one; though if after that age they continue to live in the father's family, they will not be allowed to recover for their services to him upon an implied promise of payment; Munger v. Munger, 33 N. H. 581; Guenther v. Birkicht's Adm'r, 22 Mo. 439; House v. House, 6 Ind. 60; the presumption being that such services are gratuitous, but this may be rebutted; Grant v. Grant, 109 N. C. 710, 14 S. E. 90; but see Graves v. Davenport, 50 Fed. 881; McLaughlin v. McLaughlin, 145 Pa. 582, 23 Atl. 400.

A stepfather is not bound to support and educate his stepchildren; In re Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579; nor is he entitled to their custody, labor, or earnings, unless he assumes the relation of parent; Brush v. Blanchard, 18 Ill. 46; Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; Mull v. Walker, 100 N. C. 46, 6 S. E. 685; Gerber v. Bauerline, 17 Or. 115, 19 Pac. 849; but see Ela v. Brand, 63 N. H. 14.

See also Schouler; Tiffany; Reeve, Dom. Rel.; EMANCIPATION; KIDNAPPING; CHILD; INFANT.

PARENTAGE. Kindred in the direct ascending line. See 2 Bouv. Inst. n. 1955. For a discussion of the subject in connection with citizenship, see 2 Kent 49; Morse, Citizenship; CITIZEN; NATURALIZATION.

PARENTELA. The sum of those persons who trace descent from one ancestor. 2 Poll. & Maitl. 296. "By a person's parentela is meant the sum of those persons who trace their blood from him." *id.*

See LINE.

PARENTS. The lawful father and mother of the party spoken of. Ex parte Mason, 5 N. C. 336.

The term parent differs from that of ancestor, the latter embracing not only the father and mother, but every person in an ascending line. It differs also from predecessor, which is applied to corporators. 7 Ves. Ch. 522; Ex parte Mason, 5 N. C. 336; Com. v. Callan, 6 Binn. (Pa.) 255. See INFANT; EMANCIPATION; PARENT AND CHILD; FATHER; MOTHER.

By the civil law, grandfathers and grandmothers, and other ascendants, were, in certain cases, considered parents. *Dict. de Jur. Parents.* See Com. v. Anderson, 1 Ashm. (Pa.) 55; 2 Kent 159; 5 East 223.

PARES (Lat.). A man's equals; his peers. 3 Bla. Com. 349.

PARES CURIÆ (Lat.). **In Feudal Law.** Those vassals who were bound to attend the lord's court. Erskine, Inst. b. 2, tit. 3, s. 17; 1 Washb. R. P., 5th ed. 1. See MAGNA CHARTA.

PARESIS. General paralysis of the insane.

The term is applied to a group of mental and bodily symptoms, developing usually late in life and as a result of previous syphilis. The condition differs from the various insanities, in that definite alterations of the surface of the brain and its membranes are found, in the form of chronic inflammation. Loss of memory, passionate outbursts, delusions of grandeur, restlessness and insomnia, with final absolute dementia, are the chief mental symptoms, while physically muscular weakness, tremor, particularly of the lips and tongue, ataxia, and various convulsive seizures are seen.

PARI DELICTO (Lat.). In a similar offence or crime; equal in guilt or in legal fault.

A person who is *in pari delicto* with another differs from a *particeps criminis* in this, that the former term always includes the latter, but the latter does not always include the former. 8 East 381.

Ordinarily where two persons are *in pari delicto* the law will not relieve them; see CONTRIBUTION. But this doctrine does not apply where a president of a national bank has borrowed an amount exceeding twenty per cent. of its capital stock and suit is brought to recover the amount; Dunn v. O'Connor, 25 App. Div. 73, 49 N. Y. Supp. 270.

The rule that both parties to an *ultra vires* contract are *in pari delicto*, and therefore a court of equity will not interpose to restore to one of them rights which it has thus parted with, is inapplicable to a municipal corporation whose trustees attempt to make an invalid grant; Detroit v. R. Co., 56 Fed. 867.

See IN PARI DELICTO.

PARI MATERIA (Lat.). Of the same matter; on the same subject: as laws *pari materia* must be construed with reference to each other. Bacon, Abr. *Statute* (I 3).

PARI PASSU (Lat.). By the same gradation. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other.

PARI PASSU BONDS. A name given in Scotland to certain bonds secured upon lands which share an equal benefit of the security. Where several securities are created over the same lands by separate bonds and dispositions in security, they would ordinarily have priority according to the date of registration of the sasine or bond, as the case may be. If it is intended to have them rank as *pari passu*, it is usual to insert a clause in each bond declaring that they shall be so ranked without regard to their priority of registration. 9 Jurid. Rev. 74.

PARIS, DECLARATION OF. See DECLARATION OF PARIS; BLOCKADE; NEUTRALITY.

PARISH. A district of country, of different extents. As used in the revised statutes, the word is synonymous with county; In re Sup'rs of Election, 28 Fed. 840; as also in Louisiana.

In Ecclesiastical Law. The territory committed to the charge of a parson, or vicar, or other minister. Ayl. Par. 404; 2 Bla. Com. 112; Hoffm. Eccl. Law.

Although, in the absence of a state church in this country, the status of parishes is comparatively unimportant, yet in the Protesant Episcopal Church, at least, their boundaries and the rights of the clergy therein are quite clearly defined by canon. In the leading case of Stubbs and Boggs v Tyng, decided in New York, in March, 1868, the defendant was found guilty of violating a canon of the church, in having officiated, without the permission of plaintiffs within the corporate bounds of the city of New Brunswick, N. J., which then constituted the plaintiff's parochial cure. Baum 103. As to their origin, see 2 Hallam, Mid. Ages, c. 7, p. 144. See, also, 1 Poll. & Maitl. 560.

In New England. Divisions of a town, originally territorial, but which now constitute *quasi*-corporations, consisting of those connected with a certain church. See Weston v. Hunt, 2 Mass. 501; Milford v. Godfrey, 1 Pick. (Mass.) 91. Synonymous with church and used in the same sense as society. Ayres v. Weed, 16 Conn. 299.

PARISH APPRENTICES. The children of parents unable to maintain them, who are apprenticed by the overseers of the poor of their parish, to such persons as may be willing to receive them. 2 Steph. Com. 230.

PARISH CLERK. In English Law. An officer, in former times often in holy orders, and appointed to officiate at the altar; now his duty consists chiefly in making responses

in church to the minister. By common law he has a freehold in his office, but it seems now to be falling into desuetude. 2 Steph. Com. 11th ed. 713.

PARISH CONSTABLE. See CONSTABLE.

PARISH COURT. In Louisiana the local courts in each parish, corresponding generally to county and probate courts, and, in some respects, justices' courts, in other states were formerly so called.

PARISH OFFICERS. Churchwardens, overseers, and constables.

PARISH PRIEST. The parson; a minister who holds a parish as a benefice.

PARISHIONERS. Members of a parish. In England, for many purposes they form a body politic. See PARISH.

PARITOR. A beadle; a summoner to the courts of civil law.

PARIUM JUDICIUM (Lat. the decision of equals). The right of trial by one's peers: *i. e.* by jury in the case of a commoner, by the house of peers in the case of a peer.

PARK (L. Lat. *parcus*). An inclosure. 2 Bla. Com. 38. A pound. Reg. Orig. 166; Cowell. An inclosed chase extending only over a man's own grounds. 13 Car. II. c. 10; Manw. For. Laws; 2 Bla. Com. 38.

Usually smaller than a chase; Encycl. Laws of Engl. (*Forest Laws*).

A pleasure-ground in or near a city, set apart for the recreation of the public; a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament. Perrin v. R. Co., 36 N. Y. 120. A place for the resort of the public for recreation, air, and light; a place open for everyone. Price v. Plainfield, 40 N. J. L. 613. See Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

Public parks may be dedicated to the public like highways; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Steel v. Portland, 23 Or. 176, 31 Pac. 479; and at common law, upon such dedication, the fee remains in the owners; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251. Non-user by the public, however long continued, will not affect the public right or revest the title in the donor; Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898. The title is usually vested in municipalities by the legislature; Brooklyn v. Copeland, 106 N. Y. 496, 13 N. E. 451; Riggs v. Board of Education, 27 Mich. 262; Lincoln v. Boston, 148 Mass. 580, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; and held by them in trust for the use of the public. The municipality cannot lease them; Macon v. Huff, 60 Ga. 221; nor can the legislature; Le Clercq v. Gallipolis, 7 Ohio 218, pt. 1, 28 Am. Dec. 641.

A city may own lands for a public park and cause them to be improved, not in its public capacity as an agency of the government and subject to state control, but as a corporate individual having private rights which the people have a constitutional right to enjoy undisturbed; Thompson v. Moran, 44 Mich. 602, 7 N. W. 180.

The lease of land for a public park is a lease for city purposes; Holder v. Yonkers, 39 App. Div. 1, 56 N. Y. Supp. 912. Taking land for a park is a public use; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

The acquirement of lands for public parks for children's playgrounds is within the power of the municipal authorities; Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014.

A public park may be crossed by a street railway where such use will not materially interfere with its enjoyment by the public; Philadelphia v. McManes, 175 Pa. 28, 34 Atl. 331; and compensation may not be demanded for the taking; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; but it is also held that parks dedicated to the public use are not subject to a right of way for a street railway, and that neither the municipality nor the legislature can divert them for that purpose; Jacksonville v. R. Co., 67 Ill. 540; Booth, St. Ry. L. § 11.

A park or public square may be enclosed, notwithstanding it has remained open many years; Corporation of Seguin v. Ireland, 58 Tex. 183; Langley v. Gallipolis, 2 Ohio St. 107; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; *contra*, Com. v. Bowman, 3 Pa. 206, where it was held that a public square was as much a highway as though it were a street, and that neither the county nor the public could block it up, to the prejudice of the public or an individual. See, also, Springfield R. Co. v. Springfield, 85 Mo. 674.

The city of Boston is not bound to keep the Boston Common in safe condition; Lincoln v. Boston, 148 Mass. 580, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; Steele v. Boston, 128 Mass. 584; and is not liable for injuries caused by a horse becoming, while driven along an adjoining street, frightened by the firing of a cannon on the Boston Common under a license; Lincoln v. Boston, 148 Mass. 580, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; but it must contribute to an assessment for the improvement of streets by which a park is bounded in common with private owners benefited thereby; Scammon v. Chicago, 42 Ill. 192.

The construction of a subway under the Boston Common was held no diversion of land deeded for a training field and cow pasture; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980.

Running a street through a park dedicated by an owner to the public is unlawful; Price v Thompson, 48 Mo. 361; otherwise of a

pleasure drive in a park reserved by the state; Com. v. Beaver Borough, 171 Pa. 542, 53 Atl. 112; and of a speedway; Holtz v. Diehl, 26 Misc. 224, 56 N. Y. Supp. 841. See Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164.

The erection of buildings in a park is unlawful: As barracks; Appeal of Meigs, 62 Pa. 28, 1 Am. Rep. 372; school buildings; Board of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600; a jail; Flaten v. Moorehead, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195. a city hall with a jail; Church v. Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; buildings; Fessler v. Town of Union, 68 N. J. Eq. 657, 60 Atl. 1134; a town hall; 45 L. J. Ch. N. S. 839; otherwise of a museum and library; *id.*; or a building for the public; Ross v. Long Branch, 73 N. J. L. 292, 63 Atl. 609. Monuments may be erected therein; Hoyt v. Gleason, 65 Fed. 685; and water pipes may be laid; Howe v. Lowell, 171 Mass. 575, 51 N. E. 536. Part of a park may be used for agricultural purposes; Huff v. Macon, 117 Ga. 428, 43 S. E. 708; and trees planted; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Burnet v. Bagg, 67 Barb. (N. Y.) 154.

It is held that individual dedications will be more strictly construed than those made by the public; Spires v. Los Angeles, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465; Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164.

The title in the municipality is said to be held in "a kind of trust relation to the people"; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980.

A state may commit the management of property turned over to it by congress to park commissions rather than to the municipality within whose limits it is situated; Kerrigan v. Poole, 131 Mich. 305, 91 N. W. 163. Such commissioners may apportion the expenses of metropolitan parks among the towns in the park district; In re De las Casas, 180 Mass. 471, 62 N. E. 738. Its rules are valid only in so far as they are reasonable under the conditions existing at the time they are attacked; Whitney v. Com., 190 Mass. 531, 77 N. E. 516.

As to the right of the municipality to make regulations for the preservation of order in a park or public square, see POLICE POWER; LIBERTY OF SPEECH.

See, generally, DEDICATION; EMINENT DOMAIN; RAILROAD.

PARLE HILL (also called Parling Hill). A hill where courts were held in olden times. Cowell.

PARLIAMENT (said to be derived from *parler la ment*, to speak the mind, or *parum lamentum*).

In English Law. The legislative branch of the government of Great Britain, consisting of the house of lords and the house of commons.

The parliament is usually considered to consist of the king, lords, and commons. See 1 Bla. Com. 147*, 157*, Chitty's note; 2 Steph. Com., 11th ed. 341. In 1 Woodd. Lect. 30, the lords temporal, the lords spiritual, and the commons are called the three estates of the realm: yet the king is called a part of the parliament, in right of his prerogative of veto and the necessity of his approval to the passage of a bill. That the connection between the king and the lords temporal, the lords spiritual, and the commons, who when assembled in parliament form the three estates of the realm, is the same as that which subsists between the king and those estates—the people at large—out of parliament, the king not being in either case a member, branch, or co-estate, but standing solely in the relation of sovereign or head. See Colton, Record 710; Rot. Parl. vol. iii. 623 *a*; 2 M. & G. 457, n. Historically and properly speaking the absolute sovereign power in the kingdom is vested in the king in parliament. See Dicey, British Const. 141.

The House of Lords was formerly the supreme court of judicature in the kingdom. It had no original jurisdiction (except to a certain extent before the reign of Charles II.), but was the court of appeal in the last resort, with a few exceptions and under some limitations as to the right, from the inferior courts upon appeal or writ of error for mistakes of law. Appeals lay to this tribunal from Scotch and Irish courts, in some cases. See stat. 4 Geo. IV. c. 85, as to Scotch, and stat. 39 & 40 Geo. III. c. 67, art. 8, as to Irish, appeals.

This body, when sitting as a court of law, was presided over by the lord chancellor, whose attendance alone was in any respect compulsory, and was composed of as many of its members who had filled judicial stations as chose to attend. Three laymen also attended in rotation, but did not vote upon judicial matters, 11 Cl. & F. 421. In the absence of the chancellor, deputy speakers, who were members of the profession but not of the house, have been appointed; 3 Bla. Com. 56.

Before Henry III's time the distinction between legislative and administrative acts was not clearly drawn. The need of consulting the nation before that time had imposed a vague restraint upon the crown, before then the manner and form of consulting it was uncertain. But the distinction began to grow clear in Henry III.'s reign and statutes passed in parliament could not be repealed without its consent. As yet the king's council in parliament assisted by the judges was then the essence of the parliament and made the laws, the consent of the commons was not indispensable. The Chief Justices as members of the council had a real voice in making the laws, and the king and his justices might put an authoritative interpretation upon them. The legislative, executive and judicial authorities had not yet become so completely separated that they could not on occasion work together. In the following century parliament had become a body distinct from and even antagonistic to the council and the king. Enactments passed by parliament were the only ones that the common law courts would allow to be laws and the law could only be changed by parliamentary action and not as formerly by administrative acts.

But the crown did not cease to possess discretionary powers; the intervention between parliaments, the generality of the older statutes and the growing fixity of the jurisdiction of the common law courts made the existence of some such powers a necessity, and in Edward I's reign they were often exercised by the king's council in parliament. But this supreme court tended to separate into two bodies: Parliament, the legislative, and the council, the executive. And parliament as the maker of the laws strengthened its connection with the common law courts and weakened its connection with the crown and council. It was for this reason that parliament tended to assume its common law juris-

diction in error, while the council retained the discretionary powers which were still left to the crown.

As to the constitution of parliament there were the great tenants in chief, lay and executive, summoned by special writ and forming the House of Lords. Thus the peculiar English meaning of a peerage gradually was formed. All other classes of free tenants were represented by knights of the shire elected in the county court. Edward invited the burghers to send elected representatives to parliament and they eventually became a part of the House of Commons.

Records of writs summoning knights, burgesses, and citizens to parliament are first found towards the end of the reign of Henry III., such writs having issued in the thirty-eighth and forty-ninth years of his reign. 4 Bla. Com. 425, Prynne, 4th Inst. 2. The earliest parliamentary roll is said to be 1290. 1 Poll. & Maitl. 178.

Since the reign of Edward III. the history of England shows an almost constant increase in the power of parliament. Anne was the last sovereign who exercised the royal prerogative of *veto;* and, as this prerogative no longer practically exists, the authority of parliament is absolutely unrestrained. The parliament can only meet when convened by the sovereign, except on the demise of the sovereign with no parliament in being, in which case the last parliament is to assemble, 6 Anne, c. 7. The sovereign has also power to prorogue and dissolve the parliament.

The origin of the English parliament seems traceable to the *witena-gemote* of the Saxon kings Encyc. Brit A writer traces the origin back to the local institutions of the Germanic tribes, but considers that the final stages of its growth are to be sought in the period between the accession of Henry II. and the close of the reign of Edward I; 1 Social Eng. 396.

The House of Lords. Besides the temporal peers of England, Great Britain and the United Kingdom, and such Scotch and Irish peers as also have imperial titles, the House of Lords includes sixteen Scotch peers elected for each parliament by the body of Scotch peers; twenty-eight Irish peers elected for life by the Irish peers, also the two English archbishops, and twenty four of the English bishops. The total number of members varies, but may be placed at about six hundred and thirty-eight.

The House of Lords exercises criminal jurisdiction, both as a court of first instance and as a court of criminal appeal It tries any person impeached by the House of Commons for any high crime or misdemeanor, also temporal peers and peeresses accused of treason, felony or misprision. In such case the accused cannot waive his privilege to be so tried. In the latter case the indictment is found by the grand jury and removed to the House of Lords (or into the Court of the Lord High Steward, *q. v.*) by writ of *certiorari* For the purposes of the trial the house is presided over by a peer as Lord High Steward appointed by the king's commission, or in the absence of such appointment, by the Lord Chancellor. The judges may be summoned to give their opinions on any questions of law that may arise. All the members of the House of Lords are entitled to be present, and when present are judges of law and fact. A Lord High Steward, if presiding, may regulate the procedure, but is a judge of the law to no greater extent than any other peer. The bishops have a right to be present, but by common law may not vote in a capital case, and so withdraw before judgment is given; 1 Odgers, Com. Law 990. For a trial before the Court of the Lord High Steward when the Lords are not in session, see that title For the last trial of a peer (for bigamy) see L. R. 1901, A. C. 446.

The House of Lords forms no part of the Supreme Court of Judicature, it has no original jurisdiction in ordinary civil actions.

An appeal lies to it against any judgment or order of the Court of Appeal. When sitting to hear such appeals, it is usually composed of the following: The Lord Chancellor; the ex-Lord Chancellor, if any, and the six Lords of Appeal in Ordinary. Such peers as have held high judicial office (*e. g.,* the office of Lord Chancellor, of a salaried judge of the Judicial Committee of the Privy Council, or of the Supreme Court of England or Ireland, or of the Scotch Court of Session) are also entitled to sit. At least three members of the Court must be present. Lay peers have a right to vote, but since 1883 no lay peer has attempted to exercise it; his vote would be ignored.

It is a court of final appeal. This jurisdiction is practically confined to civil cases, but an appeal lies from the Court of Criminal Appeal if the attorney general certifies that the case involves a point of law of exceptional public importance.

It exercises jurisdiction in cases of claims to peerages. It decides questions as to disputed elections of the Scotch and Irish peers.

See COURTS OF ENGLAND; 17 L. Q. Rev. 155; Jenks, House of Lords.

House of Commons. There is no property qualification for the House of Commons. Any male British subject may be elected, unless specifically barred. In one or two instances natives of India have been elected. Infants are excluded (by common law and by statute), though in two notable instances, Fox and Lord John Russell, the rule has been disregarded.

Peers are excluded, including Scotch peers who have not been elected as representatives in the lords of the Scotch peerage, but an Irish peer not elected to represent Ireland in the lords may sit for a constituency of Great Britain, but not of Ireland.

Clergy of the Church of England and the Roman Catholic Church and ministers of the Church of Scotland are ineligible.

Government contractors, holders of certain pensions, bankrupts, and persons convicted of treason or a felony or guilty of corrupt practices are ineligible.

All holders of civil offices, not distinctly political, and the judges of the higher courts and most of those of the lower courts are ineligible.

Bankruptcy and lunacy continuing for six months are ground for unseating a member.

From 1715 to 1911 the life of a parliament was seven years. In 1911, it was changed to five years. See PARLIAMENTARY ACT. Upon the demise of the crown, parliament is required to meet without summons in the usual form.

The districting of Great Britain, by the act of 1885, is uniform in boroughs and counties. Oxford and Cambridge Universities have sent representatives since the time of James I. Those of London and Dublin each have a member, Edinburgh and St. Andrews together have one, and Glasgow and Aberdeen another. In case of a tie vote at an election, the returning officers of an election may break the tie.

By act of August, 1911, members of the House of Commons not receiving a salary from the government are paid £400 a year.

The one fundamental dogma of English constitutional law is the absolute sovereignty or despotism of the parliament. Dicey, Const. 141; no English court sits as a court of appeal from parliament; L. R. 6 C. P. 582.

See May, Law, Priv. and Proc. of Parliament; St. Armand, Legislative Power; Bagehot, English Constitution; Pike, History of the House of Lords; HIGH COURT OF PARLIAMENT; FOLC-GEMOTE; WITENA-GEMOTE; LEGISLATIVE POWER; PEERS; HOUSE OF LORDS; PARLIAMENTARY ACT; CLERK OF THE CROWN.

PARLIAMENT, CONVENTION. See CONVENTION PARLIAMENT.

PARLIAMENTARY ACT. The name of an act of parliament of August 18, 1911, which recites that "it is intended to substitute for

the House of Lords as it at present exists a second chamber constituted on a popular instead of hereditary basis, but such substitution cannot immediately be brought into operation"; it provides that money bills, if sent to the House of Lords at least one month before the end of the session and not passed by it without amendment within one month, shall, upon the royal assent being signified, become acts of parliament. Public bills (other than a money bill or a bill extending the duration of parliament beyond five years), if passed by the Commons at three successive sessions, whether of the same parliament or not, and sent to the House of Lords at least one month before the end of the session and rejected by it in each of these sessions, shall on their rejection for the third time become acts of parliament, upon the royal assent being signified thereto, but this provision shall not take effect unless two years have elapsed between the second reading in the first of these sessions in the Commons and the passage of the bill in the Commons in the third of these sessions. The speaker of the House of Commons conclusively decides as to whether a money bill is such, and whether the provisions as to the passage of public bills other than money bills, etc., have been complied with. If the House of Lords amends such public bills (the Commons not concurring), it is made equivalent to a rejection by the former. The enacting clause of bills so passed reads: "Be it enacted by the King's Most Excellent Majesty by and with the consent of the Commons."

The duration of parliament, fixed at seven years in 1715, is reduced to five years.

PARLIAMENTARY AGENTS. Persons professionally employed in the promotion of or opposition to private bills, and otherwise in relation to private business in parliament. Whart. Law Lex. Business in relation to private bills must be transacted through them, and counsel may be instructed by them. 2 Brett, Com. 775.

PARLIAMENTARY COMMITTEE. A committee of members of the house of peers, or of the house of commons, appointed by either house for the purpose of making inquiries, by the examination of witnesses or otherwise, into matters which could not be conveniently inquired into by the whole house. Whart. Law Lex.

PARLIAMENTARY COUNSEL TO THE TREASURY. An office created in Great Britain in 1869 by a treasury minute. The title had existed before. The duties are to settle all departmental bills and draw such other government bills (except Scotch and Irish) as may be required; prepare memoranda of existing laws; advise on amendments to bills passing through parliament, etc. He may obtain aid from other members of the bar. Legislative Methods, by Ilbert 84.

PARLIAMENTARY LAW. That body of the recognized usages of parliamentary and legislative assemblies by which their procedure is regulated, which takes its name from the British parliament and on the practice of which it is mainly founded, with such changes and modifications in American deliberative bodies as have been necessary to adapt it to the usages of that country. See MEETINGS; QUORUM.

PARLIAMENTARY ROLLS. See ROLLS.

PARLIAMENT, CONVENTION. See CONVENTION PARLIAMENT.

PARLIAMENTUM DIABOLICUM. A parliament held at Coventry, 38 Henry VI., wherein Edward, Earl of March (afterwards Edward IV.), and many of the chief nobility were attainted, was so called; but the acts then passed were annulled by the succeeding parliament. Jacob.

PARLIAMENTUM INDOCTUM (Lat. unlearned parliament). A name applied to a parliament assembled at Coventry, under a law that no lawyer should be a member of it. 6 Hen. IV.; 1 Bla. Com. 177; Walsingham 412, n. 30; Rot. Parl. 6 Hen. IV.

PARLIAMENTUM INSANUM. A parliament assembled at Oxford, 41 Hen. III., so styled from the madness of their proceedings, and because the lords came to it with armed men. Jacob.

PARLOR CAR. See SLEEPING CAR.

PAROL (more properly, *parole*. A French word, which means, literally, word, or speech). A term used to distinguish contracts which are made verbally, or in writing not under seal, which are called parol contracts, from those which are under seal, which bear the name of deeds or specialties. 1 Chitty, Contr., 12th ed. 7; 7 Term 350; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60; 1 Chitty, Pl. 88. When a contract is made under seal, and afterwards it is modified verbally, it becomes wholly a parol contract; Vicary v. Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475. See CONTRACT.

Pleadings are frequently denominated the *parol*. In some instances the term parol is used to denote the entire pleadings in a cause: as, when in an action brought against an infant heir, on an obligation of his ancestors, he prays that the parol may demur, *i. e.* that the pleadings may be stayed till he shall attain full age; 3 Bla. Com. 300; 4 East 485; 1 Hoffm. 178. See a form of a plea in abatement, praying that the parol may demur, in 1 Wentw. Pl. 43, and 2 Chitty, Pl. 520. But a devisee cannot pray the parol to demur; 4 East 485.

PAROL DEMURRER. See PAROL.

PAROL EVIDENCE. Evidence verbally delivered by a witness. See Browne, Parol Evidence; RECEIPT; CONTRACT.

As to the admission of such evidence to vary a written contract, see EVIDENCE.

PAROL LEASE. An agreement made orally between parties, by which one of them leases to the other a certain estate. See LEASE.

PAROLE. In International Law. The agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war. Vattel, liv. 3, c. 8, § 151.

It is a sacred obligation to the fulfilment of which the national faith is pledged. U. S. v. Wright, 5 Phila. (Pa.) 299, Fed. Cas. No. 16,777.

A parole can be given only by a commissioned officer for himself or the troops under him. And an inferior officer, if his superior is within reach, cannot give his parole without the consent of the latter. If the prisoner's government refuse to confirm his parole, he is bound in honor to return into captivity. A captor is not bound to offer, nor a prisoner to accept, parole; it is voluntary on both sides. Giving a parole precludes only active service in the field. It is ended by the prisoner's exchange or by peace. A prisoner who violates his parole and is again captured may be shot as a bandit. Risley, Law of War, 131; Spaight, War Rights on Land, 290–300.

Articles 10–12 of the Convention Concerning the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1899, define the obligations which a release on parole imposes upon the prisoner himself and upon his government.

In Criminal Law. In some states acts have been passed providing for the release on parole of prisoners committed to prison upon conviction of crime. See PRISONERS.

PARQUET. In French Law. The magistrates who are charged with the conduct of proceedings in criminal cases and misdemeanors.

PARRICIDE (from Lat. *pater*, father, *caedere*, to slay). **In the Civil Law.** One who murders his father. One who murders his mother, his brother, his sister, or his children. Merlin, *Rep. Parricide;* Dig. 48. 9. 1. 3, 4.

This offence is defined almost in the same words in the penal code of China. Penal Laws of China, b. 1, s. 2, § 4.

The criminal was punished by being scourged, and afterwards sewed in a sort of sack, with a dog, a cock, a viper, and an ape, and then thrown into the sea or into a river; or, if there were no water, he was thrown in this manner to wild beasts. Dig. 48. 9. 9; Code 9, 17. 1, l. 4, 18, 6; Brown, Civ. Law 423.

By the laws of France, parricide is the crime of him who murders his father or mother, whether they be the legitimate, natural, or adopted parents of the individual, or the murder of any other legitimate ascendant. Code Penal, art. 297. This crime was there punished by the criminal's being taken to the place of execution without any other garment than his shirt, barefooted, and with his head covered with a black veil. He was then exposed on the scaffold, while an officer of the court read his sentence to the spectators; his right hand was then cut off, and he was immediately put to death. *Id.* art. 13.

The common law does not define this crime, and makes no difference between its punishment and the punishment of murder; 1 Hale, Pl. Cr. 380; Prin. Penal Law, c. 18, § 8, p. 243; Dalloz, Dict. *Homicide,* § 3.

PARS ENITIA (Lat.). **In Old English Law.** The share of the eldest daughter where lands were parted between daughters by lot, she having her first choice after the division of the inheritance. Co. Litt. 166 *b;* Glanv. lib. 7, c. 3; Fleta, lib. 5, c. 10, § *In divisionem.*

PARS RATIONABILIS (Lat. reasonable part). That part of a man's goods which the law gave to his wife and children. 2 Bla. Com. 492; Magn. Cart.; 9 Hen. III. c. 18; 2 Steph. Com., 11th ed. 194. See DEAD MAN'S PART.

PARSON. One that hath full possession of all the rights of a parochial church.

So called because the church, which is an invisible body, is represented by his *person.* In England he is himself a body corporate, in order to protect and defend the church (which he personates) by a perpetual succession, Co. Litt. 300. He is sometimes called the rector (*q. v.*), or governor, of the church: but the appellation of parson, however it may be depreciated by familiar, clownish, and indiscriminate use, is the most legal, most beneficial, and most honorable title that a parish priest can enjoy; because "such a one," Sir Edward Coke observes, "and he only, is said *vicem seu personam Ecclesiæ gerere*"; 1 Bla. Com. 384.

The parson has, during life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues, unless these are appropriated, *i. e.* given away, to some spiritual corporation, sole or aggregate, which the law esteems as capable of providing for the service of the church as any single private clergyman; *id.;* 1 Hagg. Cons. 162; 3 Steph. Com., 11th ed. 5.

The ecclesiastical or spiritual rector of a rectory. 1 Woodd. Lect. 311; Fleta, lib. 7, c. 18; Co. Litt. 300. Also, any clergyman having a spiritual preferment. Co. Litt. 17. Holy orders, presentation, institution, and induction are necessary for a parson; and a parson may cease to be such by death, resignation, cession, or deprivation, which last may be for simony, nonconformity to canons, adultery, etc.; Co. Litt. 120; 4 Co. 75, 76.

PARSON IMPERSONEE. A *persona,* or parson, may be termed *impersonata,* or impersonee, only in regard to the possession he hath of the rectory by the act of another. Co. Litt. 300. One that is inducted and in possession of a benefice; *e. g.* a dean and chapter. Dy. 40, 221. He that is in possession of a church, be it presentative or appropriate, and with whom the church is full,—*persona* in this case meaning the patron who gives the title, and *persona impersonata* the parson to whom the benefice is given in the patron's right. Reg. Jud. 24.

PARSONAGE. The house set apart for the minister's residence. A portion of lands and tithes established by law for the maintenance of a minister. Toml.

PART. A share; a purpart. This word is also used in contradistinction to counterpart: covenants were formerly made in a script and rescript, or *part* and *counterpart*.

PART-OWNERS. Those who own a thing together, or in common.

In Maritime Law. A term applied to two or more persons who own a vessel together, and not as partners.

In general, when a majority of the part-owners are desirous of employing such a ship upon a particular voyage or adventure they have a right to do so upon giving security in the admiralty by stipulation to the minority, if required to bring her back and restore the ship, or in case of her loss, to pay them the value of their respective shares; Abb. Ship. 84; 3 Kent 151; Story, Partnership § 489; The Orleans v. Phœbus, 11 Pet. (U. S.) 175, 9 L. Ed. 677. When the majority do not choose to employ the ship, the minority have the same right, upon giving similar security; The Orleans v. Phœbus, 11 Pet. (U. S.) 175, 9 L. Ed. 677; 1 Hagg. Adm. 306; Jacobsen, Sea-Laws 442. Where part-owners are equally divided as to the employment upon any particular voyage, the courts of admiralty have manifested a disposition to support the right of the court to order a sale of the ship; Story, Partn. § 439; Davis v. Seneca, Gilp. 10, Fed. Cas. No. 3,650. See VESSEL.

PARTES FINIS NIL HABUERUNT (Lat. the parties to the fine had nothing; *i. e.* nothing which they could convey). The plea to a fine levied by a stranger, which only bound parties and privies. 2 Bla. Com. *356; Hob. 334; 1 P. Wms. 520.

PARTIAL LOSS. See Loss.

PARTIBLE LANDS. Lands which might be divided; lands held in gavelkind. See 2 Poll. & Maitl. 268, 271; GAVELKIND.

PARTICEPS CRIMINIS. A partner in crime. See ACCOMPLICE.

PARTICIPATE. To take equal shares and proportions; to share or divide. 6 Ch. 696. *Participate in an estate.* To take as tenants in common. 28 Beav. 266.

PARTICULAR AVERAGE. Every kind of expense or damage, short of total loss, which regards a particular concern, and which is to be wholly borne by the proprietor of that concern or interest alone. See Bargett v. Ins. Co., 3 Bosw. (N. Y.) 385; Pierce v. Ins. Co., 14 Allen (Mass.) 320; 2 Phill. Ins. § 354; 1 Pars. Marit. Law 284; Gourlie, Gen. Average; AVERAGE. It also designates a partial loss. Arn. Ins. 1008.

PARTICULAR AVERMENT. See AVERMENT.

PARTICULAR CUSTOM. A custom which only affects the inhabitants of some particular district.

To be good, a particular custom must have been used so long that the memory of man runneth not to the contrary; must have been continued; must have been peaceable; must be reasonable; must be certain; must be consistent with itself; must be consistent with other customs. 1 Bla. Com. 74, 79.

PARTICULAR ESTATE. An estate which is carved out of a larger, and which precedes a remainder, as, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail: this precedent estate is called the particular estate, and the tenant of such estate is called the particular tenant. 2 Bla. Com. 165; 4 Kent 226; 16 Vin. Abr. 216; 4 Com. Dig. 32; 5 *id.* 346; Will. Real P. 281. See REMAINDER.

PARTICULAR LIEN. The right which a person has to retain property in respect of money or labor expended on such particular property. See LIEN.

PARTICULAR MALICE. Ill will; grudge; a desire to be revenged on a particular person. Brooks v. Jones, 33 N. C. 261. See MALICE.

PARTICULAR SERVICES. In this phrase is included the professional services of an expert; Buchman v. State, 59 Ind. 13, 26 Am. Rep. 75; but not of a witness; Daly v. Multnomah Co., 14 Or. 20, 12 Pac. 11.

PARTICULAR TENANT. See PARTICULAR ESTATE.

PARTICULARS. See BILL OF PARTICULARS.

PARTIDAS. See LAS PARTIDAS.

PARTIES. Those who take part in the performance of an act, as, making a contract, carrying on an action. Parties in law may be said to be those united in interest in the performance of an act; it may then be composed of one or more persons. The term includes every party to an act. It is also used to denote all the individual, separate persons engaged in the act,—in which sense, however, a corporation may be a party.

In Contracts. Those persons who engage themselves to do or not to do the matters and things contained in an agreement.

In general, all persons may be parties to contracts. But no person can contract with himself in a different capacity, as there must be an agreement of minds; 2 Bro. C. C. 400; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076; Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

Aliens were under greater disabilities at common law with reference to real than to personal property; 7 Co. 25 *a*; Levy v. Mc-

Cartee, 6 Pet. (U. S.) 102, 8 L. Ed. 334; Taylor v. Carpenter, 11 Paige Ch. (N. Y.) 292, 42 Am. Dec. 114; Judd v. Lawrence, 1 Cush. (Mass.) 531. The disability is now removed, in a greater or less degree, by statutes in the various states, and alien friends stand on a very different footing from alien enemies; Coats v. Holbrook, 2 Sandf. Ch. (N. Y.) 586; Re Barry, 2 How. (U. S.) 65, 11 L. Ed. 181. See ALIEN; WAR.

Bankrupts and *insolvents* are disabled to contract, by various statutes, in England, as well as by insolvent laws in the states.

Duress renders a contract voidable at the option of him on whom it was practised. See DURESS.

Infants are generally incapable of contracting before the age of twenty-one years. This provision is intended for their benefit; and therefore most of their contracts are voidable, and not void. It is the infant's privilege at majority to elect whether to avoid or ratify the contract he has made during minority; Phipps v. Phipps, 39 Kan. 495, 18 Pac. 707. Though the infant is not bound, the adult with whom he may contract is. The infant may always sue, but cannot be sued; Stra. 937. The infant cannot avoid his contract for necessaries; Phelps v. Worcester, 11 N. H. 51; 6 M. & W. 42; Shaw v. Bryant, 65 Hun 57, 19 N. Y. Supp. 618. See [1891] 1 Q. B. 413. If he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he has received; the privilege of infancy is to be used as a shield, not as a sword; Clark v. Tate, 7 Mont. 171, 14 Pac. 761; Utermehle v. McGreal, 1 App. D. C. 359. See INFANT; NECESSARIES.

Married women, at common law, were almost entirely disabled to contract, their personal existence being almost entirely merged in that of their husbands; Turtle v. Muncy, 2 J. J. Marsh. (Ky.) 82; Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; 5 Exch. 388; so that contracts made by them before marriage could be taken advantage of and enforced by their husbands, but not by themselves; Howes v. Bigelow, 13 Mass. 384; Winslow v. Crocker, 17 Me. 29; Hyde v. Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Morgan v. Bank, 14 Conn. 99. The contract of a *feme covert* was, then, generally void, unless she was the agent of her husband, in which case it was the husband's contract, and not hers; 6 Mod. 171; Pickering v. Pickering, 6 N. H. 124; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384. See MARRIED WOMAN.

Non compotes mentis. At common law, formerly, in this class were included *lunatics*, *insane persons*, and *idiots*. It is understood now to include *drunkards;* Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Rice v. Peet, 15 Johns. (N. Y.) 503; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; 13 M. & W. 623; Youn v. Lamont, 56 Minn. 216, 57 N. W. 478. See Thomas' Adm'r v. Lewis, 89 Va. 56, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. *Spendthrifts* under guardianship are not competent to make a valid contract for the payment of money; Manson v. Felton, 13 Pick. (Mass.) 206. *Seamen* "are the wards of the admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees." Harden v. Gordon, 2 Mas. 541, Fed. Cas. No. 6,047. See 3 Kent 193; 2 Dods. 504.

As to the character in which parties contract. They may act independently or severally, jointly, or jointly and severally. The decision of the question of the kind of liability incurred depends on the terms of the contract, if they are express, or, if not express, upon the intention of the parties as gathered from the circumstances of the case. Whenever, however, the obligation is undertaken by two or more, or a right given to two or more, it is a general presumption of law that it is a joint obligation or right; words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to produce a several responsibility or a several right; 13 M. & W. 499; Ehle v. Purdy, 6 Wend. (N. Y.) 629; Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399. It may be doubted, however, whether anything less than express words can raise at once a joint and several liability. No joint liability exists upon separate individual contracts, though for the same subject-matter; Fischer v. Spang, 43 Ill. App. 378. Parties may act as the representatives of others, as *agents*, *factors*, or *brokers*, *attorneys*, *executors*, or *administrators*, and *guardians*. They may also act in a collective capacity, as *corporations*, *joint-stock companies*, or as *partnerships*. See these titles.

New parties may be made to contracts already in existence, by *novation*, *assignment*, and *indorsement*, which titles see.

To Suits in Equity. The person who seeks a remedy in chancery by suit, commonly called the plaintiff, or complainant, and the person against whom the remedy is sought, usually denominated the defendant, or respondent, are the parties to a suit in equity.

In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; Christian v. R. Co., 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; Gregory

v. Stetson, 133 U. S. 579; it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matter in the suit, and it is connected with the others; Brown v. Safe Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468. In the absence of parties, and without their having an opportunity to be heard, a court is without jurisdiction to make an adjudication affecting them; New Orleans W. W. Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518.

Active parties are those who are so involved in the subject-matter in controversy that no decree can be made without their being in court. *Passive* parties are those whose interests are involved in granting complete relief to those who ask it. Joy v. Wirtz, 1 Wash. C. C. 517, Fed. Cas. No. 7,554. See Logan v. Barclay, 3 Ala. 361.

Passive parties are those to whom complete relief can be afforded without affecting the rights of those omitted; Appeal of Coleman, 75 Pa. 459.

They consist of: 1. Formal parties; 2. Persons having an interest and who ought to be made parties, in order that the court may adjust all rights involved; these are commonly termed *necessary* parties, but if their interests are separable from those of the other parties so that complete justice can be done without affecting those not before the court, the latter are not *indispensable* parties; 3. Persons who have an interest such that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Minnesota v. Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. Where granting the relief prayed would injuriously affect persons who are materially interested who are not parties, the court will dismiss the bill *sua sponte*, though the question be not raised by the pleadings or by counsel; Minnesota v. Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499.

PLAINTIFFS. In general, all persons, whether natural or artificial, may sue in equity; and an equitable title only is sufficient; Frye v. Bank, 5 Gilman (Ill.) 332. Incapacities which prevent suit are *absolute*, which disable during their continuance, or *partial* which disable the party to sue alone.

Persons representing antagonistic interests cannot be joined as complainants; Smith v. Smith, 102 Ala. 516, 14 South. 765.

Alien enemies are under an absolute incapacity to sue. Alien friends may sue; Mitf. Eq. Pl. 129; if the subject-matter be not such as to disable them; Co. Litt. 129 *b*; although a sovereign; 1 Sim. 94; Society for the Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. Ed. 662; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370. In such case he must have been first recognized by the executive of the forum; Gelston v. Hoyt, 3 Wheat. (U. S.) 324, 4 L. Ed. 381.

In such case the sovereign submits to the jurisdiction, as to the subject-matter, and must answer on oath; Mitf. Eq. Pl. 30; Ad. Eq. 313; 6 Beav. 1. See SOVEREIGN.

Attorney-general. Government (in England, the *crown*) may sue both in its own behalf, for its own political rights and interests, and in behalf of the rights and interests of those partaking of its prerogatives or claiming its peculiar protection; Mitf. Eq. Pl. 421; usually by the agency of the attorney-general or solicitor-general; Mitf. Eq. Pl. 7; Ad. Eq. 312. See INJUNCTION; QUO WARRANTO; MANDAMUS; TRUSTS.

Corporations, like natural persons, may sue; Moraw. Pr. Corp. § 357; Grant, Corp. 198; although foreign; *id.* 200; but in such case the incorporation must be set forth; 1 Cr. M. & R. 296; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 372; as it must if they are domestic and created by a private act; Central Mfg. Co. v. Hartshorne, 3 Conn. 199; 15 Viner, Abr. 198. All the members of a voluntary association must be joined; Whitney v. Mayo, 15 Ill. 251; unless too numerous; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521. See JURISDICTION; EXPRESS COMPANIES.

As to the right of a *stockholder* to sue, see Hawes v. Oakland, 104 U. S. 460, 26 L. Ed. 827; Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 500, 27 L. Ed. 300; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401.

Idiots and *lunatics* may sue by their committees; Mitf. Eq. Pl. 29. As to when a mere petition is sufficient, see In re Hallock, 7 Johns. Ch. (N. Y.) 24; Latham v. Wiswall, 37 N. C. 294. See NEXT FRIEND.

Infants may sue; Mitf. Eq. Pl. 25; and, if they be on the wrong side of the suit, may be transferred at any time, on suggestion; Le Fort v. Delafield, 3 Edw. Ch. (N. Y.) 32. The bill must be filed by the next friend; Bowie v. Minter, 2 Ala. 406; who must not have an adverse interest; Walker v. Crowder, 37 N. C. 478; and who may be compelled to give bail; Fulton v. Rosevelt, 1 Paige, Ch. (N. Y.) 178, 19 Am. Dec. 409. If the infant have a guardian, the court may decide in whose name the suit shall continue; Holmes v. Field, 12 Ill. 424.

A *married woman*, at common law, was under partial incapacity to sue; Bradley v. Emerson, 7 Vt. 369. Otherwise, when in such condition as to be considered in law a *feme sole;* Troughton's Adm'rs v. Hill's Ex'rs, 3 N. C. 406. She could sue on a separate claim by aid of a next friend of her own choice; Story, Eq. Pl. § 61; but see Wood v. Wood, 2 Paige, Ch. (N. Y.) 454; and the defendant might insist that she should sue

in this manner; Dandridge v. Minge, 4 Rand. (Va.) 397.

Though at common law an action could not be maintained by a partnership against another *partnership* having a common member with the former, upon an agreement made between the two firms, equity will take jurisdiction, and afford an adequate remedy; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526.

Societies. A certain number of persons belonging to a voluntary society may sue on behalf of themselves and their associates for purposes common to them all; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521; such as bondholders and stockholders.

The objection for want of proper parties may be taken advantage of either by demurrer, plea, answer, or at the hearing; 24 U. S. App. 601; but see ANSWER as to the changes in equity pleading under the new equity rules of the supreme court of the United States.

DEFENDANTS. Generally, all who are able to sue may be sued in equity. To constitute a person defendant, process must be prayed against him; Hoyle v. Moore's Devisees, 39 N. C. 175; Carey v. Hillhouse, 5 Ga. 251. Those who are under incapacity may be made defendants, but must appear in a peculiar manner. One, or more, interested with the plaintiff, who refuse to join may be made defendants; Contee v. Dawson, 2 Bland. Ch. (Md.) 264; Pogson v. Owen, 3 Des. (S. C.) 31; Billings v. Mann, 156 Mass. 203, 30 N. E. 1136. A court of equity even after a final hearing on the merits, and on appeal to the court of last resort, will compel the joinder of necessary parties defendant; O'Fallon v. Clopton, 89 Mo. 284, 1 S. W. 302. One cannot be made a defendant on his own application, against the objection of the complainant; Whitney v. Bank, 71 Miss. 1009, 15 South 33, 23 L. R. A. 531; Stretch v. Stretch, 2 Tenn. Ch. 140. See INTERVENTION.

Corporations must be sued by their corporate names, unless authorized to come into court in the name of some other person, as president, etc.; Story, Eq. Pl. § 70. Governments cannot, generally, be sued in their own courts; Story, Eq. Pl. § 69; yet the attorney-general may be made a party to protect its rights when involved; Garr v. Bright, 1 Barb. Ch. (N. Y.) 157; and the rule does not prevent suits against officers in their official capacity; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549. As to joining corporate officers in patent cases, see INFRINGEMENT.

Foreclosure. For the mere purpose of extinguishing an equity of redemption, the mortgagor is strictly the only necessary party; Wabash, St. L. & P. R. Co. v. Trust Co., 23 Fed. 513; but if it be intended to divest other liens, other parties must be brought in; *id.*

In a suit to foreclose a junior mortgage, a prior mortgagee need not be joined; Woodworth v. Blair, 112 U. S. 8, 5 Sup. Ct. 6, 28 L. Ed. 615; and more particularly if the prior mortgage is not yet due; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; but it is otherwise where the bill prays a receiver for the property covered by such prior mortgage; Miltenberger v. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; or where the junior mortgagee seeks a sale of the property free of incumbrance; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; or where there is a doubt as to the amount of the debt due under the prior incumbrance; Metropolitan Trust Co. v. R. Co., 43 Hun (N. Y.) 521; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136. Senior mortgagees cannot become parties to an action to foreclose a junior mortgage; Petition of McHenry, 9 Abb. N. C. (N. Y.) 256. But where joined he may enforce his lien by a cross-bill; Osborne & Co. v. Barge, 30 Fed. 805. Even junior incumbrancers are not indispensable parties, but if not joined, their rights will not be affected; Chandler v. O'Neil, 62 Ill. App. 418; Simmons v. Taylor, 23 Fed. 849.

A receiver is a proper, though not a necessary party to foreclosure proceedings begun after his appointment; Herring v. R. Co., 105 N. Y. 340, 12 N. E. 763; Kirkpatrick v. Corning, 38 N. J. Eq. 234; he may be permitted to intervene; Willink v. Banking Co., 4 N. J. Eq. 377.

Bondholders cannot bring proceedings to foreclose a mortgage without showing that they have requested their trustee to proceed and he has refused; General Electric Co. v. Electric Co., 79 Fed. 25.

Mortgage bondholders may proceed for the protection of their interests where the trustee has refused to sue; First N. F. Ins. Co. v. Salisbury, 130 Mass. 303; Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47; or has acquired interests adverse to those of the bondholders; American T. & I. Co. v. Oil & Gas Co., 51 Fed. 826; and, in such case, one or more bondholders may sue for themselves and other like bondholders; Farmers' L. & T. Co. v. R. Co., 59 Fed. 957; such others may come in at any stage; Wilmer v. R. Co., 2 Woods 447, Fed. Cas. No. 17,776.

A mortgage trustee is the only necessary party to a bill to foreclose the mortgage; he represents the bondholders; see Kerrison v. Stewart, 93 U. S. 156, 23 L. Ed. 843; Union Trust Co. v. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; and he is the proper person to bring foreclosure proceedings; Barnes v. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128; Credit Co. of London v. R. Co., 15 Fed. 52. A non-resident mortgage trustee may be brought in as defendant by publication in the federal courts; Stansell v. Levee Board, 13 Fed. 857. In a railroad foreclosure brought by a non-resident bondholder,

the fact that the trustee is a resident of the same state as the plaintiff does not affect the jurisdiction of a federal court; Barry v. R. Co., 27 Fed. 1.

A trustee may intervene in a bondholder's suit to foreclose and carry on the suit in his own name; People v. Fletcher, 2 Scam. (Ill.) 487. A buyer at a foreclosure sale makes himself a party to the record; Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379. See INTERVENTION; MORTGAGE.

Corporations are indispensable parties to a bill which affects corporate rights or liabilities; Swan L. & C. Co. v. Frank, 148 U. S. 604, 13 Sup. Ct. 691, 37 L. Ed. 577; Deerfield v. Nims, 110 Mass. 115.

Idiots and lunatics may be defendants and defend by committees, usually appointed guardians *ad litem* as of course; Mitf. Eq. Pl. 103; New v. New, 6 Paige, Ch. (N. Y.) 237.

A guardian *de facto* may not have a bill against a lunatic for a balance due him, but must proceed by petition; Tally v. Tally, 22 N. C. 385, 34 Am. Dec. 407; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

Infants defend by guardians appointed by the court; Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128, 8 L. Ed. 890; Parker v. Lincoln, 12 Mass. 16. On becoming of age, an infant is allowed, as of course, to put in a new plea, or to demur, on showing that it is necessary to protect his rights; Stephenson v. Stephenson, 6 Paige, Ch. (N. Y.) 353.

Married women might be made defendants, and might answer as if *femes sole*, if the husband was plaintiff, an exile, or an alien enemy, has abjured the realm or been transported under criminal sentence; Mitf. Eq. Pl. 104.

She should be made defendant where her husband sought to recover an estate held in trust for her separate use; Grant v. Van Schoonhoven, 9 Paige, Ch. (N. Y.) 255, 37 Am. Dec. 393; and, generally, where the interests of her husband conflicted with hers in the suit, and he was a plaintiff; Alston v. Jones, 3 Barb. Ch. (N. Y.) 397. See MARRIED WOMEN.

See, generally, as to who may be defendants, JOINDER OF PARTIES.

A failure to join the husband of a married woman in an equitable action against her, is cured by his death pending suit; Alexander v. Steele, 84 Ala. 332, 4 South. 281.

Where proceedings are against an association having numerous members, all need not be made parties defendant; they are good as to all the members named; Story, Eq. Pl. § 94.

In Fidelity Ins. Co. v. Safe Deposit Co., 175 Pa. 13, 34 Atl. 314, the same trust company as trustee for two different estates was both plaintiff and defendant in a cause. The court in its opinion adverted to the fact without comment.

At Law. *IN ACTIONS EX CONTRACTU.*

There are two necessary parties to an action, viz. the person who seeks to establish a right in himself, commonly called the plaintiff, and the person upon whom he seeks to impose a corresponding duty or liability, commonly called the defendant. In attachment proceedings there is still a third party, commonly called the garnishee.

PLAINTIFFS. In general, all persons who have a just cause of action may sue, unless some disability be shown; Dicey, Part. 1. An action on a contract, of whatever description, must be brought in the name of the party in whom the legal interest is vested; 3 B. & P. 147; Crawford v. The William Penn, 1 Pet. C. C. 109, Fed. Cas. No. 3,372; Buckbee v. Brown, 21 Wend. (N. Y.) 110. See Saltmarsh v. Candia, 51 N. H. 71.

On simple contracts, by the party from whom (in part, at least) the consideration moved; 1 Stra. 592; Anderson v. Blakely, 2 W. & S. (Pa.) 237; although the promise was made to another, if for his benefit; Cabot v. Haskins, 3 Pick. (Mass.) 83; Sailly v. Cleveland, 10 Wend. (N. Y.) 156; Clarke v. McFarlands' Ex'rs, 5 Dana (Ky.) 45; and not by a stranger to the consideration, even though the contract be for his sole benefit; Browne, Act. 101. On contracts under seal, by parties to the instrument only; Spencer v. Field, 10 Wend. (N. Y.) 87; Co. Litt. 231.

Agents contracting in their own name, without disclosing their principals, may, in general, sue in their own names; 3 B. & Ald. 280; 5 M. & W. 650; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; or the principals may sue; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Broom, Part. 44. See, generally, Ans. Contr. 352.

So they may sue on contracts made for an unknown principal; 3 E. L. & E. 391; and also when acting under a *del credere* commission; 4 Maule & S. 566; White v. Chouteau, 10 Barb. (N. Y.) 202; but not an ordinary merchandise broker. An auctioneer may sue for the price of goods sold; 1 H. Bla. 81; Hulse v. Young, 16 Johns. (N. Y.) 1; but a mere attorney having no beneficial interest may not sue in his own name; Gunn v. Cantine, 10 Johns. (N. Y.) 387.

Alien enemies, unless resident under a license, or contracting under specific license, cannot sue, nor can suit be brought for their benefit; 1 Campb. 482; 1 Kent 67; Jackson v. Decker, 11 Johns. (N. Y.) 418. License is presumed if they are not ordered away; Clarke v. Morey, 10 Johns. (N. Y.) 69; Russel v. Skipwith, 6 Binn. (Pa.) 241. See, also, Co. Litt. 129 *b*; 15 East 260; 1 Kent 68.

Alien friends may bring actions concerning personal property; Bac. Abr. *Aliens*; for libel published here; 8 Scott 182; and now, in regard to real estate generally, by

statute; Ellice v. Winn, 12 Wend. (N. Y.) 342; and, by common law, till office found, against an intruder; Jackson v. Beach, 1 Johns. Cas. (N. Y.) 399. But see People v. Folsom, 5 Cal. 373. See WAR. As a general rule, an alien may maintain a personal action in the federal courts, Taylor v. Carpenter, 3 Story 458, Fed. Cas. No. 13,784; Coffeen v. Brunton, 4 McLean, 516, Fed. Cas. No. 2,946.

Assignees of choses in action cannot, at common law, maintain actions in their own names; Broom, Part. 10; Pollard v. Ins. Co., 42 Me. 221. Promissory notes, bills of exchange, bailbonds, and replevin bonds, etc., are exceptions to this rule; Hamm. Part. 108. Assignees of a note and mortgage can maintain an action thereon, whether they paid any consideration for the assignment, or not; Whitney v. Traynor, 74 Wis. 289, 42 N. W. 267.

An assignee of real estate may have an action in his own name for breaches of a covenant running with the land, occurring after assignment; Kane v. Sanger, 14 Johns. (N. Y.) 89; and he need not be named in an express covenant of this character; Broom, Part. 8.

An assignee in insolvency or bankruptcy should sue in his own name on a contract made before the act of bankruptcy or the assignment in insolvency; 1 Chitty, Pl. 14; Com. Dig. *Abatement* (E 17); Kennedy v. Ferris, 5 S. & R. (Pa.) 394. Otherwise of a suit by a foreign assignee; Raymond v. Johnson, 11 Johns. (N. Y.) 488. The discharge of the insolvent pending suit does not abate it; *id.* But see Bird v. Pierpont, 1 Johns. (N. Y.) 118.

An assignee who is to execute trusts may sue in his own name; 4 Abb. 106. *Cestuis que trustent* cannot sue at law; 3 Bouvier, Inst. 135.

Civil death occurring in case of an outlaw, an attainted felon, or one sentenced to imprisonment for life, incapacitates the person for suing as plaintiff during the continuance of the condition; Broom, Part. 85. Sentence as above, during suit, abates it; O'Brien v. Hagan, 1 Duer (N. Y.) 664; but the right to sue is suspended only; Broom, Part. 85.

Corporations may sue in their true corporate name, on contracts made in their behalf by officers or agents; Garland v. Reynolds, 20 Me. 45; Dicey, Part. 276; Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. 409; as a bank, on a note given to a cashier; Commercial Bk. v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280. A suit against a director for his secret profits on a sale to the company is properly brought by the company and not by its stockholders; Yale Gas S. Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159.

The name must be that at the time of suit; Morgan v. Ins. Co., 3 Ind. 285; Porter v. Nekervis, 4 Rand. (Va.) 359; with an averment of the change, if any, since the making of the contract; Ready v. Tuskaloosa, 6 Ala. 327; Madison College v. Burke, *id.* 494; even though a wrong name were used in making the contract; Berks & Dauphin T. Road v. Myers, 6 S. & R. (Pa.) 16, 9 Am. Dec. 402; Medway Cotton Manufactory v. Adams, 10 Mass. 360. See NAME.

If the corporation be a foreign one, proof of its existence must be given; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Michigan Bank v. Williams, 5 Wend. (N. Y.) 478; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Bank of Ala. v. Simonton, 2 Tex. 531; Bank of Edwardsville v. Simpson, 1 Mo. 184. See Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501.

Executors and administrators, in whom is vested the legal interest, are to sue on all personal contracts; 5 Term 393; see Bushel v. Ins. Co., 15 S. & R. (Pa.) 183; or covenants affecting the realty but not running with the land; 2 H. Bla. 310; and on such covenants running with the land, for breach during the decedent's lifetime occasioning special damage; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 17. They must sue, as such, on causes accruing prior to the death of the decedent; 1 Saund. 112; Com. Dig. *Pleader* (2 D 1); Winningham v. Crouch, 2 Swan (Tenn.) 170; and as such, or in their own names, at their election, for those accruing subsequently; McDonald v. Williams, 16 Ark. 36; and upon contracts made by them in their official capacity; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Claiborne v. Yeoman, 15 Tex. 44; in their own names only, in some states; Hailey v. Wheeler, 49 N. C. 159.

On the death of an executor, his executor, or administrator, if he die intestate, is the legal representative of the original decedent; 7 M. & W. 306; Smith v. Pearce, 2 Swan (Tenn.) 127; 2 Bla. Com. 506; unless altered by statute.

Foreign governments, whether monarchical or republican; Mexico v. De Arangoiz, 5 Duer (N. Y.) 634; if recognized by the executive of the forum; Gelston v. Hoyt, 3 Wheat. (U. S.) 324, 4 L. Ed. 381; see Rose v. Himely, 4 Cra. (U. S.) 272, 2 L. Ed. 608; 9 Ves. 347; may sue; Delafield v. Illinois, 26 Wend. (N. Y.) 212.

Husband must sue alone for wages accruing to the wife, for the profits of business carried on by her, or money lent by her during coverture; 2 W. Bl. 1239; Avogadro v. Bull, 4 E. D. Sm. (N. Y.) 384; and see 1 Maule & S. 180; for slanderous words spoken of the wife which are actionable only by reason of special damage; 2 Du. 633; on a fresh promise, for which the consideration was in part some matter moving from him renewing a contract made with the wife, *dum sola;* 1

Maule & S. 180; and see Steward v. Chance, 3 N. J. L. 827; for a legacy accruing to the wife during coverture; Hapgood v. Houghton, 22 Pick. (Mass.) 480; and as administrator of the wife to recover chattels real and personal not previously reduced into possession; Broom, Part. 74. See MARRIED WOMAN.

He may sue alone for property that belonged to the wife before coverture; Trimble v. Stipe, 5 T. B. Monr. (Ky.) 261; on a joint bond given for a debt due to the wife *dum sola;* 1 Maule & S. 180; 1 Chitty, Pl. 20; on a covenant running to both; Cro. Jac. 399; 1 B. & C. 443; to reduce choses in action into possession; 2 Ad. & E. 30; for damages to his wife's separate real estate; Lee v. Turner, 71 Tex. 264, 9 S. W. 149; and, after her death, for anything he became entitled to during coverture; Co. Litt. 351 *a*, n. 1. And see 4 B. & C. 529.

Infants may sue only by guardian or *prochein ami;* 13 M. & W. 640; McChord v. Fisher's Heirs, 13 B. Monr. (Ky.) 193. In a suit by an infant against his guardian, the infant and not his next friend must be made the plaintiff; Morgan v. Potter, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670. Infants who, by their next friend, have procured a judgment from a court with jurisdiction, for the sale of their lands, are bound thereby; Tyson v. Belcher, 102 N. C. 112, 9 S. E. 634.

Joint tenants. See JOINDER.

Lunatic, or *non compos mentis*, may maintain an action, which should be in his own name; Broom, Part. 84; McKillip v. McKillip, 8 Barb. (N. Y.) 552. His wife may appear, if he have no committee; 7 Dowl. 22. An idiot may, by a next friend, who petitions for that purpose; 2 Chitty, Archb. Pr. 909.

Married women cannot, in general, sue alone at common law; Broom, Part. 74; but a married woman may sue alone where her husband is civilly dead; see Cro. Eliz. 519; 2 B. & P. 165; or, in England, where he is an alien out of the country, on her separate contracts; 1 B. & P. 357; 3 Campb. 123; while he is in such condition; Broom, Part. § 114.

So she may sue alone after a sentence of nullity or divorce *a vinculo;* 9 B. & C. 698; but not after a divorce *a mensa et thoro*, or voluntary separation merely; 3 B. & C. 297.

She may, where he is legally presumed to be dead; 2 M. & W. 894; or where he has been absent from the country for a very long time; Rose v. Bates, 12 Mo. 30; 23 E. L. & E. 127.

When the wife survives the husband, she may sue on all contracts entered into by others with her before coverture, and she may recover all arrears of rent of her real estate which became due during the coverture, on their joint demise; 8 Taunt. 181; 1 Rolle, Abr. 350 *d*. She is also entitled to all her real property, and her chattels real and choses in action not reduced into possession by the husband; Broom, Part. 76.

These are rules which are affected by the married woman's acts, to which reference must be made.

Partners. One partner cannot, in general, sue another for goods sold; 9 B. & C. 356; for work done; 7 B. & C. 419; for money had and received in connection with a partnership transaction; 6 B. & C. 194; or for contribution towards a payment made under compulsion of law; 1 M. & W. 504. But one may sue the other for a final balance struck; Broom, Part. 57; 5 M. & W. 21; see JOINDER; and they may sue the administrator of a deceased partner; Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 293. One making a contract for himself and his partner cannot sue therein in his own name alone; De Wit v. Lander, 72 Wis. 120, 39 N. W. 349. An action on an account due a firm is properly brought in the names of its members, though the firm has been dissolved; Hyde v. Nerve Food Co., 160 Mass. 559, 36 N. E. 585. The fact that after suit brought by partners, one of them sells his interest in the firm to the others, does not necessitate a change of parties; Evans Co. v. Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

Partners cannot sue or be sued in their copartnership name, but the individual names of the members must be stated; Lewis v. Cline (Miss.) 5 South. 112. A dormant partner is not a necessary party plaintiff in an action brought by the firm; Keesey v. Old, 3 Tex. Civ. App. 1, 21 S. W. 693.

Survivors. The survivor or survivors of two or more jointly interested in a contract not running with the land must sue as such; Archb. Pl. 54; 1 East 497; Wallace v. Fitzsimmons, 1 Dall. (Pa.) 248, 1 L. Ed. 122; Bernard v. Wilcox, 2 Johns. Cas. (N. Y.) 374.

The survivor of a partnership must sue alone as such; 9 B. & C. 538; 2 Maule & S. 225. See Campbell v. Pence, 118 Ind. 313, 20 N. E. 840.

The survivor of several parties to a simple contract should describe himself as such; Vandenheuvel v. Storrs, 3 Conn. 203.

Tenants in common may sue each other singly for actual ouster; Woodf. Landl. & T. 789. See JOINDER; Webb's Pollock, Torts 447.

Trustees must sue, and not the *cestuis que trustent;* Weathers v. Ray, 4 Dana (Ky.) 474. See JOINDER.

DEFENDANTS. All persons having a direct and immediate legal interest in the subject-matter of the suit are to be made parties. The proper defendants to a suit on a specialty are pointed out by the instrument.

In case of simple contracts, the person made liable expressly by its terms; 3 Bingh. N. C. 732; or by implication of law, is to be

made defendant; 2 Bla. Com. 443. See Bainbridge v. Downie, 6 Mass. 253; 1 Chitty, Pl. 24. Where there are several persons parties, if the liability be joint, all must be joined as defendants, either on specialties; 1 Wms. Saund. 154; or simple contracts; Chitty, Contr. 99. If it be joint and several, all may be joined; 1 Wms. Saund. 154, n. 4; or each sued separately; 1 Wms. Saund. 191, c.; Com. Dig. *Obligations* (G); 1 Ad. & E. 207; if it be several, each must be sued separately; 1 East 226. The presumption is, in such case, that a written agreement is joint; 2 Campb. 640; otherwise of verbal contracts; 1 Ad. & E. 691; 3 B. & Ald 89.

Alien enemies may be sued; Broom, Part. 18; 1 W. Bla. 30; Cro. Eliz. 516; 4 Bingh. 421; Com. Dig. *Abatement* (E 3); see Masterson v. Howard, 18 Wall (U. S.) 99, 21 L. Ed. 764; Seymour v. Bailey, 66 Ill. 288; and, of course, alien friends

Assignees of a mere personal contract cannot, in general, be sued; of covenants running with the realty may be, for breach after assignment; 2 Saund. 304, n. 12; Woodf. Landl. & T. 260; 7 Term 312; Pollard v. Shaaffer, 1 Dall. (Pa.) 210, 1 L. Ed. 104, 1 Am. Dec. 239; but not after an assignment by him: Bac. Abr. *Covenant* (E 4).

Assignees of bankrupts cannot be sued as such at law; Cowp. 134.

Bankrupts after discharge cannot be sued. An insolvent after discharge may be sued on his contracts, but his person is not liable to arrest in a suit on a debt which was due at the date of his discharge; 8 East 311; 1 Saund. 241, n. 5.

See CONFLICT OF LAWS; BANKRUPTCY; INSOLVENCY.

Corporations must be sued by their true names; Moraw. Pr. Corp. § 355; Minot v. Curtis, 7 Mass. 441; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 778, 14 Am. Dec. 526; Illinois State Hospital v. Higgins, 15 Ill. 185. See NAME. Assumpsit lies against a corporation aggregate on an express or implied promise, in the same manner as against an individual; Overseers of Poor v. Overseers of Poor, 3 S. & R. (Pa.) 117; Danforth v. Turnpike Road, 12 Johns. (N. Y.) 231; Hayden v. Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143; Chesapeake & O. C. Co. v. Knapp, 9 Pet. (U. S.) 541, 9 L. Ed. 222; Witte v. Fishing Co., 2 Conn. 260; 5 Q. B. 547.

Executors and *administrators* of a deceased contractor or the survivor of several joint contractors may be sued; Hamm. Part. 156; but not if any of the original contractors survive; Hench v. Metzer, 6 S. & R. (Pa.) 272.

The liability does not commence till probate of the will; Ward v. Bowen, 2 Sneed (Tenn.) 58. The executor or administrator *de bonis non* of a deceased person is the proper defendant; Broom, Part. 197.

The liability is limited by the amount of assets, and does not arise on subsequent breach of a covenant which could be performed only by the covenantor; Broom, Part. 118. They, or real representatives, may be parties, at the election of the plaintiff, where both are equally liable; 1 Lev. 189, 303.

The personal representative must be made a party before debts can be decreed against a decedent's estate; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638.

Foreign governments cannot be sued to enforce a remedy, but may be made defendants to give an opportunity to appear; Manning v. Nicaragua, 14 How. Pr. (N. Y.) 517. A foreign sovereign cannot be sued for any act done by him in the character of a sovereign prince; 2 H. L. C. 1; 17 Q. B. 171; it would appear most probably that he can in no case be made defendant in an action; Dicey, Part. *5; but see 10 Q. B. 656. See JURISDICTION; SOVEREIGN; STATE.

Heirs may be liable to suit under the ancestor's covenant, if expressly named, to the extent of the assets received; Broom, Part. 118; Platt, Cov. 449.

Husband may be sued alone at common law for breach of joint covenant of himself and wife; Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; Griffin v. Reynolds, 17 How. (U. S.) 609, 15 L. Ed. 229; and *must* be on a mere personal contract of the wife made during coverture; Com. Dig. *Pleader* (2 A 2); 2 B. & P. 105; Edwards v. Davis, 16 Johns. (N. Y.) 281; even if made to procure necessaries when living apart; Jacobs v. Featherstone, 6 W. & S. (Pa.) 346; *may* be on a new promise for which the consideration is a debt due by the wife before marriage; 7 Term 348; but such promise must be express; Broom, Part. 174; and have some additional consideration, as forbearance, etc.; 11 Ad. & E. 438, 451; on lease to both made during coverture; Com. Dig. *Baron & F.* (2 B); on lease to wife *dum sola*, for rent accruing during coverture, or to wife as executrix; Broom, Part. 178; Com. Dig. *Baron & F.* (T); not on wife's contracts *dum sola* after her death; 3 P. Wms. 410; except as administrator; Cro. Jac. 257; 1 Campb. 189, n.

He is liable, after the death of the wife, in cases where he might have been sued alone during her lifetime. See MARRIED WOMEN.

Idiots, lunatics, and *non compotes mentis,* generally, may be sued on contracts for necessaries; 2 M. & W. 2.

Infants may be sued on their contracts for necessaries; 10 M. & W. 195; Macph. Inf. 447. Ratification in due form; 11 Ad. & E. 934; after arriving at full age, renders them liable to action on contracts made before.

Partner is not liable to action by his copartners. A sole ostensible partner, the

others being dormant, may be sued alone by one contracting with him; Broom, Part. 172.

A partnership cannot be sued as such, but the names of its members must be set out; Dunham v. Shindler, 17 Or. 256, 20 Pac. 326. Garnishment to secure a claim against a partnership cannot be maintained against a partner individually: Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

Survivor of two or more joint contractors must be sued alone; 1 Saund. 291, n. 2; 2 Burr. 1196. A sole surviving partner may be sued alone; 1 B. & Ald. 29.

In Actions Ex Delicto. Plaintiffs. The plaintiff must have a legal right in the property affected, whether real; 2 Term 684; Co. Litt. 240 *b;* 2 Bla. Com. 185; or personal; Robinson v. Gould, 11 Cush. (Mass.) 55; though a mere possession is sufficient for trespass, and trespass *quare clausum;* Cro. Jac. 122; 1 Ad. & E. 44; and the possession may be constructive in case of trespass for injury to *personal* property; 6 Q. B. 606; Cary v. Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323. The property of the plaintiff may be absolute; 5 Bingh. 305; or special.

Agents who have a qualified property in goods may maintain an action of tort in their own names for injury to the goods.

A principal may sue in the name of his agent for a false representation to the agent; Raymond v. Howland, 12 Wend. (N. Y.) 176.

Assignees of property may sue in their own names for tortious injuries committed after the assignment; 3 Maule & S. 7; 1 Ad. & E. 580; although it has never been in their possession; Langdon v. Buell, 9 Wend. (N. Y.) 80; Wms. Saund. 252 *a*, n. (7). Otherwise of the assignee of a mere right of action; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551. Assignees in insolvency may sue for torts to the property; Wilmarth v. Mountford, 8 S. & R. (Pa.) 124; but not to the person of the assignee; W. Jones 215.

Executors and *administrators* cannot, in general, sue in actions *ex delicto*, as such actions are said to die with the plaintiff; Broom, Part. 212; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551. See Actio Personalis. They may sue in their own names for torts subsequent to the death of the deceased; Carter v. Estes, 11 Rich. (S. C.) 363.

Heirs and *devisors* have no claim for torts committed during the lifetime of the ancestor or devisor; 2 Inst. 305.

Husband must, at common law, sue alone for all injuries to his own property and person; 3 Bla. Com. 143; Cro. Jac. 473; including personalty of the wife which becomes his upon marriage; Lowry v. Mountjoy, 6 Call. (Va.) 55; Brown v. Fitz, 13 N. H. 283; Cro. Eliz. 133; 6 Ad. & E. 259; Rawlins v. Rounds, 27 Vt. 17; and including the continuance of injuries to such property commenced before marriage; Lowry v. Mountjoy, 6 Call (Va.) 55; in replevin for timber cut on land belonging to both; Fairchild v. Chaustelleux, 8 Watts (Pa.) 412; for personal injuries to the wife for the damages which he sustains; 3 Bla. Com. 140; 4 B. & Ald. 523; McKinney v. Stage Co., 4 Ia. 420; as in battery; 8 Mod. 342; Chapman v. Hardy, 2 Brev. (S. C.) 170; Fournet v. S. S. Co., 43 La. Ann. 1202, 11 South. 541; slander, where words are not actionable *per se;* 4 B. & Ad. 514; Williams v. Holdredge, 22 Barb. (N. Y.) 396; or for special damages; 4 B. & Ad. 514; Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

He *may* sue alone, also, for injuries to personalty commenced before marriage and consummated afterwards; 2 B. & P. 407; and the right survives to him after death of the wife in all cases where he can sue alone; 1 Chitty, Pl. 75; Viner, Abr. *Baron & F.* (G); for cutting trees on land held by both in right of the wife; Allen v. Kingsbury, 16 Pick. (Mass.) 235; and generally, for injury to real estate of the wife during coverture; Cushing v. Adams, 18 Pick. (Mass.) 110; Tallmadge v. Grannis, 20 Conn. 296; 2 Wils. 414; although her interests be reversionary only; 5 M. & W. 142; he may also sue alone for damages for the negligent failure of a telegraph company to transmit and deliver a message to his wife; Loper v. Tel. Co., 70 Tex. 689, 8 S. W. 600.

Infants may sue by guardian for torts; Broom, Part. 238.

Lessors and *reversioners*, generally, may have an action for injury to their reversions; Broom, Part. 214. Damage necessarily to the reversion must be alleged and shown; 1 Maule & S. 234; 11 Ad. & E. 40; 10 B. & C. 145.

Lessees and *tenants*, generally, may sue for injuries to their possession; 4 Burr. 2141; Woodf. Landl. & T. 661.

Married woman must sue alone for injury to her separate property; Ackley v. Tarbox, 29 Barb. (N. Y.) 512; see Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; she may bring an action of detinue to recover her separate personal property and join her husband as co-plaintiff; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. 602.

The restrictions on her power to sue are the same as in actions *ex contractu;* Broom, Part. 233. Actions in which she might or must have joined her husband survive to her; Rolle, Abr. 349 (A). A married woman though living with her husband may maintain an action for slander in her own name, and without joining him; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822.

The dissolution of marriage by divorce does not enable the wife to sue her husband for a tort committed on her during coverture; Main v. Main, 46 Ill. App. 106. She may maintain in her own name an action for the alienation of her husband's affections;

Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932.

Master has an action in tort for enticing away an apprentice; 3 Bla. Com. 342; 3 Maule & S. 191; and, upon the same principle, a parent for a child; Van Horn v. Freeman, 6 N. J. L. 322; 4 B. & C. 660; and for personal injury to his servant, for loss of time, expenses, etc.; 3 Bla. Com. 342.

For seduction or debauchery, a master; Broom, Part. 227; Moran v. Dawes, 4 Cow. (N. Y.) 412; and if any service be shown, a parent; 2 M. & W. 542; has his action.

Survivor, whether sole or several, must sue for a tortious injury, the rule being that the remedy, and not the right, survives; Broom, Part. 212; 2 Maule & S. 225.

Tenants in common must sue strangers separately in distress and avowry for rent; Decker v. Livingston, 15 Johns. (N. Y.) 479.

A tenant in common may sue his cotenant, where there has been actual ouster, in ejectment; Littleton § 322; 1 Campb. 173; or trespass *quare clausum;* McGill v. Ash, 7 Pa. 397; and trespass for mesne profits after recovery; 3 Wils. Ch. 118. Where there is a total destruction or conversion of the property, one tenant in common may sue his cotenant in trespass; Co. Litt. 200 *a, b;* Cro. Eliz. 157; 8 B. & C. 257; or in trover; 1 Term 658; Leonard v. Scarborough, 2 Ga. 73; St. John v. Standring, 2 Johns. (N. Y.) 468; Guyther v. Pettijohn, 28 N. C. 388, 45 Am. Dec. 499. For a misfeasance, waste, or case in the nature of waste, may be brought.

DEFENDANTS. He who commits the tortious act or asserts the adverse title is to be made defendant: as the wrongful occupant of land, in ejectment: 1 B. & P. 573; the party converting, in trover; Broom, Part. 246; making fraudulent representations; 3 M. & W. 532. The act may, however, have been done by the defendant's agent; 2 M. & W. 650; his mischievous animal; 12 Q. B. 29; or by the plaintiff himself if acting with due care and suffering from the defendant's negligence; 1 Q. B. 29; Johnson v. Barber, 5 Gilman (Ill.) 425, 50 Am. Dec. 416.

Agents and *principals;* Story, Ag. § 625; Paley, Ag. 294; are both liable for tortious act or negligence of the agent under the direction; 1 Sharsw. Bla. Com. 431, n.; or in the regular course of employment, of the principal; Johnson v. Barber, 5 Gilman (Ill.) 425, 50 Am. Dec. 416. As to the agent of a corporation acting erroneously without malice, see 1 East 555.

Subsequent ratification is equivalent to prior authority; Broom, Part. 259.

Agents are liable to their principals for conversion; Kennedy v. Strong, 14 Johns. (N. Y.) 128; Etter v. Bailey, 8 Pa. 442.

Assignees are liable only for torts committed by them: as, where one takes property from another who has possession unlawfully; Bac. Abr. *Actions* (B); or continues a nuisance; 1 B. & P. 409.

Bankrupts; 3 B. & Ald. 408; Kellogg v. Schuyler, 2 Den. (N. Y.) 73; and *insolvents;* 2 B. & Ald. 407; Strong v. White, 9 Johns. (N. Y.) 161; are liable even after a discharge, for torts committed previously.

Corporations are liable for torts committed by their agents; Moraw. Pr. Corp. § 725; Chesnut H. & S. H. T. Co. v. Rutter, 4 S. & R. (Pa.) 16, 8 Am. Dec. 675; Goodloe v. Cincinnati, 4 Ohio 500, 22 Am. Dec. 764; Crawfordsville & W. R. Co. v. Wright, 5 Ind. 252; but not, it seems, at common law, in replevin; Kyd. Corp. 205; or trespass *quare clausum;* Foote v. Cincinnati, 9 Ohio 31, 34 Am. Dec. 420. In an action against a corporation for a tort, the corporation and its servant by whose act the injury was done may be joined as defendants; Hussey v. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Death of a tort-feasor, at common law, takes away all cause of action for torts disconnected with contract; 5 Term 651; 1 Saund. 291 *e*. But actions against the personal representatives are provided for by statute in most of the states, and in England by stat. 3 & 4 Will. IV. c. 42, § 2.

Executors and *administrators*, at common law, are liable for the continuance of torts first committed by the deceased; W. Jones 173; Gentry's Adm'r v. McKehen, 5 Dana (Ky.) 34; but such continuance must be laid to be, as it really is, the act of the executor; 1 Cowp. 373; Burton's Adm'r v. Miller, 1 Harring. (Del.) 7.

Husband must be sued alone for his torts, and in detinue for goods delivered to himself and wife; 1 Leon. 312.

He may be sued alone for a conversion by the wife during coverture; 2 Rop. Husb. & W. 127. In an action for a wife's personal tort the husband is properly joined as defendant; Quilty v. Battie, 61 Hun 164, 15 N. Y. Supp. 765; Wirt v. Dinan, 41 Mo. App. 583.

Idiots and *lunatics* are liable, civilly, for torts committed; Bac. Abr. *Trespass* (G); Webb, Pollock, Torts 59, n.; though they may be incapable of design; Broom, Part. 281. But if the lunatic is under control of chancery, proceedings must be in that court, or it will constitute a contempt; In re Heller, 3 Paige (N. Y.) 199.

Infants may be sued in actions *ex delicto*, whether founded on positive wrongs or constructive torts; Broom, Part. 280; Co. Litt. 180 *b*, n. 4; as, in detinue for goods delivered for a specific purpose; 4 B. & P. 140; for tortiously converting or fraudulently obtaining goods; Homer v. Thwing, 3 Pick. (Mass.) 492; Wallace v. Morss, 5 Hill (N. Y.) 391; for uttering slander; 8 Term 337; but only if the act be wholly tortious and disconnected from contract; Wilt v. Welsh, 6 Watts (Pa.) 9; Vasse v. Smith, 6 Cra. (U. S.) 226, 3 L. Ed. 207.

Lessor and *lessee* are respectively liable for their part of the tort in case of a wrong

commenced by one and continued by the other; as, for example, a nuisance; 2 Salk. 460; Woodf. Landl. & T. 671.

Master is liable for a negligent tortious act or default of his servant while acting within the scope of his employment; Arthur v. Balch, 23 N. H. 157; Electric Power Co. v. Tel. Co., 75 Hun 68, 27 N. Y. Supp. 93; Brunner v. Tel. Co., 160 Pa. 300, 28 Atl. 690; Gregory's Adm'r v. R. Co., 37 W. Va. 606, 16 S. E. 819; for the direct effect of such negligence; [1893] A. C. 16; but not to one servant for the neglect of another engaged in the same general business; 36 Eng. L. & Eq. 486; Sherman v. R. Co., 15 Barb. (N. Y.) 574; Madison & I. R. Co. v. Bacon, 6 Ind. 205; Bugbee v. Sargent, 23 Me. 269; Mulhern v. Coal Co., 161 Pa. 270, 28 Atl. 1087; McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454; Jarman v. R. Co., 98 Mich. 135, 57 N. W. 32; Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771; Northern P. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; if the servant injured be not unnecessarily exposed; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Hallower v. Henley, 6 Cal. 209.

And the servant is also liable; 1 Sharsw. Bla. Com. 431; for wilful acts; 9 C. & P. 607; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; for those not committed while in the master's service; Bard v. Yohn, 26 Pa. 482; or not within the scope of his employment, he alone is liable.

Partners may be sued separately for acts of the firm, its agents or servants; 1 C. & M. 93; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Bostwick v. Champion, 11 Wend. (N. Y.) 571.

In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party; Northern P. R. Co. v. Heflin, 83 Fed. 93, 27 C. C. A. 460.

See INTERVENTION; MORTGAGE; UNITED STATES COURTS; REMOVAL; JOINDER; MISJOINDER; MISNOMER; NAME; RECEIVER; PATENT.

PARTITION. The division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them as coproprietors. The term is more technically applied to the division of real estate made between co-parceners, tenants in common, or joint tenants.

Voluntary partition is that made by the owners by mutual consent. It is effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners. Cruise, Dig. tit. 32, c. 6, § 14.

Compulsory partition is that which takes place without regard to the wishes of one or more of the owners.

At common law the right of compulsory partition existed only in cases of co-parcenary; Litt. § 264. By statutes of 31 Henry VIII, c. 1, and 32 *id.* c. 2, the right was extended to joint tenants and tenants in common. These statutes have been generally reenacted or adopted in the United States, and usually with increased facilities for partition; 4 Kent 362; Co. Litt. 175 *a*; 2 Bla. Com. 185; 16 Vin. Abr. 217. Partition at common law is effected by a judgment of the court and delivering up possession in pursuance of it, which concludes all the parties to it. In England the writ of partition has been abolished by stat. 3 & 4 Wm. IV. c. 27, § 36.

Courts of equity also exercise jurisdiction in cases of partition where no adequate remedy could be had at law, as where the titles to the estates in question are such as are cognizable only in equity or where it is necessary to award owelty of partition. This jurisdiction was first settled in Elizabeth's time, and has increased largely on account of the peculiar advantages of the chancery proceeding; 1 Spence, Eq. 654. Nor have the increased facilities grafted by statute upon the common-law proceedings ousted the jurisdiction; 1 Story, Eq. § 646.

Partition in equity is effected by first ascertaining the rights of the several parties interested; and then issuing a commission to make the partition required; and finally on return of the commissioners and confirmation thereof, by decreeing mutual conveyances between the parties; Mitf. Eq. Pl. 120; 2 Sc. & L. 371. Where the titles of the parties are legal titles, the decree in the partition has been held to vest the titles in the purparts without conveyances.

A suit in the nature of partition cannot be maintained where there has been an ouster of the complainants by the defendant tenant in common, by acts so overt and notorious as to imply notice to his co-tenants; Rich v. Bray, 37 Fed. 273, 2 L. R. A. 225. An adverse holding by any one of the parties for a period of time, however short, before the institution of proceedings in partition, is effectual to defeat the proceedings; Welch's Appeal, 126 Pa. 297, 17 Atl. 623.

A voluntary partition of land by persons under legal disabilities is binding when fairly and equally made and free from fraud; Mickels v. Ellsesser, 148 Ind. 415, 49 N. E. 373.

Where there is a parol partition, a party acquiescing in it and accepting exclusive possession under it is estopped from asserting title or right to possession in violation of its terms; Berry v. Seawall, 65 Fed. 742, 13 C. C. A. 101.

PARTNERSHIP. A relation founded upon a contract between two or more persons to do business as individuals on joint, undivided account.

A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful com-

merce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent 23; Goldsmith v. Eichold, 94 Ala. 116, 10 South. 80, 33 Am. St. Rep. 97; Krall v. Forney, 182 Pa. 11, 37 Atl. 846.

This definition was criticised by Jessel, M. R., in 5 Ch. D. 472, on the ground that there may be partners who do not contribute any property, labor, or skill, as where a share is given to the widow of a former partner. Pollock (Partnership 3) considers it the most businesslike and substantially accurate definition, and one which might be accepted, with some verbal condensation and amendment.

A voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, in some lawful commerce or business, under an understanding, express, or implied from the nature of the enterprise, that there shall be a communion of profit and loss between them, will constitute a partnership. Colly. Part. § 2; Beecham v. Dodd, 3 Harr. (Del.) 485; Howell v. Harvey, 5 Ark. 278, 39 Am. Dec. 376.

A legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. Parsons, Part., Beale's ed. § 1. See 5 Ch. D. 458.

The relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them. Colly. Part., 5th ed. 4.

Sir F. Pollock says: "The nearest approach to a definition which has been given by judicial authority in England is the statement that 'to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common;'" but he adds that this principle "excludes several kinds of transactions which, at first sight, have some appearance of partnership." Poll. Part. 4.

A contract of partnership is one by which two or more persons agree to carry on a business for their own benefit, each contributing property or services and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. Gray, J., in Karrick v. Hannaman, 168 U. S. 331, 18 Sup. Ct. 135, 42 L. Ed. 484.

An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature in every definition of the term. Ewell's Lind. Part., 2d Am. ed. *2, where many definitions are collected.

The relation which subsists between persons carrying on a business in common with a view of profit. English Partnership Act, 1890.

Nature and Characteristics. It has been said that "the various definitions have been approximate rather than exhaustive;" Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

Partnership, though often called a contract, is in truth the result of a contract; the relation which subsists between persons who have so agreed that the profits of a business inure to them as co-owners. George, Part. 30.

That a partnership is an entity, distinct from the partners, is the mercantile conception of a partnership; Liverpool, B. & R. P. Nav. Co. v. Agar, 14 Fed. 615; Hallowell v. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473; and such is the law where the civil law is in force; Succession of Pilcher, 39 La. Ann. 362, 1 South. 929; but the distinction is rarely recognized under the common law; Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. Rep. 740; L. R. 14 Ch. D. 122, where James, L. J., said, "It was not the lease of the firm, because there is no such thing as a firm known to the law." See Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Henry v. Anderson, 77 Ind. 361; Fitzgerald v. Grimmell, 64 Ia. 261, 20 N. W. 179.

In an action at law, at least, the partners alone are recognized as parties in interest, any change among them destroys the identity of the firm and what is called its property is their property, as are its debts and liabilities, in fact, theirs; a partner may be the debtor or creditor of his copartners, but not in law of his firm; 4 Myl. & C. 171; yet even at law certain doctrines are explained only by recognizing the firm as an entity. The courts of equity show more recognition of the true character of a partnership; but even in equity this has not been made clear until recently. There is now, however, a strong disposition on the part of the courts to recognize the mercantile doctrine. Pars. Part., Beale's ed. 2.

In the construction of statutes the courts frequently act upon the conception that a firm is a separate entity, as by treating as sufficient the filing of a chattel mortgage at the place of business of the firm where one partner resided, the other being a non-resident; Hubbardston L. Co. v. Covert, 35 Mich. 255; or by holding mercantile firms included in the terms "any person or persons, or body corporate," in a statute to regulate commercial paper; West v. Bank, 6 Ohio St. 169.

The notion that the firm is an entity distinct from its members has grown in popularity and has been confirmed by recent speculations as to the nature of corporations; but the fact remains that partnership debts

are debts of the members of the firm and that the individual liability of the members is not collateral, but primary; Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029.

"The firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial person, or being, distinct from the individuals composing it." Hollingshead v. Curtis, 14 N. J. L. 410.

"Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm." 5 Ch. D. 476, per Jessel, M. R.

"When one joins a partnership, he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts." Cross v. Bank, 17 Kan. 340, per Brewer, J.

A partnership is a distinct entity, having its own property, debts, and credits; for the purpose for which it was created, it is a person, and as such is recognized by the law. Rosenbaum v. Hayden, 22 Neb. 744, 36 N. W. 147.

"The partnership for most legal purposes is a distinct entity." Robertson v. Corsett, 39 Mich. 784, per Cooley, J.

"A partnership, or joint stock company, is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation. . . . The obligation and the liability, *inter partes*, are the same in the one case as the other. The only practical difference is a technical one, having reference to the *forum* and form of remedy." Walker v. Wait, 50 Vt. 676.

There are statutes in some states providing that a partnership may sue and be sued by its name.

The relation between the partners and the firm is that of agent to principal; and the firm property, the legal title to which is held by the partners, is in trust for the firm. Each partner, in doing an act which is within the scope of his agency, is acting therefor for the firm, and not for himself nor for his co-partners. Pars. Part., Beale's ed. 4.

The relation of partnership is never created by operation of law and results only from contract between the parties; Wilson's Ex'rs v. Cobb's Ex'rs, 28 N. J. Eq. 177; Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117; but the agreement need not be in writing; Simmons v. Ingram, 78 Mo. App. 603; Deering & Co. v. Coberly, 44 W. Va. 606, 29 S. E. 512; neither the use of the term partnership nor the adoption of a firm name is essential; Johnson Bros. v. Carter & Co., 120 Ia. 355, 94 N. W. 850.

The law of partnership, in England and the United States, rests on foundations derived from three sources,—the common law, the law merchant, and the Roman law; Colly. Part. § 1.

Partnership in the Roman law (*societas*) included every associated interest in property which resulted from contract; *e. g.* where two bought a farm together. Every other associated interest was styled *communitas*, *e. g.* where a legacy was left to two; Pothier, *Droit Franc.* III. 444; Ewell's Lind. Part. *58; Pickerell v. Fisk, 11 La. Ann. 277.

Partnership at the common law is an *active* notion. The relation implies a business and a turning of capital. It is to be contrasted with ownership, which is, whatever the tenancy, a *passive* notion; United Ins. Co. v. Scott, 1 Johns. (N. Y.) 106; Quackenbush v. Sawyer, 54 Cal. 439. But there may be at the common law a joint purchase and an individual liability for the whole price without a partnership. In a purchase expressly by two the contract is *prima facie* joint with a consequent liability of each for the whole price. But this inference may be contradicted by circumstances known to the seller which indicate a division of title; 1 Wms. Saund. 291 *c*; Iliff v. Brazill, 27 Ia. 131, 99 Am. Dec. 645; Post v. Kimberly, 9 Johns. (N. Y.) 475.

Partnership, in the Roman law, was in buying or selling. True partnership, at common law, is only in buying and selling. This peculiarity of the common law is due to the commercial origin of the relation and of the rules by which the relation is governed. The Roman *societas* was an outgrowth of the ancient tribal constitution. The common-law partnership is an expedient of trade; Porter v. McClure, 15 Wend. (N. Y.) 187; Chisholm v. Cowles, 42 Ala. 179; Woodward v. Cowing, 41 Me. 9, 66 Am. Dec. 211; Camp. 793. Buying to sell again fixes the transaction as a joint one. The transaction is joint because the sale excludes the idea of division of title in the purchase. The property dealt in becomes the instrument of both parties in obtaining a totally distinct subject of distribution, *i. e.* the profit; Dearborn v. Kent, 14 Wend. (N. Y.) 187; 3 Kent *25. There must be an agreement, not a mere intention, to sell jointly; Baldwin v. Burrows, 47 N. Y. 199.

In a partnership, the members do business in their unqualified capacity as men, without special privilege or exemption; they are treated in law as a number of individuals, occupying no different relation to the rest of the world than if each were acting singly; 7 Ves. 773. On the other hand, a corporation, though in fact but an association of individuals with special privileges and exemptions, is in contemplation of law a fictitious person distinct from the members who compose it; Ewell's Lind. Part. *4. Every unincorporated association for purposes of gain is a partnership; unless it can claim corporate privilege on the ground of a *de facto* standing; Central City Sav. Bk. v. Walker, 66 N. Y. 425; Kramer v. Arthurs, 7 Pa. 165; Hodgson v. Baldwin, 65 Ill. 532. A club or association not for gain is not a partnership: it is not a commercial relation; Richmond v. Judy, 6 Mo. App. 465; 2 M. & W. 172. In this country there is a far wider extent in the variety of purposes for which partnerships are established than anywhere else; Pars. Part. § 37; including farming, manufacturing, mining, lumbering, the business of lawyers, physicians, etc.; *id.*

Whether a partnership exists or not in a particular case is not a mere question of fact, but one mixed of law and fact; Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507. It is, nevertheless, generally to be decided by a jury. See Terrill v. Richards, 1 N. & McC. (S. C.) 20; 3 C. B. N. S. 562; Chisholm v. Cowles, 42 Ala. 179; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74. If the facts are admitted or the evidence consists of a written instrument, it is for the court to say whether a partnership exists; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; Boston & C. S. Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3.

Elements of partnership. The elements of partnership are the contribution and a sharing in the profits. These two elements must be combined. Without contribution the alleged partner cannot be said to do business; unless he shares the profits, the business is not carried on for his account. Contribution without a share in the profits is a simple gift to the firm, by which firm creditors are enriched, not damaged. Sharing profits without contribution is a gift by the firm to the beneficiary, with which creditors may of course interfere by seizing the property and closing out the concern. In neither case does the alleged partner enter into business relations with the customers and creditors of the firm; 8 H. L. Cas. 286; 5 Ch. Div. 458; Wills v. Simmonds, 8 Hun (N. Y.) 189; L. R. 7 Exch. 218.

Contribution need not be made to the firm stock; any co-operation in the business will be enough; 4 East 144; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Story, Partn. §§ 27, 40. A contribution must be kept in the concern, and take the risk of the business; a loan, on the other hand, is made upon the personal credit of the partners merely, and may be used by them as they please; it is to be repaid at all events. Because of this difference, sharing profits in lieu of interest upon a loan does not create a partnership. The English statute to this effect has been decided to be merely declaratory; 5 Ch. Div. 458; 7 Ch. Div. 511; Arnold v. Angell, 62 N. Y. 508; Bailey v. Clark, 6 Pick. (Mass.) 372. Mere loaning of money to a partnership for a definite period, the creditor to receive interest in proportion to the profits, does not make the lender liable as a partner; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835. It is not necessary, however, that each partner should bring into the concern both labor and property; Parsons, Partn. Beale's ed § 63. The contribution of money or property by an incoming partner is not essential to the creation of a partnership; it is competent for the prior partners, in consideration of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital of the partnership; Paul v. Cullum, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430.

It was formerly held that sharing profits constituted the parties partners, though no such relationship was intended between them; 2 W. Bla. 998; 2 H. Bla. 235; Hazard v. Hazard, 1 Story 371, Fed. Cas. No. 6,279; Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244; but not sharing gross profits; 1 Camp. 329. The doctrine of the leading case of Waugh v. Carver, 2 H. Bla. 235, was that participation in the profits made one a partner, as to third persons, though the parties themselves had no intention of being partners *inter se.*

Again, it is called *prima facie* evidence of partnership, but a contribution will have the same effect. Each is an element in a relation not complete without both.

It has been held that a partnership subsists between merchants who divide the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other; 4 B. & Ald. 663. So between persons who agree to share the profits of a single adventure; 9 C. B. 431; 1 Rose 297; and between persons one of whom is in the position of a servant to the others, but is paid a share of the profits instead of a salary; 1 Deac. 341; 1 Rose 92; (*contra*, Ryder v. Jacobs, 182 Pa. 624, 38 Atl. 471); and between persons one of whom is paid an annuity out of the profits made by the others; 17 Ves. 412; 8 Bingh. 469; or an annuity in lieu of any share in those profits; 2 W. Bla. 999. So between the vendor and purchaser of a business, if the former guarantee a clear profit of so much a year, and

was to have all profits beyond the amount guaranteed; 3 C. B. 641. The character in which a portion of the profits was received did not affect the result; see 1 Maule & S. 412; 21 Beav. 164. Persons who share profits were *quasi*-partners, although their community of interest was confined to the profits; 2 B. & C. 401. But it is held that a contract for the sale of goods, which provides that they shall be charged for at reasonable prices, and that the purchaser shall have a credit of one-half the profits, does not establish a partnership between the seller and purchaser; Teller v. Hartman, 16 Colo. 447, 27 Pac. 947.

An agreement to share losses is not essential; that follows as an incident to the relation. Indeed all liability *inter se* may be provided against by contract and a partnership may nevertheless subsist; 3 M. & W. 357; Pollard v. Stanton, 7 Ala. 761; Consol. Bk. v. State, 5 La. Ann. 44. Partnership is a question of intention, and the intention which makes a partnership is ordinarily to contribute to the business and share the profits. In this way, the parties become co-principals in a business carried on for their account. The question of intention is to be decided by a consideration of the whole agreement into which the parties have entered, and ought not to be made to turn upon a consideration of only a part of its provisions; 15 M. & W. 292; 3 Kent 27.

An agreement to share profits, nothing being said about the losses, amounts *prima facie* to an agreement to share losses also; so that an agreement to share profits is *prima facie* an agreement for a partnership; and, accordingly, it is held that, unless an agreement to the contrary is shown, persons engaged in any business or adventure, and sharing the profits derived from it, are partners as regards that business or adventure. It is strong presumptive evidence of partnership; Parker v. Canfield, 37 Conn. 250, 9 Am. Rep. 317. Still, it cannot be said that persons who share profits are necessarily partners in the proper sense of the word; Ewell's Lind. Part. *7, *12; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387; Campbell v. Dent, 54 Mo. 325; Holmes v. R. Corp., 5 Gray (Mass.) 59, 60; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; 8 H. L. Cas. 268; see Everitt v. Chapman, 6 Conn. 347; Paul v. Cullum, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430; unless the business is carried on by them personally or by their agents; 8 H. L. Cas. 268. Although a presumption of partnership would seem to arise in such a case; Chapin v. Brown, 101 Cal. 500, 35 Pac. 1051; Caldwell v. Miller, 127 Pa. 442, 17 Atl. 983; still, the particular circumstances of the case may be such as to repel this presumption. It may appear that the share of the profits taken was merely a compensation to one party for labor and service, or for furnishing the raw materials, or a mill privilege, or a factory, or the like, from which the other is to earn profits; Holmes v. R. Corp., 5 Gray (Mass.) 60; 3 Kent 33; Perrine v. Hankinson, 11 N. J. L. 181; Lowry v. Brooks, 2 McCord (S. C.) 421; but see Bromley v. Elliot, 38 N. H. 289, 75 Am. Dec. 182. Originally it was immaterial whether the profits were shared as gross or net; but the later cases have established a distinction. A division of gross returns is thought to be identical with a purchase for the purpose of division; the price represents the thing. There is no unity of interest; 3 Kent *25; 4 Maule & S. 240; Pattison v. Blanchard, 5 N. Y. 186. But the distinction is not absolutely decisive on the question of partnership. See 1 Camp. 330; Ambler v. Bradley, 6 Vt. 119; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; Bromley v. Elliot, 38 N. H. 287, 304, 75 Am. Dec. 182; 4 B. & Ald. 663. The officers and crews of whaling and other fishing vessels, who are to receive certain proportions of the produce of the voyage in lieu of wages; Rice v. Austin, 17 Mass. 206; 2 Y. & C. 61; captains of merchant-ships who, instead of wages, receive shares in the profits of the adventure; 4 Maule & S. 240; or who take vessels under an agreement to pay certain charges and receive a share of the earnings; Taggard v. Loring, 16 Mass. 336, 8 Am. Dec. 140; Winsor v. Cutts, 7 Greenl. (Me.) 261; persons making shipments on half-profits; Turner v. Bissell, 14 Pick. (Mass.) 195; have generally been held not to be partners with the owners, and the like. Running a steamboat on shares does not make the owners partners in respect of the vessel; The Daniel Kaine, 35 Fed. 785; so of an agreement between two parties to farm on shares; Holloway v. Brinkley, 42 Ga. 226; Donnell v. Harshe, 67 Mo. 170; Rose v. Buscher, 80 Md. 225, 30 Atl. 637; and a purchase of land on joint account for the purpose of sale and profit; Clark v. Sidway, 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157; and a hotel lease where the rental depends in part on the profit of the hotel; Dake v. Butler, 7 Misc. 302, 28 N. Y. Supp. 134; or running a saw mill where one erects it and another furnishes logs and they divide profits; Robinson v. Bullock, 58 Ala. 618. A seaman who is to receive pay in proportion to the amount of fish caught, is not a partner; Holden v. French, 68 Me. 241. Sharing profits in lieu of wages is not a partnership. There is no true contribution; Crawford v. Austin, 34 Md. 49; Whitehill v. Schickle, 43 Mo. 538; Sankey v. Iron Works, 44 Ga. 228. Where a person enters into a contract with another by which the latter is to receive a certain salary and a percentage of the profits, while the former is to own the entire capital, no partnership exists; Bremen Sav. Bk. v. Saw Co., 104 Mo. 425, 16 S. W. 209; L. R. 4 P. C. App. 419; Loomis v. Mar-

shall, 12 Conn. 69, 30 Am. Dec. 596; In re Haines & Co.'s Estate, 176 Pa. 361, 35 Atl. 237; nor where one receives a share of the profits by way of compensation; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Mason v. Hackett, 4 Nev. 420. The device of allowing a percentage of profits is based upon a shadowy distinction and seems to have no basis of common sense, but the rule rests upon authority. A factor, simple or *del credere*, may receive a portion of the profits in lieu of commissions, without becoming a partner; Edwards v. Tracy, 62 Pa. 374; 24 L. J. Ch. 58. A mere participation in profits and losses of a business does not necessarily constitute a partnership; Clifton v. Howard, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97.

Where a business is assigned to trustees who are to manage it and pay creditors out of the profits, the creditors are not partners; the distribution of so called profit is really the payment of a debt; 8 H. L. C. 268; but creditors who set up their insolvent debtor in business and share the profits with him, forbearing meanwhile to press their claims, have been held to be partners; Wills v. Simmonds, 8 Hun (N. Y.) 189.

The case of Cox v. Hickman, 8 H. L. C. 268, which held that persons who share profits do not thereby incur the liability of partners, is said to have put an end to two doctrines formerly held to be fundamental; that persons may be held to the liability of partners who are not partners in fact, merely because some other relation exists between them; and that profit-sharing is conclusive of the existence of a partnership; Pars. Part. § 43. The true question of partnership is said in L. R. 1 C. P. 86, to be as stated by Lord Cranworth in 8 H. L. C. 268: "Whether the trade is carried on, on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."

The doctrine of Cox v. Hickman has been generally followed in this country; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835; George, Partn. 43, where cases in nearly all the states are collected; as they are also in Gilmore, Partn. 10–24; but in Pennsylvania the rule in Waugh v. Carver, 2 H. Bla. 235, *supra*, has been held to be firmly established, though overruled in England; Edwards v. Tracy, 62 Pa. 374. In New York, Cox v. Hickman was considered, but not followed, in Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244; and in Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; the rule in Waugh v. Carver was held to be still in force in that state. The rule was fully discussed in Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192, and Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

The courts which have adhered to Waugh v. Carver, have done so upon the ground that they were concluded by their own earlier decisions, and that to change the law, as settled, would require legislation.

The result of the English doctrine is said to be that there can be no partnership between parties unless by contract among themselves, but parties may be charged as partners by way of estoppel. It is the present law of England that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se;* 1 Lind. Part. *42; L. R. 1 C. P. 86.

Mutual agency as a final test of partnership has been approved in some cases; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; 64 L. J. Q. B. 170; and rejected in others; 5 Ch. Div. 458; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

The ultimate test is said to be the co-ownership of the profits, which the owner receives as owner and not by way of compensation for something, such as services, etc.; George, Partn. 50. To constitute partnership each person must have an interest in the profits as a principal in the joint business; Campbell v. Dent, 54 Mo. 325.

In order to render a man liable as partner he must have a specific interest in the profits as a *principal trader;* Bucknam v. Barnum, 15 Conn. 73; Bradley v. White, 10 Metc. (Mass.) 303, 43 Am. Dec. 435; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387. But in reference to these positions the questions arise: When may a party be said to have a specific interest in the profits, *as profits?* when, as a principal trader?—questions in themselves very nice, and difficult to determine. See Denny v. Cabot, 6 Metc. (Mass.) 82; Loomis v. Marshall, 12 Conn. 77, 30 Am. Dec. 596.

Sometimes the partnership relation has been made dependent on the power to control the business. In strictness the only control necessary is the power to control the application of the contribution. A partner may have no power, as between him and his partners, to manage the business, Ogden v. Astor, 4 Sandf. (N. Y.) 311.

Again, partnership has been said to require that a partner have an initiative in the conduct of the business; but the proposition seems to lose sight of dormant partners; L. R. 4 P. C. 419.

Again, partnership has been made to depend on what is termed the legal title to the business: A was held not a partner, though he shared in the profits of a business created solely by his contribution but assigned to B for A's protection; L. R. 1 C. P. 86. There are other cases in which considerable

stress is laid on the right to an account of profits, as furnishing a rule of liability; 3 Kent 25; Champion v. Bostwick, 18 Wend. (N. Y.) 184, 31 Am. Dec. 376; 3 C. B. N. S. 544, 561. But, although it is true that every partner must have a right to an account, it seems not to be equally true that every party who has a right to an account is a partner; Holmes v. R. Corp., 5 Gray (Mass.) 58.

Partnership has sometimes been styled a branch of the law and relation of principal and agent. But mutual agency is not the basis, it is the incident of partnership. Partners are co-principals, and the right and power of representation springs from this circumstance. A dormant partner is not at all the agent of the firm; L. R. 7 Ex. 227. The principal distinction between a partnership and a mere agency is that a partner has a community of interest with the other partners in the business and responsibilities of the partnership,—sometimes both in the stock and profits, and sometimes only in the profits,—whereas an agent, as such, has no interest in either; 4 B. & C. 67. The authority of a partner is very much more extensive than that of a mere agent; Greeley v. Wyeth, 10 N. H. 16. The reference to agency as a test of partnership is unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.

The *formation* of a contract of partnership does not require any particular formality. It is, in general, sufficient that it is formed by the voluntary consent of the parties, whether that be express or implied, whether it be by written articles, tacit approbation, or by parol contract, or even by mere acts; 3 Kent 27; Bunnel v. Taintor's Adm'r, 4 Conn. 568. As a general rule a writing is unnecessary; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Ewell's Lind. Part. *80. Under the statute of frauds, where there is an agreement that a partnership shall commence at some time more than a year from the making of the agreement, a writing is necessary; 5 B. & C. 108. As to partnership in lands, see *infra*.

Where there is no written agreement, the evidence generally relied upon to prove a partnership is the conduct of the parties, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other persons. This can be shown by the books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established. As to the presumption arising from the joint retainer of solicitors, see 20 Beav. 98; 7 Hare 159. For cases in which partnership has been inferred from various circumstances, see 4 Russ. 247; 2 Camp. 45. Though formed by deed, partnership may be dissolved by parol; Ewell's Lind. Part. *572.

A contract for the creation of a partnership is enforcible at law; Rush Centre Creamery Co. v. Hillis, 3 Pa. Super. Ct. 527. The practical construction of partnership articles given for several years by the partners to its language will usually be accepted by the courts as conclusive; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

There is a distinction between the creation of a partnership and the making of an executory contract for one. The partnership itself may, if so provided in the contract, take effect after a certain time has elapsed, or a certain contingency has happened, and until that time no partnership will exist; Savannah R. & E. Co. v. Sabel & Son, 145 Ala. 681, 40 South. 88; In re Hoagland's Estate, 164 N. Y. 573, 58 N. E. 1088; the arrangement meanwhile is contingent and if one of the parties refused performance there is no remedy except a suit in equity for specific performance or an action for damages, if any; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; and even an agreement to be partners after a fixed time does not necessarily make the parties partners upon the arrival of that time, since either one may repudiate the agreement; it is necessary that the partnership be "launched"; Dow v. Bank, 88 Minn. 355, 93 N. W. 121; Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169.

Whether a partnership exists is, after the facts are established, a question of law; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; Rider v. Hammell, 63 Kan. 733, 66 Pac. 1026; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 75. The burden of proving it is on him who relies on its existence; Hallstead v. Coleman, 143 Pa. 353, 22 Atl. 977, 13 L. R. A. 370; Martin Browne Co. v. Morris, 1 Ind. T. 495, 42 S. W. 423; Sheldon v. Bigelow, 118 Ia. 586, 92 N. W. 701.

THE PARTNERS. The members of a partnership are called *partners*. They are of various kinds.

General partners are those whose liability for partnership debts is unlimited.

Ostensible partners are those whose names appear to the world as partners, and who in reality are such.

Nominal partners are those who are held out as partners but who have no interest in the firm or business. They may be liable as partners by reason of their own acts, without being actually partners.

Secret partners are partners whose connection with the firm is not publicly made known.

Silent partners are those who, though having a share in the firm profits, have no voice in the firm business.

Dormant partners are those whose names and transactions as partners are professedly concealed from the world. They combine the characters of both secret and silent partners.

A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, son, etc.; 4 Phill. 1. It is not necessary that his membership be universally unknown; it it enough if he is not an ostensible partner; Metcalf v. Officer, 2 Fed. 640.

Special partners are those whose liabilities are limited by statute to the amount of their respective contributions. Ordinarily a special partner is associated with at least one general partner by whom the business is managed, but in the "partnerships limited" organized under recent statutes, all the parties have a limited liability.

WHO MAY BE. *General rule.* Persons who have the legal capacity to make other contracts may enter into that of partnership; Lind. Part. *77; 1 Col. Part. § 11; Pars. Part. § 14; Gilmore, Partn. 77.

Aliens. An alien friend may be a partner; Lind. Part. *78; Co. Litt. 129 *b;* Griswold v. Waddington, 15 Johns. (N. Y.) 57. An alien enemy cannot enter into any commercial contract, 1 Kent *66; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. Ed. 793; McAdams' Ex'rs v. Hawes, 9 Bush (Ky.) 15; 11 Exch. 135; and the breaking out of a war between two countries in which partners reside dissolves the partnership; Matthews v. McStea, 91 U. S. 7, 23 L. Ed. 188; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142. See WAR.

Corporations. There is no general principle of law which prevents a corporation from being a partner with another corporation, or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its charter; Lind. Part., 2d Am. ed. *78; Butler v. Toy Co., 46 Conn. 136; Grant, Corp. 5; Holmes v. R. Corp., 5 Gray (Mass.) 58.

In the absence of authority in its charter, however, a corporation is probably not competent to enter into a partnership; White Star Line v. Star Line of Steamers, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551; People v. Sugar Ref. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; Morris Run Coal Co. v. Coal Co., 68 Pa. 173, 8 Am. Rep. 159; Mallory v. Oil-Works, 86 Tenn. 598, 8 S. W. 396; and it has been specifically decided that a national bank cannot be a partner; Merchants' N. Bk. v. Wehrmann, 69 Ohio St. 160, 68 N. E. 1004; nor a department store corporation; Franz v. Dry Goods Co., 132 Mo. App. 8, 111 S. W. 636; Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37; nor can two corporations form a partnership; New York & S. C. Co. v. Bank, 7 Wend. (N. Y.) 412; nor does the purchase of an interest in a firm by a corporation make it a partner; Aurora State Bk. v. Oliver, 62 Mo. App. 390; but a corporation may be expressly authorized by its charter to enter into a partnership, as was the case in Butler v. Toy Co., 46 Conn. 136.

A corporation which shares profits may be held to make good losses; Catskill Bank v. Gray, 14 Barb. (N. Y.) 479. While a contract of partnership between a corporation and an individual is *ultra vires* as to this corporation, yet if the corporation has received the benefit of the contract, it must account to the other party for what is due him under the contract; Boyd v. Carbon Black Co., 182 Pa. 206, 37 Atl. 937.

Clergymen were disqualified to enter into a partnership in England by 57 Geo. III.

Firms. Two firms may be partners in one joint firm; Smith v. Wright, 1 Abb. Pr. (N. Y.) 243; In re Hamilton, 1 Fed. 800; Willson v. Morse, 117 Ia. 581, 91 N. W. 823. Where a partnership and an individual form a second partnership, all the members of the first partnership are members of the new firm; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495.

Felons. Felons probably are not disqualified, in the absence of any statutory restriction, to enter into a contract of partnership in this country; George, Partn. 11; Avery v. Everett, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368.

Infants. An infant may contract the relation of partner, as he may make any trading contract which is likely to prove for his advantage; Penn. v. Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478; 5 B. & Ald. 147. Such a contract made by a person during infancy is voidable and may be affirmed or disaffirmed by him at majority; Story, Part. § 7; Osburn v. Farr, 42 Mich. 134, 3 N. W. 299; but whether he may disaffirm before majority is doubtful; Dunton v. Brown, 31 Mich. 182; Lind. Part., 2d Am. ed. *74, n.; though it is said that he may; Pars. (Jas.) Partn. § 136; Childs v. Dobbins, 55 Ia. 205, 7 N. W. 496; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Folds v. Allardt, 35 Minn. 488, 29 N. W. 201.

He may reclaim his contribution before majority; Sparman v. Keim, 83 N. Y. 245. Unless he gives notice of disaffirmance, or in some manner repudiates the contract within a reasonable time after becoming of age, he will be presumed to have ratified it; Story, Part. § 7; Richardson v. Boright, 9 Vt. 368; but it is held that there must be positive acts of ratification after majority; neglect to disaffirm is not ratification; Dana v. Stearns, 3 Cush. (Mass.) 372; see 8 Exch. 181; Jones v. Bank, 8 N. Y. 228; and his liability then relates back to firm contracts made during his minority; Salinas v. Bennett, 33 S. C. 285, 11 S. E. 968; Minock v. Shortridge, 21 Mich. 304. The person with

whom the minor contracts will be bound; 2 M. & S. 205; Voorhees v. Wait, 15 N. J. L. 343. In England and in Maine ratification, after majority, must be in writing.

Lunatics. A lunatic is probably not absolutely incapable of being a partner; Lind. Part. *81; since the insanity of a partner does not *per se* dissolve the firm, but simply amounts to a sufficient cause for a court of equity to decree a dissolution; 1 Cox, Ch. 107; 2 Myl. & K. 125; Griswold v. Waddington, 15 Johns. (N. Y.) 57, *contra*, Isler v. Baker, 6 Humphr. (Tenn.) 85. Subject to these qualifications a lunatic may enter into a partnership; Behrens v. McKenzie, 23 Ia. 333, 92 Am. Dec. 428. Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142.

Whether a contract by a lunatic to become a partner can in all cases be avoided by him, is, perhaps, unsettled; Story, Part. § 7, n. 1. But until such dissolution, the lunatic is entitled to a share of the profits made by the other partners, and is liable for their misconduct; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112; Reynolds v. Austin, 4 Del. Ch. 24.

Married women, at common law, are incapable of becoming partners, since they are generally unable to contract or engage in trade; Mayer v. Soyster, 30 Md. 402; 3 De G., M. & G. 18; and cannot be made partners by contract; Foxworth v. Magee, 44 Miss. 430; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46; *contra*, Graff v. Kinney, 15 Abb. N. C. (N. Y.) 397; or by estoppel; Montgomery v. Sprankle, 31 Ind. 113. But where a married woman is authorized by custom, statute, or otherwise to trade as a *feme sole*, she may probably be a partner; Newman v. Morris, 52 Miss. 402; Norwood v. Francis, 25 App. D. C. 463, 4 Ann. Cas. 865; Dupuy v. Sheak, 57 Ia. 361, 10 N. W. 731; *contra*, Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; Story, Part. § 10; Pars. Part. § 19. The mere consent of her husband to her trading as a *feme sole* does not necessarily permit her to become a partner; Story, Part. § 12. In some states she may be a partner as to her separate estate; Silveus' Ex'rs v. Porter, 74 Pa. 448; Vail v. Winterstein, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. Rep. 334; *contra*, Carey & Co. v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790. When she becomes a member of a firm she has the same rights and liabilities as the other members; Loeb v. Mellinger, 12 Pa. Super. Ct. 592. A married woman, by acting as partner and continuing the business after her husband's death, creates a partnership from the beginning; Everit v. Watts, 10 Paige (N. Y.) 82.

Except as above stated, a married woman cannot become a partner without statutory authority; Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. 229; Carey & Co. v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790; in any case, however, the capital she puts in is liable for the firm debts; Weil v. Simmons, 66 Mo. 617. It has been held that where the wife cannot be a partner, the husband will be considered as such; Miller v. Marx, 65 Tex. 131.

Under modern married women statutes, a wife is not, according to most of the cases, permitted to enter into partnership with her husband; Bowker v. Bradford, 140 Mass. 521, 5 N. E. 480; Board of Trade v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919; Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907, 2 L. R. A. 343, 16 Am. St. Rep. 572; Gilkerson-Sloss Commission Co. v. Salinger, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. Rep. 105 (and note on partnership between husband and wife); *contra*, Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593. See In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824.

Number of persons. Generally speaking, the common law imposes no restriction as to the number of persons who may carry on trade as partners; Gilmore, Partn. 89; Manning v. Gasharie, 27 Ind. 399. But a partnership cannot consist of but one person; Stirling v. Heintzman, 42 Mich. 449, 4 N. W. 165. By the English Companies Act, 1862, no more than ten persons may be partners in banking, and not more than twenty in any other business for profit.

THE FIRM AND FIRM NAME. It may be that the names of all the members of the partnership appear in the name or style of the firm, or that the names of only a part appear, with the addition of "and company," or other words indicating a participation of others, as partners, in the business; Goddard v. Pratt, 16 Pick. (Mass.) 428; or that the name of only one of the partners, without such addition, is the name of the firm. It sometimes happens that the name of neither of the partners appears in the style of the firm; 9 M. & W. 284. In some states no partner is permitted to transact business in the name of a person not interested in the firm.

The proper style of the firm is frequently agreed upon in the partnership articles; and where this is the case, it becomes the duty of every partner, in signing papers for the firm, to employ the exact name agreed upon; Story, Partn. § 202. This may be necessary, not only to bind the firm itself; Story, Partn. § 102; but also to prevent the partner signing from incurring a personal liability both to third persons and to his co-partners; 11 Ad. & E. 339; Pothier, Partn. nn. 100, 101. Where persons associate themselves together and carry on business under a common name, and the association is not a corporation, they may be regarded as partners, whatever name they may have adopt-

ed; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928.

So, the name which a partnership assumes, recognizes, and publicly uses becomes the legitimate name of the firm, not less so than if it had been adopted by the articles of copartnership; Le Roy v. Johnson, 2 Pet. (U. S.) 198, 7 L. Ed. 391; Folk v. Wilson, 21 Md. 538, 83 Am. Dec. 599; and a partner has no implied authority to bind the firm by any other than the firm name thus acquired; 9 M. & W. 284; Munroe v. Williams, 35 S. C. 572, 15 S. E. 279; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192. Wherefore, where a firm consisted of J B & C H, the partnership name being J B only, and C H accepted a bill in the name of "J B & Co.," it was held that J B was not bound thereby; 9 M. & W. 284. See In re Warren, 2 Ware (Dav. 325) 322, Fed. Cas. No. 17,191. If no firm name is designated, each partner has implied power to use an appropriate one; Meriden N. Bk. v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; and the name so chosen becomes the firm name and the only one by which the partnership may be bound; 9 Mees. & W. 284.

If the firm have no fixed name, a signing by one, in the name of himself and company, will bind the partnership; Austin v. Williams, 2 Ohio 61; Holland v. Long, 57 Ga. 36; and a note in the name of one, and signed by him "For the firm, etc.," will bind the company; Caldwell v. Sithens, 5 Blackf. (Ind.) 99. Where the business of a firm is to be carried on in the name of B & D, a signature of a note by the names and surnames of the respective parties is a sufficient signature to charge the partnership; 3 C. B. 792. Where a written contract is made in the name of one, and another is a *secret* partner with him, both may be sued upon it; Graeff v. Hitchman, 5 Watts (Pa.) 454.

Where partners agree that their business shall be conducted in the name of one person, whether himself interested in the partnership business or not, that is the partnership name, and the partners are bound by it; Rogers v. Coit, 6 Hill (N. Y.) 322; Little Grocer Co. v. Johnson, 50 Ark. 62, 6 S. W. 231. By agreement among themselves, the individual names of partners, or of any one of them, may be used to bind the firm and create obligations good against the partnership; Severson v. Porter, 73 Wis. 70, 40 N. W. 577. Where the name used is the name of one of the partners, and he does business also on his own private account, a contract signed by that name will not bind the firm, unless it appears to have been entered into for the firm; but, if there be no proof that the contract was made for the firm, the presumption will be that it was made by the partner on his own separate account, and the firm will not be responsible; Pars. (Jas.) Partn. 76; Mifflin v. Smith, 17 S. & R. (Pa.) 165; Winship v. Bank, 5 Pet. (U. S.) 529, 8 L. Ed. 216.

The name of the firm should be distinct from the names of all other firms. When there is confusion in this respect, the partners composing one firm may, in some cases, be made responsible for the debts of another. See 7 East 210; Phillips v. Paxton, 3 Mart. N. S. (La.) 39. As to the right of a surviving partner to carry on the business in the name of the firm, see 7 Sim. 127; Story, Partn. § 100, n.

A firm can neither sue nor be sued, otherwise than in the name of the partners composing it; Pars. (Jas.) Partn. 76. Consequently, no action can be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person at least would appear both as plaintiff and defendant, and it is considered absurd for any person to sue himself, even in form; 4 Mylne & C. 171; Ryder v. Wilcox, 103 Mass. 24. For the same reason, one firm cannot bring an action against another if there be one or more persons partners in both firms; 2 B. & P. 120; unless by statute; as in Pennsylvania, by the act of April 14, 1838.

One partner cannot sue another for his share while their partnership accounts are unsettled; Bouzer v. Stoughton, 119 Ill. 47, 9 N. E. 208; Robinson v. Green's Adm'r, 5 Harring. (Del.) 115; Ozeas v. Johnson, 1 Binney (Pa.) 191; Learned v. Ayres, 41 Mich. 677, 3 N. W. 178; and where a trustee, under a deed of trust executed by one partner on firm property, as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession, the other partner cannot sue at law to recover it from the trustee as its co-owner, but must resort to equity; Hoff v. Rogers, 67 Miss. 208, 7 South. 358, 19 Am. St. Rep. 301. So a partner cannot sue for partition of firm real estate against his co-partner in advance of an adjustment of the firm accounts; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679; Meinhart v. Draper, 133 Mo. App. 50, 112 S. W. 709; MacFarlane v. MacFarlane, 82 Hun 238, 31 N. Y. Supp. 272; *contra*, Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536. The reason of the inability of one partner to sue another upon a claim or liability is that, until the affairs of the concern are wound up, what one partner might owe the firm is not a debt of the other members to him; Ives v. Miller, 19 Barb. (N. Y.) 196; Christopherson v. Olson, 104 Minn. 330, 116 N. W. 840; Burns v. Nottingham, 60 Ill. 531; Newby v. Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

An appeal or writ of error taken in the name of a firm and not giving the names of the individuals comprising it will be dismissed, and the defect cannot be amended;

The Protector, 11 Wall. (U. S.) 86, 20 L. Ed. 47; Porter v. Foley, 21 How. (U. S.) 393, 16 L. Ed. 154; Hodge v. Williams, 22 How. (U. S.) 87, 16 L. Ed. 237.

Whenever a firm is spoken of by its name or style, the courts admit evidence to show what persons did in fact constitute the firm at the time in question; 4 Maule & S. 13; 2 Keen 255. If persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is binding as much as if real names had been used; 1 Chitty, Bailm. 707; 2 C. & P. 296; 2 Campb. 548.

Any change in the persons composing a firm is productive of a new signification of the name. If, therefore, a legacy is left to a firm, it is a legacy to those who compose it at the time the legacy vests; see 2 Keen 255; 7 De G. M. & G. 673; and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business; 11 Ir. Eq. 451; 1 Lindl. Partn. 216. Where a creditor takes a note made by one partner in the firm name after its dissolution, whereby the time of payment of a firm debt is extended, the other party is discharged from liability; Silas v. Adams, 92 Ga. 350, 17 S. E. 280.

If a retiring partner leaves a firm and the remaining partners agree to pay the debts and indemnify the outgoing partner, the creditors who know these facts and raise no objections are bound to treat the outgoing partner merely as surety for the debts; [1894] A. C. 586.

Again, an authority given to a firm of two partners cannot, it would seem, be exercised by them and a third person afterwards taken into partnership with them; 6 Bing. N. C. 201. See 7 Hare 351; 4 Ves. 649.

The addition of a member to a firm creates a new firm and operates as a dissolution of the old one, even though the business be continued under the old firm name, and so does the retirement of a member; Allen v. Logan, 96 Mo. 591, 10 S. W. 149.

A name may be a trade-mark; and, if it is, the use of it by others will be illegal, if they pass off themselves or their own goods for the firm or the goods of the firm whose name is made use of; 2 Keen 213; 4 K. & J. 747. Moreover, if this is done intentionally, the illegality will not be affected by the circumstance that the imitators of the trade-mark are themselves of the same name as those whose mark they imitate; 13 Beav. 209; 3 De G. M. & G. 896.

The protection of a name is not confined to individuals, but the right belongs as well to a partnership; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; Mattingly v. Mattingly, 96 Ky. 430, 27 S. W. 985, 17 Ky. Law Rep. 1; *id.*, 31 S. W. 279, 17 Ky. Law Rep. 1; Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72.

Where one partner acts for the *firm* in demanding illegal charges and detains goods until they are paid, every member of the firm is liable for damages; Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257.

An action by a *firm* may be defeated by a defence founded on the conduct of one of the partners. If one member of a firm is guilty of a fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. See Ry. & M. 178; 2 Beav. 128; 9 B. & C. 241. The above rule seems not to rest upon the ground that the act of the one partner is imputable to the firm; Pars. (Jas.) Part. 139; it governs when the circumstances are such as to exclude the doctrine of agency. Thus, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still, as *he* cannot dispute the validity of his own act, he and his copartners cannot recover the property so pledged by an action at law; 5 Exch. 489. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm, yet if he actually agrees that such set-off shall be made, and it is made accordingly, he and his copartners cannot afterwards in an action recover the debt due to the firm; 7 M. & W. 204; 9 B. & C. 532. When a partner executing a firm note waives exemptions, and signs the firm name, the waiver is confined to the partner signing; Reed Lumber Co. v. Lewis, 94 Ala. 626, 10 South. 333. An individual note given by a partner, and indorsed by him in the firm name without authority, in satisfaction of a debt which the creditor knows to be that of the individual, is not enforceable by the latter against the firm; Lyon v. Fitch, 18 N. Y. Supp. 867.

If a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body, or not. If he did, his liability is not discharged by any change among the members constituting the partnership at the time he became surety; 10 B. & C. 122; 5 B. & Ald. 261; but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged, and consequently any change in it, whether by the death or the retirement of a partner; 7 Hare 50; 3 Q. B. 703; or by the introduction of a new partner; 2 W. Bla. 934; immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and, whether he

has in fact been damnified by the change or not, he has a right to say, *non in hæc fœdera veni*. Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm; 5 M. & W. 580. See 6 Q. B. 514; 4 B. & P. 34; 8 Cl. & F. 214; 1 Lindl. Partn. 172.

CLASSIFICATION OF PARTNERSHIPS. The Roman law recognized five sorts of partnership. First: *societas universorum bonorum*, a community of goods: probably a survival of the old tribal relation. Second: *societas universorum quæ ex quæstu veniunt*, or partnership in everything which comes from gain,—the usual form; Pothier, Part. nn. 29, 43. Such contracts are said to be within the scope of the common law; but they are of very rare existence; Story, Part. § 72; U. S. Bank v. Binney, 5 Mas. 183, Fed. Cas. No. 16,791. Third: *societas vectigalium*, a partnership in the collection of taxes. It was not dissolved by the death of a member; and if it was so agreed in the beginning, the heir immediately succeeded to the place of the ancestor. Fourth: *societas negotiationis alicujus, i. e.* in a given business venture. Fifth: *societas certarum rerum vel unius rei, i. e.* in the acquisition or sale of one or more specific things; Pothier, Part. *24.

In the French law there are four principal classes of partnership; First: *en nom collectif*, the ordinary general partnership. Second: *en commandite*, an association corresponding to our limited partnership, composed of general and special partners in which the liability of the latter is limited to the fund invested by them. Third: *anonyme*, a joint stock company with limited liability. Fourth: *en participation*, simply a partnership with a dormant partner; Merlin, *Répert. de Jur.* tit. *Société;* Mackenzie, Rom. Law 217; Pothier, Part. *39. See Goiraud, Code, etc.

In the common law all partnership is for gain. *General* partnership is for a general line of business; 3 Kent *25; Cowp. 814. But where the parties are engaged in one branch of trade or business only, they would be usually spoken of as engaged in a general partnership, Story, Part. § 74. *Special* or *particular* partnership is one confined to a particular transaction. The extent or scope of the agreement is different in the two cases, but the character of the relation is the same. A partnership may exist in a single transaction as well as in a series; Davcis 323; Solomon v. Solomon, 2 Ga. 18; 3 C. B. 641; Schollenberger v. Seldonridge, 49 Pa. 83. Special or limited partnership differs from the ordinary relation. It is composed of general partners to whom all the ordinary rules of partnership apply, and of limited partners with circumscribed power and liability limited to the amount of their contribution. The privilege is imparted by charter in England. In America it exists by statute; and unless the provisions of the act are strictly complied with, the association will be treated as a general partnership; 3 Kent *35; Van Ingen v. Whitman, 62 N. Y. 513; Henkel v. Heyman, 91 Ill. 96; Vanhorn v. Corcoran, 127 Pa. 255, 18 Atl. 16, 4 L. R. A. 386. The special exemption of a limited partner will be recognized in other jurisdictions than the one in which the association is formed, though the firm has made the contract in the foreign jurisdiction; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128.

Another sort of association is styled *limited partnership*. It is of recent, statutory origin and strongly resembles a corporation. The members incur no liability beyond the amount of their subscription; unless they violate in some manner the requirements of the statute under which they organize. It is a general requirement, that the word "limited" be in all cases added to the firm name. Limited partnerships in Pennsylvania, which can be sued in the partnership name, are nevertheless not corporations entitled to sue as artificial citizens of the states, within the constitution and laws of the United States; Imperial Refin. Co. v. Wyman, 38 Fed. 574, 3 L. R. A. 503.

In Louisiana and in Panama and the Canal Zone, under the civil law, a limited partnership is known as a partnership *in commendam;* and in Hawaii it is provided that limited partnerships may be formed between corporations. For a list of statutes on the subject in force to 1911, see Gilmore, Partn. 597, n. 20.

There is still another class of partnerships, called *joint-stock companies* (*q. v.*).

Sub-partnerships. The *delectus personæ*, *q. v.*, which is inherent in the nature of partnership (excepting mining partnerships; see Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Duryea v. Burt, 28 Cal. 569; and joint-stock companies, and certain partnership associations in Massachusetts; see Edwards v. Gasoline Works, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791) precludes the introduction of a stranger into the firm without the concurrence of all the partners; Gilmore v. Black, 11 Me. 488; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Moddewell v. Keever, 8 W. & S. (Pa.) 63; Channel v. Fassitt, 16 Ohio 166; 2 Rose 254. Yet no partner is precluded from entering into a *sub-partnership* with a stranger; *nam socii mei socius meus socius non est.* In such case the stranger may share the profits of the particular partner with whom he contracts; and although it has been decided that it is not true as a general proposition that such stranger will not be liable for the debts of the general partnership; Fitch v. Harrington, 13 Gray (Mass.) 468, 74 Am. Dec. 641; still, it is quite evident that a *mere* participation in profits renders one responsible only

for the debts and liabilities of those with whom he participates; and, inasmuch as such stranger shares the profits only of and with *one* of the partners, he can be held only as the partner of that partner; he cannot be held as a partner in the general partnership, because he does not share or participate with the other persons who compose it. See 3 Kent 52; 1 B. & P. 546; Reynolds v. Hicks, 19 Ind. 113; Meyer v. Krohn, 114 Ill. 574, 2 N. E. 495. Besides, a sub-partner does not receive a certain share of the whole profits of the firm, but only a part of a share thereof; and he does not receive this part of a share, nor is he entitled to interfere with it at all, to say whether it shall be more or less in amount, until it has actually been set out and the time has come for a division between himself and the partner with whom he contracted. He does not draw out of the general concern any of its profits; he only draws from the profits of one who has previously drawn them from the general partnership. See 6 Madd. 5; 4 Russ. 285. If this stranger has caused damage to the partnership by his default, the party who has taken him into the partnership will be liable to the other partners the same as if he had done the damage himself; Pothier, Part. n. 93.

Any number of partners less than the whole may form an independent co-partnership, which, though not strictly a sub-partnership, is entitled to a separate standing in equity. In case of insolvency the subordinate co-partnership is treated as a distinct concern, and the assets are marshalled accordingly. Consequently, although the creditors of the smaller firm are strictly separate creditors when compared with the creditors of the larger firm; yet debts owing by one firm to the other are collected on insolvency for the benefit of the creditors of the creditor firm; 1 B. & P. 539; 1 Cox 140. See In re Haines & Co.'s Estate, 176 Pa. 354, 35 Atl. 237. Indeed, one partner may have this independent standing if the trade is distinct; Lind. Part. 2d Am. ed. *725. But the debts must arise in the ordinary course of trade; Lind. Part. 2d Am. ed. *527.

Quasi-partnership. This is simply the case of a man who without being actually a partner, holds himself out or suffers himself to be held out as such; he is estopped to deny his liability as a partner; Hicks v. Cram, 17 Vt. 449; 6 Ad. & E. 469; Sun Ins. Co. v. Kountz Line, 122 U. S. 583, 7 Sup. Ct. 1278, 30 L. Ed. 1137. This rule of law rests, not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without others they would not have been willing to lend anything; 3 Kent 32; Purviance v. McClintee, 6 S. & R. (Pa.) 259; Gill v. Kuhn, *id.* 333; Dob v. Halsey, 16 Johns. (N. Y.) 40, 8 Am. Dec. 293; Osborne v. Brennan, 2 N. & McC. (S. C.) 427, 10 Am. Dec. 614; Brown v. Grant, 39 Minn. 404, 40 N. W. 268; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355.

In legal effect it is a partnership by estoppel which exists only where the parties have not agreed to be, and are not in fact, partners but are held as such only because they have so represented themselves, and some third person has relied upon the representations; Deputy v. Harris, 1 Marv. (Del.) 100, 40 Atl. 714; Uhl v. Harvey, 78 Ind. 26; Lighthiser v. Allison, 100 Md. 103, 59 Atl. 182.

The term "holding one's self out as partner" imports, at least, the voluntary act of the party holding himself out; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; 2 Camp. 617; but no particular mode of holding himself out is requisite to charge a party. It occurs most frequently where a partner retires from a firm and his retirement is not made known. It may be express and either by direct assertion or by authority to a partner to use the party's name. It may result from negligence, as a failure to forbid the use of one's name by the firm; Poillon v. Secor, 61 N. Y. 456; Drennen v. House, 41 Pa. 30; Dailey v. Coons, 64 Ind. 545; Barnett Line of Steamers v. Blackmar, 53 Ga. 98. It must appear that the "holding out" was done by him or by his consent; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136; Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112; Rittenhouse v. Leigh, 57 Miss. 697; 8 L. J. C. P. 257.

Holding out is a question of fact; Stephenson v. Cornell, 10 Ind. 475; Nelson Distilling Co. v. Loe, 47 Mo. App. 31; Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355. The usual evidence to charge a party in such cases is that he has suffered the use of his name over the shop-door, etc., or that he has done other acts, or suffered his agents to do acts; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; no matter of what kind, sufficient to induce others to believe him to be a partner; Buckingham v. Burgess, 3 McLean 364, Fed. Cas. No. 2,087; *id.*, 3 McLean 549, Fed. Cas. No. 2,089; 3 Camp. 310, *per* Tindal, C. J.; State v. Wiggin, 20 N. H. 453; Holmes v. Porter, 39 Me. 157; Carmichael v. Greer, 55 Ga. 116; Bartlett v. Raymond, 139 Mass. 275, 30 N. E. 91; McClellan Dry-Dock Co. v. Steamboat Line, 43 La. Ann. 258, 9 South. 630. A person is not relieved from liability though he was induced by the fraud of others to hold himself out as a partner with them. See 5 Bingh. 521; 1 Rose 69. The holding out must have been before the contract with the third person was entered into, and must have been the

inducement to it; 7 B. & C. 409; Wright v. Powell, 8 Ala. 560; Hefner v. Palmer, 67 Ill. 161; Palmer v. Pinkham, 37 Me. 252; Howes v. Fisk, 67 N. H. 289, 30 Atl. 351. A third party will be held liable as a partner only to one who knew of the holding out at the time he acted and who acted in reliance upon it; 1 B. & Ald. 11; Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; Marble v. Lypes, 82 Ala. 322, 2 South. 701; Partridge v. Kingman, 130 Mass. 476; Burnett v. Snyder, 81 N. Y. 550, 37 Am. Rep. 527; Adrian Knitting Co. v. R. Co., 145 Mich. 323, 108 N. W. 706; Spaulding v. Nathan, 21 Ind. App. 122, 51 N. E. 742; Daniel v. Schultz, 12 Ky. L. Rep. 957; and so is "the great weight of authority"; Gilmore, Partn. 66; though on the strength of a rule laid down in Parsons, Partn. (3d Ed.) 130, there is at least one case *contra*, Poillon v. Secor, 61 N. Y. 456, which may be considered as overruled by subsequent cases; Central City Sav. Bk. v. Walker, 66 N. Y. 424; Cassidy v. Hall, 97 N. Y. 159; Rogers v. Murray, 110 N. Y. 658, 18 N. E. 261; and it was said that the cases of Poillon v. Secor, 61 N. Y. 456 and 2 H. Bla. 242, cannot be considered as good law; Pars. Partn. Beale's ed. § 93. If the plaintiff knew at the time he made the contract that the party he seeks to charge was not a partner, he cannot hold him as such; Willis v. Rector, 50 Fed. 684, 1 C. C. A. 611; or if the plaintiff had notice of any kind; Alabama Fertilizer Co. v. Reynolds, 85 Ala. 19, 4 South. 639; 1 Camp. 404; and a representation made after the contract was entered into will not charge the defendant; 1 C. M. & R. 415. The doctrine is based upon estoppel. But it has been held that even where there was no evidence that the plaintiff was misled, the reputed partner will be held liable; Rizer v. James, 26 Kan. 221.

Where the new firm had the same name as the old, one who sold goods to the former may recover of the members of the old firm, though notice of dissolution was published in a newspaper, and though the old firm owed him nothing at the dissolution, and though he did not know the names of the members of the old firm; Elkinton v. Booth, 143 Mass. 479, 10 N. E. 460.

Where persons hold themselves out as a corporation, without having even a *de facto* corporate existence, persons dealing with them, if not estopped to deny their corporate existence, may hold them liable as partners; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Eliot v. Himrod, 108 Pa. 569; Wechselberg v. Bank, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470. Other cases hold that the remedy is against the agent who professed to act for a non-existent corporation; 1 Thomps. Corp. § 418; Fay v. Noble, 7 Cush. (Mass.) 188. Where there is a *de facto* corporation, the members cannot be held as partners; Snider's Sons Co. v. Troy, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Planters' & Miners' Bk. v. Padgett, 69 Ga. 159. If the organization is defective and the parties act in good faith, they are not liable as partners; Gartside Coal Co. v. Maxwell, 22 Fed. 197; American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743; *contra*, Ferris v. Thaw, 72 Mo. 446; Whipple v. Parker, 29 Mich. 369. Text writers differ widely. That stockholders in a defective or illegal corporation are liable as partners, see Cook, Stockh. § 233; *contra*, whether the corporation is *de facto* or not; Moraw. Priv. Corp. § 748; Tayl. Priv. Corp. § 148; Bates, Partn. § 4. Incorporators who transact business upon the strength of an organization which is materially defective, are individually liable, as partners, to those with whom they have dealt. Failure to record the charter as required by law, renders the incorporators personally liable to persons who deal with them without knowledge of the attempted incorporation or without knowledge of facts which ought to put them on inquiry; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249.

Where persons enter into articles of association for banking purposes, and go through the usual steps for forming a corporation, such as subscribing for shares, etc., but without a charter, they are liable as partners; Pettis v. Atkins, 60 Ill. 454. Where persons associate together to form a corporation, but none is formed, by reason of a failure to comply with the statute, they become a *quasi*-partnership; Flagg v. Stowe, 85 Ill. 164; but not as against a creditor who is also a stockholder; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; or is a director; Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; or when it appears that third parties dealt with the concern as a corporation; Merchants & M. Bk. v. Stone, 38 Mich. 779.

If the charter is obtained by fraud, the members will be held liable as partners; Paterson v. Arnold, 45 Pa. 410; or if it be obtained for gambling purposes; McGrew v. City Produce Exch., 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771. Where parties go to another state to get a charter to carry on business in their own state, with powers which they could not obtain at home, they will be held liable as partners, the transaction being substantially forbidden by statute; Empire Mills v. Grocery Co., 4 Willson, Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505, 12 L. R. A. 366; *contra*, Demarest v. Flack, 128 N. Y. 205, 28 N. Y. 645, 13 L. R. A. 854. It is held that when parties incorporate in one state to do business in another, they are partners; Hill v. Beach, 12 N. J. Eq. 31; *contra*, Second Nat. Bank v. Hall, 35 Ohio St. 158; Cook, St. & Stockh. § 237; Atchison, T. & S. F. R. Co. v. Fletcher, 35

Kan. 242, 10 Pac. 596. The intent to form a corporation will not prevent parties being held as partners; Martin v. Fewell, 79 Mo. 401.

After dissolution of a corporation, stockholders are not liable as partners for corporate debts; Central City Sav. Bk. v. Walker, 66 N. Y. 424; unless they agree to continue the business as partners; National Union Bk. v. Landon, 45 N. Y. 410.

The fact that a special partner fails to comply with the stipulated requirements, does not change his special partnership into a general one, but simply makes him liable to creditors as a general partner; Abendroth v. Van Dolsen, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57.

THE SCOPE AND SUBJECT-MATTER. A partnership is primarily a commercial relation. The notion has, however, been gradually extended to include other associations than those for trade merely: *e. g.* partnerships between two attorneys at law; Livingston v. Cox, 6 Pa. 360; Warner v. Griswold, 8 Wend. (N. Y.) 665; Smith v. Hill, 13 Ark. 173. It is said by Collyer that "perhaps it may be laid down generally that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced." Colly. Part. 5th ed. § 56.

The classification of partnerships with respect to the nature of the business is into trading and non-trading forms and the difference is in the powers of the partners, as in the former they have implied power to borrow money and to give the firm paper therefor, but in the latter they have no such power unless the act in question is clearly within the scope of the firm's business; Lee v. Bank, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73, 6 Ann. Cas. 127; Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. Ed. 313; and the burden is on the plaintiff to show authority, express or implied, or ratification; Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53. Formerly the question whether the act done was within the scope of the business, was for the jury; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; but latterly in the case of ordinary transactions, the question was treated as one of law for the court; Alsop v. Trust Co., 100 Ky. 375, 38 S. W. 510; Farmer v. Bank, 51 S. W. 586, 21 Ky. L. Rep. 425; and in one case it was said to be a matter of which courts take judicial cognizance under the law merchant; Woodruff v. Scaife, 83 Ala. 152, 3 South. 311; and see Gilmore, Partn. 287.

The early law did not recognize partnerships for trading in land, because the land was all held by the barons who did not engage in trade. But in modern times, and especially in America, where the social conditions are different, land is largely held by speculators whose operations as partners the law must recognize; Dudley v. Littlefield, 21 Me. 421, 422; Kramer v. Arthurs, 7 Pa. 165; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550. In transferring title to and from the firm the ordinary rules of conveyancing must be observed. When the title is in all the partners, all must join in the deed; if in the name of one, he alone need execute; Story, Part. § 92; Coles v. Coles, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; Davis v. Christian, 15 Gratt. (Va.) 11; Arnold v. Stevenson, 2 Nev. 234.

Building operations are now upon the same footing as land speculations; Reynolds v. Cleveland, 4 Cow. (N. Y.) 282, 15 Am. Dec. 369. But the tradition has been too strong to be impaired as yet in landlord and tenant cases. Farming on shares is not partnership. The owner of land may either receive a share in the produce as rent, or give such a portion to a laborer in lieu of wages; Lind. Part. Am. ed. *651; Keiser v. State, 58 Ind. 379. But there may be a partnership in the development of land owned by one; Autrey v. Frieze, 59 Ala. 587.

A much mooted question whether under the Statute of Frauds an ordinary contract of partnership for dealing in land either incidentally or as a business, must be in writing, seems to be determined, on the weight of authority, in the negative; Williams v. Gillies, 75 N. Y. 197; Pennybacker v. Leary, 65 Ia. 220, 21 N. W. 575; Marsh v. Davis, 33 Kan. 326, 6 Pac. 612; Brooke v. Washington, 8 Gratt. (Va.) 248, 56 Am. Dec. 142; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169; Stitt v. Lumber Co., 98 Minn. 52, 107 N. W. 824; Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, 7 Ann. Cas. 1140; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; *contra*, Goldstein v. Nathan, 158 Ill. 641, 42 N. E. 72; Norton v. Brink, 75 Neb. 566, 106 N. W. 668, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. Rep. 822; Schultz v. Waldons, 60 N. J. Eq. 71, 47 Atl. 187; Appeal of Everhart, 106 Pa. 349; Langley v. Sanborn, 135 Wis. 178, 114 N. W. 787; Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; McKinley v. Lloyd, 128 Fed. 519. This is said to result from the fact that partnership is based on a contract which may be shown by oral evidence and then what are its assets and the interests of the partners may be also shown by such evidence; 5 Ves. 309; 5 Hare 369; *contra*, Smith v. Burnham, 3 Sumn. 435, Fed. Cas. 13,019, where Story, J., discusses the authorities at large; and see Gilmore, Partn. 94, where the cases are collected.

See *infra*, as to mining partnerships; also MINES AND MINING.

Firm Property. Partners have, presumptively, the same interest in the stock that they have in the profits; Ryder v. Gilbert, 16 Hun (N. Y.) 163. Their shares are presumed to be equal both in capital and profits; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Griggs v. Clark, 23 Cal. 427. Where no definite arrangement is made between partners as to a division of profits, the presumption of law is that they are to be equally divided; Frazer v. Linton, 183 Pa. 186, 38 Atl. 589. But a joint stock is not essential to a partnership. The partner without capital is then interested, not in the fund, but in the adventure; 2 Bingh. 170; Moore v. Huntington, 7 Hun (N. Y.) 425; Ewell's Lind. Part. *13.

Sometimes a partnership exists between parties merely as the managers and disposers of the goods of others; 4 B. & Ald. 663; Walden v. Sherburne, 15 Johns. (N. Y.) 409, 422. So, it seems, two persons may be owners in common of property, and also partners in the working and management of it for their common benefit; 2 C. B. N. S. 357, 363; 16 M. & W. 503.

Whether a partnership includes the capital stock, or is limited to the profit and loss, must be determined from the agreement and intention of the parties; Bradbury v. Smith, 21 Me. 120. See 4 B. & C. 867; Story, Part. § 26.

A partner may contribute only the use of his capital, retaining full control of the principal; and he may charge interest for the use whether profits are earned or not; Ewell's Lind. Part. *328. If, however, the firm funds are expended in repairing and improving the property thus placed at their disposal, it becomes partnership stock; Ewell's Lind. Part. *330; Lane v. Tyler, 49 Me. 252; Deveney v. Mahoney, 23 N. J. Eq. 247; Appeal of Clark, 72 Pa. 142.

The partnership property consists of the original stock and the additions made to it in the course of trade. The term means such property, real and personal, as by the agreement of the partners is to be devoted to firm purposes; Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685; and when one partner put in his property as against the other's experience, the partnership was only as to the profits; Hillock v. Grape, 111 App. Div. 720, 97 N. Y. Supp. 823.

All real estate purchased for the partnership, paid for out of the funds thereof, and devoted to partnership uses and trusts, whether the legal title is in one or all of the partners, is treated in equity in the same manner as other partnership property until the partnership account is settled and the partnership debts are paid; 5 Ves. 189; Fall River W. Co. v. Borden, 10 Cush. (Mass.) 458; 3 Kent 37; Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Ewell's Lind. Part. *324. Leases or real estate taken by one partner for partnership purposes, mines, and trade-marks are held to be partnership property; 1 Taunt. 250; Story, Part. § 98. The good-will of a business is an asset of the firm. But Kent says, "The good-will of a trade is not partnership stock;" 3 Kent 64. The good-will of a professional partnership belongs, in the absence of express stipulations, exclusively to the survivors; 3 Madd. 64; a surviving partner has the right to carry on the business under the firm name; 28 Beav. 536; 34 *id.* 566; Caswell v. Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833; 7 Sim. 421; Staats v. Howlett, 4 Den. (N. Y.) 559; *contra*, Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 202; Colton v. Thomas, 7 Phila. (Pa.) 257; the reason being assigned that to permit it would impair the value of the good-will and might subject the retired partners to additional liabilities; Lindl. Partn. 2d Am. Ed. *444; 43 Ch. D. 208. It is said to be the better opinion that the firm name is an asset of the firm; Pars. Partn. § 182, n. Where there is a sale of the business to a partner, the latter does not, without express agreement, acquire a right to the firm name; 43 Ch. D. 208 (C. A.); Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; but see 10 Ch. D. 436 (C. A.); Holmes, B. & H. v. Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; even so as to advertise himself as "successor"; *id.;* but he may advertise that he is "late of" the former firm; *id.* A continuing partner who has acquired the right to a retiring partner's name, cannot transfer it to a corporation; Bagby & R. Co. v. Rivers, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632, 67 Am. St. Rep. 357; nor, when in selling out, there was no mention of the good-will, can he use it so as to give third persons cause to believe that the retired partner is still associated with the business; McGowan Bros. P. & M. Co. v. McGowan, 22 Ohio St. 370.

The firm name is a part of the good-will; Hegeman & Co. v. Hegeman, 8 Daly (N. Y.) 1; upon dissolution, it passes as such to one who buys the business and continues it; Adams v. Adams, 7 Abb. N. C. (N. Y.) 292; L. R. 10 Ch. Div. 436; subject only to the liability to be enjoined in the absence of a special agreement if he make such use of it as to cause injury to the purchaser of the business; L. R. 45 Ch. D. 577; in whose hands it was held taxable capital employed in the state, although the then owner was a corporation of another state, in which it had never done any business; People v. Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126; but if one partner transfers his interest with the understanding that his co-partners are to succeed to the business, he cannot use the firm name in a similar business in the vicinity; Brass & I. W. Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82. Otherwise, on dissolution and a division of firm assets, each partner may use the firm name in a similar business; 34 Beav. 566; Lathrop v.

Lathrop, 47 How. Pr. (N. Y.) 532 (but see Blumenthal v. Strauss, 53 Hun 501, 6 N. Y. Supp. 393); see Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543; but he must not do it in such a way as to mislead the public; L. R. 9 Ch. Div. 196; McGowan Bros. P. & M. Co. v. McGowan, 22 Ohio St. 370. The name of a withdrawing partner cannot be used by the remaining partners without an agreement; L. R. 43 Ch. Div. 208; nor can a partner who buys the firm stock in trade, but not the good-will, keep the name of the retiring partner in the firm name; 26 L. J. N. S. 391. There are statutes which partially govern the subject in New York and Massachusetts. See Vonderbank v. Schmidt, 44 La. Ann. 264, 10 South. 616, 15 L. R. A. 462, 32 Am. St. Rep. 336; GOOD-WILL.

A ship, as well as any other chattel, may be held in strict partnership; 3 Kent 154; Lamb v. Durant, 12 Mass. 54, 7 Am. Dec. 31. But ships are generally owned by parties as tenants in common; and they are not in consequence of such ownership to be considered as partners; Harding v. Foxcroft, 6 Greenl. (Me.) 77; French v. Price, 24 Pick. (Mass.) 19; Buddington v. Stewart, 14 Conn. 404; Hopkins v. Forsyth, 14 Pa. 34, 38, 53 Am. Dec. 513; Williams v. Lawrence, 47 N. Y. 462. The same is true of any other species of property in which the parties have only a community of interest; 8 Exch. 825; 21 Beav. 536. As against an assignment of partnership property for the benefit of creditors, property in the possession of and used by the firm, cannot be claimed to have been the individual property of a member of the firm, by one to whom such member subsequently assigned it; Sherman v. Jenkins, 70 Hun 593, 24 N. Y. Supp. 186.

Partners hold land by a peculiar title. In one respect it most resembles an ancient joint tenancy. Neither partner can convey title to a moiety of the goods; his assignee takes subject to the right of the other partner to have firm debts paid out of that fund; he therefore can assign only a moiety of what is left after firm debts paid. Upon this principle depends also the special right of survivorship for the purposes of liquidation. With these qualifications the partner's title at law differs but slightly from a tenancy in common; Story, Part. §§ 90, 97; Commercial Bank v. Wilkins, 9 Greenl. (Me.) 28; Rodriguez v. Hefferman, 5 Johns. Ch. (N. Y.) 417. They hold the land in common and must grant it as other tenants in common; Dillon v. Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700. The legal title to the land, with all the characteristics of realty, attaches to it until applied to partnership purposes; Espy v. Comer, 76 Ala. 501; equity interferes for partnership purposes only; Wilcox v. Wilcox, 13 Allen (Mass.) 252. Copartners may withdraw realty from the partnership for the purpose of holding it in severalty; and in this event they become simply co-tenants in such land; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717.

A partner has the same title to the stationary capital of the firm that he has to its product in his hands for sale, but his power over it is less extensive. He cannot sell the permanent capital stock. The power of a partner to sell results not from the title, but from the general partnership relation; Sloan v. Moore, 37 Pa. 217.

It has been held that in order to make the land really firm assets the title should be in the partners as a firm, otherwise, the partners would be mere tenants in common, and the land, as to purchasers and creditors, would be the individual estate of the partners, regardless of the funds by which it was purchased and the uses to which it was put; Foster v. Barnes, 81 Pa. 377; but as to the partners and their representatives, the land would belong to the firm, in such case; Howard v. Priest, 5 Metc. (Mass.) 582; Appeal of Black, 89 Pa. 203 (even if the title is in one partner's name; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. Supp. 78; Teschemacher v. Lenz, 82 Hun 594, 31 N. Y. Supp. 543). The rule is applied to cases of equitable, as well as legal, estates; Appeal of Ebbert, 70 Pa. 79. In other cases it has been held that where land has been bought with firm money and is used for firm purposes, or been dedicated to the firm, it must be regarded as partnership property without considering the record title; Fairchild v. Fairchild, 64 N. Y. 479; Price v. Hicks, 14 Fla. 565; Dupuy v. Leavenworth, 17 Cal. 262. It has been thought necessary to resort to an equitable conversion of firm land into personalty in order to subject it to the rules governing partnership property; Appeal of Foster, 74 Pa. 391, 15 Am. Rep. 553; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282. But this fiction seems unnecessary. See Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Campbell v. Campbell, 30 N. J. Eq. 415; Buckley v. Buckley, 11 Barb. (N. Y.) 43.

Partnership lands are liable for firm debts prior to the claim of the widow or heirs of a deceased partner; Clay v. Freeman, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. Ed. 104. After liquidation, the lands or their surplus proceeds pass as real estate; Campbell v. Campbell, 30 N. J. Eq. 415; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Appeal of Foster, 74 Pa. 391, 15 Am. Rep. 553; upon a dissolution the equitable title to land passes to the surviving partner; Clay v. Field, 34 Fed. 375; Weld v. Mfg. Co., 86 Wis. 552, 57 N. W. 374; Williams v. Whedon, 109 N. Y. 333, 16 N. E. 365, 4 Am. St. Rep. 460.

If one partner buys land with firm money and takes title in his own name, a resulting trust arises to the firm; Rice v. Pennypacker, 5 Houst. (Del.) 279; Fairchild v. Fair-

child, 64 N. Y. 471; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282; Pepper v. Thomas, 85 Ky. 539, 4 S. W. 297. No length of possession by one partner of real estate paid for with partnership funds and conveyed to him, bars the other partners; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282. A deed made to a partnership as grantee in the firm name, vests in the individual partners the power to convey; 8 C. C. App. 600; Kelley v. Bourne, 15 Or. 476, 16 Pac. 40; but it has been held that such a conveyance vests title only in the partner whose name appears in the firm name; Arthur v. Weston, 22 Mo. 378. In Pennsylvania, so far as third parties without notice are concerned, the title of the firm must appear of record; Warriner v. Mitchell, 128 Pa. 153, 18 Atl. 337. As to partnership realty, see Yorks v. Tozer, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. Rep. 395; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Goldthwaite v. Janney, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56; Robinson Bk. v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883.

Profits made by a member of a firm through individual outside transactions do not belong to the firm, though he employs therein the skill and information acquired by him as a member thereof; Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169. Nor do they when made with the consent of the firm which receives a commission on them; Davis v. Darling, 80 Hun 299, 30 N. Y. Supp. 321; but if a partner avails himself of information obtained by him in the firm business, and uses it for any purposes within the scope of the firm business, or in competition with the firm in its business, he is liable to account to it for the profits made by him; [1891] 2 Ch. 244.

Powers of Partners. *General rule.* It has been customary to derive the authority of a partner from an assumed relation of mutual agency between the members of the firm, and it is true that the firm is responsible for whatever is done by any of the partners while acting for it within the limits of the authority conferred by the nature of the business carried on; 8 H. L. Cas. 268; Loudon Sav. Fund Soc. v. Bk., 36 Pa. 498, 78 Am. Dec. 390; Keck v. Fisher, 58 Mo. 532; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732. The principle of agency applies to copartners; but it is only when one is acting as their agent that he binds them; Midland N. Bk. v. Schoen, 123 Mo. 650, 27 S. W. 547. It is perhaps more accurate to trace a partner's power to his standing as a co-principal, and to consider his agency an incident of this relation; 5 Ch. Div. 458, L. R. 7 Ex. 218. The relation is a peculiar sort of agency, where the partner is agent for the firm and not merely for the other partners; 5 Ch. Div. 458. Whatever the source of a partner's power, it is, as a rule, limited to acts incident to carrying on, in the usual way, the particular business in which the firm is engaged, and each partner has the power to manage the ordinary business of the firm, and, consequently, to bind his copartners, whether they be ostensible, dormant, actual, or nominal; 2 B. & Ald. 673; 1 Cr. & J. 316; by whatever he may do, in the course of such management, as entirely as to bind himself. But the acts of a partner wholly unconnected with the business of the partnership do not bind the firm; 2 B. & Ald. 678; Eastman v. Cooper, 15 Pick. (Mass.) 290, 26 Am. Dec. 600; Lawrence v. Dale, 3 Johns. Ch. (N. Y.) 23; nor will an act beyond the scope of the partnership; Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122.

The partner's authority is incident to, and co-extensive with, the business; Pars. (Jas.) Partn. § 133. A partner's authority to act cannot be restricted by notice from another partner to a third party; Gillilan v. Ins. Co., 41 N. Y. 376. An insolvent partner has the same authority, even after dissolution; Hubbard v. Guild, 1 Duer (N. Y.) 662. Partners may, by agreement, restrict the authority of a partner, as between themselves, but not as to third parties, without notice; Pars. (Jas.) Part. § 134; nor can either exclude the other from an equal share in the management of the concern or the possession of partnership effects; Law v. Ford, 2 Paige (N. Y.) 310; 2 J. & W. 558.

One of two partners in the practice of the law has no authority to accept for the firm an agency for the mere sale of real estate; Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592.

Accounts. One partner can bind his firm by rendering an account relating to a partnership transaction; 8 Cl. & F. 121; Cady v. Kyle, 47 Mo. 346; Lind. Part., 2d Am. ed. *28; and the periodical statements of firm accounts are, in the absence of fraud or mistake, conclusive on the partners; Stretch v. Talmadge, 65 Cal. 510, 4 Pac. 513; Gage v. Parmelee, 87 Ill. 329; Broderick v. Beaupre, 40 Minn. 379, 42 N. W. 83.

Actions. One partner can bring an action on firm account in his own and his copartners' names without their consent; In re Barrett, 2 Hughes 444, Fed. Cas. No. 1,043; but they are entitled to indemnity if he sues against their will; 2 Cr. & M. 318; Jones v. Hurst, 67 Mo. 568. This power of a partner survives the dissolution of the firm; Ward v. Barber, 1 E. D. Sm. (N. Y.) 423. One partner cannot, as a rule, sue in his own name for a firm debt; the suit must be in the names of all; Wright v. Williamson, 3 N. J. L. 978.

Admissions. After the relation of partnership has been established, a partner may bind his co-partner by an admission; Pars.

(Jas.) Partn. § 121; Collett v. Smith, 143 Mass. 473, 10 N. E. 173; Franklin v. Hoadley, 115 App. Div. 538, 101 N. Y. Supp. 374; Munson v. Wickwire, 21 Conn. 513; Caris v. Nimmons, 92 Mo. App. 66; Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104; but the existence of the partnership must be shown by other evidence; Union N. Bk. v. Underhill, 102 N. Y. 336, 7 N. E. 293; Hahn v. Ins. Co., 50 Ill. 456; Taft v. Church, 162 Mass. 527, 39 N. E. 283. The admissions of a partner as to firm business bind the firm; 2 C. & P. 232; but are not necessarily conclusive; 2 K. & J. 491; McElroy v. Ludlum, 32 N. J. Eq. 828. The admission of one partner in legal proceedings is the admission of all; 1 Maule & S. 259; Abrahams v. Myers, 40 Md. 499; Dodds v. Rogers, 68 Ind. 110; Cady v. Kyle, 47 Mo. 346.

Appearance. In an action against partners, one may enter or authorize an appearance for the rest; 7 Term 207; Bennett v. Stickney, 17 Vt. 531; McCullough v. Guetner, 1 Binn. (Pa.) 214; Wheatley v. Tutt, 4 Kan. 205; *contra,* L. R. 8 Q. B. 398; Critchfield v. Porter, 3 Ohio 519; see Pars. (Jas.) Partn. § 119; 10 App. Cas. 680; but not after dissolution of the firm; Haslet v. Street, 2 McCord (S. C.) 311, 13 Am. Dec. 724. Nor can one partner bind his co-partners personally and individually by entering an appearance for them when they are not within the jurisdiction, nor served with process; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56. A partner cannot authorize an appearance for a co-partner, not subject to the jurisdiction of the court, or if the firm has been dissolved; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; but a solicitor instructed by a managing partner may enter an appearance for all partners; [1896] 1 Q. B. 386.

Arbitration. As a general rule, one partner cannot bind the firm by submitting any of its affairs to arbitration, whether by deed or parol; 3 Kent 49; 3 C. & B. 742; Backus v. Coyne, 35 Mich. 5; Walker v. Bean, 34 Minn. 427, 26 N. W. 232; Fancher v. Furnace Co., 80 Ala. 481, 2 South. 268; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. Ed. 121. The reason given being that such a power is unnecessary for carrying on the business in the ordinary way; Lind. Part., 2d Am. ed. *129, *272. But the acting partner may be bound; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200. And the general rule is perhaps somewhat relaxed; Pars. Partn. § 121. It is held that one partner may bind the firm by submission to arbitration, by an agreement not under seal; Gay v. Waltman, 89 Pa. 453; but apparently only so as to bind firm assets; Gay v. Waltman, 89 Pa. 453.

Assignments. The right of a partner to dispose of the property of the firm extends to the assignment of at least a portion of it as security for antecedent debts, as well as for debts thereafter to be contracted; Story, Part. § 101; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; Keck v. Fisher, 58 Mo. 532; Dana v. Lull, 17 Vt. 394. Although the authorities differ, the better opinion seems to be that one partner cannot, without the knowledge or consent of his co-partners, assign all the property of the firm to a trustee for the benefit of creditors; Hook v. Stone, 34 Mo. 329; Dunklin v. Kimball, 50 Ala. 251; Brooks v. Sullivan, 32 Wis. 444; Mayer v. Bernstein, 69 Miss. 17, 12 South. 257; unless the co-partner is absent, or is incapable of giving his assent or dissent; Hill v. Postley, 90 Va. 200, 17 S. E. 946; Williams v. Frost, 27 Minn. 255, 6 N. W. 793; but not against the assent, or without the consent, of the co-partner, if the latter is present and capable of acting; Fox v. Curtis, 176 Pa. 52, 34 Atl. 952. A surviving partner has power to make an assignment for the benefit of the firm's creditors; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443.

Bills of exchange and promissory notes. A partner may draw, accept, and indorse bills and notes in the name and for the use of the firm, for purposes within the scope of its business; 7 Term 210; Blodgett v. Weed, 119 Mass. 215; Zuel v. Bowen, 78 Ill. 234; First N. Bk. v. Freeman, 47 Mich. 408, 11 N. W. 219; Ketcham N. Bk. v. Hagen, 164 N. Y. 446, 58 N. E. 523; Pettyjohn v. Bank, 101 Va. 111, 43 S. E. 203. A restriction of this power by agreement between the partners does not affect third persons unless they have notice; Lagan v. Cragin, 27 La. Ann. 352; Faler v. Jordan, 44 Miss. 283. This power cannot be exercised after dissolution of the firm; Carleton v. Jenness, 42 Mich. 110, 3 N. W. 284; Curry v. White, 51 Cal. 531; but its exercise may bind the firm if such dissolution be without proper notice; Stimson v. Whitney, 130 Mass. 591; or when the other party subsequently assents thereto; Norton v. Oil Can Co., 98 Ga. 468, 25 S. E. 501.

The doctrine is generally limited to partnerships in trade and commerce, and does not apply to other partnerships, unless it is the common usage of such business so to bind the firm, or it is necessary for the due transaction thereof; Dowling v. Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795. Non-trading partners, such as farmers; Ulery v. Ginrich, 57 Ill. 531; lawyers; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757; physicians; Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; cannot usually bind the firm by such instruments. Parties dealing with non-trading partnerships are put on inquiry; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Benedict v. Thompson, 33 La. Ann. 196; the doctrine of

general agency does not apply; Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

A bill or note made by one partner in the name of the firm is *prima facie* for partnership purposes; Carrier v. Cameron, 31 Mich. 373, 18 Am. Rep. 192; Hogg v. Orgill, 34 Pa. 344; Faler v. Jordan, 44 Miss. 283.

A partner has no implied authority to indorse a note made payable to a co-partner, although for firm account; McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; nor to bind the firm as a party to a note for the accommodation of or as surety for another; Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215; Presbrey v. Thomas, 1 App. D. C. 171; unless by special authority implied from the nature of the business or previous course of dealing; 3 Kent 46; Bank of Tennessee v. Saffarrans, 3 Humph. (Tenn.) 597; Austin v. Vandermark, 4 Hill (N. Y.) 261; and the burden is on the holder of the instrument to show such authority; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; Mechanics' Bk. v. Barnes, 86 Mich. 632, 49 N. W. 475; Mayer v. Bernstein, 69 Miss. 17, 12 South. 257; nor can a partner bind the firm by a guaranty of payment of a bill of exchange; 3 Camp. 478; Lemke v. Faustmann, 124 Ill. App. 624.

Direct proof is not necessary; the authority or ratification may be inferred from circumstances; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Darling v. March, 22 Me. 188; Jones v. Booth, 10 Vt. 268. Indorsement of a note for a third person by a partner in the firm name without the knowledge of the other member of the firm and having no connection with its business, does not bind the firm; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725.

Borrowing money. One partner may borrow money on the credit of the firm, when it is necessary for the transaction of the business in the ordinary way; Smith v. Collins, 115 Mass. 388; Hoskinson v. Eliot, 62 Pa. 393; Pahlman v. Taylor, 75 Ill. 629; Wagner v. Simmons & Co., 61 Ala. 143; Union Nat. Bk. v. Neill, 149 Fed. 711, 70 C. C. A. 417, 10 L. R. A. (N. S.) 426; Sherwood v. Snow, Foote & Co., 46 Ia. 481, 26 Am. Rep. 155; but the amount must be within the usual business of the firm; Pars. (Jas.) Partn. § 125; but a partner in a cash business, as a firm of solicitors, cannot borrow; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757; or physicians; Humph. 23. It is said that a partner cannot borrow to increase the firm's capital; 2 Hare 218. A contract to borrow money in violation of a partnership agreement is not valid, though made in furtherance of the interests of the firm; King v. Levy (Miss.) 13 So. 282.

Checks. One partner has the implied power to bind the firm by firm checks drawn on its bankers; 3 C. B. N. S. 442. Such checks must not be post-dated; L. R. 6 Q. B. 209.

Compromise. A partner may compromise with debtors or creditors of the firm; Story, Part. § 115; Noyes v. R. Co., 30 Conn. 1; Doremus v. McCormick, 7 Gill (Md.) 49.

Confession of judgment. One partner cannot, by confessing a voluntary judgment against the firm, bind his co-partners; Miller v. Glass Works, 172 Pa. 70, 33 Atl. 350; Morgan v. Richardson, 16 Mo. 409, 57 Am. Dec. 235; Hier v. Kaufman, 134 Ill. 215, 25 N. E. 517. But a judgment so confessed will bind the partner who confessed it; 3 C. B. 742; Franklin v. Morris, 154 Pa. 152, 26 Atl. 364; North v. Mudge, 13 Ia. 496, 81 Am. Dec. 441; Shedd v. Bank, 32 Vt. 709; Conery v. Rotchford, 30 La. Ann. 692; but see Clark v. Bowen, 22 How. (U. S.) 270, 16 L. Ed. 337; and will bind the firm assets; see Wilmot v. The Ouachita Belle, 32 La. Ann. 607, where it was held that a "commercial partner" has a right to confess judgment on behalf of the firm. Only the other partner can object to it; Farwell v. Cook, 42 Ill. App. 291. Where a judgment note has been signed in the firm name only, the plaintiff may name the individual members, and judgment may be entered in this form; Miller v. Glass Works, 172 Pa. 70, 33 Atl. 350.

Contracts. A partner has the power to bind the firm by simple contracts within the scope of the partnership business; Winship v. Bank, 5 Pet. (U. S.) 529, 8 L. Ed. 216; and make a contract which will bind them as partners and also as individuals; Morris v. Neel, 78 Ga. 797, 3 S. E. 643; but not a contract to convey firm real estate; Lawrence v. Taylor, 5 Hill (N. Y.) 107.

Debts. One partner may receive debts due the firm, and payment to him by the debtor extinguishes the claim; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; Salmon v. Davis, 4 Binn. (Pa.) 375, 5 Am. Dec. 410; even after dissolution; 15 Ves. 198; although the debtor knew there was an agreement that one party alone was to collect and pay the debts; Hansen v. Miller, 44 Ill. App. 550. A partner may also bind the firm by assenting to the transfer of a debt due to it, as the transfer of the firm's account from one banker to another; 2 H. & N. 326. A partner cannot employ partnership funds to pay his own pre-existing debt, without the consent of his co-partners; Filley v. Phelps, 18 Conn. 294; Thomas v. Pennrich, 28 Ohio St. 55; Huiskamp v. Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971. But in Blair v. Harrison, 57 Fed. 257, 6 C. C. A. 326, it was held that one of two co-partners could pledge the partnership property to secure his private debts, to the extent of his interest therein.

Of course, the power to receive money implies the power to receipt for the firm; Story, Partn. § 115.

Deeds. One partner has no implied authority to bind his co-partners by a deed, even for a debt or obligation contracted in the ordinary course of commercial dealings

within the scope of the partnership business; 3 Kent 47; McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303. Such an instrument binds the maker only; Hoskinson v. Eliot, 62 Pa. 393. But such a deed may be ratified; Wilcox v. Dodge, 12 Ill. App. 517; and this consent or adoption may be by parol; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379. It binds the firm if they were present at the execution; 3 Ves. 578. The fact that the partnership articles are under seal does not give such authority; 7 Term 207; unless they contain a particular power to that effect; *id.* One partner may convey by deed property of the firm which he might have conveyed without deed. The seal in such a case would be surplusage; Purviance v. Sutherland, 2 Ohio St. 478; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Milton v. Mosher, 7 Metc. (Mass.) 244; he may assign a mortgage in payment of a firm debt, or release a mortgage; Smith v. Stone, 4 Gill & J. (Md.) 310; Halsey v. Fairbanks, 4 Mas. 206, Fed. Cas. No. 5,964. See *infra* under *Release.* One partner may acknowledge a deed for the firm; Sloan v. Machine Co., 70 Mo. 206.

So a partner may sometimes execute under seal a paper, as a charter party, which "is exclusively a mercantile transaction, and always in the course of trade"; T. U. P. Charlt. 163, 4 Am. Dec. 705; or a release of a firm debt, as incident to the power to collect it; 2 Co. 68; per Kent, C. J., in Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Allen v. Cheever, 61 N. H. 32; Dyer v. Sutherland, 75 Ill. 583; Smith v. Stone, 4 Gill. & J. (Md.) 310; Fluck v. Bond, 3 Phila. (Pa.) 207; Foster's Curator v. Rison, 17 Gratt. (Va.) 321; but see Brayley v. Goff, 40 Ia. 76; and though not originally valid to bind the firm it may be made so by previous authority or ratification; Sterling v. Bock, 40 Minn. 11, 41 N. W. 236; see Fore v. Hitson, 70 Tex. 517, 8 S. W. 292; which may be implied from circumstances; McDonald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303. Such release is not effective if made in consideration of a debt due to the partner himself; Gram v. Cadwell, 5 Cow. (N. Y.) 489; nor if made by one of a legal firm; Remington v. R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321. As a release by one partner is a release by all; Wood v. Goss, 21 Ill. 604; Thrall v. Seward, 37 Vt. 573; so a release to one partner is a release to all; Clagett v. Salmon, 5 Gill. & J. (Md.) 314; Wiggin v. Tudor, 23 Pick. (Mass.) 444.

Distress. Where a lease has been granted by the firm, any partner may distrain or appoint a bailiff to do so; 4 Bing. 562, and cases there cited.

Firm property. Each partner has the power to dispose of the entire right of his copartners in the partnership effects, for the purposes of the partnership business and in the name of the firm; Story, Part. § 9; Lambert's Case, Godb. 244; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Graser v. Stellwagen, 25 N. Y. 315; Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; and the fact that he appropriated the price to the payment of private debts did not invalidate the sale as against a creditor of the partnership; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; but this general power seems to be modified by modern cases so as to limit it to sales made in the course of, or in furtherance of, the partnership business; Creath v. Kolb, 70 Mo. App. 296; Freeman v. Abramson, 30 Misc. 101, 61 N. Y. Supp. 839; and in some states such blanket sales are forbidden by statute; Doll v. Mercantile Co., 33 Mont. 80, 81 Pac. 625; Phillips v. Thorp, 12 Okl. 617, 73 Pac. 268. See SALES. A *bona fide* sale of all the partnership effects by one partner to another is valid, although the firm and both partners are at the time insolvent; Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; Ferson v. Monroe, 21 N. H. 462. But an insolvent partner was enjoined from selling the property pending an accounting; Taylor v. Russell, 119 N. C. 30, 25 S. E. 510.

This power is held not to extend to real estate, which a single partner cannot transfer without special authority; Story, Part. § 101; Anderson v. Tompkins, 1 Brock. 456, Fed. Cas. No. 365; Piatt v. Oliver, 3 McLean, 27, Fed. Cas. No. 11,116. Since the power to transfer the firm property must be exercised for the ordinary purposes of the partnership business, it is held that a partner's employment of firm capital in a new partnership, which he forms for his firm with third persons charges him for a conversion of the fund to his own use; Reis v. Hellman, 25 Ohio St. 180.

Guarantees. A partner derives no authority from the mere relation of partnership to bind the firm as guarantor of the debt of another; 4 Exch. 623; Rollins v. Stevens, 31 Me. 454; Langan v. Hewett, 13 Smedes & M. (Miss.) 122; McQuewans v. Hamlin, 35 Pa. 517. If the contract of guaranty is strictly within the scope of the firm business, one partner may bind the firm by it; First N. Bk. v. Carpenter, Stibbs & Co., 41 Ia. 518; or if guaranty is usual in that kind of business or is such as the firm has frequently recognized; Pars. Partn. § 144; and where a partner sold notes and applied the proceeds to firm use; Sweet v. Bradley, 24 Barb. (N. Y.) 549.

Insurance. One partner may effect an insurance of the partnership goods; 1 M. & G. 130; Hillock v. Ins. Co., 54 Mich. 531, 20 N. W. 571. The assignment of a partner's interest in the firm stock without the insur-

er's consent, does not violate a policy of insurance upon it; West v. Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294.

Leases. The rule is that a partner has no power to contract on behalf of the firm for a lease of a building for partnership purposes; 22 Beav. 606. But it is held that a partner may bind the firm for the rent of premises necessary for partnership purposes, and so used; Stillman v. Harvey, 47 Conn. 26; but see 22 Beav. 606. A partner can give a valid notice to quit; 1 B. & Ad. 135.

Statute of limitations. Before dissolution an acknowledgment by one partner of a debt barred by the statute will bind the firm; Pars. Part. § 127; as to whether it will do so, if made after dissolution, the authorities are conflicting; the better view appears to be that it will not; *id.;* Cronkhite v. Herrin, 15 Fed. 888; Espy v. Comer, 76 Ala. 501; Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491; some cases distinguish between acknowledgments made before and after the statutory period has run; if made after, it does not bind; Newman v. McComas, 43 Md. 70; if made before, it does; Beardsley v. Hall, 36 Conn. 270, 4 Am. Rep. 74; McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378. Some cases hold that it binds though made after dissolution and after the statutory period has run; Mix v. Shattuck, 50 Vt. 421, 28 Am. Rep. 511; Brockenbrough v. Hackley, 6 Call (Va.) 51. If made after dissolution by a liquidating partner, it is binding; Houser v. Irvine, 3 W. & S. (Pa.) 345, 38 Am. Dec. 768; but not otherwise; Wilson v. Waugh, 101 Pa. 233. In England and in many states statutes have rendered the acknowledgment of one partner insufficient to toll the statute.

Majority, power of. The weight of authority seems to be in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership business; 3 Kent 45; 33 Beav. 595; Peacock v. Cummings, 46 Pa. 434; Johnston v. Dutton's Adm'r, 27 Ala. 245; Campbell v. Bowen, 49 Ga. 417. But see 1 Yo. & Jer. 227; Yeager v. Wallace, 57 Pa. 365. It is said that, in the absence of an express stipulation, a majority may decide as to the disposal of the partnership property; 3 Chitty, Com. L. 234; but the power of the majority must be confined to the ordinary business of the partnership; 14 Beav. 367; 2 De G. M. & G. 49; it does not extend to the right to change any of the provisions therein; Abbot v. Johnson, 32 N. H. 9; nor to engage the partnership in transactions for which it was never intended; 3 Maule & S. 488; and all must be consulted; Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789. Where a majority is authorized to act, it must be fairly constituted and must proceed with the most entire good faith; 10 Hare 493; 5 De G. & S. 310. A majority cannot change the place of business after a lease has expired; 8 Ch. Div. 129. The American cases are said to have enlarged the power of the majority; Pars. Partn. § 147; but the question is not clearly settled; *id.*

Mortgages. A partner has no implied power to make a mortgage of partnership real estate; Lind. Part., 2d Am. ed. *139; Napier v. Catron, 2 Humph. (Tenn.) 534; Cottle v. Harrold, 72 Ga. 830; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. Supp. 753; McGahan v. Bank, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403. See Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321. But one partner may execute a valid chattel mortgage of firm property, without the consent of his co-partners; Hembree v. Blackburn, 16 Or. 153, 19 Pac. 73; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210; McCarthy v. Seisler, 130 Ind. 63, 29 N. E. 407; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Union N. Bk. v. Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; Beckman v. Noble, 115 Mich. 523, 73 N. W. 803. The power to pledge results by implication from the power to borrow money on the firm's credit; George v. Tate, 102 U. S. 564, 26 L. Ed. 232; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 8 L. R. A. 677, 25 Am. St. Rep. 565.

A deed of trust of partnership property to secure certain creditors to the exclusion of others will bind the partnership, though executed by only two out of three partners; Union N. Bk. v. Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. Two or three members of a firm have authority to mortgage partnership stock for the security of the debts of the firm; Southern White Lead Co. v. Haas, 73 Ia. 399, 33 N. W. 657, 35 N. W. 494. A mortgage by one partner of the whole stock in trade to secure a firm debt has been held valid; Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374.

Pledges of firm property. A partner may pledge its personal property to raise money for the firm; 3 Kent 46; 10 Hare 453; 7 M. & G. 607; 3 Bradw. 261. It is thought that a partner's equitable mortgage of firm real estate, by depositing deeds of partnership property as a pledge, would be valid; Lind. Part., 2d Am. ed. *140.

Purchases. A partner may bind the firm by purchasing on credit such goods as are necessary for carrying on the business in the usual way; 1 Camp. 185; Feigley v. Sponeberger, 5 W. & S. (Pa.) 564; Baker v. Nappier, 19 Ga. 520; Johnson v. Bernheim, 76 N. C. 139; even land; Davis v. Cook, 14 Nev. 265; but see Judge v. Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185.

Servants. One partner has the implied power to hire servants for partnership purposes; 9 M. & W. 79; Appeal of Moist's Adm'rs, 74 Pa. 166; and probably to dis-

charge them, though not against the will of his co-partner; Lind. Part., 2d Am. ed. *147.

Specialties. As a rule, the relation of partnership gives a partner no authority to bind his co-partners by specialty; Story, Part. § 117; and see *Deeds* and *Mortgages*, *supra*. But he may bind his firm by an executed contract under seal, because the firm is really bound by the act, and the seal is merely evidence; Appeal of Dubois, 38 Pa. 231, 80 Am. Dec. 478. If the seal was not necessary, it will be regarded as surplusage; as in an assignment for creditors; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; a mortgage of firm chattels; Milton v. Mosher, 7 Metc. (Mass.) 244; an assignment of a chose in action due the firm; Everit v. Strong, 5 Hill (N. Y.) 163. A lender may disregard a specialty executed by one partner, for a loan, and recover from the firm in assumpsit; Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75.

Warranties. It is laid down as a general rule that a power to sell does not carry with it the implied authority to bind the firm by a warranty; Pars. Part. 4th ed. § 144. But if the partner has power to sell, his warranty would probably bind the firm; Pars. Partn. § 144; Sweet v. Bradley, 24 Barb. (N. Y.) 549.

LIABILITIES OF PARTNERS. *General Rule.* If an act is done by one partner on behalf of the firm, and it can be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners; but if the act cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* not be liable; 10 B. & C. 128; 14 M. & W. 11. As to reason for such liability, see *Powers*, *supra*.

Agreements inter se. No arrangement between the partners themselves can limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arrangement; 2 B. & Ald. 679; 3 Kent 41; Winship v. Bank, 5 Pet. (U. S.) 529, 8 L. Ed. 216; 3 B. & C. 427. But where the creditor has express notice of a private arrangement between the partners, by which either the power of one to bind the firm or his liability on partnership contracts is qualified or defeated, such creditor will be bound by the arrangement; Baxter v. Clark, 26 N. C. 129; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Bailey v. Clark, 6 Pick. (Mass.) 372; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; 5 Bro. P. C. 489.

Attachment. A partner's interest in a firm is liable to attachment by his creditors; 7 C. B. 229; Moody v. Payne, 2 Johns. Ch. (N. Y.) 548; Morrison v. Blodgett, 8 N. H. 252, 29 Am. Dec. 653; but one partner cannot maintain an attachment against the firm of which he is a member; Newsom v. Pitman, 98 Ala. 526, 12 South. 412.

Contribution. A partner's contribution to the capital of his firm is a partnership debt for the repayment of which each partner is liable on an accounting and after payment of debts; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311. Failure of a partner to pay his contribution in full does not entitle his co-partner to exclude him from the business without a dissolution; Hartman v. Woehr, 18 N. J. Eq. 385.

Debts. Each partner is liable to pay the whole partnership debts. In what proportion the partners shall contribute is a matter merely among themselves; 5 Burr. 2613. Universally, whatever agreement may exist among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of, the partnership, each individual member is liable for the joint debt; 5 Burr. 2611; Gill v. Kuhn, 6 S. & R. (Pa.) 333; Gardner v. Conn, 34 Ohio St. 187. In Louisiana, ordinary partners are not bound *in solido* for the debts of the partnership; La. Civ. Code, art. 28; though commercial partners who deal in personal property are bound *in solido;* a partner is bound for his share of the partnership debts, calculating such share in proportion to the number of partners, without attention to the proportion of the stock or profits each is entitled to; *id.* art. 2873. In equity, partnership debts are regarded as both joint and several; Greene v. Butterworth, 45 N. J. Eq. 738, 17 Atl. 949.

An incoming partner is not liable for the debts of the firm incurred before he became a member, unless he assumes them by agreement; Babcock v. Stewart, 58 Pa. 179; Wright v. Brosseau, 73 Ill. 381; Rohlfing v. Carper, 53 Kan. 251, 36 Pac. 336; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Smith v. Millard, 77 Cal. 440, 19 Pac. 824. But a retiring partner remains liable for the outstanding debts of the firm; 4 Russ. 430.

Dormant partners. Dormant partners are, when discovered, equally liable with those who are held out to the world as partners, upon contracts made during the time they participate in the profits of the business; 1 Cr. & J. 316; Etheridge v. Binney, 9 Pick. (Mass.) 272; Winship v. Bank, 5 Pet. (U. S.) 529, 8 L. Ed. 216; Mitchell v. Dall, 2 Harr. & G. (Md.) 159; Schmidt v. Ittman, 46 La. Ann. 894, 15 South. 310; 5 Ch. Div. 458; Wm. L. Allen & Co. v. Davids, 70 S. C. 260, 49 S. E. 846.

This liability is said to be founded on their participation in the profits; Winship v. Bank, 5 Pet. (U. S.) 574, 8 L. Ed. 216; Dob v. Halsey, 16 Johns. (N. Y.) 40, 8 Am. Dec. 293; 1 H. Bla. 31. Another reason given for holding them liable is that they might otherwise

receive usurious interest without any risk; 4 B. & Ald. 663; Muzzy v. Whitney, 10 Johns. (N. Y.) 226. But inasmuch as a dormant partner differs from an ostensible partner only in being unknown as such, the liability of each must be owing to the same cause, viz.: that they are principals in the business, the dormant partner being undisclosed; L. R. 7 Ex. 218. Sharing profits is simply evidence of this relation; 5 Ch. Div. 458; and the usurious interest theory is so palpably illogical that it has never been accepted to any extent; 2 W. Bla. 997.

So long as he is unknown he may retire "without giving notice to the world"; 1 B. & Ad. 11; Nussbaumer v. Becker, 87 Ill. 281, 29 Am. Rep. 53; Magill v. Merrie, 5 B. Mon. (Ky.) 168; Deford v. Reynolds, 36 Pa. 325; but when known to any persons he ceases to be dormant as to them and must give them notice of retirement; 1 C. & K. 580; Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838; Park v. Wooten's Ex'rs, 35 Ala. 242; and if known to many, such notice must be the same as of a general partner; Elmira I. & S. R. M. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541.

Dower. It has been held that a partner's widow is entitled to dower in firm lands subject to the equities of the parties; Campbell v. Campbell, 30 N. J. Eq. 415. Firm debts are a lien on partnership lands paramount to a widow's right of dower; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Simpson v. Leech, 86 Ill. 286; where partnership land is sold to pay debts, the widow of a partner has no dower; Willett v. Brown, 65 Mo. 138, 27 Am. Rep. 265; but *contra*, Bowman v. Bailey, 20 S. C. 550; Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76. Where the firm debts are all paid the dower revives; Brewer v. Browne, 68 Ala. 210.

The general result of American cases is that dower does not attach to firm real estate until it has served all the purposes of the partnership and then so much as remains in specie, unconverted, becomes individual real estate, subject to dower; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. Rep. 503; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. Supp. 427; as to what descends to the heir there is dower; Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; Huston v. Neil, 41 Ind. 504; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Mowry v. Bradley, 11 R. I. 370. In some states dower attaches at once and the wife must join in a deed; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Bowman v. Bailey, 20 S. C. 553; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Collins v. Warren, 29 Mo. 236; and see Gilmore, Partn. § 54, for cases on the subject.

Firm funds. A partner who withdraws firm funds from the business, thereby diminishing the stock, and applies them to his own use, is liable to the others for the injury; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 507; Kelley v. Greenleaf, 3 Sto. 101, Fed. Cas. No. 7,657; and funds so used by a partner may be followed into his investments; Shaler v. Trowbridge, 28 N. J. Eq. 595.

Fraud. One partner will be bound by the fraud of his co-partner in contracts relating to the affairs of the partnership, made with innocent third persons; 2 Cl. & F. 250; Jackson v. Todd, 56 Ind. 406; Wright v. Brosseau, 73 Ill. 381; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Banner v. Schlessinger, 109 Mich. 262, 67 N. W. 116.

This doctrine proceeds upon the ground that where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or the occasion of the confidence and credit reposed in such third person; Locke v. Stearns, 1 Metc. (Mass.) 562, 563, 35 Am. Dec. 382. The liability, therefore, does not arise when there is collusion between the fraudulent partner and the party with whom he deals; 1 East 48; or the latter has reason to suppose that the partner is acting on his own account; 2 C. B. 821; 10 B. & C. 298. See *infra*.

Not only gross frauds, but intrigues for private benefit, are clearly offences against the partnership at large, and, as such, are relievable in a court of equity; 3 Kent 51, 52; 1 Sim. 52, 89.

A fraud committed by a partner (in a law firm) while acting on his own separate account is not imputable to the firm, although, had he not been a member of the firm, he would not have been in a position to commit the fraud; Andrews v. De Forest, 22 App. Div. 132, 47 N. Y. Supp. 1011.

Insolvency. It has been held that the discharge of the partners in insolvency, as individuals, does not relieve them from liability for the firm debts; Glenn v. Arnold, 56 Cal. 631.

The United States bankrupt law of 1898 provides that partnership property shall not be administered in bankruptcy, unless all of the members have been adjudged bankrupt or the consent is given of those who have not been, and this has been held to apply only where all the partners were bankrupt; In re Mercur, 122 Fed. 384, 58 C. C. A. 472. The act also provides for bankruptcy of a partnership, even though each member of the firm had been adjudicated bankrupt. A discharge of an individual partner in bankruptcy discharges him from liability on partnership obligations; In re Kaufman, 136 Fed. 262.

Judgments. The rule is that a judgment obtained against one partner on a firm liability is a bar to an action against his co-partners on the same obligation; 3 De G. &

J. 33; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Williams v. Rogers, 14 Bush (Ky.) 777; see *contra*, except when they are abroad and cannot be sued with effect; Lind. Part., 2d Am. ed. *255; Yoho v. McGovern, 42 Ohio St. 11; 4 De G. & S. 199; and this is so even if the other partners were not known to him. But in Pennsylvania and other states this rule is changed by statute, and what are termed the "Joint Debtor Acts" are held to apply to partnership debts and under them a judgment which is not against all of the partners does not extinguish the obligation of those not joined; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. Ed. 783 (changing the rule of Sheehy v. Mandeville, 6 Cra. [U. S.] 254, 3 L. Ed. 215).

Where one partner is sued and judgment is given *for him*, the creditor may still have recourse to the others; 2 H. & C. 717.

Mismanagement. As a rule, a partner is not liable to the firm for the mismanagement of its business; Houston v. Polk, 124 Ga. 103, 52 S. E. 83; Peters v. McWilliams, 78 Va. 567; Lyons v. Lyons, 207 Pa. 7, 56 Atl. 54, 99 Am. St. Rep. 779; see *infra*, *Torts*. Because it is unreasonable to hold a partner, who acts fairly and for the best interests of the firm according to his judgment, liable for a loss thus unwittingly occasioned; Lyles v. Styles, 2 Wash. C. C. 224, Fed. Cas. No. 8,625. So for a loss caused by his culpable negligence or breach of duty, a partner is personally liable in an accounting between the members of the firm; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Finn v. Young, 50 Wash. 543, 97 Pac. 741; though not for mere omission or neglect; Iman v. Inkster, 90 Neb. 704, 134 N. W. 265; Northen v. Tatum, 164 Ala. 368, 51 South. 17.

Notice. A retiring ostensible partner remains liable to persons who have had dealings with the firm and who have no notice of his retirement; Stewart v. Sonneborn, 51 Ala. 126; Stall v. Cassady, 57 Ind. 284; Shamburg v. Ruggles, 83 Pa. 148. Some cases hold that the retiring partner becomes, as to creditors who have notice of the agreement of another partner to assume the debts, a surety merely and entitled to the rights of one; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124, 1 Ann. Cas. 724; Millerd v. Thorn, 56 N. Y. 402; [1894] App. Cas. 586; while in other cases it is held that the debtors cannot change their relations to the debt without the consent of the creditors; McAreavy v. Magril, 123 Ia. 605, 99 N. W. 193; and therefore the agreement between the partners cannot change their liability as principal debtors; McAreavy v. Magril, 123 Ia. 605, 99 N. W. 193; Dean & Co. v. Collins, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. Rep. 610, 11 Ann. Cas. 1027; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464. Another view is that a creditor having knowledge of the agreement must exercise reasonable diligence and good faith in enforcing his right against the partner who assumed the debts; Grotte v. Weil, 62 Neb. 478, 87 N. W. 173.

Actual notice by the retiring partner is not necessary to escape liability to new customers; Wade, Notice 226; Pars. Part. § 317; even though the business is continued in the same firm name; Cook v. State Co., 36 Ohio St. 135, 38 Am. Rep. 568. As a general rule, notice to one partner of any matters relating to the business of the firm is notice to all; Howland v. Davis, 40 Mich. 546; Gowan v. Jackson, 20 Johns. (N. Y.) 176; Hubbard v. Galusha, 23 Wis. 398; even if two firms have a common partner; West Branch Bk. v. Fulmer, 3 Pa. 399, 45 Am. Dec. 651.

Surviving partner. The surviving partner stands chargeable with the partnership debts, and takes the partnership property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid; 3 Kent 37; Egberts v. Woods, 3 Paige Ch. (N. Y.) 527, 24 Am. Dec. 236; In re F. Dobert & Son, 165 Fed. 749; Word v. Word, 90 Ala. 81, 7 South. 412; Hamlin v. Mansfield, 88 Me. 131, 33 Atl. 788.

The debts of the partnership must be collected in his name; Murray v. Mumford, 6 Cow. (N. Y.) 441; 3 Kent 37; Burnside v. Merrick, 4 Metc. (Mass.) 540. He has full power to control and dispose of the firm assets for the purpose of winding up its affairs and may secure a firm creditor by the execution of a mortgage, which is not invalid by reason of the fact that it also secures money borrowed by him after the death of his partner, if used for the partnership debts; Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932. He has power to make an assignment for the benefit of firm creditors with preferences; Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49.

Torts. The firm is not liable for the torts of a partner committed outside of the usual course of the business, unless they are assented to or adopted by its members; Taylor v. Jones, 42 N. H. 25; Durant v. Rogers, 87 Ill. 508; Graham v. Meyer, 4 Blatchf. 129, Fed. Cas. No. 5,673; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; otherwise, in regard to torts committed in conducting the affairs of the partnership or those assented to by the firm; 1 Q. B. 396; Haase v. Morton, 138 Ia. 205, 115 N. W. 921, 16 Ann. Cas. 350; as for the negligent driving of a coach by a member of a firm of coach proprietors; 4 B. & C. 223; or where one member of a firm of butchers left meat where it was eaten by a dog who died from the effect of

it; Dudley v. Love, 60 Mo. App. 420; or for the negligence of a servant employed by the firm while transacting its business; Linton v. Hurley, 14 Gray (Mass.) 191; or for the conversion of property by a partner, to be appropriated to the use of the firm; Durant v. Rogers, 87 Ill. 508; or for obtaining goods by false pretences and fraudulently disposing of them; Banner v. Schlessinger, 109 Mich. 262, 67 N. W. 116. Demand of, and a refusal by, one partner to deliver up property is evidence of a conversion by the firm; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Nisbet v. Patton, 4 Rawle (Pa.) 120, 26 Am. Dec. 122. A partnership may be liable for the publication of a libel; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 South. 800. If the firm is liable for the tort of a partner, each partner is liable *in solido;* Pars. Partn. § 100; and all or one or more may be sued; Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49.

It has been held that the fraud of one partner does not charge the firm; Pierce v. Jackson, 6 Mass. 215; without participation by the firm; Sherwood v. Marwick, 5 Greenl. (Me.) 295 (but see as to these cases Locke v. Stearns, 1 Metc. [Mass.] 564, 35 Am. Dec. 382); and that it is not liable for malicious prosecution instituted by one partner for the larceny of firm property, unless the others participated in the prosecution; Marks v. Hastings, 101 Ala. 165, 13 South. 297; or where a partner converted property to his own use; Townsend v. Hagar, 72 Fed. 949, 19 C. C. A. 256; Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126; or where without consultation he instigated malicious prosecution for an offence against the firm; Marks v. Hastings, 101 Ala. 165, 13 South. 297; Farrell v. Friedlander, 63 Hun 254, 18 N. Y. Supp. 215. A loss resulting from violation of the articles, gross negligence, fraud or wanton misconduct of a partner in the firm business, must be borne by him; Devall v. Burbridge, 6 W. & S. (Pa.) 529; 1 Sim. 89; but not if it be the result, merely, of an honest mistake in judgment; Charlton v. Sloan, 76 Ia. 288, 41 N. W. 303; Morris v. Allen, 14 N. J. Eq. 44.

RIGHTS AND DUTIES. *General rules.* Good faith, reasonable diligence and skill, and the exercise of a sound judgment and discretion, lie at the very foundation of the relation of partnership. In this respect the same general rules apply to partners which are applicable to the other fiduciary relations; Story, Part. § 169; 14 Beav. 250; Morrison v. Smith, 81 Ill. 221; Appeal of Raiguel, 80 Pa. 234. It becomes, therefore, the implied duty of each partner to devote himself to the interests of the business, and to exercise due diligence and skill for the promotion of the common benefit of the partnership. No partner has, ordinarily, a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital; 3 Kent 51; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; 1 S. & S. 133; nor to place himself in a position which gives him a bias against the discharge of his duty; Story, Part. § 175; 1 S. & S. 124; Gratz v. Bayard, 11 S. & R. (Pa.) 41, 48; 3 Kent 61; nor to make use of the partnership property for his own private benefit; 4 Beav. 534; 1 Sim. 52; Todd v. Rafferty's Adm'rs, 30 N. J. Eq. 254; nor to make a personal profit out of any transaction connected with firm interests; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252. He cannot make a profit out of any transaction between himself and the firm; L. R. 18 Eq. 524; a partner cannot engage in any other business in which he competes with his firm; 1 S. & S. 124. But a partner may traffic outside of the scope of the firm's business for his own benefit and advantage; Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169.

In the absence of agreement to the contrary each partner has an equal right to share in the management; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; and this right may be protected by injunction; Miller v. O'Boyle, 89 Fed. 140; Abbot v. Johnson, 32 N. H. 9.

Account in equity. Every partner has a right to an account from his co-partner, which may be enforced in equity, whereby a partner is enabled to secure the application of partnership assets to firm debts and the distribution of the surplus among the members of the firm; 8 Beav. 106; Niles v. Williams, 24 Conn. 279.

It was formerly the rule that a bill for an account would not be entertained except as incidental to obtaining a dissolution; Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; but this rule has been departed from where injustice would arise from its enforcement; 32 Beav. 177; Maloney v. Crow, 11 Colo. App. 518, 53 Pac. 828; Hogan v. Walsh, 122 Ga. 283, 50 S. E. 84; Sanger v. French, 157 N. Y. 213, 51 N. E. 979; Bruns v. Heise, 101 Md. 163, 60 Atl. 604.

A silent partner may have a bill for an account; Harvey v. Varney, 98 Mass. 118. It has been held that a partner's bill for an account will be barred by the statute of limitations; Cowart v. Perrine, 18 N. J. Eq. 457. See Gray v. Green, 66 Hun 469, 21 N. Y. Supp. 533. But not for secret profits made by one partner in transacting firm business; Todd v. Rafferty's Adm'rs, 30 N. J. Eq. 254. A partner cannot maintain account against a co-partner for the profits of an illegal traffic; Dunham v. Presby, 120 Mass. 285.

Accounts to be kept. In order to give the partners information that the business is being carried on for their mutual advantage, it is the duty of each to keep an accurate account ready for inspection; 2 J. & W. 556; Story, Part. § 181.

In the absence of agreement this duty rests equally upon each partner; Morris v. Griffin, 83 Ia. 327, 49 N. W. 846; though it is usually delegated to one partner, or a clerk, in which case it is the duty of each partner to give him necessary information; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Kelley v. Greenleaf, 3 Sto. 105, Fed. Cas. No. 7,657.

Actions. As a general rule an action at law does not lie by one partner against his co-partners for money paid or liabilities incurred on account of the partnership, because without an account it is impossible to tell whether a partner is a debtor or creditor of the firm; Smith v. Smith, 33 Mo. 557; Bracken v. Kennedy, 3 Scam. (Ill.) 558; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; Johnson v. Wilson, 54 Ill. 419. See, *contra*, Gow, Part. c. 2, § 3. There are, however, many circumstances under which partners may sue each other; see Story, Part. § 219.

Articles of co-partnership. Partners may enter into any agreements between themselves, which are not void as against statutory provisions or general principles of law, even though they do conflict with the ordinary rules of the law of partnership, and such engagements will be enforced between the parties; Pars. Part., 4th ed. § 160; 28 E. L. & Eq. 7.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the contract of partnership, even when the dissolution of the partnership is not asked; Leavitt v. Inv. Co., 54 Fed. 439, 4 C. C. A. 425, 12 U. S. App. 193; as not to carry on business; 3 Beav. 383; or to divulge trade secrets; Roberts v. McKee, 29 Ga. 161; 9 Hare 241; or to collect debts of the firm; 8 Ves. 317; Ellis v. Commander, 1 Strob. Eq. (S. C.) 188.

But it is held that equity will not interfere with the suit of a partner to prevent a dissolution made in contravention of the partnership articles, or to compel specific performance of them, the contract being of an essentially personal character; Satterthwait v. Marshall, 4 Del. Ch. 337; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Karrick v. Hannaman, 168 U. S. 336, 18 Sup. Ct. 135, 42 L. Ed. 484.

But the partnership articles do not affect third persons, unless they have notice of them; 2 B. & Ald. 697; 8 M. & W. 703; Gano v. Samuel, 14 Ohio 592; Whitaker v. Brown, 16 Wend. (N. Y.) 505.

Claims against the firm. A partner may be a firm creditor and is entitled to payment of his claim before judgment creditors of the individual partners; Uhler v. Semple, 20 N. J. Eq. 288.

Compensation. As it is the duty of partners to devote themselves to the interests of the business, it follows that they are not entitled to any special compensation for so doing, although the services performed by them are very unequal in amount and value, unless there is an express stipulation for remuneration; Caldwell v. Leiber, 7 Paige, Ch. (N. Y.) 483; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476; Lindsey v. Stranahan, 129 Pa. 635, 18 Atl. 524; Adams v. Warren (Ala.) 11 South. 754; Nevills v. Min. Co., 135 Cal. 561, 67 Pac. 1054; Roth v. Boies, 139 Ia. 253, 115 N. W. 930; Williams v. Pedersen, 47 Wash. 472, 92 Pac. 287, 17 L. R. A. (N. S.) 385, and note where the cases are collected; nor for services performed prior to the partnership, although they enure to its benefit; Dunlap v. Watson, 124 Mass. 305. A surviving partner has been held entitled to compensation for continuing the business, in order to save the good-will; Cameron v. Francisco, 26 Ohio St. 190. A surviving partner is ordinarily entitled to compensation after dissolution; 25 Beav. 382; but it is held that a liquidating partner is not entitled to compensation for winding up the concern; Burgess v. Badger, 82 Hun 488, 31 N. Y. Supp. 614; Appeal of Brown, 89 Pa. 139; Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476; Dunlap v. Watson, 124 Mass. 305; so of a surviving or liquidating partner; Burgess v. Badger, 82 Hun 488, 31 N. Y. Supp. 614; Burgess v. Badger, 82 Hun 488, 31 N. Y. Supp. 614; but he is entitled to be paid his expenses; Book v. O'Neil, 2 Pa. Super. Ct. 306. But where it was agreed that a partner should not give personal services, he may recover for services rendered the firm at their request; Lewis v. Moffett, 11 Ill. 392. See *Liquidating partner, infra.*

Contribution. Since partners are coprincipals and all liable for the firm debts, any partner who pays its liabilities is, in the absence of agreement to the contrary, entitled to contribution from his co-partners; Lind. Part., 2d Am. ed. *367; 6 De G. M. & G. 572; Kelly v. Kauffman, 18 Pa. 351. The right exists independently of the articles of partnership even if not there recognized; Taft v. Schwamb, 80 Ill. 289; Moley v. Brine, 120 Mass. 324; Jones v. Butler, 87 N. Y. 613.

Exemption. The right of partners to statutory exemption out of firm property is a disputed point, and depends somewhat on the statutes of the several states. It has been held that they are not so entitled; Cowan v. Creditors, 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294; First N. Bk. v. Hackett, 61 Wis. 335, 21 N. W. 280; Pond v. Kimball, 101 Mass. 105; Thurlow v. Warren, 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472; Hart v. Hiatt, 2 Ind. T. 245, 48 S. W. 1038; Gay-

lord v. Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762; Bonsall v. Comly, 44 Pa. 442; *contrá*, Harris v. Visscher, 57 Ga. 229; Skinner v. Shannon, 44 Mich. 86, 6 N. W. 108, 38 Am. Rep. 232; Stewart v. Brown, 37 N. Y. 350, 93 Am. Dec. 578; Ladwig v. Williams, 87 Wis. 615, 58 N. W. 1103; McKinney v. Baker, 9 Or. 74. See Thomps. Hom. & Ex. § 197.

Firm property. Each partner has a claim, not to any specific share or interest in the property *in specie*, as a tenant in common has, but to the proportion of the residue which shall be found to be due to him upon the final settlements of their accounts, after the conversion of the assets and the liquidation of all claims upon the partnership; and therefore each partner has a right to have the same applied to the payment of all such claims, before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto; Story, Part. § 97; 4 Ves. 396; 17 *id.* 193.

Each partner has also a specific lien on the present and future property of the partnership, the stock brought in, and everything coming in during the continuance and after the determination of the partnership, not only for the payment of debts due to third persons, but also for the amount of his own share of the partnership stock, and for all moneys advanced by him beyond that amount, as also for moneys withdrawn by his co-partners beyond the amount of his share; 3 Kent 65; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; 25 Beav. 280; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327. This lien attaches to real estate held for partnership purposes, as well as to the personal estate; Dyer v. Clark, 5 Metc. (Mass.) 562, 577, 39 Am. Dec. 697; and is co-extensive with the transactions on joint account; Houston v. Stanton, 11 Ala. 412.

Upon a settlement of a partnership by an account, the assets are divided among the partners in proportion to their contributions; and each partner is liable for a deficit in proportion to his share of the profits; Moley v. Brine, 120 Mass. 324.

Fraud. A partner has an equity to rescind the partnership and be indemnified for his co-partner's fraud in inducing him to enter the business; Smith v. Everett, 126 Mass. 304; 3 De G. & J. 304; Rosenstein v. Burns, 41 Fed. 841; White v. Smith, 63 Ark. 513, 39 S. W. 555; 13 Ch. Div. 384. Where the partnership suffers from the fraud or wanton misconduct of any partner in transacting firm business, he will be responsible to his co-partners for it; Story, Part. § 169. See *supra*.

Interest. As a general rule partners are not entitled to interest on their respective contributions to capital unless by special agreement, or unless it has been the custom of the firm to have such interest charged in its accounts; 6 Beav. 433; Appeal of Brown, 89 Pa. 139; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Desha v. Smith, 20 Ala. 747; Topping v. Paddock, 92 Ill. 92; Jackson v. Johnson, 11 Hun (N. Y.) 509; Keiley v. Turner, 81 Md. 269, 31 Atl. 700. But a partner is entitled to interest on advances made by him to the firm; Baker v. Mayo, 129 Mass. 517; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Morris v. Allen, 14 N. J. Eq. 44; Collender v. Phelan, 79 N. Y. 366; and no express agreement is necessary; Morris v. Allen, 14 N. J. Eq. 44. In Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342, it was held that a partner was entitled to interest on advances without an express agreement, but it would not be allowed where the partnership agreement was that he should furnish the capital and his co-partner supervise the work. See, however, Lee v. Lashbrooke, 8 Dana (Ky.) 214; Day v. Lockwood, 24 Conn. 185. But it is held that interest will not be allowed on advances and profits not drawn out; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424. Where profits are left in the business, a partner is not entitled to interest thereon; L. R. 5 Ch. 519; Appeal of Brown, 89 Pa. 139; Sweeney v. Neely, 53 Mich. 421, 19 N. W. 127; a partner who has not paid in his contribution to capital will be charged with interest; Krapp v. Aderholt, 42 Kan. 247, 21 Pac. 1063; Ligare v. Peacock, 109 Ill. 94; a partner will not be charged with interest on overdrafts; Prentice v. Elliott, 72 Ga. 154. A partner has been held entitled to interest on a sum contributed to capital in excess of the agreed share; Reynolds v. Mardis' Heirs, 17 Ala. 32.

There is undoubtedly conflict in the cases on the subject of interest on advances, and one writer contends that the weight of authority is against the allowance of interest; Gilmore, Partn. 396; but there is much authority in favor of allowing interest and the author cited admits that there is no question, where there is a special contract or fair ground for implication from the facts and circumstances. It is not unlikely that the courts would be inclined to find such to be the circumstances of the case and to lean in favor of allowing interest.

Liquidating partner. It is the duty of those upon whom, by appointment or otherwise, it devolves, after the dissolution of a firm, to wind up the affairs of the partnership, to act for the best advantage of the concern, to make no inconsistent use of the property, and to seek no private advantage in the composition of debts or in any other transaction in the performance of this business; Lewis v. Moffett, 11 Ill. 392; Insley v. Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308. Nor, in this case, can any partner claim any commission for getting in the debts, or, in any other particular, reward or compensation for his trouble; *id.*; Denver v.

Roane, 99 U. S. 355, 25 L. Ed. 476; 1 Knapp, P. C. 312; 3 Kent 64; Washburn v. Goodman, 17 Pick. (Mass.) 519; Patton's Ex'rs v. Calhoun's Ex'rs, 4 Gratt. (Va.) 138; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; Appeal of Gyger, 62 Pa. 73, 1 Am. Rep. 382; Kimball v. Lincoln, 99 Ill. 578; *contra*, Royster v. Johnson, 73 N. C. 474; but in Bradley v. Chamberlin, 16 Vt. 613, a partner who performed services in settling up the affairs of a firm after dissolution was allowed compensation for them, and where one partner contributed all the capital and exercised complete management of the business, he was allowed compensation; Mattingly v. Stone's Adm'r (Ky.) 35 S. W. 921; and where there is a great difference between the services of the partners, there may be compensation; Beatty v. Wray, 19 Pa. 516, 57 Am. Dec. 677; see Dunlap v. Watson, 124 Mass. 305; it is held that no compensation will be allowed for an excess of services without a special agreement; Heckard v. Fay, 57 Ill. App. 20. But it is held that a partner will be allowed compensation for extra and outside services in winding up; Schenkl v. Dana, 118 Mass. 236. See *Compensation, supra.*

Litigation. A partner may recover the costs of carrying on litigation for the firm —but not compensation for conducting it, unless by express agreement; Coddington v. Idell, 29 N. J. Eq. 504.

Profits and losses, how distributed. As between the partners, they may by agreement stipulate for equal or unequal shares in the profit and loss of the partnership; Paul v. Cullum, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430; Story, Part. § 23; but in the absence of any express agreement or stipulation between them, and of all controlling evidence and circumstances, the presumption has been held to be that they are interested in equal shares; Frazer v. Linton, 183 Pa. 186, 38 Atl. 589; Turnipseed v. Goodwin, 9 Ala. 372; 20 Beav. 98; Lewis v. Loper, 54 Fed. 237; Paul v. Cullum, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430; Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384. And the circumstance that each partner has brought an unequal amount of capital into the common stock, or that one or more have brought in the whole capital and the others have only brought industry, skill, and experience, would not seem to furnish any substantial ground of difference as to the distribution; 3 Kent 28, 29; Bradbury v. Smith, 21 Me. 117.

It has sometimes been asserted, however, that it is a matter of fact, to be settled according to all the circumstances, what would be a reasonable apportionment, uncontrolled by any natural presumption of equality in the distribution; Story, Partn. § 24; 2 Camp. 45. The opinion in England seems divided; but in America the authorities seem decidedly to favor the doctrine of a presumed equality of interest. See American cases cited above; Story, Part. § 24. "The better view is that although all or a large part of the capital is furnished by one partner, the entire loss is to be borne by all. Hence, after payment of the debts, the contributions of partners to capital are all to be repaid before there can be any division of profits (L. R. 7 Eq. 538; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869). And if the assets are not sufficient, after paying the debts, to repay the capital, the deficit must be shared by all the partners; and the partner who has contributed more than his share of capital is therefore entitled to contribution from the rest (Hellebush v. Coughlin, 37 Fed. 294; Emerick v. Moir, 124 Pa. 498, 17 Atl. 1)." Pars. Part., Beale's ed. § 173.

Receiver, appointment of. To authorize a partner to demand the appointment of a receiver of a subsisting partnership, he must show such a case of gross abuse and misconduct on the part of his co-partner, that a dissolution ought to be decreed and the business wound up; Story, Part. §§ 228, 231; Sutro v. Wagner, 23 N. J. Eq. 388; Campbell v. Oil Co., 96 S. W. 442, 29 Ky. L. Rep. 716; and the courts will not interfere with the management of a firm except as incidental to winding up its affairs and distributing its assets; 15 Ves. 10.

Where it appears that the surviving members of a firm are conducting the business for the purpose of enlarging and continuing it, and not to close it up, a receiver may be appointed for that purpose, on application of the legal representatives of the deceased member; Dawson v. Parsons, 20 N. Y. Supp. 65. After dissolution a court of equity will appoint a receiver almost as a matter of course; Lind. Part. *1008; 1 Ch. Div. 600; Richards v. Baurman, 65 N. C. 162. But see 18 Ves. 281; [1892] Ch. 633, where it was held that the mere fact of dissolution of a partnership does not give one partner an absolute right, as against his co-partners, to have a receiver appointed of the partnership business; and to the same effect are, Appeal of Slemmer, 58 Pa. 168, 98 Am. Dec. 255; Marshall v. Matson, 171 Ind. 238, 86 N. E. 339; Cox v. Peters, 13 N. J. Eq. 39; Lawrence Lumber Co. v. Lyon, 93 Miss. 859, 47 South. 849.

The mere fact of the death or bankruptcy of a partner is not ground for appointing a receiver, there must be some neglect or breach of duty shown; 2 Bro. C. C. 272; Renton v. Chaplain, 9 N. J. Eq. 62; Jones v. Weir, 217 Pa. 321, 66 Atl. 550, 10 Ann. Cas. 692; Hamill v. Hamill, 27 Md. 679; it is otherwise if there be misconduct of an insolvent partner; Phillips v. Trezevant, 67 N. C. 370; or misconduct of the partners in possession which imperils the assets; Davis v. Grove,

2 Rob. (N. Y.) 134; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; or the exclusion of one partner by another from any control of the affairs of the firm; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; 2 Jac. & W. 558; Maynard v. Railey, 2 Nev. 313; Marten v. Van Schaick, 4 Paige, Ch. (N. Y.) 479.

The existence of a partnership must be established before a receiver is appointed; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; McCarty v. Stanwix, 16 Misc. 132, 38 N. Y. Supp. 820; but where it is alleged by one party and denied by the other, and the court directs an issue to decide that question, until that is decided a receiver will be denied; 19 Ves. 144; 2 Macn. & G. 144; Hobart v. Ballard, 31 Ia. 521; Guyton v. Flack, 7 Md. 398.

Set-off. It may be stated as a general rule in law and equity that there can be no set-off of joint debts against separate debts unless under a special agreement; Story, Part. § 396. Thus, a debt due by one of the members of a firm cannot be set off against a debt due the firm; 2 C. B. 821; Colwell v. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913; Edwards v. Parker, 88 Ala. 356, 6 South. 684; unless the partners assent; Montz v. Morris, 89 Pa. 392. Nor can a debt owing to a partner be set off against a debt due by the firm; International Bank v. Jones, 119 Ill. 407, 9 N. E. 885; 6 C. & P. 60; Lind. Part., 2d Am. ed. *269; but see Eyrich v. Bank, 67 Miss. 60, 6 South. 615.

But a partner sued for a firm debt, may set off his individual claim against the plaintiff; Lewis v. Culbertson, 11 S. & R. (Pa.) 48, 14 Am. Dec. 607; and when a surviving partner sues for a debt due to the firm, his individual debt may be set off; White v. Ins. Co., 1 Nott & McC. (S. C.) 556, 9 Am. Dec. 726; or if sued on an individual debt he may set off a firm debt due to him as survivor; Johnson v. Kaiser, 40 N. J. L. 286. But otherwise where the partnership's debt is reduced to judgment; Pars., Part., Beale's ed. § 262; Seligmann v. Clothing Co., 69 Wis. 410, 34 N. W. 232.

Marshalling Assets. A firm is not a corporation, and hence firm creditors are in theory separate creditors as well. But in administering insolvent estates equity has established the "rule of convenience" that firm and separate creditors shall have priority upon, and be confined to, the firm and separate funds respectively; Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; Spratt's Ex'x v. Bank, 84 Ky. 85; Rothell v. Grimes, 22 Neb. 526, 35 N. W. 392. A *surplus* of a separate fund is divided among firm creditors *pro rata;* and a *surplus* of a firm fund is divided among the separate creditors of the various partners in proportion to the shares of the partners therein; Hardy v. Mitchell, 67 Ind. 485; Appeal of Black, 44 Pa. 503; Union N. Bk. v. Bank, 94 Ill. 271; Toombs v. Hill, 28 Ga. 371; Van Wagner v. Chapman's Adm'r, 29 Ala. 172. If there is no firm fund and no solvent partner, the firm creditors come in on an equal footing with separate creditors against the separate estates of partners *pari passu* with individual creditors; In re West, 39 Fed. 203; Shackelford's Adm'r v. Clark, 78 Mo. 491; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647; *contra,* Weaver v. Weaver, 46 N. H. 188; Warren v. Farmer, 100 Ind. 593; Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68. A very slight firm fund over and above costs will suffice to exclude firm creditors from the separate estate; five shillings has been said to be enough; 7 Am. L. Reg. 499; and five pounds is enough, and so is a joint estate of less than two pounds; 2 Rose 54; one dollar and a quarter was considered too little; Pars. Part. 4th ed. § 384. A solvent partner, if living, is equivalent to a firm fund; Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703; Lind. Part. *731.

But though there is no separate estate, separate creditors cannot come against the joint estate until the firm debts are paid, after which they may resort to the partners' interest in any surplus remaining; 3 B. & P. 288, 289; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Tenney v. Johnson, 43 N. H. 144.

As a general rule partnership creditors, after they have exhausted firm assets, cannot share equally with individual creditors in the individual assets; Claflin v. Behr's Adm'r, 89 Ala. 503, 8 South. 45; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Hundley v. Farris, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. Rep. 863; some cases hold that they can; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Pettyjohn's Ex'rs v. Woodruff's Ex'r, 86 Va. 478, 10 S. E. 715. In Kentucky they share the separate assets equally with the separate creditors after the latter have received the same dividend from the separate estate that the firm creditors have received from the firm estate; Fayette N. Bk. v. Kenney's Assignee, 79 Ky. 133. It has been said not to be settled that, at law, the partnership creditors may not look to the several funds at once, in common with several creditors, but that the law is now tending towards the adoption of the rule to that effect which prevails in equity; Pars. Part. § 383.

If two firms having one or more common members, are both bankrupt, there can be no proof by one against the other; Pars. Part. § 381. Various explanations have been offered for this rule. Sometimes it is called a "rule of convenience"; sometimes a fundamental principle of equity; Ewell's Lind. Part. *692; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Story, Part. § 377; Appeal of Black, 44 Pa. 503. Sometimes it

is said to depend on the principle of destination; the partners by gathering together a firm fund have dedicated it to the firm creditors. Upon this theory, the partnership stock becomes a trust fund. The firm creditors occupy a commanding position and restrain even the partners in dealing with the property; In re Cook, 3 Biss. 122, Fed. Cas. No. 3,150; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683. Usually it is declared to be the outgrowth of the partner's equity, *i. e.* his right to have firm funds applied first to the payment of firm debts; Shackelford's Adm'r v. Shackelford, 32 Gratt. (Va.) 481; Black v. Bush, 7 B. Monr. (Ky.) 210. Consequently, where the partner gives up this right, the firm creditor loses his priority; Case v. Beauregard, 1 Woods, 127, Fed. Cas. No. 2,487; Shackelford's Adm'r v. Shackelford, 32 Gratt. (Va.) 481. The rule does not apply where a partnership creditor has acquired a lien by contract; Spratt's Ex'x v. Bank, 84 Ky. 85. If insolvent partners divide the firm fund among their separate creditors in proportion to the interest of each in the partnership, firm creditors cannot object; McNutt v. Strayhorn, 39 Pa. 269; Atkins v. Saxton, 77 N. Y. 195.

As a general rule, insolvency fixes the position of the different funds. A debt to a partner by the firm cannot be collected for the benefit of separate creditors; a debt of a partner to the firm cannot be collected for the benefit of firm creditors; because a man cannot prove against his own creditors; Ridgely v. Carey, 4 H. & McH. (Md.) 167. What one partner owes his co-partner independently of the firm can be collected from the separate estate of the debtor for the benefit of the separate estate of the creditor: but this will not be allowed unless the situation is such that the firm creditors can derive no benefit even indirectly from the enforcement of the claim, *i. e.* there must be no surplus to go to them; 4 De G. J. & S. 551; *contra*, where both partners owe the firm one-half of the excess of one debt over the other, it is payable to the firm creditors out of the estate of the greater debtor; Appeal of McCormick, 55 Pa. 252. Partners, before insolvency, may, by an executed agreement, change firm into separate property. Firm creditors have no lien to prevent the alteration; *e. g.* where one partner sells out to the others, the fund becomes primarily liable for the claims of the creditors of the new firm; National Bk. of Metropolis v. Sprague, 20 N. J. Eq. 13; Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; Maquoketa v. Willey, 35 Ia. 323; 6 Ves. 119.

Equity will not interfere to embarrass a vested legal right. Therefore if a firm creditor levies on a separate estate, he has priority over the subsequent execution of a separate creditor; Hoskins v. Johnson, 24 Ga. 625; Wisham v. Lippincott, 9 N. J. Eq. 353; Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465. A separate creditor can sell nothing but his debtor's interest. An execution against the firm, though subsequent, has priority, because it attaches this paramount right of the co-partner. But a firm creditor, without a legal lien, has no standing; Burpee v. Bunn, 22 Cal. 194; Mittnight v. Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233; Rodriguez v. Hefferman, 5 Johns. Ch. (N. Y.) 417. But where there is an execution against each partner and a subsequent execution against the firm, and the sheriff seizes and sells firm goods under the three, the proceeds are given first to the joint creditor, and the remainder to the separate creditors in proportion to each partner's interest; Appeal of Coover, 29 Pa. 9, 70 Am. Dec. 149. So in the case of judgments against real estate. A judgment on a separate claim has no lien on the firm real estate, but only on the partner's interest. But a firm judgment is a lien on a partner's separate real estate, and takes priority over a subsequent separate judgment; Meech v. Allen, 17 N. Y. 300, 72 Am. Dec. 465; Gillaspy v. Peck, 46 Ia. 461. Partnership creditors who have a levy on partnership goods are entitled to be paid before a creditor of one of the partners, who had a prior attachment on the individual interest of one partner; First N. Bk. v. Brenneisen, 97 Mo. 145, 10 S. W. 884.

When an assignment for creditors has been made by a firm, and also by the partners individually, the holder of a note executed by the firm and by the individual members is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from each, though the note was given for a firm liability; In re Carter, 98 Ia. 261, 67 N. W. 239.

As to the remedies of joint and separate creditors both at law and in equity, see Gilmore, Partn. ch. VII, pp. 404–458, where the cases are collected and classified.

Duration. *Prima facie* every partnership is determinable at will. But it may be entered into for a definite term by agreement express or implied; Ewell's Lind. Part. *121, 413.

A partnership at will is presumed to continue so long as the parties are in life and of capacity to continue it; 1 Greenl. Ev. § 42; Irby v. Brigham, 9 Humphr. (Tenn.) 750. See PARTNERS. A partnership for a term is presumed to continue during the term, provided the parties are in life and of legal capacity to continue it. If a partnership be continued by express or tacit consent after the expiration of the prescribed period, it will be presumed to continue upon the old terms, but as a partnership at will; Mifflin v. Smith, 17 S. & R. (Pa.) 165. But in no case will the law presume a partnership to exist beyond the life of the parties; 1 Wils. Ch. 181. When a partnership has been en-

tered into for a definite term, it is nevertheless dissolved by death within the term; Story, Part. § 195. The *delectus personæ* is so essentially necessary to the constitution of a partnership that even the executors or other representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners; Kingman v. Spurr, 7 Pick. (Mass.) 237; 3 Kent 55; Remick v. Emig, 42 Ill. 342; Spaunhorst v. Link, 46 Mo. 197. The civilians carried this doctrine so far as not to permit it to be *stipulated* that the heirs or executors of partners should themselves be partners; Domat, lib. 1, tit. 8, s. 2; Pothier, Part. n. 145; though Pothier thinks it binding.

At common law, the representatives of a deceased partner may be made partners in his stead either by original agreement or by testamentary direction; Ewell's Lind. Part. *590; Alexander's Ex'rs v. Lewis, 47 Tex. 481. Clauses providing for the admission into the firm of a deceased partner's representatives will, in general, be construed as giving them an option to become partners, and not as constituting them partners absolutely; 7 Jarm. Conv. 120; 1 McCl. & Y. 569; 2 Russ. 62. The executor of a deceased partner is not compelled in such case to become a partner, so as to charge the estate with debts incurred after the partner's death; Wilcox v. Derickson, 168 Pa. 331, 31 Atl. 1080; Wild v. Davenport, 48 N. J. L. 129, 7 Atl 295, 57 Am. Rep. 552. In any event it must be a new partnership; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; Vincent v. Martin, 79 Ala. 540; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; *contra*, Butler v. Toy Co., 46 Conn. 136; Edwards v. Thomas, 66 Mo. 468; Lewis v. Alexander, 51 Tex. 578; and such is said to be the tendency of modern decisions; Pars. Part. Beale's ed. § 343, n.

Only the fund already invested or directed to be invested by the testator is subject to the claims of new creditors; Davis v. Christian, 15 Gratt. (Va.) 11; 10 Ves. 110; Columbus W. Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. 239; any direction, in order to charge the general assets, must be clear and unambiguous; Burwell v. Cawood, 2 How. (U. S.) 577, 11 L. Ed. 378; Laughlin v. Lorenz' Adm'r, 48 Pa. 275, 86 Am. Dec. 592.

The rule in England is clear that when an executor undertakes to participate in the business, whether in consequence of a testamentary direction or otherwise, he becomes personally liable to creditors as a partner, in addition to the liability of the estate. The common-law relation of partnership will not admit of a qualified liability; Ewell's Lind. Part. *593, *604; 11 Moo. P. C. 198. But simply taking the profits will not charge the executor; L. R. 7 Ex. 218. In America, some authorities have declared that the executor is not personally liable when the testator has directed him to continue the business, but only when he does so of his own motion; Edgar v. Cook, 4 Ala. 588; Owens v. Mackall, 33 Md. 382; Laughlin v. Lorenz' Adm'r, 48 Pa. 275, 86 Am. Dec. 592; *contra*, for personal liability of executor; Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703. A simple direction to allow a fund to remain in a partnership may be construed as a loan to the survivors; 9 Hare 141. An executor is not liable personally if he merely leaves the estate of his testator in the business and takes no part in it; Avery v. Myers, 60 Miss. 367; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 95, 57 Am. Rep. 552.

Dissolution. A partnership may be dissolved: 1. *By the act of the parties:* as by their mutual consent; Bank v. Page, 98 Ill. 109; 3 Kent 54; and where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time; Fletcher v. Reed, 131 Mass. 312; McElvey v. Lewis, 76 N. Y. 373; Karrick v. Hannaman, 168 U. S. 334, 18 Sup. Ct. 135, 42 L. Ed. 484; Carlton v. Cummins, 51 Ind. 478; Lawrence v. Robinson, 4 Colo. 567. It will then continue only for purposes of winding up; 17 Ves. 298; Brown's Ex'r v. Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618; Davis v. Megroz, 55 N. J. L. 427, 26 Atl. 1009. But a court of equity would perhaps interfere to prevent irreparable injury by an untimely dissolution; 1 Swanst. 512. Where there is an agreement to continue the business for a certain time, one partner has no right to have a dissolution except for special cause; Waterbury v. Exp. Co., 50 Barb. (N. Y.) 169; Hannaman v. Karrick, 9 Utah 236, 33 Pac. 1039. But it is held that a partner can dissolve a partnership formed for a definite period, before the end of that period, but that he is liable in damages for the value of the profits which the other partner would otherwise have received; Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Karrick v. Hannaman, 168 U. S. 337, 18 Sup. Ct. 135, 42 L. Ed. 484. In general, any circumstance which renders the continuance of the partnership, or the attainment of the end for which it was created, practically impossible, would seem sufficient to warrant a dissolution; 22 Beav. 471. A sale by one partner of his interest in the firm's property to the others has been held not necessarily to work a dissolution of the firm; Lobdell v. Baldwin, 93 Mich. 569, 53 N. W. 730; but see Schleicher v. Walker, 28 Fla. 680, 10 South. 33.

Whether a partnership for a certain time can be dissolved by one partner at his mere will before the term has expired, seems not to be absolutely and definitely settled; Story, Part. § 275. In favor of the right of one partner in such cases, see 3 Kent 55; Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336, per Cooley, J.; Appeal of Slemmer, 58 Pa.

155, 98 Am. Dec. 248; Karrick v. Hannaman, 168 U. S. 337, 18 Sup. Ct. 135, 42 L. Ed. 484; Swift v. Ward, 80 Ia. 700, 45 N. W. 1044, 11 L. R. A. 302; Monroe v. Conner, 15 Me. 178, 32 Am. Dec. 148; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315. Among the authorities against this right are Story, Part. § 275; Howell v. Harvey, 5 Ark. 281, 39 Am. Dec. 376; Pearpoint v. Graham, 4 Wash. C. C. 234, Fed. Cas. No. 10,877; Ewell's Lind. Part. *571; Hannaman v. Karrick, 9 Utah 236, 33 Pac. 1039; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Sieghortner v. Weissenborn, 20 N. J. Eq. 172.

A partner exercising such right would be liable for his breach of the partnership articles; Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; and if he, within the term stipulated in the articles, seeks to dissolve the partnership and take exclusive possession of its property and business, he is liable to account to his co-partner for profits according to the partnership agreement; Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484.

As against third persons, a partner may certainly withdraw from a partnership at his pleasure; 3 C. B. N. S. 561. Partners may terminate the partnership at any time by mutual agreement; Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777; and this may be inferred from an abandonment of the undertaking; Ligare v. Peacock, 109 Ill. 94; Harris v. Hillegass, 54 Cal. 463; but see Goddard v. Pratt, 16 Pick. (Mass.) 412. The incorporation of the partners for a similar business may perhaps work a dissolution as by consent. See Pars. Part. § 285. Dissolution need not be under seal, even though the partnership articles were under seal; Pars. Part. § 284.

2. *By the act of God:* as, by the *death* of one of the partners; and this operates from the time of the death; 3 Mer. 610; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. Rep. 686; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338; Canfield v. Hard, 6 Conn. 184; Knapp v. McBride, 7 Ala. 19; Scholefield v. Eichelberger, 7 Pet. (U. S.) 594, 8 L. Ed. 793; Jenness v. Carleton, 40 Mich. 343. As to the effect of a provision in the partnership articles to the contrary, see *supra*.

A partnership dissolved by the death of one of the partners is dissolved as *to the whole firm;* Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 594, 8 L. Ed. 793; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; and the reason given for this rule is applicable not only to dissolution by death, but to every species of dissolution; Story, Part. § 317.

3. *By the act of law:* as by the bankruptcy of one of the partners; 5 Maule & S. 340; McNutt v. King, 59 Ala. 597; Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327; Halsey v. Norton, 45 Miss. 703, 7 Am. Rep. 745; Amsinck v. Bean, 22 Wall. (U. S.) 395, 22 L. Ed. 801; or by the bankruptcy of the firm; Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; Appeal of McKelvy, 72 Pa. 409; 25 Can. Sup. Ct. 225; and see cases cited as to bankruptcy of partner. Such dissolution takes place when bankruptcy is legally declared, and then relates back to the act of bankruptcy; 11 Ves. 78; but in Blackwell v. Claywell, 75 N. C. 213, it was held that the partnership was dissolved by the adjudication and that the statute of limitations "began to run from that date" against a purchaser of any chose in action of the bankrupt.

The mere fact of insolvency does not work a dissolution; there must be some act of bankruptcy; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124.

4. *By a valid assignment* of all the partnership effects for the benefit of creditors, which has been held to work immediate dissolution; Welles v. March, 30 N. Y. 344; Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; either under insolvent acts; Colly. Part. 6th ed. § 102; or otherwise; Simmons v. Curtis, 41 Me. 373; but this is only *prima facie* evidence of dissolution which other circumstances may rebut; Pleasants v. Meng, 1 Dall. (Pa.) 380, 1 L. Ed. 185; by a sale of the partnership effects under a separate execution against one partner; 2 V. & B. 300; 3 Kent 59. It is said that this does not constitute a dissolution but inevitably leads to it; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Carter v. Roland, 53 Tex. 540; but it was said by Fuller, C. J., "The absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not expired, may be subject to modification according to circumstances;" Riddle v. Whitehill, 135 U. S. 621, 633, 10 Sup. Ct. 924, 34 L. Ed. 282. The mere insolvency of one or all of the members of a partnership, without a suspension or judicial process, etc., does not of itself operate a dissolution; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; but it at least gives to the partners an option to require one; Williston v. Camp, 9 Mont. 88, 22 Pac. 501.

5. *By the civil death* of one of the partners; Pothier, Part. n. 147. But the absconding of a party from the state does not of itself operate a dissolution; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296. See Story, Part. § 298.

6. *By the breaking out of war* between two states in which the partners are domiciled and carrying on trade; Griswold v. Waddington, 16 Johns. (N. Y.) 438; McStea v. Matthews, 50 N. Y. 166; Matthews v. McStea, 91 U. S. 7, 23 L. Ed. 188. See WAR.

7. *By the marriage of a feme sole* partner; 4 Russ. 260; 3 Kent 55. This would now,

in view of the recent married women acts, depend upon the laws of the state; Brown v. Chancellor, 61 Tex. 437. The marriage of a male and female partner would work a dissolution; Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217.

8. *By the extinction of the subject-matter* of the joint business or undertaking; Griswold v. Waddington, 16 Johns. (N. Y.) 491; and by the completion of the business or adventure for which the partnership was formed; Story, Part. § 280.

9. *By the termination of the period* for which a partnership for a certain time was formed; Colly. Part. § 105.

10. *By the assignment of the whole of one partner's interest* either to his co-partner or to a stranger; 4 B. & Ad. 175; Marquand v. Mfg. Co., 17 Johns. (N. Y.) 525; Cochran v. Perry, 8 W. & S. (Pa.) 262; Clark v. Carr, 45 Ill. App. 469; Schleicher v. Walker, 28 Fla. 680, 10 South. 33; where it does not appear that the assignee acts in the concern after the assignment; Marquand v. Mfg. Co., 17 Johns. (N. Y.) 525; Mason v. Connell, 1 Whart. (Pa.) 381; Buford v. Neely, 17 N. C. 481. But in England this can occur only in partnerships at will. See Riddle v. Whitehill, 135 U. S. 632, 10 Sup. Ct. 924, 34 L. Ed. 282. It has been held that a sale by one partner of his interest in the firm's property to the other does not necessarily work a dissolution of the firm; Lobdell v. Baldwin, 93 Mich. 569, 53 N. W. 730; but it has been held that a sale by a partner of his share of the stock dissolves the firm and gives the purchaser a right to an account; Miller v. Brigham, 50 Cal. 615. In partnerships for a term, assignment is a ground for dissolution by remaining co-partners, but probably not by the transferee. In America, the transferee always has a right to an account; Monroe v. Hamilton, 60 Ala. 226; Miller v. Brigham, 50 Cal. 615. But see Taft v. Buffum, 14 Pick. (Mass.) 322; where it was held that such an assignment would not *ipso facto* work a dissolution. See Riddle v. Whitehill, 135 U. S. 632, 10 Sup. Ct. 924, 34 L. Ed. 282.

11. *By the award of arbitrators* appointed under a clause in the partnership articles to that effect. See 1 W. Bla. 475; 4 B. & Ad. 172; Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

12. *By judicial decree.* A court of equity may dissolve a partnership on the occurrence of events or changes of circumstances which render the continuance of the relation impossible or unprofitable; Gilmore, Partn. 581. To dissolve a partnership at will requires no proceedings in court, as it may be done by the voluntary action of either partner; *supra.* Where it is for a term however, as already stated *supra,* it is held by many courts that the action of a partner is not sufficient and therefore there must be resort to the courts. This must be to a court of equity; Story, Partn. § 284; Wilson v. Lassen, 5 Cal. 116; Barnstead v. Min. Co., id. 299. A dissolution may be decreed for the wilful fraud or other gross misconduct of one of the partners; Pars. Part. §§ 270, 357; 4 Beav. 502; Reynolds v. Austin, 4 Del. Ch. 24; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 444, 15 Am. St. Rep. 112; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Oteri v. Scalzo, 145 U. S. 578, 12 Sup. Ct. 895, 36 L. Ed. 824; 1 De G., M. & G. 171; so on his gross carelessness and waste in the administration of the partnership, and his exclusion of the other partners from their just share of the management; 1 J. & W. 592; Howell v. Harvey, 5 Ark. 278, 39 Am. Dec. 376; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; or persistent violation of partnership articles; Rosenstein v. Burns, 41 Fed. 841; or the loss of health by a partner; Pars. Part. § 360; or the pecuniary inability of a partner to fulfil his engagement with the others; *id.;* so on the existence of violent and lasting dissension between the partners; Blake v. Dorgan, 1 G. Greene (Ia.) 537; where these are of such a character as to prevent the business from being conducted upon the stipulated terms; 3 Kent 60, 61; and to destroy the mutual confidence of the partners in each other; 21 Beav. 482; Sieghortner v. Weissenborn, 20 N. J. Eq. 172.

So equity will dissolve for any breach of duty, though not at the suit of the party who is alone at fault; Gilmore, Partn. 585; in such case, for example, as the desertion or absconding of a partner, which has been in some cases held to work a dissolution *ipso facto;* Whitman v. Leonard, 3 Pick. (Mass.) 177; Ayer v. Ayer, 41 Vt. 346; Beaver v. Lewis, 14 Ark. 138; Potter v. Moses, 1 R. I. 430; but, generally, it is treated merely as ground of a suit; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476; Ambler v. Whipple, 20 Wall. (U. S.) 546, 22 L. Ed. 403; 3 Ves. 74. The courts have interfered where profit, which is the object of partnership, was clearly out of the question; Burns v. Rosenstein, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; Moies v. O'Neill, 23 N. J. Eq. 207; Dunn v. McNaught, 38 Ga. 179; 13 Sim. 495; or where the firm was formed to exploit a patented device which proved to be a failure; 1 Cox 213; or where the business was a whaling voyage, with no prospects of success after six months trial; Brown v. Hicks, 8 Fed. 155; or where the firm property had been destroyed or taken away by an army of invasion; Jackson v. Deese, 35 Ga. 84; or where the business could not be carried on as provided in the articles; Holladay v. Elliott, 8 Or. 85; Rosenstein v. Burns, 41 Fed. 841; or where the partners were unwilling or unable to advance necessary funds; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; 3 Kay & J. 78.

Equity will not act on slight grounds; Appeal of Slemmer, 58 Pa. 168, 98 Am. Dec. 255; it requires a strong case; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Sloan v. Moore, 37 Pa. 217; Loomis v. McKenzie, 31 Ia. 425; 25 Beav. 190; for minor difficulties it will be sufficient to interfere by injunction; Sieghortner v. Weissenborn, 20 N. J. Eq. 172. As to what are slight grievances and also gross misconduct, it is sometimes difficult to determine and must depend upon the circumstances of the case as bearing upon the question whether the acts complained of would prevent the profitable continuance of the business upon the terms of the articles; Page v. Vankirk, 1 Brewst. (Pa.) 282.

A partner cannot, by misconducting himself and rendering it impossible for his co-partners to act in harmony with him, obtain a dissolution on the ground of the impossibility so created by himself; 21 Beav. 493; 3 Hare 387; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438. A partnership may be dissolved by decree when its business is in a hopeless state, its continuance impracticable, and its property liable to be wasted and lost; 3 Kent 60; Griswold v. Waddington, 16 Johns. (N. Y.) 491; 13 Sim. 495; Holladay v. Elliott, 8 Or. 84; Rosenstein v. Burns, 41 Fed. 841; or where there was fraud in inducing a partner to enter into the partnership; *id.*

The confirmed *lunacy* of an active partner is sufficient to induce a court of equity to decree a dissolution, not only for the purpose of protecting the lunatic, but also to relieve his co-partners from the difficult position in which the lunacy places them. See 6 Beav. 324; 3 Y. & C. 184; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112. The same may be said of every other inveterate infirmity, which has seized upon one of the partners and rendered him incompetent to act where his personal labor and skill were contracted for; 3 Kent 62. But lunacy does not itself dissolve the firm, nor do other infirmities; 3 Kent 58; Story, Part. § 295; this is said to be supported by the current of authorities; Pars. Part. § 362. It is, however, contended by Mr. Justice Story and by Parker, C. J., that a clear case of insanity ought to effect that result; Story, Part. § 295; Davis v. Lane, 10 N. H. 156. An inquisition of lunacy found against a member dissolves the firm; Isler v. Baker, 6 Humph. (Tenn.) 85. The court does not decree a dissolution on the ground of lunacy except upon clear evidence that the malady exists and is incurable; 3 Y. & C. 184; 2 K. & J. 441. A temporary illness is not sufficient; 2 Ves. Sen. 34; 1 Cox 107. A dissolution by the court on the ground of insanity dates from the decree and not from a prior day; 1 K. & J. 765.

13. *The sale by a partner* of all the firm property, or of his entire interest therein effects a dissolution of the firm; Davis v. Niswonger, 145 Ind. 426, 44 N. E. 542; Coggswell & Boulter Co. v. Coggswell (N. J.) 40 Atl. 213; Appeal of Haeberly, 191 Pa. 239, 43 Atl. 207. It is immaterial whether the sale is to a co-partner; Lesure v. Norris, 11 Cush. (Mass.) 328; Schleicher v. Walker, 28 Fla. 680, 10 South. 33; Wiggin v. Goodwin, 63 Me. 389; or to a third person; Monroe v. Hamilton, 60 Ala. 226; McCall v. Moss, 112 Ill. 493; 25 Ont. 559. In the former case, the sale is sometimes treated only as evidence of a dissolution; Waller v. Davis, 59 Ia. 103, 12 N. W. 798; Lobdell v. Baldwin, 93 Mich. 569, 53 N. W. 730; Taft v. Buffum, 14 Pick. (Mass.) 322.

Annulment. In cases of fraud, imposition, and oppression in the original agreement, the partnership may be declared void *ab initio;* Gilmore, Partn. 589. Such decree has been made where the complaining party was induced to enter into the contract by fraudulent entries and alterations of books; Richards v. Todd, 127 Mass. 169; or where the contract was induced by false representations; Caplen v. Cox, 42 Tex. Civ. App. 297, 92 S. W. 1048; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859. This remedy has been invoked in many cases; Oteri v. Scalzo, 145 U. S. 578, 12 Sup. Ct. 895, 36 L. Ed. 824; Smith v. Everett, 126 Mass. 304; Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. Supp. 372; Gibson v. Cunningham, 92 Mo. 131, 5 S. W. 12; 20 Ch. Div. 1; and it will be applied wherever the misrepresentation was material; 1 Giff. 355; although it might not be sufficient to sustain an action for deceit; 34 Ch. Div. 582; but it cannot be availed of for a comparatively trifling cause, as mere exaggeration of the value of property or puffing the prospects of the venture; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; 5 De G. M. & G. 126. A partner having knowledge of the fraud, who has recognized the fraudulent contract as valid, cannot obtain a rescission; Andriessen's Appeal, 123 Pa. 303, 16 Atl. 840; Evans v. Montgomery, 50 Ia. 325; St. John v. Hendrickson, 81 Ind. 350; 10 L. T. 561.

Actual *notice of dissolution* must be brought home to persons who have been in the habit of dealing with the firm; but as to all persons who have had no previous dealings with the firm, notice fairly given in the public newspapers is deemed sufficient; Colly. Part. 6th ed. 163, n. See Robinson v. Floyd, 159 Pa. 165, 28 Atl. 258; Cent. N. Bk. v. Frye, 148 Mass. 498, 20 N. E. 325. This notice is necessary to terminate the agency of each partner, and, consequently, his powers and liabilities as a member; Howell v. Adams, 68 N. Y. 314; Woodruff v. King, 47 Wis. 261, 2 N. W. 452; Southern v. Grim, 67 Ill. 106. If there is no notice of the dissolution and the retiring partner per-

mits the use of his name, he is liable for the acts of the continuing partner; Hahn v. Kenefick, 48 Mo. App. 518. It is said that notice of dissolution need not be given to one who has sold goods to the firm for cash; Merritt v. Williams, 17 Kan. 287; Clapp v. Rogers, 12 N. Y. 283; or to one who, without the knowledge of the firm, has discounted its commercial paper; City Bank v. McChesney, 20 N. Y. 241.

It is not necessary to give notice of the retirement of a dormant partner from the firm, if the fact of his being a partner be unknown to all the creditors of the firm; if it be known to some, notice to those must be given, but that will be sufficient; 1 B. & Ad. 11; Deford v. Reynolds, 36 Pa. 325; Warren v. Ball, 37 Ill. 76. But where there were an active and two dormant partners, and the firm retained a solicitor in pending litigation, and the dormant partners retired, the solicitor never having known that they were partners and having no notice of dissolution, the dormant partners were held liable for the solicitor's costs incurred after dissolution; [1897] 2 Q. B. 397.

Notice of the dissolution is not necessary, in case of the death of one of the partners, to free the estate of the deceased partner from further liability; 3 Kent 63; Washburn v. Goodman, 17 Pick. (Mass.) 519; Dickinson v. Dickinson, 25 Gratt. (Va.) 321; nor is notice, in fact, necessary in any case where the dissolution takes place by operation of law; 3 Kent 63, 67; Griswold v. Waddington, 15 Johns. (N. Y.) 57; 9 Exch. 145. Bankruptcy of a member, after dissolution, is notice of dissolution; Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327.

One partner may obtain an injunction to restrain his co-partner from violating his rights under the partnership articles, even when the dissolution of the partnership articles is not asked; Leavitt v. Inv. Co., 54 Fed. 439, 4 C. C. A. 425.

Effect of dissolution. The effect of dissolution, as between the partners, is to terminate all transactions between them as partners, except for the purpose of taking a general account and winding up the concern; Petrikin v. Collier, 1 Pa. 247; 3 Kent 62. As to third persons, the effect of a dissolution, with notice as stated *supra*, is to absolve the partners from all liability for future transactions, but not for past transactions of the firm; Maxey v. Strong, 53 Miss. 280; Curry v. White, 51 Cal. 530; Floyd v. Miller, 61 Ind. 225; Easter v. Bank, 57 Ill. 215.

It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business; 11 Ves. 5; Ewell's Lind. Part. *217. The power of the partners subsists for many purposes after dissolution: among these are —*first*, the completion of all the unfinished engagements of the partnership; *second*, the conversion of all the property, means, and assets of the partnership existing at the time of the dissolution, for the benefit of those who were partners, according to their respective shares; *third*, the application of the partnership funds to the payment of the partnership debts; 3 Kent 57; Washburn v. Goodman, 17 Pick. (Mass.) 519. See Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282. But although, for the purposes of winding up the concern and fulfilling engagements that could not be fulfilled during its existence, the power of the partners certainly subsists even after dissolution, yet, legally and strictly speaking, it subsists for those purposes only; 10 Hare 453; Bennett v. Buchan, 61 N. Y. 222; Dunlap v. Limes, 49 Ia. 177. The surviving members of a co-partnership have the legal title to the firm property, and the right to dispose of its assets only for the purpose of closing the business, not to continue it; Dawson v. Parsons, 66 Hun 628, 21 N. Y. Supp. 212. After dissolution a partner has the power to sell; 4 De G. M. & G. 542; and they may sell firm realty to pay debts; Shanks v. Klein, 104 U. S. 18, 26 L. Ed. 635.

Whether the dissolution of a partnership is *per se* a breach of a contract by the firm to employ a person in their service is questionable; 3 H. & N. 931. A contract of employment for a year by a firm terminates on the dissolution of the firm during the year by the death of a partner; Greenburg v. Early, 4 Misc. 99, 23 N. Y. Supp. 1009.

PARTURITION. The act of giving birth to a child. See BIRTH.

PARTUS (Lat.). The child just before it is born, or immediately after its birth.

Offspring. See MAXIMS, *Partus sequitur*, etc.

PARTY. See PARTIES.

PARTY AGGRIEVED. The phrase is not technical. They are ordinary English words and are to be construed in the ordinary meaning put upon them. 7 Q. B. D. 470.

PARTY IN INTEREST. A scheduled creditor of a bankrupt is such, though he has not proved his claim; Haley v. Pope, 206 Fed. 266, 124 C. C. A. 330.

PARTY-JURY. A jury *de medietate linguæ*. See JURY.

PARTY TO BE CHARGED. A phrase used in the seventeenth section of the Statute of Frauds, under which, in the case of certain sales, a note or memorandum of the contract must be in writing, "signed by the parties to be charged by such contract." In the fourth section the language is "by the party to be charged." It is held to be sufficient if the signature is only by the party against whom the contract is sought to be enforced; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 31, 66 Am. Dec. 394; Easton

v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576; and if a written offer be made though accepted by parol; L. R. 1 Exch. 342; *contra*, Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708. The signature may be by mark, or by initials, or printed, if the printed name be shown to have been adopted: Tiff. Sales 75. If the name be shown to have been signed to the writing to authenticate it, it is immaterial in what part of the writing it is placed; L. R. 2 H. L. 127. An agent may be authorized to sign by parol and a subsequent ratification proved; Conaway v. Sweeney, 24 W. Va. 643; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345. An auctioneer at a public sale may sign for either party; 7 East 558; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; and so, ordinarily may a broker; Coddington v. Goddard, 16 Gray (Mass.) 436; and his memorandum need not be signed: *id.*

See FRAUDS, STATUTE OF; NOTE OR MEMORANDUM.

PARTY-WALL. A wall erected on the line between two adjoining pieces of land belonging to different persons, for the use of both properties. 2 Washb. R. P. 385.

A structure for the common benefit and convenience of both the tenements which it separates. Field v. Leiter, 118 Ill. 17, 6 N. E. 877.

The phrase ordinarily means a wall of which the two adjoining owners are tenants in common. Emden, Building Leases 285. It does not as a matter of law necessarily imply a solid structure; Hammann v. Jordan, 129 N. Y. 61, 29 N. E. 294.

It has been held that by usage the terms party-wall and partition wall have come to mean a solid wall; Normile v. Gill, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441. Cuttings of 4 inches in a party wall 18 inches thick for the insertion of joists and sleepers do not impinge on a contract that the wall shall be and remain a solid wall; McMinn v. Karter, 116 Ala. 390, 22 South. 517.

It is a wall built by one owner partly on the land of another for the common benefit of both. The adjoining owners are not joint tenants or tenants in common of the party wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and buildings of such other: Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491; Odd Fellows' Hall Ass'n v. Hegele, 24 Or. 16, 32 Pac. 681.

"The words *party wall* appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, which is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety." 14 Ch. Div. 192.

A brick wall which is used in common, as the wall of two adjacent properties in a city, is a party-wall, if erected partly on the soil of each, and so used for many years without question or complaint by either; Kelly v. Taylor, 43 La. Ann. 1157, 10 South. 255.

Every wall and separation between two buildings is presumed to be a common or party wall if the contrary be not shown; Bellenot v. Laube's Ex'r, 104 Va. 842, 52 S. E. 698.

Party-walls are generally regulated by statute. The principles of these acts generally are that the wall shall be built equally on the lands of the adjoining owners, at their joint expense, but when only one owner wishes to use such wall, it is built at his expense, and when the other wishes to make use of it he pays one-half of its value; Spaulding v. Grundy, 126 Ky. 510, 104 S. W. 293, 13 L. R. A. (N. S.) 149, 128 Am. St. Rep. 328, 15 Ann. Cas. 1105. Each owner has a right to place his joists in it and use it for the support of his roof. See Sherred v. Cisco, 4 Sandf. (N. Y.) 480; Abrahams v. Krautler, 24 Mo. 69, 66 Am. Dec. 698.

The law of party-walls is based on the doctrine of lateral support and is a statutory extension of the principle to buildings. An owner of a party-wall cannot extend the beams of his building beyond the middle of the wall; Lederer & Strauss v. C. Inv. Co., 130 Ia. 157, 106 N. W. 357, 8 Ann. Cas. 317.

When the party-wall has been built, and the adjoining owner is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor; and, having done so, he is not answerable for any consequential damages which may ensue; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Runnels v. Bullen, 2 N. H. 534. An adjoining owner of a party-wall has a right to increase its height, but in doing so is liable for any injury to the adjoining building, even though the addition is being built by a contractor and the damages result from a windstorm which causes

the wall to fall; Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545; Negus v. Becker, 68 Hun 293, 22 N. Y. Supp. 986.

When such a wall exists between two buildings, belonging to different persons, and one of them takes it down with his buildings, he is required to erect another in its place in a reasonable time and with the least inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall; 3 Kent 436; Eno v. Del Vecchio, 6 Duer (N. Y.) 17. When the wall is taken down, it must be done with care; but it is not the duty of the person taking it down to shore up or prop the house of his neighbor to prevent it from falling. If, however, the work be done with negligence, by which injury accrues to the neighboring house, an action will lie; 1 M. & M. 362; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632.

Where the owner of two contiguous lots erects a brick messuage, with a division wall, and sells to different purchasers, the wall is not a party-wall; Oat v. Middleton, 2 Miles (Pa.) 247 (but see *infra* as to the Pennsylvania statute); *contra*, Eno v. Del Vecchio, 6 Duer (N. Y.) 17. The right to use a party-wall is not lost by lapse of time, even seventy-five years; Roudet v. Bedell, 1 Phila. (Pa.) 366. It can be acquired by prescription after a sufficient period; Schile v. Brokhahus, 80 N. Y. 614.

A party-wall must be built without openings; Dauenhauer v. Devine, 51 Tex. 480, 32 Am. Rep. 627. Corcoran v. Nailor, 6 Mackey (D. C.) 580; Bonney v. Greenwood 96 Me. 335, 52 Atl. 786; Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. Rep. 915; Normille v. Gill, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441; National Commercial Bank v. Gray, 71 Hun 295, 24 N. Y. Supp. 997. A party-wall can only be built for mutual support; painting a sign on it is unlawful; Wistar v. Pub. Soc., 2 W. N. C. (Pa.) 333. The principle of party-walls is based upon mutual benefit, and does not extend to the interior of lots where the adjoining owner cannot be expected to build; Rodearmel v. Hutchison, 2 Pears. (Pa.) 324.

Where one built a party-wall, which was defective and fell over, injuring the adjoining premises, he was held liable to the owner of the premises; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224. Where a building having a party-wall is destroyed by fire, leaving the wall standing, the easement in the wall ceases; Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491; and so where the wall becomes unfit either from age or accident; Odd Fellows' Ass'n v. Hegele, 24 Or. 16, 32 Pac. 679.

An agreement between adjoining owners in relation to a party-wall erected on the division lines of their lots is binding on the parties and those who purchase subject to such agreement, and creates cross easements upon the lots; Stehr v. Raben, 33 Neb. 437, 50 N. W. 327; Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; but see Nalle v. Paggi, 9 S. W. 205, 1 L. R. A. 33. It creates a covenant running with the land; Keating v. Korfhage, 88 Mo. 524, 1 L. R. A. 3. But an agreement to pay half the cost is merely a personal covenant; Gibson v. Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146.

A property owner who utilizes a party-wall erected by the owner of adjoining property must pay a reasonable price for such use, either to the one who erected it or to his grantee, although no agreement was made at the time the wall was erected, and the one making use of the wall may have acquired his title to the property after the wall was in existence; Spaulding v. Grundy, 126 Ky. 510, 104 S. W. 293, 13 L. R. A. (N. S.) 149, 128 Am. St. Rep. 328, 15 Ann. Cas. 1105.

By statute in Iowa, Mississippi, Pennsylvania, and South Carolina, and in the District of Columbia, one adjacent owner may build over his neighbor's line, without compensating him, except that the latter may, when he pleases, use the wall so built, upon paying for it. The cases should be read with a view to the statutes. The regulation of party walls is a very ancient form of exercise of the police power, and came to Pennsylvania from the customs of London, like so many other parts of our early law. The subject is discussed in a note in 7 Amer. L. Reg. N. S. 10. Such regulation, as it exists in Pennsylvania and some other states, is an interference with the rights and enjoyment of property, sustainable only on the police power, and therefore to be governed and measured by the strict extent of the statutory grant; Hoffstot v. Voight, 146 Pa. 636, 23 Atl. 351. The provincial act of 1692 in Massachusetts, similar to the Pennsylvania act, was held void as contrary to the bill of rights; Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214, a case cited by counsel, but not followed in McCall's Appeal, 16 W. N. C. (Pa.) 95. But it has also been said that there can be no available objection to the principle upon which the law of party-walls is based. It has constituted a part of the law of France for ages. The principle is no invasion of the absolute right of property. Per Lowrie, J., in Evans v. Jayne, 23 Pa. 36.

The purpose of the Pennsylvania act of April 10, 1849, relating to party-walls was—first, to make the right to compensation pass with the land unless reserved until the wall is used; and second, to vest in the owner at the time of such use the right to compensation. Where such right of compensation has actually vested in an owner, the right does not pass from the owner by his subsequent conveyance of the property, even though there is no reservation of this right; Lea v. Jones, 209 Pa. 22, 57 Atl. 1113. Each

purchaser of either lot on which a party-wall has been placed has the right to assume that any compensation as between their vendors has been paid; Mayer v. Martin, 83 Miss. 322, 35 South. 218.

A party-wall agreement by which it is agreed that a wall about to be erected by one of two adjoining owners shall be a party-wall, that it shall stand equally on the land of both, and that the other owner or his representatives, whenever he or they desire to use the wall, shall pay a share of the expense of erecting it, does not constitute a covenant running with the land; Sebald v. Mulholland, 155 N. Y. 455, 50 N. E. 260; Mayer v. Martin, 83 Miss. 322, 35 South. 218. That such a contract concerns an interest in real estate, and hence the covenants thereof run with the land, is held in Hall v. Geyer, 14 Ohio Cir. Ct. R. 229.

One taking a warranty deed, without reservation, from tenants in common, is not bound by a previous party-wall agreement between his grantors on the one hand, and one of them owning an adjoining parcel on the other, though the agreement is declared to be a covenant running with the land; Kinnear v. Moses, 32 Wash. 215, 73 Pac. 380.

See LATERAL SUPPORT.

PARVA SERJEANTIA. Petty serjeanty. See SERJEANTY.

PARVIS. A part of St. Paul's Cathedral in London, where the Serjeants, standing each by his allotted pillar used to give advice to their clients. 2 Holdsw. Hist. E. L. 411.

PARVUM CAPE. See PETIT CAPE.

PASS. A certificate given to a slave, by his master or mistress, in which it is stated that he is permitted to leave his home with their authority. The paper on which such certificate is written.

In Practice. To be given or entered: as, let the judgment pass for the plaintiff.

To become transferred: thus, the title to goods passes by the sale whenever the parties have agreed upon the sale and the price, and nothing remains to be done to complete the agreement; 1 Bouvier, Inst. n. 939.

To decide upon. When a jury decide upon the rights of the parties, which are in issue, they are said to pass upon them.

The constitutions of various states forbid the issue of free passes on railroads, except in certain cases, as does the interstate commerce act.

A contract to issue free railroad passes to one in consideration of his grant of land to a railroad company is not within the prohibition of the interstate commerce act; Curry v. R. Co., 58 Kan. 6, 48 Pac. 579; so where the consideration is a release of damages for personal injury; Louisville & N. R. Co. v. Mottley, 133 Ky. 652, 118 S. W. 982; but it was held otherwise where the consideration was an agreement to throw business in the way of the railroad company; Slater v. R. Co., 2 Inters. Com. R. 243; and where such passes were issued on account of interstate traffic furnished by the recipients, on the ground that it afforded transportation at less than established rates; Milk Producers' Protective Ass'n v. R. Co., 7 Inters. Com. R. 163; so where newspaper employés were employed on interstate trains to sort newspapers for quick delivery at stations, receiving return transportation to the starting point; In re Free Transp. of Newspaper Employés, 12 Inters. Com. R. 15. Furnishing transportation in payment of newspaper advertising is a violation of the amended interstate commerce act; U. S. v. R. Co., 163 Fed. 114; so under a like state act; Hicks Print. Co. v. R. Co., 138 Wis. 584, 120 N. W. 512; McNeill v. R. Co., 132 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641; unless the advertising was equal to the transportation; Hicks Print. Co. v. R. Co., 138 Wis. 584, 120 N. W. 512.

The interstate commerce act, as amended, provides that railroad companies may give free carriage to their own officers and employés, and the principal officers may exchange passes or tickets with each other; see American Exp. Co. v. U. S., 212 U. S. 535, 29 Sup. Ct. 315, 53 L. Ed. 635.

See INTERSTATE COMMERCE COMMISSION; PASSENGER.

PASS AND REPASS. The phrase has been held to mean going and returning over the road once only. 34 J. P. 823.

PASS-BOOK. In Mercantile Law. A book used by merchants with their customers, in which an entry of goods sold and delivered to a customer is made.

It is kept by the buyer, and sent to the merchant whenever he wishes to purchase any article. It ought to be a counterpart of the merchant's books, as far as regards the customer's account.

The term pass-book is given to a small book made up from time to time from the banker's ledger and forwarded to the customer: this is not considered as a statement of account between the parties: yet when the customer neglects for a long time to make any objection to the correctness of the entries, he will be bound by them; 2 D. & C. 534; 2 M. & W. 2.

The entry of a deposit in a pass-book to the credit of the depositor is in the nature of a receipt, and is *prima facie* evidence that the bank has received the amount from the depositor and entered it to his credit; Quattrochi v. Bank, 89 Mo. App. 500.

A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound to examine with due diligence the pass-book and vouchers, and to report to the bank without any unreasonable delay

any errors which may be discovered in them; and if he fails to do so and the bank is thereby misled to its prejudice, he cannot afterwards discredit the balance as shown by the pass-book. If a depositor delegates the examination to a clerk without proper supervision he will not be protected from loss if it turns out that without his knowledge the clerk had committed forgery in raising the amounts of some of the checks, and thereby misled the bank to its prejudice, in spite of due care on the part of its officers; Leather Manufacturers' Bk. v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. He is not however, necessarily liable for his agent's dishonesty; Nat. Bk. of Commerce v. Mill Co., 182 Fed. 11, 104 C. C. A. 441.

PASSAGE. Properly a way over water. Where a seaman shipped for a voyage to foreign parts, and at the termination of the voyage was provided with a passage to a port within the United Kingdom, but not the one from which he originally shipped, he was held to have been provided with a passage home, within the meaning of the Merchant Shipping Act; [1897] 1 Q. B. 712.

PASSAGE COURT. An ancient court of record in Liverpool, once called the "mayor's court of *pays sage*," but now usually called the "court of the passage of the borough of Liverpool." M. & W.

PASSAGE-MONEY. The sum claimable for the conveyance of a person, with or without luggage, on the water.

The difference between *freight* and *passage-money* is this, that the former is claimable for the carriage of goods, and the latter for the carriage of the person. The same rules which govern the claim for freight affect that for passage-money; 3 Chitty, Com. Law 424; 1 Pet. Adm. 126; Watson v. Duykinck, 3 Johns. (N. Y.) 335. See COMMON CARRIERS OF PASSENGERS.

PASSAGIO. An ancient writ addressed to the keepers of the ports to permit a man who had the king's leave to pass over sea. Reg. Orig. 193.

PASSAGIUM REGIS. A voyage or expedition to the Holy Land made by the kings of England in person. Cowell.

PASSATOR. He who has the interest or command of the passage of a river; or a lord to whom a duty is paid for passage. Wharton.

PASSENGER. One who has taken a place in a public conveyance, by virtue of a contract, for the purpose of being transported from one place to another, on the payment of fare or its equivalent. Bricker v. R. Co., 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585.

The Nature of the Relation between Carrier and Passenger. "The rights, privileges, and protection attaching to the relation of a passenger are imposed by law upon common carriers upon considerations of public policy, independent of contract, and arise from the nature of their public employment;" McNeill v. R. Co., 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227.

The purchase of a ticket and the entry by a person on the premises or accommodations of the carrier creates the relation of passenger and carrier with all its rights, duties, and obligations; Wabash, St. L. & P. R. Co. v. Rector, 104 Ill. 296; Allender v. R. Co., 37 Ia. 264; so does entry on the premises with the intention of buying a ticket; Norfolk & W. R. Co. v. Gallihor, 89 Va. 639, 16 S. E. 935.

One becomes a passenger when in the station waiting for a train; Warner v. R. Co., 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; Exton v. R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508, and Atchison, T. & S. F. Ry. Co. v. Holloway, 71 Kan. 1, 80 Pac. 31, 114 Am. St. Rep. 462 (but not crossing the track with a ticket in his pocket, not having been to the depot; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; Southern R. Co. v. Smith, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746); or when he purchased a ticket and passed through the turn-stile to take a train; Illinois Cent. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290; or with a return ticket waiting in the station for a train; Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520. One who gets on the wrong train by his own mistake is a passenger and entitled to care and protection; Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. 248; Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; even if a freight train; Boggess v. R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777; but not if, on being informed of his mistake, he attempts to leave it; Robertson v. R. Co., 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314. As to the duty of a carrier to passengers on wrong trains by mistake of its servants, see St. Louis S. W. R. Co. v. White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, note, 122 Am. St. Rep. 631, 13 Ann. Cas. 965. A contract to carry a passenger from one station to another does not, in the absence of special terms, entitle him to break his journey at any intermediate station; [1904] 2 K. B. 313

One who travels regularly in the prosecution of his business on the trains or other conveyances of a carrier, and pays for the privilege of conducting his business, is a passenger entitled to protection, as one who sells popcorn on a train; Com. v. R. Co., 108 Mass. 7, 11 Am. Rep. 301; or conducts a bar on a steamboat; Yeomans v. Steam Nav. Co., 44 Cal. 71. Express messengers and mail clerks are passengers; Nolton v. R. Corp., 15 N. Y. 444, 69 Am. Dec. 623; Seybolt v. R. Co., 95 N. Y. 562, 47 Am. Rep. 75;

Davis v. R. Co., 122 Ky. 529, 92 S. W. 339, 5 L. R. A. (N. S.) 458, 121 Am. St. Rep. 481, 12 Ann. Cas. 723; Blair v. R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Pennsylvania R. Co. v. Price, 96 Pa. 256; but not a voluntary assistant to an express messenger or mail clerk; Union P. R. Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; or a newsboy permitted to ride free; Flower v. R. Co., 69 Pa. 210, 8 Am. Rep. 251; Snyder v. R. Co., 60 Mo. 413; or an employé of the carrier who rides free between his home and place of employment; McQueen v. R. Co., 30 Kan. 689, 1 Pac. 139. An express agent cannot recover against a stipulation of his ticket; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; and see note to that case in 35 Am. L. Rev. 306, where the cases are collected on the subject of express messengers, drovers, postal clerks, etc., and where it is strongly contended that the company should be liable upon the ground taken in a dissenting opinion by Harlan, J.

One who travels free; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; Cleveland, C., C. & St. L. R. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 539, 36 Am. St. Rep. 550; McNeill v. R. Co., 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227; Bryant v. R. Co., 53 Fed. 997, 4 C. C. A. 146, 12 U. S. App. 115; Flint & P. M. R. Co. v. Wier, 37 Mich. 111, 26 Am. Rep. 499; on an annual or other free pass; Thompson v. R. Co., 47 La. Ann. 1107, 17 South. 503; In re California Nav. & Imp. Co., 110 Fed. 670; Young v. Ry. Co., 93 Mo. App. 267; State v. R. Co., 63 Md. 433; or on a drover's pass; Flinn v. R. Co., 1 Houst. (Del.) 469; Cleveland P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Rose v. R. Co., 39 Ia. 246; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Va. & T. R. Co. v. Sayers, 26 Grat. (Va.) 328; Ohio & M. R. Co. v. Nickless, 71 Ind. 271; is entitled to the same care as the holder of a regular ticket, even if he expressly assumes the risk of accident; Burnett v. R. Co., 176 Pa. 45, 34 Atl. 972; but an employé, travelling on a free pass containing a stipulation that the company will not be liable, cannot recover for injuries; Kinney v. R. Co., 34 N. J. L. 513, 3 Am. Rep. 265. It has been held that the carrier may exempt himself from liability to one travelling on a free pass even against its own negligence; Northern P. R. Co. v. Adams, 192 U. S. 442, 24 Sup. Ct. 408, 48 L. Ed. 513; Griswold v. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Quimby v. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846. But it is held otherwise in England as to negligence; 13 Ir. L. T. 100; L. R. 10 Q. B. 437; L. R. 8 Q. B. 57; and in New York; Poucher v. R. Co., 49 N. Y. 263, 10 Am. Rep. 364. Where the employés are carried back and forth to their work, whether on construction or passenger trains, outside of their regular hours of employment, they are passengers; Gillshannon v. R. Corp., 10 Cush. (Mass.) 228; St. Louis, C. & St. P. R. Co. v. Waggoner, 90 Ill. App. 556; Vick v. R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

One who was travelling on Sunday contrary to a statute is entitled to protection as a passenger; Carroll v. R. Co., 58 N. Y. 126, 17 Am. Rep. 221. This results from the theory of the relation cited, *supra*, from a North Carolina case, since, as it rested upon contract, there could be no liability for the breach of a contract entered into in violation of law, but the duty is independent of contract and "imposed by law from considerations of public policy"; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442. Where a policeman, travelling free under a municipal ordinance, was injured, the company was held liable, although the ordinance was unconstitutional; Bradburn v. Light Co., 45 Wash. 582, 88 Pac. 1020, 14 L. R. A. (N. S.) 526. One permitted by an employé to ride for less than the fare and shut in a box car is not a passenger; McNamara v. R. Co., 61 Minn. 296, 63 N. W. 726; Atchison, T. & S. F. R. Co. v. Johnson, 3 Okl. 41, 41 Pac. 641; Grahn v. R. Co., 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025, and note, 123 Am. St. Rep. 767; a carrier is not liable to one who rides by stealth; Chicago & A. R. Co. v. Michie, 83 Ill. 427; or who is a trespasser; Muehlhausen v. R. Co., 91 Mo. 332, 2 S. W. 315; although invited by an employé of the carrier to ride; Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19.

The relation had ceased when the passenger started to go into the office of the stage company while the horses were changed; Central R. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; where he got off while the train was side-tracked; State v. R. Co., 58 Me. 176, 4 Am. Rep. 258; but, on the contrary, it is held that the railroad company owes a peculiar duty to passengers; Atchison, T. & S. F. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; he need not be on the train while stopping, but may stand or walk around; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; or leave the car while the transit is interrupted; Conroy v. R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; or at a regular station for motives of either business or curiosity; Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666; or to eat a meal at a nearby hotel; Watson v. R. Co., 92 Ala. 320, 8 South. 770. An employé going to work is not a passenger; Southern Indiana R. Co. v. Messick, 35 Ind. App. 676; one employed as a "greaser," who paid his

fare with a ticket given by his employer with which he was going to his work, was held not a passenger, the ticket being part of his wages; Herbert v. R. Co., 103 Me. 315, 69 Atl. 266, 125 Am. St. Rep. 297, 13 Ann. Cas. 886; *contra*, O'Donnell v. R. Co., 59 Pa. 239, 98 Am. Dec. 336; nor is one a passenger if, as an employé, he is travelling on his own business; Ohio & M. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336; nor if the carrier refuses to accept him as such because he refuses to pay fare; Louisville & N. R. Co. v. Johnson, 92 Ala. 204, 9 South. 269, 25 Am. St. Rep. 35; Moore v. R. Co., 38 S. C. 1, 16 S. E. 781; Brown v. R. Co., 64 Mo. 536; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; or is drunk and disorderly; L. & E. R. R. Co. v. McNally, 105 S. W. 124, 31 Ky. L. Rep. 1357; and in such case the railway company is not bound to transport him; 6 Fed. 362; but if refused on the latter ground, and the jury find the refusal wrongful, the carrier is liable; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; nor is one who secures a ticket by fraud a passenger; Brown v. R. Co., 64 Mo. 536; Moore v. R. Co., 41 W. Va. 160, 23 S. E. 539; Fitzmaurice v. R. Co., 192 Mass. 159, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 7 Ann. Cas. 586; 16 Yale L. J. 282, where it is said the decisions are almost unanimous but for Robostelli v. R. Co., 33 Fed. 796, where one using the commutation ticket of another was held a passenger if it was presented in good faith, though as suggested in the annotation cited it is difficult to see how this could be done in that case.

The relation continues until the passenger has left the railroad premises or has had reasonable time to do so; Burnham v. R. Co., 91 Mich. 523, 52 N. W. 14; Chicago & A. Ry. Co. v. Tracey, 109 Ill. App. 563; Imhoff v. R. Co., 20 Wis. 344; Chicago, R. I. & P. Ry. Co. v. Wood, 104 Fed. 663, 44 C. C. A. 118; Wallace v. R. Co., 8 Houst. (Del.) 529, 18 Atl. 818; Glenn v. R. Co., 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255, and note, 6 Ann. Cas. 1,032, collecting cases; but a reasonable time may include detention in the station by the weather; Louisville & N. R. R. Co. v. Keller, 104 Ky. 768, 47 S. W. 1072; remaining on a boat overnight, after arrival, by permission; Prickett v. Anchor Line, 13 Mo. App. 436; or looking after baggage; Ormond v. Hayes, 60 Tex. 180; but not attending to his own business; Hendrick v. R. Co., 136 Mo. 548, 38 S. W. 297; Pittsburgh, C. & St. L. R. Co. v. Krouse, 30 Ohio St. 222; or delaying to commit a breach of the peace; Chicago, R. I. & P. R. Co. v. Barrett, 16 Ill. App. 17; and what is a reasonable time is a question for the jury; Houston & T. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902. So also he is entitled to a reasonable or sufficient time to leave the train, the two words being used indiscriminately; Raughley v. R. Co., 202 Pa. 43, 51 Atl. 597; Appleby v. R. Co., 60 S. C. 48, 38 S. E. 237; Rutledge v. R. Co., 129 Fed. 94, 63 C. C. A. 596; McDonald v. R. Co., 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. Rep. 437; Fuller v. R. Co., 21 Conn. 557; Chicago, R. I. & P. R. Co. v. Wimmer, 72 Kan. 566, 84 Pac. 378, 4 L. R. A. 140, note, 7 Ann. Cas. 756.

Riding or going on the platform when there is no seat in the car is not negligence as a matter of law; Dewire v. R. Co., 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166; Werle v. R. Co., 98 N. Y. 650; Chesapeake & O. R. Co. v. Lang's Adm'r, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271, 19 Ky. L. Rep. 65; Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139; Morgan v. R. Co., 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609, distinguished from Cleveland, C., C. & St. L. R. Co. v. Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141, where it was held *contra* upon the facts; but it is a question for the jury; Ward v. R. Co., 102 Wis. 215, 78 N. W. 442; and in other cases going on the platform, if there is standing room in the car, is held to be contributory negligence as a matter of law; Rolette v. R. Co., 91 Minn. 16, 97 N. W. 431, 1 Ann. Cas. 313; Worthington v. R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; Snowden v. R. R., 151 Mass. 220, 24 N. E. 40; Quinn v. R. Co., 51 Ill. 495; Posey v. R. Co., 102 Fed. 236, 42 C. C. A. 293; Camden & A. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120; or riding in the baggage car or other dangerous place; Hickey v. R. Co., 14 Allen (Mass.) 429; Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 Am. Rep. 651; H. & T. C. R. R. Co v. Clemmons, 55 Tex. 88, 40 Am. Rep. 799; *contra*, Jacobus v. R. Co., 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360; Carroll v. R. Co., 1 Duer (N. Y.) 571; so of allowing one to ride on a freight train; New York, C. & St. L. R. Co. v. Doane, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451; and knowledge or consent of the trainmen does not effect the case; Downey v. R. Co., 28 W. Va. 732; though it is the duty of the passenger to go inside the car if requested by the conductor; Graville v. R. Co., 105 N. Y. 525, 12 N. E. 51, 59 Am. Rep. 516; where the train is crowded so that passengers are on the platform, the carrier must exercise care commensurate with the situation and is liable for failure to do so; Lynn v. So. Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, and note, as to the duty of the carrier with respect to crowded trains. A passenger may go on the platform to escape danger and his doing so will not prevent a recovery, even under a statute relieving the company from liability for injury to one riding on the platform; Mitchell v. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Buel v. R. Co., 31 N. Y. 314, 88 Am. Dec. 271.

The exposure of the body beyond the sides of a moving train is *per se* contributory neg-

ligence; Clarke's Adm'r v. R. Co., 101 Ky. 34, 39 S. W. 840, 36 L. R. A. 123; Benedict v. R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. Rep. 345; Richmond & D. R. Co. v. Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Pittsburg & C. R. Co. v. McClurg, 56 Pa. 294; Ga. Pac. R. Co. v. Underwood, 90 Ala. 49, 8 South. 116, 24 Am. St. Rep. 756; Breen v. R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Pittsburg & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; but some courts hold that resting the elbow on the window sill is not negligence; Farlow v. Kelly, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. Ed. 726; Breen v. R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; Winters v. R. Co., 39 Mo. 468; and others hold that in such cases it is a question for the jury, even where the arm projected outside the car; Barton v. R. Co., 52 Mo. 253, 14 Am. Rep. 418; Spencer v. R. Co., 17 Wis. 487, 84 Am. Dec. 758; Quinn v. R. Co., 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682; Moakler v. R. Co., 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; Holbrook v. R. Co., 12 N. Y. 236, 64 Am. Dec. 502.

The carrier owes no duty to one who tries to board the train when a gate or vestibule door is closed; Sanders v. R. Co., 10 Okl. 325, 61 Pac. 1075; Robinson v. R. Co., 5 Misc. 209, 25 N. Y. Supp. 91; Clark v. R. Co., 68 App. Div. 49, 74 N. Y. Supp. 267, affirmed 175 N. Y. 476, 67 N. E. 1081; Graham v. R. Co., 131 Ia. 741, 107 N. W. 595, 7 L. R. A. (N. S.) 603, 117 Am. St. Rep. 445; and one refused as a passenger, riding on the step and refusing to come inside, is not a passenger; Hogner v. R. Co., 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960, and note. An attempt to board a train or car after the gate or door is closed is generally held to be negligence which will bar a recovery; Brown v. R. Co., 82 App. Div. 222, 81 N. Y. Supp. 755; Graham v. R. Co., *supra;* and as to getting on or off a moving train see Hoylman v. R. Co., 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, note, 17 Ann. Cas. 1149. But whether it was contributory negligence to remain on the platform, when the door was locked under what the court held to be a reasonable rule at stations, was a question for the jury; Missouri, K. & T. R. Co. v. Brown (Tex.) 39 S. W. 326; such negligence will not excuse the carrier, if by the negligent act of its employé an injury occurs; Sharrer v. Paxson, 171 Pa. 26, 33 Atl. 120; Wabash, St. L. & P. R. Co. v. Recor, 104 Ill. 296. The mere fact of riding upon the platform or running board of a crowded street car is not contributory negligence; Kramer v. R. Co., 190 N. Y. 310, 83 N. E. 35; Lobner v. R. Co., 79 Kan. 811, 101 Pac. 463, 21 L. R. A. (N. S.) 972, and note where the cases are collected; as also Capital Traction Co. v. Brown, 29 App. D. C. 473, 12 L. R. A. (N. S.) 831, 10 Ann. Cas. 813; Burns v. R. Co., 213 Pa. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191; *contra,* as to standing on the running board outside of the lowered bar; Harding v. R. Transit Co., 217 Pa. 69, 66 Atl. 151, 10 L. R. A. (N. S.) 352; and when there is a seat in the car; Burns v. R. Co., 213 Pa. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191; Pike v. R. Co., 192 Mass. 426, 78 N. E. 497; Chicago City R. Co. v. Schaefer, 121 Ill. App. 334; and the conductor has warned him; Schoenfeld v. R. Co., 74 Wis. 433, 43 N. W. 162; it is a question of fact; Brackney v. Public Service Corp., 77 N. J. L. 1, 71 Atl. 149; Betz v. Rhode Island Co. (R. I.) 70 Atl. 1058.

A railroad employé is not guilty of contributory negligence as a matter of law in taking an exposed position (or one of some danger), unless he takes a risk of injury so great that no person of ordinary prudence would have assumed it; Milbourne v. Electric Power Station Co., 140 Mich. 316, 103 N. W. 821, 70 L. R. A. 600, where there is a full collection of cases in the opinions and arguments on the question of contributory negligence of employés in riding in a dangerous position.

A passenger is bound by the reasonable rules of a carrier; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Gray v. R. Co., 11 Fed. 683; Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 472; which do not violate the obligation of the contract; Attorney General v. R. R., 142 Mass. 40, 6 N. E. 854. Whether such rule is reasonable is a question for the court; 18 Am. & Eng. R. R. Cas. 356; Smith v. R. Co., 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128; Montgomery v. R. Co., 165 N. Y. 139, 58 N. E. 770. As to what is a reasonable regulation, see COMMON CARRIERS OF PASSENGERS. There is a reciprocal duty of the passenger to ask of trainmen any information required and for the trainmen to furnish such information to the passenger; Boehm v. R. Co., 91 Wis. 592, 65 N. W. 506.

A carrier is liable for the misdirection of a passenger by a ticket agent which results in his not taking the best route and thereby suffering inconvenience and delay; St. Louis S. W. R. Co. v. White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, 122 Am. St Rep. 631, 13 Ann. Cas. 965. Where the agent by mistake punched the mileage ticket to expire on the day of its date instead of a year later the ejection of the passenger was wrongful, because the circumstances were such as to put the conductor on inquiry before acting; Krueger v. Ry. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487. If injury result from the discharge of a passenger at the wrong destination, then the

negligence of the defendant must be shown to be the proximate cause; Georgia R. & Elec. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177, and note.

A passenger paid his fare to a flag station and notified the conductor of his desire to be set down there. The train stopped about a mile before reaching the station, and upon being directed by the conductor that it was his station, the passenger alighted. The passenger recovered for injuries due to his being compelled to walk to his destination, regardless of carrier's negligence; Beaumont S. L. & W. R. Co. v. Bishop (Tex.) 160 S. W. 975.

A conductor ejecting passengers for alleged disorderly conduct acts at his peril in determining their identity; Gulf, C. & S. F. R. Co. v. Conder, 23 Tex. Civ. App. 488, 58 S. W. 58; Seaboard Air Line Ry. v. O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472. So it is a question for the jury whether due care was used in expelling a passenger when the right to do it existed; Tilburg v. R. Co., 217 Pa. 618, 66 Atl. 846, 12 L. R. A. (N. S.) 359, and note.

As a general rule a carrier is not liable as an insurer for torts of fellow passengers, but he is bound to due care to protect a passenger from them and is liable for the lack of it; Brown v. R. Co., 189 Fed. 972, 72 C. C. A. 20, 2 L. R. A. (N. S.) 105 and note; Meyer v. R. Co., 54 Fed. 116, 4 C. C. A. 221. Some cases put the liability upon the doctrine of *respondeat superior;* Britton v. R. Co., 88 N. C. 536, 43 Am. Rep. 749; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; while others hold that there is no such privity between a carrier and a disorderly passenger as to warrant the application of that rule; Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224. Some cases hold that the carrier is bound only to ordinary care; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483; Exton v. R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508; Tall v. Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120; Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 11 South. 101, 16 L. R. A. 627; while others require of it extraordinary care of the same degree as that which applies to its machinery, roadbed, etc.; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Newport News & M. V. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 557.

The best considered cases hold the carrier liable for insults &c. of strangers, fellow passengers, and servants; Sanford v. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; even for torts outside of the scope of the servants' authority; Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Indianapolis U. R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; where the passenger was insulted by the carrier's servant, she was allowed to recover for mental humiliation; Gillespie v. R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; and as to the principles involved, see 15 Harv. L. Rev. 670. The carrier is under the same strict obligation to protect a passenger from the negligence or wilful misconduct of a fellow passenger as to carry him safely; Colorado M. R. Co. v. Brady, 45 Colo. 207, 101 Pac. 62.

An ordinance requiring a street railway company to run cars enough to provide with a seat every passenger from whom fare is demanded is valid, unless in particular cases where it can be shown to be impossible of performance; North Jersey St. R. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

Where plaintiff bought a ticket and, although she did not become a passenger herself, used it to send baggage which was lost, she may recover the value of the baggage; Alabama G. S. R. Co. v. Knox (Ala.) 63 South. 538, *contra*, Marshall v. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650.

Seamen have no right, even in cases of extreme peril, to sacrifice the lives of passengers, for the sake of preserving their own; U. S. v. Holmes, 1 Wall. Jr. 1, Fed. Cas. 15,383.

See NEGLIGENCE; BAGGAGE; TICKET; COMMON CARRIERS OF PASSENGERS; SLEEPING CAR; RAILROAD.

PASSENGER SHIP. "Every description of sea-going vessel carrying one or more passenger or passengers on any voyage from any place in Her Majesty's Dominions to any place whatever." 52 & 53 Vict. c. 29.

PASSENGER TRAIN. "A train advertised to take passengers generally,—people travelling from place to place,—upon the terms and in the manner *ordinarily* applicable to such passengers." 54 L. J. Q. B. 535.

PASSIAGIARIUS. A ferryman. Jacob.

PASSIM (Lat.). Everywhere. Often used to indicate a very general reference to a book or legal authority.

PASSIVE. See DEBT; TRUST.

PASSPORT (Fr. *passer*, to pass, *port*, harbor or gate). **In Maritime Law.** A paper containing a permission from a neutral state to the captain or master of a ship or vessel to proceed on the voyage proposed. It usually contains his name and residence, the name, property, description, tonnage, and destination of the ship, the nature and quantity of the cargo, the place from whence it comes, and its destination, with such other matters as the practice of the place requires.

It is also called a *sea-brief*, or *sea-letter* (*q. v.*). But Marshall distinguishes sea-letter from passport, which latter, he says, is pretended to protect the ship, while the former relates to the cargo, destination, etc. See Jacobs, Sea-Laws 66, note.

This document is indispensably necessary in time of war for the safety of every neutral vessel; Marsh. Ins. 317, 406 *b*.

A Mediterranean pass (*q. v.*), or protection against the Barbary powers.

A document granted in time of war to protect persons or property from the general operation of hostilities. Wheat. Int. Law, 3d Eng. ed. § 408; 1 Kent 161; The Amiable Isabella, 6 Wheat. (U. S.) 3, 5 L. Ed. 191.

In most countries of continental Europe passports are given to travellers. These are intended to protect them on their journey from all molestation while they are obedient to the laws. The secretary of state may issue, or cause to be issued in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the president may prescribe, passports, but only to citizens of the United States; R. S. §§ 4075–4076. See SAFE CONDUCT.

PASTURES. Lands upon which beasts feed themselves. By a grant of pastures the land itself passes. 1 Thomas, Co. Litt. 202.

See COMMON.

PATENT. A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals. Phillips, Pat. 1.

As the term was originally used in England, it signified certain written instruments emanating from the king and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises; they were called letters patent, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed.

In the United States, the word patent is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands. But in its more usual acceptation it is understood as referring to those instruments by which the government secures to inventors for a limited time the exclusive right to their own inventions.

The granting of exclusive privileges by means of letters patent was a power which for a long time was greatly abused by the sovereigns of England. The sole right of dealing in certain commodities was in that manner conferred upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. These exclusive privileges, which were termed monopolies, became extremely odious, and, at an early date, met with the most determined resistance. One of the provisions of Magna Charta was intended to prevent the granting of monopolies of this character; and subsequent prohibitions and restrictions were enacted by parliament even under the most energetic and absolute of their monarchs. See Hallam, Const. Hist. 153, 205.

Still, the unregulated and despotic power of the crown, which reached its height in Elizabeth's reign, proved, in many instances, superior to the law, until the reign of James I., 1623, when an act was passed, known as the Statute of Monopolies, 21 Jac. 1, ch. 3, which entirely prohibited all grants of that nature, and abolished existing monopolies. But the king was permitted to secure by letters patent to the inventor of any new manufacture, the sole right to make and vend the same for a term not exceeding fourteen years. Since that time the power of the monarch has been so far controlled by the law that the prohibition contained in the Statute of Monopolies has been fully observed, and under that statute has grown up the present system of British patent law, from which ours has to a great extent been derived. See Rob. Pat. §§ 1–8. See 12 Law Quart. Rev. 141, as to the earliest grants of privileges in England and the early history of patent law.

The constitution of the United States (art. 1, § 6, cl. 8) confers upon congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This right can, accordingly, be conferred only upon the *authors* and *inventors* themselves; but it rests with congress to determine the length of time during which it shall continue. Congress at an early day availed itself of the power. The first act passed was that which established the patent office, on the 10th of April, 1790. There were several supplements and modifications to this law, the acts passed February 7, 1793, June 7, 1794, April 17, 1800, July 3, 1832, July 13, 1832. These were all repealed, by an act passed July 4, 1836, and a new system was established. Subsequently other changes were made by the acts of March 3, 1837, March 3, 1839, August 29, 1842, May 27, 1848, March 3, 1849, February 18, 1861, March 2, 1861, July 16, 1862, March 3, 1863, June 25, 1864, and March 3, 1865. The act of July 8, 1870, repealed all existing acts. Various minor amendments to it have been passed.

The patent laws were extended to the Canal Zone by Circular of the Isthmian Canal Commission (March 15, 1907). Protection of a patent right in the Philippines is procured by filing at the Bureau of Patents, etc., a certified copy of the United States patent (Circular of the Division of Customs, etc., of the war department, April 11, 1899, and subsequent circulars); and in Porto Rico, under the same circular of April 11, 1899, by filing at the office of the Secretary, San Juan, a certified copy of the patent.

Letters patent for inventions are granted for a term of seventeen years.

The law does not furnish any guarantee of the validity of the patent. It is neverthe-

less, *prima facie* evidence of its own validity; Pitts v. Hall, 2 Blatchf. 229, Fed. Cas. No. 11,192; it implies novelty and invention; Valley I. Works v. Wood's Sons Co., 196 Fed. 780, 116 C. C. A. 46, that the defendant's device is patented may tend, when offered in evidence, to show non-infringement, in some cases. See Corning v. Burden, 15 How. (U. S.) 252, 14 L. Ed. 683.

The exclusive right of the patentee did not exist at common law; it is created by acts of congress; and no rights can be acquired unless authorized by the statute and in the manner it prescribes; Dable Grain Shovel Co. v. Flint, 137 U. S. 41, 11 Sup. Ct. 8, 34 L. Ed. 618. The rights granted by the patent are confined within the limits of the United States; consequently it does not extend to a foreign vessel lawfully entering one of our ports, where the patented improvement was placed upon her in a foreign port and authorized by the laws of the country to which she belongs; Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. Ed. 595.

Of the subject-matter of a patent. The act of July 8, 1870, § 24, provides for the granting of a patent to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned. By act of March 3, 1897 (in effect January 1, 1898), amending this section, the patenting or publication of an invention in a foreign country, if more than two years before the application in this country bars a patent.

There are five classes of inventions which may be the subjects of patents: *first*, an art; *second*, a machine; *third*, a manufacture; *fourth*, a composition of matter; and *fifth*, design. In Great Britain, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture." But the English courts in defining the meaning of the term, have construed the word "manufacture" to be coextensive in signification with the whole of the first four classes of inventions thus recognized by our law. An art or process, a machine, and a composition of matter are all regarded there as manufactures. The field of mechanical invention in Great Britain is, therefore, coincident with that provided by our law, and the legal subject-matter of patents is the same in each country; 2 B. & Ald. 349; 2 M. & W. 544. But, inasmuch as we have three other classes of mechanical inventions, the term "manufacture" has a more limited signification here than it receives in Great Britain.

A *process* is an art or method by which any particular result is produced. Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, vulcanizing india-rubber, smelting ores, etc., are usually carried on by processes, as distinguished from machines. But the term process is often employed more vaguely in a secondary sense in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine, and does not constitute a patentable subject-matter, because there cannot be a valid patent for the function or abstract effect of a machine, but only for the machine which produces it. Corning v. Burden, 15 How. (U. S.) 267, 14 L. Ed. 683.

"A *process* is a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter, to be transferred and reduced to a different state or thing. . . . In the language of the patent law, it is an 'art.' The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be entirely new, and produce an altogether new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." Cochrane v. Deener, 94 U. S. 788, 24 L. Ed. 139. The term *process* is not used in the patent statutes, but it has been uniformly held that there may be a patent for a process: Tilghman v. Proctor, 102 U. S. 727, 26 L. Ed. 279. A process may be new though the apparatus is old; New Process Fermentation Co. v. Maus, 122 U. S. 413, 7 Sup. Ct. 1304, 30 L. Ed. 1193; Carnegie Steel Co. v. Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; Lawther v. Hamilton, 21 Fed. 811. The process by which an article is produced and the product are two different inventions; Tucker v. Dana, 7 Fed. 213. The new combination of old processes constitutes a new process; Wallace v. Noyes, 13 Fed. 172; 7 E. & B. 725.

Letters patent for a process irrespective of the particular mode or form of apparatus for carrying it into effect are granted un-

der the laws of the United States. Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, produce precisely the result he discovers; Tilghman v. Proctor, 102 U. S. 727, 26 L. Ed. 279.

Processes of manufacture which involve chemical or other similarly elemental action are patentable, though mechanism may be necessary in carrying out the process, while those which consist solely in the operation of a machine are not, and where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon the mechanism, does not impair his right to the patent for the process. But patentability of processes is not confined to those involving chemical or other similar elemental action; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034. A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine; Risdon I. & L. Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Carnegie Steel Co. v. Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; U. S. Consol. Seeded Raisin Co. v. Fruit Co., 195 Fed. 264, 115 C. C. A. 234.

Where a patent clearly shows and describes the functions of a certain process, no other person can afterwards patent that process; New Process Fermentation Co. v. Koch, 21 Fed. 580. Where the process is described with the method of operation of a machine, the machine alone is patentable; Excelsior Needle Co. v. Needle Co., 32 Fed. 221; the product, unless itself new, is not patentable; *id.*

A *machine* is any contrivance composed of co-operating elements which act under the law imposed upon them to regulate or modify the relations between force, motion, and weight.

"The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result;" Corning v. Burden, 15 How. (U. S.) 267, 14 L. Ed. 683; but when the effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such methods or operations are called processes; Piper v. Brown, 4 Fish. Pat. Cas. 175, Fed. Cas. No. 11,180.

A machine is an instrument composed of one or more of the mechanical powers, and capable, when set in motion, of producing by its own operation, certain predetermined physical effects. Rob. Pat. § 173. A machine differs from an art in that the act or series of acts which constitute the art become, in the machine, inseparably connected with a specific physical feature. The art is the primary conception, the machine the secondary. A machine differs from all other mechanical instruments in that its rule of action resides within itself. The structural law of a machine is its one enduring and essential characteristic. Rob. Pat. § 175; Parker v. Hulme, 1 Fish. 44, Fed. Cas. No. 10,740.

Mechanical movements, which are sometimes called the simple machines, are six in number: the lever, the pulley, the wheel and axle, the wedge, the screw, and the inclined plane. These are sometimes known as the mechanical powers, though neither these nor any other machinery can ever constitute or create power; they can only control, direct, and render it useful.

Machines, as generally seen and understood, are compounded of these simple machines in some of their shapes and modification. Such a combination as, when in operation, will produce some specific result, is regarded as an entire machine. It is so treated in the patent law; for although a new machine, or a new improvement of a machine, is an invention, and although only one invention can be included in a single patent, still several different contrivances, each of which is in one sense a machine, may all be separately claimed in a single patent, provided they all contribute to improve or to constitute one machine, and are intended to produce a single result; and a new combination of machines is patentable whether the machines themselves be new or old; Wyeth v. Stone, 1 Sto. 273, 568, Fed. Cas. No. 18,107; Evans v. Eaton, 3 Wheat. (U. S.) 454, 4 L. Ed. 433.

While a combination is a union of elements which may be partly new, or wholly old or wholly new, the combination is a means distinct from its constituent elements, any of which, if new and patentable, may be covered by separate claims in the same patent as the combination. A combination which produces by the co-operation of its constituents the result specified in the manner specified is a true mechanical devise and a valid combination; Leeds & C. Co. v. Mach. Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

Inventions pertaining to machines may be divided into four classes: 1. Where the invention embraces the entire machine; 2. Where it embraces one or more of the elements of the machine only, as the coulter of a plough; 3. Where the invention embraces both a new element and a new combination of old elements; 4. Where all the elements of the machine are old and the invention consists in a new combination. Almost all

of the modern machines are of the fourth class; Union Sugar Refinery v. Matthiesson, 3 Cliff. 639, Fed. Cas. No. 14,399.

A *manufacture* is an instrument created by the exercise of mechanical forces and designed for the production of mechanical effects, but not capable, when set in motion, of attaining, by its own operation, to any predetermined results. It receives its rule of action from the external source which furnishes its motive power. A manufacture requires the constant guidance and control of some separate intelligent agent; a machine operates under the direction of that intelligence with which it was endowed by its inventor when he imposed on it its structural law. The parts of a machine, considered separately from the machine itself, all kinds of tools and fabrics, and every other vendible substance, which is neither a complete machine nor produced by the mere union of ingredients, is included under the title "manufacture"; Rob. Pat. § 182. An article of ornament may be a manufacture; Simpson v. Davis, 20 Blatch. 413, 12 Fed. 144; and a bond and coupon register in the form of a book; Munson v. New York, 3 Fed. 338; and a wooden pavement; 2 Webst. 126.

A manufacture, if new in itself, may be patentable whether the process or apparatus by which it is produced be new or not; Draper v. Hudson, Holmes 208, Fed. Cas. No. 4,069. A manufacture may be an invention distinct from the mode of producing it; United Nickel Co. v. Pendleton, 21 Blatch. 226, 15 Fed. 739. Making an old article by a new process or apparatus is not making a new manufacture; McKloskey v. Du Bois, 8 Fed. 710; a new process producing a new manufacture may involve two separate inventive acts; Tucker v. Dana, 7 Fed. 213. A new form of an old article may be a new manufacture; 25 O. G. 601; but to perceive a hitherto unknown quality in an existing substance is not the invention of a new substance; Ansonia B. & C. Co. v. Supply Co., 32 Fed. 81. Although a new process for producing an article is patentable, the product itself cannot be patented, if it is old; Cochrane v. Badische Anilin & Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433.

A *composition* of *matter* is a substance composed of two or more different substances, without regard to form. A design is an ornamental object as specified in R. S. § 4929.

Invention, what constitutes. The general rule is that, wherever *invention* has been exercised, there will be found the subject-matter of a patent; Poppenhusen v. Falke, 5 Blatch. 46, Fed. Cas. No. 11,280.

The constitution provides for the grant to inventors of the exclusive right to the respective "discoveries," while R. S. § 4884, uses "inventions and discoveries."

Although the word "discovery" is used as entitling the discoverer to a patent, still, every discovery is not a patentable invention. The discoverer of a mere philosophical principle, or abstract theory, or elementary truth of science, cannot obtain a patent for the same, unless he applies it to some directly useful purpose. The patent can only be for such a principle, theory, or truth reduced to practice and embodied in a particular structure or combination of parts; Clark Thread Co. v. Linen Co., 110 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521; nor can there be a patent for a function or for an effect only, but for an effect produced in a given manner or by given means; Piper v. Brown, 1 Holmes 20, Fed. Cas. No. 11,180; Tilghman v. Werk, 2 Fish. 229, Fed. Cas. No. 14,046; or by a particular operation; Stone v. Sprague, 1 Sto. 270, Fed. Cas. No. 13,487; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. Ed. 601; but a patent covers the means employed to effect results; Miller v. Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

A function is that "which a machine is designed to do, as distinguished from the machine itself and from the product of its action or something external to itself;" Denning Wire & Fence Co. v. Steel Co., 169 Fed. 793, 95 C. C. A. 259. In Westinghouse v. Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, it was said that the term "function" may not be readily defined, and that it was not advisable that it should be attempted.

While the end or purpose sought to be accomplished by the device is not the subject of a patent, the device or mechanical means by which the desired result is to be secured, is; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059. An idea is not patentable; a patent is valid only for the practical application of an idea; Sickels v. Borden, 3 Blatch. 535, Fed. Cas. No. 12,832; Rubber-Tip-Pencil Co. v. Howard, 20 Wall. 498, 22 L. Ed. 410. A principle denotes the physical force employed by an invention. It is some natural power or energy which operates with uniformity under given circumstances, and may thus be contemplated as obedient to law. It is a necessary factor in every means which produce physical effects, whether such means be natural or artificial; Rob. Pat. § 135.

To be entitled to a patent, a person must have invented and discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced, it has not been known, and that it is useful, but it must amount to an invention or discovery; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647.

An invention, to be patentable, must not only be *new*, but must also be *useful*. But

by this it is not meant that it must be more useful than anything of the kind previously known, but that it is capable of use for a beneficial purpose. The word "useful" is also to be understood in contradistinction to "pernicious," or "frivolous." A contrivance directly and mainly calculated to aid the counterfeiter, the pickpocket, or the assassin, or which would in any way be directly calculated to be injurious to the morals, the health, or the good order of society, would not be patentable. Neither would a new contrivance which was of too trivial a character to be worthy of serious consideration; Langdon v. De Groot, 1 Paine 203, Fed. Cas. No. 8,059; Many v. Jagger, 1 Blatch. 372, Fed. Cas. No. 9,055; Parkhurst v. Kinsman, 1 Blatch. 488, Fed. Cas. No. 10,757.

The patent itself is *prima facie* evidence of utility; Waterbury Brass Co. v. Miller, 9 Blatch. 77, Fed. Cas. No. 17,254; Bell v. Daniels, 1 Bond 212, Fed. Cas. No. 1,247; and its use by the defendant and others is evidence of utility; Smith v. Elastic Fabrics Co., 1 Holmes 340, Fed. Cas. No. 13,050.

A mere application of an old device or process to the manufacture of an article is held to constitute only a "double use," and not to be patentable. There must be some new process or machinery used to produce the effect; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267. See Howe Mach. Co. v. Needle Co., 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963; Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552. A combination of old elements does not constitute a patentable invention, where they are all found, some in one and some in another of earlier devices for the same purpose, in which each element performs the same function that it has in the new combination; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. 150, 34 L. Ed. 719; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent; Belding Mfg. Co. v. Corn Planter Co., 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370; and something more is required to support one than a slight advance over what has preceded it, or mere superiority in workmanship or finish; International Tooth Crown Co. v. Gaylord, 140 U. S. 55, 11 Sup. Ct. 716, 35 L. Ed. 347.

Invention, in the nature of improvements, is the double mental act of discerning, in existing machines, processes or articles, some deficiency, and pointing out the means of overcoming it; General Electric Co. v. Electric Co., 174 Fed. 246, 98 C. C. A. 154.

Inventive skill has been defined as "that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; it differs from a "suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal." Hollister v. Mfg. Co., 113 U. S. 72, 5 Sup. Ct. 717, 28 L. Ed. 901.

"Not every improvement is invention; but to entitle a thing to protection it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates." Rosenwasser v. Berry, 22 Fed. 841.

"An invention, in the sense of the patent law, means the finding out—the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind." Conover v. Roach, 4 Fish. 12, Fed. Cas. No. 3,125.

"It was never the object of those [patent] laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." Atlantic Works v. Brady, 107 U. S. 200, 2 Sup. Ct. 225, 27 L. Ed. 438.

"Originality is the test of invention. If that is successfully exercised, its product is protected; and it is immaterial whether it is displayed in a greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought or dawned on his mind after groping his way through many and dubious experiments." Blake v. Stafford, 6 Blatch. 195, Fed. Cas. No. 1,504. Whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device. A lucky casual thought, involving a comparatively trifling change, often produces decided and useful results, and, though the result of a small amount of inventive skill, the law extends to it the same protection as if it were the product of a lifetime of profound thought and most ingenious experiment; Middletown Tool Co. v. Judd, 3 Fish. 141, Fed. Cas. No. 9,536. The patentee must be an inventor and he must have made a discovery. It is not enough that a thing shall be new and that it shall be useful, but it must amount to an invention or discovery; Thompson v. Boisselier, 114 U. S. 11, 5 Sup. Ct. 1042, 29 L. Ed. 76.

The unsuccessful effort of others in the same art, to accomplish the same result, indicates that the means by which the patentee

has produced it are the result of inventive skill; Celluloid Mfg. Co. v. Zylonite Co., 28 Fed. 195; Dudgeon v. Watson, 29 Fed. 248. In The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, it appeared that the sales of the earlier article had been but tentative and slight, and those of the patented article enormous. In sustaining the patent in suit, Brown, J., said: "Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. . . . It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

The degree of invention is not prescribed by the statute; Hillborn v. Mfg. Co., 69 Fed. 958, 16 C. C. A. 569; nor is it material; Washburn & M. Mfg. Co. v. Haish, 4 Fed. 900; each case must stand on its own facts, but if the patented structure is at the head of the evolution in its particular art and is a marked improvement on what preceded it, the court should surely be predisposed in its favor; Bray v. Twine Co., 70 Fed. 1006. Courts give a liberal construction to the law, so as to protect every contrivance which can be called new, and which proves at all useful. The inventor, therefore, has the benefit of the doubt. But it is obvious that there is a limit beyond which mere changes cannot and ought not to receive this protection; Kirby v. Beardsley, 3 Fish. 265, Fed. Cas. No. 7,837.

Where the question of patentable novelty in a device was by no means free from doubt, the court, in view of the extensive use to which the patent had been put by manufacturers of wagons, resolved the doubt in favor of the patentee and sustained the patent; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. While the utility of a contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is nevertheless highly persuasive in that direction, and in the absence of pretty conclusive evidence to the contrary, will generally exercise controlling influence; Hill v. Biddle, 27 Fed. 560; in doubtful cases only; Voigtmann v. Cornice Co., 148 Fed. 848, 78 C. C. A. 538; in case of doubt it will turn the scale; Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; it is better evidence of invention than the opinion of an expert or the intuition of a judge; Palmer v. Johnston, 34 Fed. 336; but not where public acceptance is the plain result of successful business methods in creating a market for the article. And not when the popularity is not due to any patentable feature. The fact that a patented device went into immediate use, and supplanted all others, cannot be attributed to artful advertising, in the case of an article such as an electric heater for railway cars, which is sold, not to the public, but to mechanicians of skill in their art; Consolidated C. H. Co. v. Heating Corp., 82 Fed. 993. But extensive use has been said to be an unsafe criterion of patentability; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. When, in a class of machines widely used, it appears that at least, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when a patent has been granted to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103.

Simplicity in the device is itself a merit; 2 Webst. Pat. Cas. 113. Mere suggestions from others do not negative the existence of patentable invention, unless they cover the entire invention; Hubbell v. U. S., 5 Ct. of Cl. 1. The suggestion by others of a part of a device does not show the absence of inventive skill as to the whole; Worden v. Fisher, 11 Fed. 505. Where inventive skill was necessary in addition to suggestions of others, the inventor is entitled to a patent; Union Paper-Bag Mach. Co. v. Pultz & Walkley Co., 15 Blatchf. 160, Fed. Cas. No. 14,392; Alden v. Dewey, 1 Sto. 336, Fed. Cas. No. 153; O'Reilly v. Morse, 15 How. (U. S.) 62, 14 L. Ed. 601. To suggest that a certain result may be obtained, but without indicating how, is not an invention; Graham v. Gammon, 7 Biss. 490, Fed. Cas. No. 5,668. Mere experiment is not invention; Many v. Sizer, 1 Fish. 17, Fed. Cas. No. 9,056.

The simplicity of a device and its apparent obviousness after the event, ought not to detract from its meritoriousness. That it had never been suggested or thought of before, and effectually supplied the one thing necessary to bring success, when before there had been nothing but failure, is sufficient within the meaning of the patent law; McKay & C. L. Mach. Co. v. Dizer, 61 Fed. 102, 9 C. C. A. 382. "The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practised eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one." Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275.

A "double use" may involve invention if the second use is an art remote from the former use; otherwise, if the new use is such that it would occur to a person of ordinary mechanical skill; much depends

upon the nature of the changes required to adapt the device to its new use; *id.*

Study, effort, and experiment are not alone enough to constitute inventive skill; Butler v. Steckel, 27 Fed. 219. Nor is the exercise of good judgment; Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. 531, 27 L. Ed. 1058. Nor the exercise of the reasoning process; Watson v. Ry. Co., 23 Fed. 443. Inventive skill requires thought, while mechanical skill does not; Butler v. Bainbridge, 24 Blatch. 163, 29 Fed. 142. Small discoveries may involve inventive skill; Hobbie v. Smith, 27 Fed. 656. If it exist in some degree, the courts will not measure it by an exacting standard; Valvona v. D'Adamo, 135 Fed. 544.

The exercise of mechanical skill must be considered as it existed at the date of the invention; Wilcox v. Bookwalter, 31 Fed. 224.

A *mechanical equivalent* exists where one device may be adopted instead of another by a person skilled in the art, from his knowledge of the art; Johnson v. Root, 1 Fish. 351, Fed. Cas. No. 7,411. Equivalents have been said to be "obvious and customary" interchanges; Smith v. Downing, 1 Fish. 64, Fed. Cas. No. 13,036. It is a question of fact depending on the opinion of experts and on an inspection of the machine; Foss v. Herbert, 2 Fish. 31, Fed. Cas. No. 4,957. It is a question of use, not of name; Graham v. Mason, 5 Fish. 1, Fed. Cas. No. 5,671. Equivalents may differ in shape; Graham v. Mfg. Co., 11 Fed. 148; a substitute in a combination does not cease to be an equivalent because, in addition, it does something more and better; Atlantic Giant Powder Co. v. Goodyear, 3 B. & Ard. 161, Fed. Cas. No. 623. Only those things can be considered equivalents for the elements of a manufacture which perform the same function in substantially the same way; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. Ed. 149.

The test of equivalency is whether the substituted element operates in substantially the same way to produce substantially the same result; Palmer v. Mach. Co., 186 Fed. 496. The doctrine of equivalency may be invoked for other than pioneer patents, the range depending upon and varying with the degree of invention; Continental Paper Bag Co. v. Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122. Where no inventive skill is shown in the substitute, it is an equivalent; Crouch v. Roemer, 103 U. S. 797, 26 L. Ed. 426.

Successive patents. "No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. The second patent, in such case, although containing a claim broader and more generic in its character than the specific claims contained in the prior patent, is also void. But where the second patent covers matters described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained." Miller v. Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

An *improvement* is an addition to or alteration in some existing means, which increases its efficiency without destroying its identity. It includes two necessary ideas: the idea of a complete and practical operative art or instrument and the idea of some change in such art or instrument not affecting its essential character but enabling it to produce its appropriate results in a more perfect or economical manner; Rob. Pat. § 210.

No patent can be granted for the mere importation of an invention brought from abroad; although it is otherwise in England. The constitution, as we have seen, only authorizes congress to grant these exclusive privileges to the inventors themselves. The mere fact of an inventor having obtained a patent for a device in a foreign country did not under the act of March 3, 1897, prevent his obtaining a patent for the same thing here, provided he applies for a patent here within seven months from the date of the foreign patent.

By the act of March 3, 1903, the period has been extended to one year (and to four months on design patents). When the foreign patent issues before the United States patent issues, the latter expires at the same time as the former, or, if there be more than one, with the former patent having the shortest term; but in no case will the term exceed seventeen years; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601.

By the act of July 8, 1870, an inventor might lodge a *caveat* in the patent office by virtue of which he was to a certain extent protected while perfecting his invention. The practice was abolished by the act of June 25, 1910, it having been found ineffective.

Of the application for a patent. When the invention is conceived or complete, and the inventor desires to apply for a patent, he causes a specification to be prepared, setting forth in clear and intelligible terms the exact nature of his invention, describing its different parts and the principle and mode in which they operate, and stating precisely what he claims as new, in contradistinction from those parts and combinations which were previously in use. This is accompanied by a petition to the commissioner of patents, stating the general nature of his invention and the object of his application. One copy of drawings should be attached to the specification, where the nature of the case admits of drawings; and, where the invention is for a composition of matter, specimens of the ingredients and of the composition of matter should be furnished.

If the inventor is shown to be the original and first inventor, a mere prior invention of the same thing in a foreign country, if not patented or described in some printed publication, will not affect his right to a patent here.

If the applicant has, either actually or constructively, *abandoned* his invention to the public, he can never afterwards recall it and resume his right of ownership.

Abandonment may be by conduct from which an intention to abandon will be inferred, or by public use or sale. In the former class, it may be *before* the application; *by* the application; or *after* application. Abandonment before application may be shown by any conduct from which can be inferred an intention to give the invention to the public; as, by throwing it aside and not using it; disclaiming any right in it, or giving it expressly to the public; and by public use of the device for even less than two years, taken in connection with circumstances tending to show that the inventor did not intend to secure a monopoly; Rob. Pat. § 349. It is a question of intention; McCormick v. Seymour, 2 Blatch. 240, Fed. Cas. No. 8,726; and of fact; Russell & Erwin Mfg. Co. v. Mallory, 10 Blatch. 140, Fed. Cas. No 12,166.

An applicant, either by express words in his specification, or by a failure to claim all of his invention or by unreasonable delay in applying for a revision, may abandon the whole or a part of his invention; and after application he can abandon his invention by withdrawing his application.

Public use or sale of the invention for more than two years before the application works an abandonment; Andrews v. Hovey, 123 U. S. 267, 8 Sup Ct. 101, 31 L. Ed. 160; this is a conclusive presumption; Sisson v. Gilbert, 9 Blatch. 185, Fed. Cas. No. 12,912; and a single use is enough; Egbert v. Lippmann, 104 U. S 333, 26 L. Ed. 755. But this rule does not apply to a strictly experimental use; Innis v. Boiler Works, 22 Fed. 780; no matter how long it had continued; Elizabeth v. Pav. Co., 97 U. S. 126, 24 L. Ed. 1000. A mere temporary use by a few persons as an act of kindness, for a limited period, or a use where the party using it is bound to secrecy, or is actually under the control of the inventor, or a use by the inventor in private is not within the rule; Wyeth v. Stone, 1 Sto. 273, Fed. Cas. No. 18,107. Such public use, with or without the consent of the subsequent patentee, renders the patent invalid; Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160.

The sale which works an abandonment in this connection must be a sale in the usual course of business; Henry v. Soap-Stone Co., 2 Fed. 78; and of the completed invention; *id.*; and merely placing the device on sale is not sufficient; Plimpton v. Winslow, 14 Fed. 919. A sale on trial, to test the invention, is not an abandonment, even though warranted; Graham v. McCormick, 11 Fed. 859.

Use by the inventor for the purpose of testing the machine, in order to devise means for perfecting its operation, is admissible where, as incident to such use, the product of its operation is disposed of by sale; such use does not change its character; but where the use is mainly for the purposes of trade and profit and the experiment is merely incidental to that, the principle, and not the incident, must give character to the use; Smith & G. Mfg. Co. v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141.

Where an invention was complete and capable of producing the result sought to be accomplished, and the construction and mode of operation and use of the mechanism were necessarily known to the workmen who put it into safes, which were the articles in question, where it was hidden from view after the safes were completed and no attempt was made to expose the mechanism and thus prove whether or not it was efficient, it was held that it was not an experimental use; Hall v. Macneale, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367. If an inventor, after having made his device, gives or sells it to another to be used by the donee or vendee without limitation or restriction or injunction of secrecy, and it is so used, such use is public even though confined to one person; Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755. Where the inventor of a connecting tie for rails used the device in constructing a cable road and reserved no future control over it, and had no expectation of making any material changes in it, and never examined it to see whether it was defective or could be improved, it was held that it was a public use so as to defeat the patent; Root v. R. Co., 146 U. S. 210, 13 Sup. Ct. 100, 36 L. Ed. 946. But where the inventor of a wooden pavement himself constructed an experimental pavement which was used for six years before the patent was applied for, and it appeared that he built it at his own expense and went to see the effect of traffic upon it and its durability, and examined it almost daily, it was held that this was an experimental use; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000. Where the invention is a machine, such as a grist mill, its experimental use does not cease to be so because its products have been sold. But if the inventor allows his machine to be used by other persons generally, with or without compensation, or if it is by his consent put on sale for such use, then it will be in public use and on public sale, within the act; Root v. R. Co., 146 U. S. 223, 13 Sup. Ct. 100, 36 L. Ed. 946. Where there is no evidence of use or sale of the invention, which was a method of driven wells, by the applicant before his application, or by others with his

consent, except putting down a single well, it was held that the use was merely experimental; Beedle v. Bennet, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074.

The use of a telephone transmitter to test its efficiency is not a public use; International Tel. Mfg. Co. v. Supply Co., 171 Fed. 651, 96 C. C. A. 395; nor is the use of a computing machine in the census bureau for a week; Universal Adding Mach. Co. v. Comptograph Co., 146 Fed. 981, 77 C. C. A. 227; nor the use of a machine while being perfected, in a room from which the public and all others not engaged in its operation were excluded, improvements being made from time to time; Penn Electrical & Mfg. Co. v. Conroy, 159 Fed. 943, 87 C. C. A. 149; nor the building of a machine for a customer for experimental use by a purchaser, to be paid for if successful, and which was abandoned; Huntington Dry-Pulverizer Co. v. Mill Co., 109 Fed. 269. But the commercial use of a machine for more than four years, though its operation was unsatisfactory to the inventor, leading to frequent experiments and the addition of an element of value, is a public use; Risley v. Utica, 179 Fed. 876; and so where the discoverer of a new form of calcium carbide made a considerable quantity to demonstrate its commercial use and sent a quantity abroad without enjoining secrecy; Union Carbide Co. v. Carbide Co., 181 Fed. 104, 104 C. C. A. 522; and so of the construction and sale of a turbine wheel and its use to drive machinery, although one object was to have a practical test made; Swain v. Mach. Co., 102 Fed. 910; and of the exhibition of the subject of a design patent; Young v. Mfg. Co., 130 Fed. 150, 64 C. C. A. 502; and a single unrestricted sale of a machine; Swain v. Mach. Co., 111 Fed. 408, 49 C. C. A. 419; and the manufacture and sale, with delivery, of a machine, on order; National Cash Register Co. v. Cash Register Co., 178 Fed. 79, 101 C. C. A. 569; but not of a machine put out for trial "on sale or return," unless the trial period expired, or there was actual acceptance; W. B. Mershon & Co. v. Lumber Co., 189 Fed. 741.

The abandonment extends only to the exact invention publicly used or sold; Henry v. Soap-Stone Co., 2 Fed. 78.

Where, for eight years after rejection of an application, the applicant, without excuse, omits to reinstate it, meantime other patents issuing, he is taken to have abandoned his invention; U. S. Rifle & Cartridge Co. v. Arms Co., 118 U. S. 22, 6 Sup. Ct. 950, 30 L. Ed. 53; but a delay of 13 years in the patent office was held, under the circumstances, not to invalidate a patent; U. S. v. Telephone Co., 167 U. S. 225, 17 Sup. Ct. 809, 42 L. Ed. 144.

By act of March 3, 1897, it is provided that the failure to apply for a patent in this country for more than seven months (by act of March 3, 1903, changed to twelve months) after the inventor's application in a foreign country, bars the patent. And, by the same act, a failure to complete an application and prepare it for examination within one year after its filing, and a failure to prosecute the same within one year after action in the office, of which notice shall have been given, works an abandonment, unless the commissioner be satisfied that the delay was unavoidable.

If the application or any claim is rejected, the specification or the claim may be amended and a second examination requested. If again rejected, an appeal may be taken to the examiners-in-chief. If rejected by them, an appeal lies to the commissioner; and if rejected by him, an appeal may be taken to the court of appeals of the District of Columbia, upon notice to the commissioner, and filing the reasons of appeal in writing. Whenever a patent is refused, either by the commissioner or the supreme court, the applicant has a remedy by a bill in equity, and if the court so adjudge, he shall receive a patent.

All the proceedings before the patent office connected with the application for a patent are *ex parte*, and are kept secret, except in cases of conflicting claims, which will be referred to below.

Of the date of the patent. The patent usually takes date on the day it issues; and the final fee of twenty dollars must be paid not later than six months from the date of allowance.

The date of the application and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered; The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. Where two patents issue on the same day, the earlier numbered patent will be senior, there being no other evidence of seniority; Crown Cork & Seal Co. v. Stopper Co., 136 Fed. 841, 69 C. C. A. 200.

Of two patents to the same person the one first numbered takes precedence, except where the patentee had an application pending for the second when the first was issued, and especially when the two are the result of splitting an application, in which latter case they are to be treated as a single patent; Benjamin Electric Mfg. Co. v. Dall Co., 158 Fed. 617, 85 C. C. A. 439.

The *conception* of an invention consists in the complete performance of the mental part of the inventive act. While this in theory necessarily precedes the physical reduction to practice, it in fact also embraces whatever of thought and skill the inventor may have exercised in bringing the invention to that point where reduction to practice can begin; Rob. Pat. § 376; and the date of the conception is the date when

the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression; Rob. Pat. § 80. The true *date* of invention is at the point where the work of the inventor ceases and the work of the mechanic begins; 18 O. G. 520.

The one who first conceives the invention, and is diligent to reduce it to practice is entitled to a patent in preference to one who conceives it subsequently, although the latter may have been the first to render the invention available for public use; Rob. Pat. § 383.

Of interferences. When an application is filed which interferes with another pending application or with an unexpired patent, an investigation is ordered for the purpose of determining who was the prior inventor, and a patent is directed to be issued or not accordingly. When the controversy is between two applications a patent will be finally granted to him who is shown to be the first inventor, and will be denied to the other applicant so far as the point thus controverted is concerned. But if the interference is between an application and an actual patent, as there is no power in the patent office to cancel the existing patent, all that can be done is to grant or withhold from the applicant the patent he asks. If the patent is granted to him there will be two patents for the same thing. The two parties will stand upon a footing of equality, and must settle their rights by a resort to the courts.

The parties to an interference are required to put their claims into proper shape, each, when proper, making the claims of the other, and the question of the patentability of the device for which the application is filed is then determined by the examiner. The issues are then defined by the examiner and the parties notified. Each party is then required to file a concise written statement under oath of the date of the conception of his invention, its reduction to practice, etc. If a party to an interference fail to file such a statement, he cannot show an earlier date for his invention than the date of his application. The averments of fact in the preliminary statement are conclusive upon the party who files it. If, in an interference between two applications, the date fixed in the preliminary statement is not earlier than the date of filing the previous application, the priority is awarded to the earliest application. Testimony is taken in contested cases and the question of priority passed upon. An appeal lies to the examiners-in-chief and from them to the commissioner. Priority of inventive act consists in the prior conception of the idea of means and the prior embodiment of this idea in some practically operative art or instrument, or reasonable diligence in perfecting such embodiment, and must be established by a clear preponderance of evidence; Rob. Pat. § 600. Conception of the invention may be shown by verbal descriptions, sketches, models, etc., but these have little weight in proving a reduction to practice. The testimony cannot carry the date of conception back of the statement filed. An applicant can terminate interference proceedings by disclaiming the matter in contest, whereupon judgment goes against him on the interference. A judgment in an interference has been held to be binding only on the parties to the record, and only in respect of further proceedings on the same question in the patent office, and not on the courts on the question of novelty or priority; King v. Werner, 1 Bann. & A. 394, Fed. Cas. No. 7,809; though the courts will consider it on a motion for a preliminary injunction against the defeated party; Celluloid Mfg. Co. v. Collar & Cuff Co., 24 Fed. 275; but the supreme court has held that where the question decided in the patent office is one between contesting parties as to priority of invention, the decision there must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony, which in character and amount carries thorough conviction; Morgan v. Daniels, 153 U. S. 125, 14 Sup. Ct. 772, 38 L. Ed. 657. The opinion of the patent office on claims or earlier patents do not affect the applicant, except so far as they lead him to abandon or modify some of his claims; Palmer Pneumatic Tire Co. v. Lozier, 84 Fed. 659.

The question of interference is determined by the claims and not by the general appearance and functions of the machine shown, but not claimed; Dederick v. Fox, 56 Fed. 714. A decision in an interference determines only the question of priority of invention between the parties, and the loser may still contend that there is no interference in fact; or that the successful party is not entitled to the claims made; Westinghouse v. Hien, 159 Fed. 936, 87 C. C. A. 142, 24 L. R. A. (N. S.) 948.

An appeal lies from the Commissioner of Patents in an interference case to the court of appeals of the District of Columbia; Act of Feb. 9, 1893.

Whenever there are interfering patents, any person interested in any one of such patents may have relief against the interfering patent by suit in equity against its owners; the court may thereupon adjudge either patent void in whole or in part, etc., but such judgment shall affect none but parties to the suit and those deriving title under them subsequently to the judgment.

Of the specification. The specification is required to describe the invention in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it relates, to make, construct,

or use it. In the trial of an action for infringement, it is a question of fact for the jury whether this requirement has been complied with. See Carver v. Mfg. Co., 2 Sto. 432, Fed. Cas. No. 2,485; Davoll v. Brown, 1 W. & M. 53, Fed. Cas. No. 3,662. At the same time, the interpretation of the specification, and the ascertainment of the subject-matter of the invention from the language of the specification and claims and from the drawings are a matter of law exclusively for the court; Wood v. Underhill, 5 How. (U. S.) 1, 12 L. Ed. 23; Serrell v. Collins, 4 Blatch. 61, Fed. Cas. No. 12,671. The specification will be liberally construed by the court, in order to sustain the invention; Stone v. Sprague, 1 Sto. 270, Fed. Cas. No. 13,487; Winans v. Denmead, 15 How. (U. S.) 341, 14 L. Ed. 717; Turrill v. R. Co., 1 Wall. (U. S.) 491, 17 L. Ed. 668; but it must, nevertheless, identify with reasonable clearness and accuracy the invention claimed, and describe the manner of its construction and use so that the public from the specification alone may be enabled to practise it; and if the court cannot satisfactorily ascertain the meaning of the patent from its face, it will be void for ambiguity; Emerson v. Hogg, 2 Blatch. 1, Fed. Cas. No. 4,440; Barrett v. Hall, 1 Mas. 447, Fed. Cas. No. 1,047. It will be construed in view of the state of the art; Lawther v. Hamilton, 124 U. S. 1, 8 Sup. Ct. 342, 31 L. Ed. 325; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647. A specification in letters patent is sufficiently clear and descriptive, when expressed in terms intelligible to a person skilled in the art to which it relates; Seabury v. Am Ende, 152 U. S. 561, 14 Sup. Ct. 689, 38 L. Ed. 553.

It is required to distinguish between what is new and what is old, and not mix them together without disclosing distinctly that for which the patent is granted; Wyeth v. Stone, 1 Sto. 273, Fed. Cas. No. 18,107. If the invention consists of an improvement, the patent should be confined thereto, and should clearly distinguish the improvement from the prior device, so as to show that the former only is claimed; Barrett v. Hall, 1 Mas. 447, Fed. Cas. No. 1,047; Brooks v. Bicknell, 3 McLean, 250, Fed. Cas. No. 1,944. Ambiguous terms should be avoided; nothing material to the use of the invention should be omitted; and the necessity of trials and experiments should not be thrown upon the public.

Of the claim. The claim is the statutory requirement prescribed for the purpose of making a patentee define what the invention is. It is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, but not to an extent inconsistent with their meaning; Thomson-Houston Electric Co. v. R. Co., 71 Fed. 396, 18 C. C. A. 145, 38 U. S. App. 55. If an invention is not covered by the claim, it will not be protected by the patent; Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552. A mere reference in a claim to a letter on the drawing does not in itself limit the claim to the precise geometrical shape shown in the drawing; Delcmater v. Heath, 58 Fed. 414, 7 C. C. A. 279, 20 U. S. App. 14.

The *claim* is the measure of a patentee's right to relief; and while the specification may be referred to, to limit the claim, it can never be made available to expand it; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

Separate claims in the same patent are independent inventions, and the infringement of one is not the infringement of the others; Leeds & Catlin Co. v. Talking Mach. Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

A patent may embrace more than one invention; U. S. v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555; and it may embrace a process and the apparatus by which it is performed; Leeds & Catlin Co. v. Talking Mach. Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

The inventor need not describe all the functions to be performed by his machine if they are evident in its practical operation; McCormick Harvesting Mach. Co. v. Aultman & Co., 69 Fed. 371, 16 C. C. A. 259, 37 U. S. App. 299.

The terms of the claims are carefully scrutinized in the patent office. It defines and determines what the applicant is entitled to. The scope of the patent should be limited to the invention covered by the claim; although the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. Ed. 639. The whole patent, including specifications and drawings, is to be taken into consideration, though the court looks to them only for the purpose of placing a proper construction upon the claims; Rich v. Lippincott, 2 Fish. 10, Fed. Cas. No. 11,758. The scope of the patent is given by the claims; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 555, 6 Sup. Ct. 846, 29 L. Ed. 952; though it be less than the real invention; Waterbury Brass Co. v. Miller, 9 Blatch. 77, Fed. Cas. No. 17,254; parts which may be indispensable to the invention are not covered by the patent unless mentioned in the claims; McMillan v. Rees, 1 Fed. 722; and where a feature is inserted in the claims which is not essential, its materiality cannot be afterwards denied; Le Fever v. Remington, 13 Fed. 86. The patentee, in a suit brought on his patent, is bound by his claims; Keystone Bridge Co. v. Iron Co., 95 U. S. 274, 24 L. Ed. 344; the court will not enlarge the claims by the specification; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 Sup. Ct. 846, 29 L.

Ed. 952. Words in a claim such as "substantially as described" refer back to the descriptive parts of the specification and are implied in a claim whether inserted or not; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. Ed. 125; they relate only to the material features of the invention; Waterbury Brass Co. v. Miller, 9 Blatch. 77, Fed. Cas. No. 17,254. "Substantially as set forth" are technical words and are equivalent to saying "by the means described in the text of the inventor's application for letters patent as illustrated by the drawings, diagrams, and model which accompany the application;" Boyden A. B. Co. v. Brake Co., 70 Fed. 816, 17 C. C. A. 430, 25 U. S. App. 475.

A patentee cannot hold under his patent anything excluded therefrom by him or with his acquiescence during the stages of his application therefor; Hillborn v. Mfg. Co., 69 Fed. 958, 16 C. C. A. 569, 28 U. S. App. 525.

Where one originates a generic invention and also several specific inventions and presents the same for patent contemporaneously, he cannot enlarge each invention by use of general terms so as to obtain overlapping patents, Electrical Accumulator Co. v. Electric Co., 52 Fed. 130, 2 C. C. A. 682, 1 U. S. App. 320. An inventor is required to explain the principle of his machine and the best mode of applying the principle, so as to distinguish it from other inventions; but he is not necessarily limited to the one mode shown. A pioneer inventor is entitled to a generic claim, which will include every species within the genus, and may also insert in the same application specific claims for one or more of the species; Von Schmidt v. Bowers, 80 Fed. 121, 25 C. C. A. 323.

A claim must be interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

In the interpretation of a patent, the usual canons of interpretation apply; National Hollow B. B. Co. v. Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Century Elec. Co. v. Mfg. Co., 191 Fed. 350, 112 C. C. A. 8; the claims will be fairly construed in the light of the specifications and drawings, and so as to save the patent, if meritorious; Mossberg v. Nutter, 135 Fed. 95; Denning W. & F. Co. v. Wire Co., 169 Fed. 793, 95 C. C. A. 259; or if it has won a position of unchallenged supremacy in the commercial world; Consol. Rubber T. Co. v. Rubber Co., 151 Fed. 237, 80 C. C. A. 589; but if the invention has never been put in use the construction may be narrow; National M. C. Co. v. Coupler Co., 171 Fed. 847, 96 C. C. A. 515; if two constructions are admissible, that one will be adopted which will give the inventor the protection to which he is entitled; Malignani v. Lamp Co., 180 Fed. 442. Recourse may be had to the patent office proceedings; rejected features cannot be reasserted, nor a broad construction insisted upon, when a narrow one was adopted in the office to meet objections of the examiner; Eck v. Kutz, 132 Fed. 758. Construction cannot be aided by parol testimony; Wolff T. F. Co. v. Steel Foundries, 195 Fed. 940, 115 C. C. A. 628; but technical terms may be explained by experts; Fried, Krupp Atkien-Gesellschaft v. Steel Co., 191 Fed. 588, 112 C. C. A. 194.

The specifications must be interpreted with the claims, not to contract or expand them, but to ascertain the intent; Century Electric Co. v. Mfg. Co., 191 Fed. 350, 112 C. C. A. 8. Reference may be had to the rejected claims; Williams Patent C. & P. Co. v. Crusher Co., 185 Fed. 805, 108 C. C. A. 37; and to the drawings; Steiner & Voegtly H. Co. v. Sash Co., 178 Fed. 831; and construction must be with reference to the state of the prior art; Williams Patent C. & P. Co. v. Crusher Co., 185 Fed. 805, 108 C. C. A. 37; definitions and admissions made in the office to avoid the state of the art are binding on the patentee; New York Asbestos Mfg. Co. v. Air-Cell Covering Co., 103 Fed. 316, affirmed in 112 Fed. 1022, 50 C. C. A. 669.

A claim for a function is bad; Matthews v. Shoneberger, 4 Fed. 635; though it will, if possible, be construed as a claim for means of performing the function; Royer v. Belting Co., 28 Fed. 850; thus a claim for doing an act is treated as a claim for the means of doing it; Fuller v. Yentzer, 94 U. S. 288, 24 L. Ed. 103.

While the law does not limit the number of claims, their multiplication is disapproved; Bostock v. Goodrich, 21 Fed. 316.

A *drawing* must be filed whenever the nature of the invention permits; 16 O. G. 809; a *model* is not required until called for by the patent office.

Of re-issues. It often happens that errors, defects, and mistakes occur in the specification of a patent, by which it is rendered wholly or partially inoperative, or perhaps invalid. Sec. 53 of the act of 1870 provides that when such errors or defects are the result of inadvertence, accident, or mistake, without any fraudulent or deceptive intention, the patent may be surrendered by the patentee, his executors, administrators, or assigns, and a new patent issued in proper shape to secure the real invention intended to have been patented originally. Rob. Pat. § 658. The identity between the invention described in the re-issue and that in the original patent is a question of fact for the jury; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. Ed. 650. A patentee cannot secure in a re-issue claims covering what has been previously rejected upon his original application; Corbin C. L. Co. v. Lock Co., 150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989.

A re-issued patent has the same effect and operation in law, on the trial of all actions *for causes subsequently arising*, as though the patent had been originally issued in such corrected form. From this it appears that after a re-issue no action can be brought for a past infringement of the patent. But, as the bare use of a patented machine is (if unauthorized) an infringement of the rights of the patentee, a machine constructed and lawfully used prior to the re-issue may be an infringement of the patent if used afterwards. The re-issued patent will expire when the original patent would have expired.

All matters of fact relating to a re-issue are finally settled by the decision of the commissioner, granting the re-issue; but it may be shown that the commissioner has exceeded his authority in granting a re-issue for an invention different from the one embraced in the original patent; Seymour v. Osborne, 11 Wall. (U. S.)) 516, 20 L. Ed. 33. Where a re-issue is sought on the ground of inadvertent errors, rendering the patent inoperative, the decision of the commissioner upon the questions of fact relating to inoperativeness and inadvertence will not be re-examined by the courts; Beach v. Hobbs, 82 Fed. 910.

In a suit brought under R. S. § 4915, to obtain a re-issue refused by the patent office, the right of the complainant is to be determined on all the competent evidence, and not merely on the patent office record; Ingersoll v. Holt, 104 Fed. 682.

Where the only mistake suggested is that the claim is not so broad as it might have been, the mistake was apparent on the first inspection of the patent, and any correction desired should have been applied for immediately; the right to a correction may be lost by unreasonable delay. The claim of a specific device, and the omission to claim other devices apparent on the face of the patent, are in law a dedication to the public of that which was not claimed, and the legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was so framed by real inadvertence, accident, or mistake, and this should be done with due diligence and before adverse rights have accrued. It was not the special purpose of the legislation to authorize re-issues with broader claims, though such a re-issue may be made when it clearly appears that there has been a *bona fide* mistake, such as chancery in cases within its ordinary jurisdiction would correct. The specifications cannot be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed; Pattee Plow Co. v. Kingman, 129 U. S. 294, 9 Sup. Ct. 259, 32 L. Ed. 700. The re-issue is an amendment and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident, or mistake; Dobson v. Lees, 137 U. S. 258, 11 Sup. Ct. 71, 34 L. Ed. 652. The re-issued patent is not a new patent; and an existing contract concerning the patent before its surrender applies equally to it after the surrender and re-issue; McBurney v. Goodyear, 11 Cush. (Mass.) 569.

A re-issue can cover only what an examination of the original shows the original was intended to embrace; Flower v. Detroit, 127 U. S. 563, 8 Sup. Ct. 1291, 32 L. Ed. 175; and not that which the original did not describe or claim; Dunham v. Mfg. Co., 40 Fed. 667; though shown in the drawing; Marvel Buckle Co. v. Mfg. Co., 180 Fed. 1002, affirmed in 196 Fed. 1006, 115 C. C. A. 672. It can enlarge a claim by omitting an element previously claimed as essential; Matthews v. Mfg. Co., 124 U. S. 347, 8 Sup. Ct. 639, 31 L. Ed. 477. A re-issued claim may be broader; Weber v. Mfg. Co., 190 Fed. 189. Claims cannot be enlarged so as to cover matter already in public use after unreasonable delay; Flower v. Detroit, 127 U. S. 563, 8 Sup. Ct. 1291, 32 L. Ed. 175. If not for the same invention, the re-issue is void; Freeman v. Asmus, 145 U. S. 226, 12 Sup. Ct. 939, 36 L. Ed. 685.

A claim restricted by the patent office in the first re-issue cannot be enlarged by subsequent re-issues; Yale Lock Mfg. Co. v. James, 125 U. S. 447, 8 Sup. Ct. 967, 31 L. Ed. 807. A re-issue which brings in a claim originally rejected by the patent office with the acquiescence of the applicant, is void; Yale Lock Mfg. Co. v. Bank, 135 U. S. 342, 10 Sup. Ct. 884, 34 L. Ed. 168; but a re-issue may correct errors occasioned by the mistaken ideas raised in the patent office; Hutchinson v. Everett, 33 Fed. 502. Both the specification and the claims may be corrected by a re-issue; Hailes v. Stove Co., 16 Fed. 240.

Laches in applying for a re-issue is fatal to the re-issue and may be taken advantage of by a demurrer; Philadelphia Novelty Mfg. Co. v. Rouss, 39 Fed. 273. What is reasonable delay is a question for the court and the decision of the patent office on that point is not conclusive; Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. The plaintiff must explain the delay in applying for a re-issue; Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. The inadvertence must be in reference to the application and not to the invention. See a review of the cases in Parker & W. Co. v. Clock Co., 123 U. S. 89, 8 Sup. Ct. 38, 31 L. Ed. 100. A delay of three years is held to invalidate a re-issue; Mast, Foos & Co. v. Pump Co., 76 Fed. 816, 22 C. C. A. 586; so of more than five years, unexcused; United Blue-Flame O. S. Co. v. Glazier, 119 Fed. 157, 55 C. C. A. 553; but not of seven and a half months; A. D. Howe Mach. Co. v. Motor Washer Co., 197 Fed. 541, 117 C. C. A.

37; nor a year; Trethaway v. W. B. Bertels & Son Co., 180 Fed. 730, 104 C. C. A. 96; but where a patent, dated in 1882, was held void in 1894 and a re-issue was granted five months later, it was held valid; Maitland v. Mfg. Co., 86 Fed. 124, 29 C. C. A. 607; and a delay of twelve years, where the patent has been acquiesced in for ten years by the trade; Steiner & V. Hardware Co. v. Sash Co., 178 Fed. 831; but where a patent had been declared void, the patentee cannot continue to litigate on it for years and then apply for a re-issue; Thomson-Houston Electric Co. v. Electric Co., 158 Fed. 813, 86 C. C. A. 73; where, on an application for a re-issue, the primary examiner rejects certain claims, and the applicant abandons his application, the claims disallowed are not invalidated; McCormick H. M. Co. v. Aultman Co., 169 U. S. 606, 18 Sup. Ct. 443, 42 L. Ed. 875.

No action lies on the original patent after its surrender for re-issue; Burrell v. Hackley, 35 Fed. 833. A patentee, imposing words of limitation upon himself in his claim in taking out a re-issue, is bound thereby in subsequent suits on the re-issued patent; Crawford v. Heysinger, 123 U. S. 589, 8 Sup. Ct. 399, 31 L. Ed. 269.

A patent cannot be re-issued to enlarge a claim unless there has been a clear mistake in the wording of the claim, and an application is made within a reasonably short period after the original patent was granted; Parker & Whipple Co. v. Clock Co., 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100; Huber v. Mfg. Co., 148 U. S. 270, 13 Sup. Ct. 603, 37 L. Ed. 447.

A re-issue of a patent for an invention, after the expiration of foreign patents for the same invention is invalid; Commercial Mfg. Co. v. Canning Co., 135 U. S. 176, 10 Sup. Ct. 718, 34 L. Ed. 88.

Of patents for designs. The act of 1870 (amended May 2, 1902) permits any person to obtain a patent for a design, which shall continue in force for three and a half, seven, or fourteen years, at the option of the applicant. These patents are granted wherever the applicant has invented any new ornamental and original design for an article of manufacture, not known or used by others in this country before his invention thereof, or patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years before his application, and not in public use or on sale in this country for more than two years prior to his application, unless abandoned; Rowe v. Clapp Co., 112 Fed. 61, 50 C. C. A. 120.

A design is created by the imposition upon a physical substance of some peculiar shape or ornamentation which produces a particular impression upon the human eye, and through the eye, upon the mind. Its creation involves a change in the substance itself and not merely in the mode of presenting it for sale; and affects, not its abstract qualities, nor those on which its practical utility depends, but those only which determine its appearance to the sight; Rob. Pat. § 200; it must have esthetic value; Eaton v. Lewis, 115 Fed. 635, affirmed in 127 Fed. 1018, 61 C. C. A. 562; it is not enough that it identifies the article as a trade mark; Rowe v. Clapp Co., 112 Fed. 61, 50 C. C. A. 120.

The acts of congress were plainly intended to give encouragement to the decorative arts; they contemplate not so much utility as appearance; Gorham Co. v. White, 14 Wall. (U. S.) 511, 20 L. Ed. 731. A design is patentable though not more beautiful than former ones; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939. Design patents require as high a degree or exercise of the inventive or originative faculty as utility patents; Western Elec. Mfg. Co. v. Odell, 18 Fed. 321. Where scrollwork is used there must be something peculiar to sustain a patent; Soehner v. Range Co., 84 Fed. 182, 28 C. C. A. 317.

A design patent cannot be enlarged in its scope from the specifications; Frank v. Hess, 84 Fed. 170.

The general method of making the application is the same as has been hereinbefore described, and the patent issues in a similar form.

The use of a design or colorable imitation thereof on any article of manufacture or the sale of any article to which the same shall have been applied, knowing that it has been so applied, renders the party liable to pay $250 or the profits in excess of that amount, and this may be recovered at law or in equity.

Of disclaimers. R. S. § 4922 provides that the plaintiff in a suit for infringement may *disclaim* so much of his patent as is in excess of his real invention and thus recover damages for the injury he has really sustained. Sec. 4917 provides for the filing in the patent office of a disclaimer of either a separate claim or some distinct and separate matter which can be excinded without mutilating or changing what is left. These two sections are part of one law having one general purpose and both relate to a case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent intention, has included in his claim and in his patent, inventions to which he is not entitled, and which are clearly distinguishable from those to which he is entitled. The purpose of § 4917 is to authorize him to file a disclaimer to the part to which he is not entitled and of § 4922 is to legalize the suit on the patent mentioned in the section, and to the extent to which the patentee can rightfully claim the patented invention; Hailes v. Stove Co., 123 U. S. 582, 8 Sup. Ct. 262, 31 L. Ed. 284.

Delay in a disclaimer under § 4917 goes

only to the question of costs; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609.

No person can avail himself of the benefits of this provision who has unreasonably neglected or delayed to enter his disclaimer.

A disclaimer by one owner will not affect the interest of any other owner.

A disclaimer cannot be used to change the character of the invention; Collins Co. v. Coes, 130 U. S. 56, 9 Sup. Ct. 514, 32 L. Ed. 858.

A disclaimer of an unnecessary or inadvertent statement in the specification may be entered in an infringement suit, when, if retained, they might illegally broaden the claim; Carnegie Steel Co. v. Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; or to limit the patent to the actual invention; Simplex Ry. Appliance Co. v. Car Co., 189 Fed. 70, 110 C. C. A. 634, affirmed in Pressed Steel Car Co. v. Appliance Co., 223 U. S. 721, 32 Sup. Ct. 523, 56 L. Ed. 630. Where some claims are held invalid, a disclaimer must be filed thereto before obtaining an injunction as to sustained claims; F. D. Cummer & Son Co. v. Dryer Co., 193 Fed. 993, 113 C. C. A. 611.

After an action in equity for the infringement of letters patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court upon such terms as it thinks fit to impose; Roemer v. Bernheim, 132 U. S. 103, 10 Sup. Ct. 12, 33 L. Ed. 277.

Of the extension of a patent. See EXTENSION OF PATENTS.

Of the *repeal* of letters patent. The United States may sue in equity for the repeal of a patent obtained by fraud; U. S. v. Telephone Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; the power rests with the courts alone; Mica Insulator Co. v. Mica Co., 166 Fed. 440, 92 C. C. A. 292; a bill in equity to repeal two patents for the same subject-matter and to the same party is not multifarious; U. S. v. Telephone Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450.

R. S. § 4918 provides that any person interested in one or more interfering patents may bring his bill in equity against the owner of the adverse patent, upon which the court may declare either of the patents void in whole or part, or inoperative, or invalid in any particular part of the United States. The judgment rendered affects only the parties or those taking under them.

Suits may be maintained by the government in its own courts to set aside one of its own patents, not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are merely to enforce the rights of an individual. In a suit between individuals to set aside an instrument for a fraud, the testimony must be clear, unequivocal, and convincing and more than a bare preponderance of evidence is required. This is much more so when the government attempts to set aside its solemn patent; U. S. v. Telephone Co., 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144.

Of the assignment of patents. Every patent or an interest therein is assignable in law, by an instrument in writing; such assignments, etc., are void as against any purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the patent office within three months. But an unrecorded assignment is valid as against a subsequent party who has had actual notice; Pitts v. Whitman, 2 Sto. 609, Fed. Cas. No. 11,196.

The right may be successively assigned without limit; Selden v. Gas Burner Co., 9 Fed. 390. Any person may take under an assignment, a married woman, an infant, etc.; Fetter v. Newhall, 17 Fed. 841. An invention may be assigned before it is perfected; Hammond v. Organ Co., 92 U. S. 724, 23 L. Ed. 767; but an agreement for the future assignment of a patent not yet granted is not a recordable instrument; New York P. B. Mach. Co. v. Mach. Co., 32 Fed. 783. A deed conveying "all the inventor's property and estate whatsoever" carries rights in unpatented inventions; Philadelphia W. & B. R. Co. v. Trimble, 10 Wall. (U. S.) 367, 19 L. Ed. 948.

Patents are creatures of the statute and an assignment is sufficient if it conforms to R. S. § 4898. It must be by a written instrument duly recorded; Ball v. Coker, 168 Fed. 304; but an assignment passes title against an infringer, though not recorded; Delaware S. T. Co. v. Tube Co., 160 Fed. 928, 88 C. C. A. 110; it need not be under seal; U. S. L. & H. Co. v. Electric Co., 189 Fed. 382, modified in 194 Fed. 866, 114 C. C. A. 612; nor acknowledged, when the genuineness of the assignor's signature is proved; Clancy v. Supply Co., 157 Fed. 554, 85 C. C. A. 314.

A certified copy of a patent office record of an assignment is not prima facie proof of the execution or genuineness thereof, nor is it made competent evidence by R. S. § 4898, as amended March 3, 1897; American Graphophone Co. v. Leeds Co., 140 Fed. 981; Eastern Dynamite Co. v. Mfg. Co., 164 Fed. 47, per Archibald, J.; *contra*, American Bank Protection Co. v. Bank, 181 Fed. 377, per Sanborn, J.; National Folding B. & P. Co. v. Box Co., 55 Fed. 488; Standard Elevator Co. v. Elevator Co., 76 Fed. 767, 22 C. C. A. 549.

An assignment is the transfer of the entire interest in a patented invention or of an undivided portion of such entire interest as to every section of the United States; Rob. Pat.

§ 762; it differs from grant in relation to the territorial area to which they relate. A grant is the transfer of the exclusive right in a specific part of the United States. It is an exclusive sectional right. A license is a transfer of a less or different interest than either the interest in a whole patent or an undivided part of such whole interest or an exclusive sectional interest; Potter v. Holland, 4 Blatch. 206, Fed. Cas. No. 11,329. See Littlefield v. Perry, 21 Wall. (U. S.) 205, 22 L. Ed. 577. Any transfer of an interest in a patented invention, which cannot operate as an assignment or grant, is a license; Rob. Pat. § 806.

A license is distinguished from an assignment and a grant in that the latter transfers the monopoly as well as the invention, while a license transfers only the invention and does not affect the monopoly otherwise than by estopping the licensor from exercising his prohibitory powers in derogation of the privileges conferred by him upon the licensee; Rob. Pat. § 806. See Pope Mfg. Co. v. Mfg. Co., 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423. A license is said to be merely the right not to be sued; Hawks v. Swett, 4 Hun (N. Y.) 146. It may be by parol; Gates I. Works v. Fraser, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734. The right of a patent owner to license the use of his patent is not a creature of statute, but of the common law; U. S. v. Telephone Co., 29 Fed. 17.

No particular form is required for an assignment; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; to comply with the act it must be in writing; Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851. It may be made either before or after the patent issues; Cammeyer v. Newton, 94 U. S. 225, 24 L. Ed. 72.

A grant of the exclusive right to make, use, and sell a patented article throughout the United States for the full term of the patent, is an assignment; Rapp v. Kelling, 41 Fed. 792; where the intention of a writing is to transfer all rights under the patent, it is an assignment; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790.

One owning a patent with several claims cannot assign a single claim so as to pass the legal title; such a transfer is a mere license; Pope Mfg. Co. v. Mfg. Co., 144 U. S. 238, 12 Sup. Ct. 637, 36 L. Ed. 420. A joint owner may give a license; Pusey & J. Co. v. Miller, 61 Fed. 401.

A *licensee* cannot dispute the validity of the patent; National Rubber Co. v. Rubber-Shoe Co., 41 Fed. 48; but where a license does not recite the validity of the patent, a licensee who abandons the patent may set up the defence of invalidity in an action for royalties alleged to be payable by him after his repudiation; Mudgett v. Thomas, 55 Fed. 645; and a licensee is not estopped to question the validity of a patent in vindication of acts done after his license expired; H. Tibbe & Son Mfg. Co. v. Heineken, 37 Fed. 686. A patentee cannot question the validity of his own patent as against his assignee; Burdsall v. Curran, 31 Fed. 918; Woodward v. Mach. Co., 60 Fed. 283, 8 C. C. A. 622.

An oral agreement for the sale and assignment of the right to obtain a patent, is not within the statute of frauds, nor within R. S. § 4898, requiring assignments of patents to be in writing, and may be specifically enforced in equity, upon sufficient proof thereof; Dalzell v. Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

The right to damages for past infringements does not pass by assignment; New York G. S. Co. v. G. Sugar Co., 18 Fed. 638; May v. Juneau County, 30 Fed. 241; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; but see May v. Board, 30 Fed. 250; May v. Saginaw County, 32 Fed. 629; Siebert Cylinder Oil-Cup Co. v. Beggs, 32 Fed. 790; Emerson v. Hubbard, 34 Fed. 327; unless such right is expressly included.

Acts *in pais* will sometimes justify the presumption of a license; McClurg v. Kingsland, 1 How. (U. S.) 202, 11 L. Ed. 102. As to a verbal license, see Bell v. McCullough, 1 Bond 194, Fed. Cas. No. 1,256. A license to use an invention implied from circumstances is not transferable; Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369; and a licensee cannot divide the territory in which he is licensed among third parties although the license is to him and his assigns; Brush Elec. Co. v. Elec. Light Co., 52 Fed. 945, 3 C. C. A. 368. A verbal assignment of an interest in a patent has no force against a subsequent assignee under a written transfer, without notice; Gates I. Works v. Fraser, 153 U. S. 332, 14 Sup. Ct. 883, 38 L. Ed. 734; but it has been held that a license to use a patent, not exclusive of others, need not be recorded and may be by parol; and a subsequent assignee of the patent takes title subject to such license, of which he must inform himself as best he may; but the verbal license will be strictly construed, and must show the consideration and alleged payment of royalties; Jones v. Berger, 58 Fed. 1006.

An assignment may be made prior to the granting of a patent. And when duly made and recorded, the patent may be issued to the assignee. This, however, only applies to cases of assignments proper, as contradistinguished from grants or licenses. The application must, however, in such cases be made and the specification sworn to by the inventor. See Rathbone v. Orr, 5 McLean 131, Fed. Cas. No. 11,585; Gay v. Cornell, 1 Blatch. 506, Fed. Cas. No. 5,280. The assignment transfers the right to the assignee, although the patent should be afterwards issued to the assignor; Gayler v. Wilder, 10 How. (U. S.) 477, 13 L. Ed. 504. The as-

signee of the entire right in a patent has the exclusive right to sue either at law or in equity for its subsequent infringement; Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923; and may sue in his own name, and so may the assignee of the entire interest for some particular territory; Suydam v. Day, 2 Blatch. 20, Fed. Cas. No. 13,654; but see Ingalls v. Tice, 14 Fed. 297.

A license to use includes the right to make for use; Illingworth v. Spaulding, 43 Fed. 827.

The title to a patent passes to the assignee in bankruptcy of the patentee, subject to the assignee's election not to accept it if in his opinion it is worthless or would prove to be burdensome and unprofitable; and he is entitled to a reasonable time to elect whether he will accept it or not; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. Upon the death of the owner of a patent, intestate, it passes to his administrator; Bradley v. Dull, 19 Fed. 913; who can sue thereon in another state without taking out ancilliary letters of administration therein; Hodge v. R. Co., 1 Dill. 104, Fed. Cas. No. 6,561.

Licenses containing express stipulations for their forfeiture are not *ipso facto* forfeited upon condition broken, but remain operative and pleadable until rescinded by a court of equity; Rob. Pat. § 822; White v. Lee, 3 Fed. 222. The question of forfeiture depends upon the ordinary principles of equity; therefore a court will not rescind a license for non-payment of money at the time fixed therein, if payment has been subsequently tendered or justice can be done by a judgment for the amount already due; Rob. Pat. § 822; White v. Lee, 5 Bann. & A. 572, 3 Fed. 222. A refusal to pay royalties coupled with an abandonment of the license and a defence on other grounds, are sufficient for annulment; Bell v. McCullough, 1 Fish. 380, Fed. Cas. No. 1,256. If the contract contain no power of revocation, the licensor can only proceed at law for any breach; Chase v. Cox, 41 Fed. 475; Densmore v. Tanite Co., 32 Fed. 544.

Of joint inventors. The patent must in all cases issue to the inventor, if alive and if he has not assigned his interest. And if the invention is made jointly by two inventors, the patent must issue to them both. This is equally the case where one makes a portion of the invention at one time and another at another time.

It is not necessary that exactly the same idea should have occurred to each at the same time. If an idea is suggested to one and he even goes so far as to construct a machine embodying this invention, but it is not a completed working machine and another person takes hold of it and by their joint labor a perfect machine is made, a joint patent may be properly issued to them. But if each person invented a distinct part of a machine, each should obtain a patent for his invention; Worden v. Fisher, 11 Fed. 505.

A joint patent is invalid as to a feature previously invented by one of the patentees, which is not a necessary part of the device jointly invented; Heulings v. Reid, 58 Fed. 868.

Of executors and administrators. Where an inventor dies before obtaining a patent, his executor or administrator may apply for and obtain such patent, holding it in trust for the heirs at law or devisees, accordingly as the inventor died intestate or testate. Nothing is said as to its being appropriated to the payment of debts; but, having once gone into the hands of the executors or administrators, it would perhaps become assets, and be used like other personal property.

The right to make a surrender and receive a re-issue of a patent also vests by law in the executor or administrator.

The liability of a patent to be levied upon for debt. The better opinion is that letters patent cannot be levied upon and sold by a common-law execution. The grant of privilege to the patentee would, from its incorporeal nature, seem to be incapable of manual seizure and of sale. Even if such a sale were made, there does not appear to be any provision in the acts of congress which contemplates the recording of a sheriff's deed; and without a valid record, the patentee might nevertheless make a subsequent transfer to a *bona fide* purchaser without notice, which would be valid.

But this peculiar species of property may be subjected to the payment of debts through the instrumentality of a bill in equity. The chancellor can act upon the person. He can direct the patent to be sold, and by attachment can compel the patentee to execute a conveyance to the purchaser; see Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, where it was further held that the court might compel the holder of the patent to assign it, or appoint a trustee for that purpose; or a receiver; In re Keach, 14 R. I. 571, but not if no income is being received; 25 T. L. R. 815. The right of a patentee will pass to his assignees in bankruptcy; 3 B. & P. 777; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; but not to a trustee in insolvency in Massachusetts; Ashcroft v. Walworth, 1 Holmes 152, Fed. Cas. No. 580. The legal title to a patent does not pass to a receiver of an insolvent owner; but the receiver may maintain a bill to compel the owner to transfer it to him; McCulloh v. Association Horlogere Suisse, 45 Fed. 479.

How far a patent is retroactive. Section 37 of the act of 1870, following substantially the act of 1837, provides "that every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly-invented or

discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others, to be used, the specific thing so made or purchased, without liability therefor."

On the question of anticipation by a prior device, the patentee's invention will be considered as relating back to his original conception; Dixon v. Moyer, 4 Wash. C. C. 68, Fed. Cas. No. 3,931; Treadwell v. Bladen, 4 Wash. C. C. 703, Fed. Cas. No. 14,154.

Marking patented articles. Sec. 38 of the act of 1870 declares that in all cases where an article is made or vended by any person under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label containing a like notice; on failure of which, in any suit for the infringement of letters patent by the party failing so to mark, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice, to make, use, or vend the article patented. The burden of proof is on the plaintiff, in a suit for infringement, to allege and prove actual or constructive notice of the patent; Coupe v. Royer, 155 U. S. 584, 15 Sup. Ct. 199, 39 L. Ed. 263.

U. S. R. S. § 4901, imposes a penalty for marking an unpatented article "patented," or with any word importing that it is patented, for the purpose of deceiving the public; there is not a distinct offense for each article marked, but for the offense; London v. Dunbar Corp., 179 Fed. 506, 103 C. C. A. 130.

Defences. In any action for infringement the defendant may plead the general issue and having given thirty days notice previous to trial, may prove: 1. That for the purpose of deceiving the public the description and specification was made to contain less than the whole truth relative to the invention or more than is necessary to produce the desired effect; 2. That the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; 3. That it has been patented or described in some printed publication prior to his supposed invention thereof *or more than two years prior to the application;* 4. That the patentee was not the original and first inventor of any material and substantial part of the thing patented; 5. That it had been in public use or on sale in this country more than two years before the application or had been abandoned to the public. R. S. § 4920, as amended. The italicized portions above were inserted in § 4920 by the act of March 3, 1897, and do not apply to patents previously granted.

Special notice of such defences must be given at law or must be set up in the answer in equity; notice of previous invention, knowledge, or use must state the names of the patentees and when granted and the names and residences of the persons alleged to have invented or to have had a prior knowledge of the thing patented and where and by whom it had been used.

Numerous other defences can be set up at law or in equity, such as the want of invention, novelty, or utility; absence of title in the plaintiff; non-infringement; estoppel; title in the defendant; a release, etc. See Rob. Pat. All of these, and also the above statutory defences, can be proved at law under a general issue plea; those not statutory do not require notice of special matter, unless under special practice in the particular court. The statute of limitations must be pleaded specially.

Prior use must be proved beyond reasonable doubt; Stegner v. Blake, 36 Fed. 183; it must antedate the patentee's invention and not merely his application; Von Schmidt v. Bowers, 80 Fed. 121, 25 C. C. A. 323.

A prior use of a device, in order to defeat a patent, must be something which was identical with the patented invention; Ellithorp v. Robertson, 4 Blatch. 307, Fed. Cas. No. 4,408. It is not enough to show older devices having part of the elements in one machine, part in a second, and part in a third, and then say that the patented device is anticipated; Kelly v. Porter, 17 Fed. 520. A prior use of all the elements of a device does not anticipate their combination; Kelleher v. Darling, 4 Cliff. 424, Fed. Cas. No. 7,653; a prior invention must have been complete and operative; Stephenson v. R. Co., 14 Fed. 457. A mere written description or drawing does not constitute a prior use; Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. 293; nor does the construction of a model; Union Paper-Bag Mach. Co. v. Pultz & Walkley Co., 16 Blatch. 76, Fed. Cas. No. 14,393. But there may be circumstances under which a complete model will suffice; Stephenson v. R. Co., 14 Fed. 457, 19 Blatch. 473; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. Ed. 821. A patent, though a mere paper one, may constitute anticipation if it discloses the principle of a subsequent invention; Universal Winding Co. v. Linen Co., 82 Fed. 228.

If the prior use was the embryotic or inchoate it is not enough. If the device was a machine, it must have been clothed in a substantial form, sufficient to demonstrate at

once its practical efficacy and utility; Coffin v. Ogden, 18 Wall. (U. S.) 120, 21 L. Ed. 821.

Trade magazines, copyrighted, and found in public and scientific libraries are "publications"; Truman v. Mfg. Co., 87 Fed. 470.

Abandoned experiments do not constitute a prior use; The Corn-Planter Patent, 23 Wall. (U. S.) 181, 23 L. Ed. 161; Hoyt v. Slocum, 26 Fed. 329. But throwing aside an invention does not necessarily show that it was an unsuccessful experiment; Brush v. Condit, 20 Fed. 826. It has been said that where an invention once in use has become a lost art, one who has reinvented it may obtain a patent therefor; Webst. Pat. 720.

Evidence as to the state of the art before the date of the conception of the invention is always admissible to show what was then known, to distinguish the new features from the old and to enable the court to perceive the precise limits of the inventive act; Rob. Pat. § 1020. No previous notice of this evidence is necessary; Shepley v. Cowan, 91 U. S. 337, 23 L. Ed. 424.

If letters patent be manifestly invalid upon their face, the question of their validity may be raised on demurrer; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; but only in an unusual case; Patent Button Co. v. Fastener Co., 84 Fed. 189; or where the lack of invention is so palpable that evidence could not show it otherwise; Gaines v. Coal & Iron Co., 173 Fed. 303; or when the court, on inspection, is convinced that the patent cannot be sustained; Kuhn v. Check Co., 165 Fed. 445, 91 C. C. A. 389.

The doctrine of laches has been said to apply to a case where a patentee has slept on his rights for sixteen years while infringement was open and notorious; Richardson v. Osborne & Co., 82 Fed. 96; but on the other hand it is held that mere delay will not bar a right unless it act as an estoppel; Sawyer Spindle Co. v. Taylor, 69 Fed. 838.

The failure of a patentee for some years to manufacture his device does not defeat his right to his patented invention; Masseth v. Johnston, 59 Fed. 613; Continental P. B. Co. v. Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Utility is said to be absence of frivolity and mischievousness, and utility for some beneficial purpose; Rob. Pat. § 339; and the degree of utility is not material; Gibbs v. Hoefner, 19 Fed. 323. But there is no utility if the invention can be used only to commit a fraud with; Klein v. Russell, 19 Wall. (U. S.) 433, 22 L. Ed. 116; or for some immoral purpose; Lowell v. Lewis, 1 Mas. 182, Fed. Cas. No. 8,568; or can be used only for gambling purposes in saloons; Schultze v. Holtz, 82 Fed. 448; or if the invention is dangerous in its use; Mitchell v. Tilghman, 19 Wall. (U. S.) 287, 22 L. Ed. 125. It is no defence to a suit for infringing a patent that the owner has entered into a conspiracy in restraint of trade; Motion Picture Patents Co. v. Ullman, 186 Fed. 174; Strait v. Harrow Co., 51 Fed. 819.

Of infringements. The criterion of infringement is substantial identity of construction and operation. Mere changes of form, proportion, or position, or substitution of mechanical equivalents, will still be infringements, unless they involve a substantial difference of construction, operation, or effect; O'Reilly v. Morse, 1 How. (U. S.) 62, 14 L. Ed. 601; Foster v. Moore, 1 Curt. 279, Fed. Cas. No. 4,978. As a general rule, whenever the defendant has incorporated in his structure the substance of what the plaintiff has invented and properly claimed, he is responsible to the latter; Burr v. Duryee, 1 Wall. (U. S.) 531, 17 L. Ed. 650.

Where the patent is for a new combination of machines to produce certain effects, it is no infringement to use any of the machines separately, if the whole combination is not used; Silsby v. Foote, 14 How. (U. S.) 219, 14 L. Ed. 394; Vance v. Campbell, 1 Black (U. S.) 427, 17 L. Ed. 168; Eames v. Godfrey, 1 Wall. (U. S.) 78, 17 L. Ed. 547. But it is an infringement to use one of several improvements claimed, or to use a substantial part of the invention, although with some modification or even improvement of form or apparatus; Wyeth v. Stone, 1 Sto. 273, Fed. Cas. No. 18,107. Where the patent describes and claims a machine, it cannot be construed to be for a process or function, so as to make all other machines infringements which perform the same function; and no infringement will in such case take place where the practical manner of giving effect to the principle is by a different mechanical structure and mechanical action; Corning v. Burden, 15 How. (U. S.) 252, 14 L. Ed. 683. If the patentee is the inventor of a device, he may treat as infringers all who make a similar device operating on the same principle and performing the same functions by analogous means or equivalent combinations, although the infringing machine may be an improvement of the original and patentable as such. But if the invention claimed is itself but an improvement on a known machine, by a mere change of form or combination of parts, it will not be an infringement to improve the original machine by the use of a different form or combination of parts performing the same functions. The doctrine of equivalents does not in such case apply, unless the subsequent improvements are mere colorable invasions of the first; McCormick v. Talcott, 20 How. (U. S.) 405, 15 L. Ed. 930. A pioneer in the art of making a practical device, who has invented a principle which has gone into almost universal use in this country, is entitled to a liberal construction of his claim;

and another device containing all the elements of his combination should be held an infringement, though there are superficial dissimilarities in their construction; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. A pioneer patent means one covering a function never before performed; a wholly novel device marking a distinct step in the progress of the art; Westinghouse v. Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. The new application of a patented device to another use, which does not involve the exercise of the inventive faculty, is an infringement as much as though the new machine were an exact copy of the old; Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294. The mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defence to a charge of infringement; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307.

A sale of the thing patented to an agent of the patentee, employed by him to make the purchase on account of the patentee, is not *per se* an infringement, although, accompanied by other circumstances, it may be evidence of infringement; Byam v. Farr, 1 Curt. 260, Fed. Cas. No. 2,264.

An infringer is not an outlaw. He can, if convinced that the patent is invalid or that he does not infringe, use the machine, subject to a risk of injunction and accounting. If patent be newly issued and generally infringed, his act should not be viewed in the same light as if the patent had been adjudicated and a license fee established; Diamond S. S. Mach. Co. v. Brown, 166 Fed. 306, 92 C. C. A. 224.

The making of a patented machine for philosophical experiment only, and not for use or sale, has been held to be no infringement; Whittemore v. Cutter, 1 Gall. 429, Fed. Cas. No. 17,600; Sawin v. Guild, 1 Gall. 485, Fed. Cas. No. 12,391; but a use with a view to an experiment to test its value is an infringement; Watson v. Bladen, 4 Wash. C. C. 580, Fed. Cas. No. 17,277. The sale of the articles produced by a patented machine or process is not an infringement; Boyd v. Brown, 3 McLean 295, Fed. Cas. No. 1,747; Simpson v. Wilson, 4 How. (U. S.) 709, 11 L. Ed. 1169; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235; nor is the *bona fide* purchase of patented articles from an infringing manufacturer; Keplinger v. De Young, 10 Wheat. (U. S.) 359, 6 L. Ed. 341; nor a sale of materials by a sheriff; Sawin v. Guild, 1 Gall. 485; 1 Robb 47, Fed. Cas. No. 12,391. Ignorance by the infringer of the existence of the patent infringed is no defence, but may mitigate damages; Hogg v. Emerson, 11 How. (U. S.) 587, 13 L. Ed. 824. Infringing articles made during the life of the patent cannot be sold afterwards; Underwood Typewriter Co. v. Elliott-Fisher Co., 156 Fed. 588. See INFRINGEMENT.

The purchaser of a car load of beds covered by a patent from the owner of the territorial rights of Michigan, for the express purpose of selling them in Massachusetts, had the right to sell them anywhere within the United States, even within the territory already assigned to another person; Keeler v. Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848 (Brown J., dissenting); Hobbie v. Jennison, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766; but one cannot buy a patented article in a foreign country from a person authorized to sell it there and then sell it in the United States; Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139.

Unpatented elements of a patented combination may not be sold for use therewith, though they might be for use with other machines; Leeds & Catlin Co. v. Talking Mach. Co., 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816; it was held that supplying repair parts, not separately patented, is not an infringement; National Malleable Casting Co. v. Steel Foundries, 182 Fed. 626.

The owners of letters patent can sue the United States in the court of claims for infringement of his patent. This does not apply to employés of the United States government or officers of the army or navy (Act of June 25, 1910). Officers or agents of the United States, though acting under its orders, are personally liable for infringement; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599.

The United States has no right to use a patented invention without a license from the patentee or making compensation to him. No suit can be maintained, or injunction granted, against the United States, unless expressly permitted by act of congress. Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent. Upon a suit in equity by the patentee of an improvement in caisson gates against officers of the United States, using in their official capacity a caisson gate made and used by the United States, in infringement of his patent, the plaintiff is not entitled to an injunction. Nor can he recover profits, if the only profit proved is a saving to the United States in the cost of the gate; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599.

Of damages for infringement. Damages may be recovered in any district court of the United States, in the name of the party interested either as patentee, assignee, or grantee, and in case of a verdict for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of

such verdict, together with costs. A court of equity may award damages for infringement and increase the same in a similar manner. R. S. § 4921, as amended March 3, 1897, provides that upon a decree in equity for infringement the complainant shall be entitled to recover, in addition to profits, the damages he has sustained, which shall be assessed by the court, and the court has the same power to increase the damages as is given to the court to increase the damages found by verdict, even though the infringer made no profit; Marsh v. Seymour, 97 U. S. 348, 24 L. Ed. 963. At law a plaintiff is entitled to recover what he has lost although it exceed defendant's profits; in equity only the profits the defendant has actually made; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599.

The actual damage is all that can be allowed by a jury, as contradistinguished from exemplary, vindictive, or punitive damages. The amount of defendant's profits from the unlawful user is, in general, the measure of the plaintiff's damages; and this may be determined by the plaintiff's price for a license; Hogg v. Emerson, 11 How. (U. S.) 607, 13 L. Ed. 824; but no interest is allowed on the profits until their amount is judicially ascertained; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664. The rule of damages is different where a patent is only for an improvement on a machine and where it is for an entire machine; Seymour v. McCormick, 16 How. (U. S.) 480, 14 L. Ed. 1024. If there be a mere making and no user proved, the damages should be nominal; Whittemore v. Cutter, 1 Gall. 478, Fed. Cas. No. 17,601; and where there is in the evidence no basis for a computation of the damages, only nominal damages can be given; Cornely v. Marckwald, 131 U. S. 159, 9 Sup. Ct. 744, 33 L. Ed. 117. Where a royalty was proved on a device covering two claims and one only was sustained, only nominal damages were allowed; Proctor v. Brill, 4 Fed. 415; but it has been held that in an action at law, if there is no established royalty, the jury may consider what would be a reasonable royalty; and, in so doing, may consider the utility and advantage of the invention, and take into account defendant's profits; Cassidy v. Hunt, 75 Fed. 1012.

The advantage which defendants derived from using the patented device over what he could have derived by using any other known device constitutes the profits, if it can be reasonably ascertained; Fullerton Walnut Growers' Ass'n v. Mfg. Co., 166 Fed. 443, 92 C. C. A. 295; if, but for the use of the patented device, the defendant's device would not have been salable, the infringer is liable for the entire profits; Wales v. Mfg. Co., 101 Fed. 126, 41 C. C. A. 250; the profits recovery in equity may, in a proper case, exceed defendant's profits; Westinghouse v. Air Brake Co., 140 Fed. 545, 72 C. C. A. 61.

In equity, a plaintiff, though he has an established license fee, is not limited to the amount thereof as damages; but may instead of damages recover the profits the defendants have made; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664.

The plaintiff may recover in equity as profits the advantages which the defendants have gained by using the invention, and a definite saving shown to have been made in the cost of manufacture; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664. The expense of using the new process is to be ascertained from the manner in which the defendants have used it and not in the manner in which they might have used it; *id.*

A plaintiff cannot recover a defendant's entire profits unless the whole market value of defendant's article is shown to be due to the invention; Fay v. Allen, 30 Fed. 446, 24 Blatch. 275. But if the entire salability of the article is the result of the introduction of the patented feature, the plaintiff is entitled to all the profits made; McDonald v. Whitney, 39 Fed. 466; Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011. Where the invention apparently gave the device its value, the defendant must show the extent to which his own improvements were the cause of the profits which he had made; Morss v. Form Co., 39 Fed. 468. The profits are what the defendant made or saved; Vulcanite Pav. Co. v. Pavement Co., 36 Fed. 378. Nominal damages only are allowed where it is not shown what definite profits were due to the invention; Roemer v. Simon, 41 Fed. 41, 24 Blatch. 396; Everest v. Oil Co., 41 Fed. 742, 24 Blatch. 463; Fischer v. Hayes, 39 Fed. 613; or where plaintiff shows no established license fee, no market price, and no other use of the invention than by the defendant; Seattle v. McNamara, 81 Fed. 863, 26 C. C. A. 652.

Where the owner of a patent has a fixed license fee, this is the measure of damages for an infringement; May v. Fond Du Lac Co., 27 Fed. 691; this must be the license fee existing at the date of infringement; Hoe v. Kahler, 25 Fed. 274; one established afterwards may be considered, though it is not conclusive; Wooster v. Thornton, 26 Fed. 274; it is immaterial whether in such case the use of the invention has been profitable to the defendant. A single instance is not sufficient to establish a license fee; Graham v. Mfg. Co., 35 Fed. 597; but two instances may be; Cary v. Mfg. Co., 37 Fed. 654; it is not enough to show foreign license fees; Black v. Munson, 14 Blatchf. 265, Fed. Cas. No. 1,463. And a license fee must be shown

by actual payment and not merely by promises to pay; Adams v. Stamping Co., 28 Fed. 360; nor by amount paid in settlement of a claim; Keyes v. Refining Co., 43 Fed. 478.

In the absence of an established license fee, damages must be shown by general evidence; Suffolk Co. v. Hayden, 3 Wall. (U. S.) 315, 18 L. Ed. 76; and there is a difference between infringement by sale and those by use. The measure of recovery in a suit in equity for infringement of patent is the gains and profits made by the infringer and such further damage as the proof shows that the complainant sustained in addition; but in an action at law the damages are measured only by the extent of the plaintiff's loss, as proved by the evidence, and when the evidence discloses the existence of no license fee, no impairment of the plaintiff's market, no damages of any kind, only nominal damages can be recovered; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263.

Where the defendant's acts compelled the plaintiff to reduce his price, such loss is an item of damage; Mack v. Levy, 43 Fed. 72.

It is said that any attempt to classify the reported cases on damages would be futile; Rob. Pat. § 1061.

The *statute of limitation* is six years prior to the filing of the bill of complaint or the issuing of a writ at law; Act of March 3, 1897 (in effect January 1, 1898).

It is the *province of the court* to define the patented invention, as indicated by the language of the claims; and of the jury to determine whether, as so defined, it covers the defendant's article; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263.

If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. What he accomplishes becomes the property of the employer. So when one is in the employ of another in a certain line of work and devises an improved instrument for that work and uses the property of his employer and the services of other employés to develop and put in practical form his invention, a jury or court is warranted in finding that the benefits resulting from his use of the property and the assistance of the coemployés of his employer have given to such employer an irrevocable license to use the invention; Gill v. U. S., 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480. But a railroad company is not entitled to the use of an invention of its master mechanic, when none of the company's material or labor entered into the perfecting of the invention or was devoted to its construction until after the patent had issued; Ft. Wayne, C. & L. R. Co. v. Haberkorn, 15 Ind. App. 479, 44 N. E. 322; and in Pressed Steel Car Co. v. Hansen, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; it was held that, in the absence of an express contract, the relation of employer and employé, under whatever circumstances, at least short of specific employment to make an invention, does not give the employer a right to the invention, or anything more than a shop-right or an irrevocable license to use it.

The fact that the patentee, when he made the invention, was general manager of a corporation, does not give the corporation any right in the patent; Johnson F. & E. Co. v. Furnace Co., 178 Fed. 819, 102 C. C. A. 267; where the patentee was president, it does not create an implied license to use the device of the patent; American S. Co. v. Stoker Co., 182 Fed. 642.

But where it was part of patentee's duty to improve the machinery, and the entire cost of the experiments, the building of an operative machine, and taking out patents was paid by the employer, who also built and installed machines in its factory under the patentee's directions, there was held to be an implied license to use these machines; Wilson v. Loom Co., 187 Fed. 840, 109 C. C. A. 600.

Patents can be granted to United States officers, except those in the patent office, without any fee, when the invention is used or to be used in the public service, but the patentee must file a stipulation, which must be inserted in the patent, that the invention may be used by the government and its officers in public work or by any other person in the United States; Act of March 3, 1883.

In patent cases, costs will not be awarded to complainant, where some of the claims sued on are withdrawn at the argument, and others are adjudged not infringed, although the decree sustains still other claims; Thomson-Houston Elec. Co. v. R. Co., 71 Fed. 886.

Jurisdiction of cases under the patent laws. The Judicial Code gives original jurisdiction to district courts of the United States in all cases arising under the laws of the United States granting exclusive privileges to inventors. This jurisdiction extends both to law and equity, and is irrespective of the citizenship of the parties or the amount in controversy. The jurisdiction of the federal courts is exclusive of that of the state courts; Elmer v. Pennel, 40 Me. 430. But this is to be understood of cases arising directly under the acts of congress, and not of those where the patent comes collaterally in question: as, for instance, where it is the subject-matter of a contract or the consideration of a promissory note; Nesmith v. Calvert, 1 W. & M. 34, Fed. Cas. No. 10,123; Rich v. Atwater, 16 Conn. 409. Hence a bill to enforce the specific performance of a contract for the sale of a patent-right is not such a case arising under the patent laws as gives jurisdiction to the federal courts; Marsh v. Nichols, S. & Co., 140

U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413. A contract relating to a patent does not necessarily involve a federal question; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683; Felix v. Scharnweber, 125 U. S. 54, 8 Sup. Ct. 759, 31 L. Ed. 687; Marsh v. Nichols, S. & Co., 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413. For the requirements of a bill on a patent, see McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000, 30 L. Ed. 1017. If a bill is filed so near the expiration of a patent that, under the rules, there could be no injunction, it will be dismissed; but if one could be obtained, though only three days before the expiration, the court may retain jurisdiction and proceed, with or without an injunction; Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392.

The expiration of a patent pending a suit for infringement does not defeat the jurisdiction of a court of equity, although it is a reason for denying an injunction which was the basis of equity jurisdiction; Beedle v. Bennett, 122 U. S. 71. A bill is not maintainable when filed only a few days before the patent expired; McDonald v. Miller, 84 Fed. 344.

Patent-right, note given for a. In many of the states, acts have been passed making void all notes given in consideration of a patent-right unless the words "given for a patent-right" are prominently written on the face of the note.

They usually provide that the maker shall have a defense against any holder. Such an act in Arkansas was held valid; Woods v. Carl, 203 U. S. 358, 27 Sup. Ct. 99, 51 L. Ed. 219; as a police regulation; Ozan Lumber Co. v. Bank, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195. Also in Tod v. Wick, 36 Ohio St. 370; Pape v. Wright, 116 Ind. 502, 19 N. E. 459; Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198; *contra*, Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Crittenden v. White, 23 Minn. 24, 23 Am. Rep. 676. See many cases cited in 1 Dan. Neg. Instr. § 200. A state may provide that before the sale of a patent right, an authenticated copy of the letters patent and the authority of the vendor to sell shall first be filed in the clerk's office of the county; Allen v. Riley, 203 U. S. 347, 27 Sup. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137.

On the *expiration* of patents on the "Singer" sewing-machine, under which name it came to indicate a type of machine made by that company, the right to make the patented article and use the generic name passed to the public, but one using the name in selling such type of machines may be compelled to indicate that the articles made by him are his product and not the product of the owners of the extinct patent; Singer Mfg. Co. v. Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. See TRADE-MARK.

See CAVEAT; DEVICE; EXPERT; EXTENSION OF PATENTS; INFRINGEMENT; LIBEL; RESTRAINT OF TRADE.

PATENT AMBIGUITY. An ambiguity which appears upon the face of an instrument. It is a settled rule that extrinsic evidence is not admissible to explain such an ambiguity. The general rule on the subject is thus stated in 2 Eng. Rul. Cas. 707: "Where a legal relation is sought to be established by means of a written instrument, if an uncertainty of intention appear by the expression of the instrument itself, the true intention cannot be ascertained by the aid of extrinsic evidence. For, as said by Lord Bacon (Maxims, Reg. 23), '*ambiguitas patens* cannot be holpen by averment.'" 5 Bing. N. C. 425. See AMBIGUITY; LATENT AMBIGUITY.

PATENT OFFICE. See PATENT.

PATENT OFFICE, EXAMINERS IN. Officials in the United States patent office, whose chief duty it is to determine whether the subject-matter of applications for letters patent is such as to entitle the applicant to the grant of such letters. See PATENT OFFICE.

PATENT RIGHT. See PATENT.

PATENT ROLLS. Registers in England in which are recorded all letters patent granted since 1516. 2 Sharsw. Bla. Com. 346; Whart. L. Lex.

PATENT WRIT. A writ not closed or sealed up. Co. Litt. 289; 7 Co. 20.

PATENTEE. He to whom a patent has been granted. The term is usually applied to one who has obtained letters patent for an invention. See PATENT.

PATER (Lat.). Father. The term is frequently used in genealogical tables.

PATER-FAMILIAS (Lat.). **In Civil Law.** One who was *sui juris*, and not subject to the paternal power.

In order to give a correct idea of what was understood in the Roman law by this term, it is proper to refer briefly to the artificial organization of the Roman family,—the greatest moral phenomenon in the history of the human race. The comprehensive term *familia* embraced both persons and property; money, lands, houses, slaves, children, all constituted part of this artificial family, this juridical entity, this legal patrimony, the title to which was exclusively vested in the chief or *pater-familias*, who alone was *capax dominii*, and who belonged to himself, was *sui juris*.

The word *pater-familias* is by no means equivalent to the modern expression father of a family, but means proprietor in the strongest sense of that term; it is he *qui in domo dominium habet*, in whom were centred all property, all power, all authority: he was, in a word, the lord and master, whose authority was unlimited. No one but he who was *sui juris*, who was *pater-familias*, was capable of exercising any right of property, or wielding any superiority or power over anything; for nothing could belong to him who was himself *alieni juris*. Hence the children of the *filii familias*, as well as those of slaves, belonged to the *pater-familias*. In the same manner, everything that was acquired by the sons or slaves formed a part

of the *familia*, and, consequently, belonged to its chief. This absolute property and power of the *pater-familias*, only ceased with his life, unless he voluntarily parted with them by a sale; for the alienation by sale is invariably the symbol resorted to for the purpose of dissolving the stern dominion of the *pater-familias* over those belonging to the *familia*. Thus, both emancipation and adoption are the results of imaginary sales,—*per imaginarias venditiones*. As the daughter remained in the family of her father, grandfather, or great-grandfather, as the case might be, notwithstanding her marriage, it followed as a necessary consequence that the child never belonged to the same family as its mother: there is no civil relationship between them; they are natural relations,—*cognati*,—but they are not legally related to each other,—*agnati;* and therefore the child never inherits from its mother, nor the mother from her child. There was, however, a means by which the wife might enter into the family and subject herself to the power of her husband, *in manu mariti*, and thereby establish a legal relationship between herself and her husband. This marital power of the husband over the wife was generally acquired either *coemptione*, by the purchase of the wife by the husband from the *pater-familias*, or *usu*, by the prescription based on the possession of one year,—the same by which the title to movable property was acquired according to the principles governing the *usucapio* (*usu capere*, to obtain by use). Another mode of obtaining the same end was the *confarreatio*, a sacred ceremony performed by the breaking and eating of a small cake, *farreum*, by the married couple. It was supposed that by an observance of this ceremony the marital power was produced by the intervention of the gods. This solemn mode of celebrating marriages was peculiar to the patrician families. By means of these fictions and ceremonies the wife became in the eye of the law the daughter of her husband, and the sister of the children to whom she gave birth, who would otherwise have been strangers to her. Well might Gaius say, *Fere nulli sunt homines qui talem in liberos habeant potestatem qualem nos habemus.*

There is some similarity between the *agnatio*, or civil relationship, of the Romans, and the transmission of the name of the father, under the modern law, to all his descendants in the male line. The Roman law says of the children, *patris, non matris, familiam sequuntur;* we say, *patris, non matris, nomen sequuntur.* All the members of the family who, with us, bear the same name, were under that law *agnates*, or constituted the *agnatio*, or civil family. Those children only belonged to the family, and were subject to the paternal power, who had been conceived in *justis nuptiis*, or been adopted. *Nuptiæ*, or *matrimonium*, was a marriage celebrated in conformity with the peculiar rules of the civil law. There existed a second kind of marriage, call *concubinatus*,—a valid union and a real marriage,—which has been often improperly confounded, even by high authority, with concubinage. This confusion of ideas is attributable to a superficial examination of the subject; for the illicit intercourse between a man and a woman which we call concubinage was stigmatized by the opprobrious term *stuprum* by the Romans, and is spoken of in the strongest terms of reprobation. The *concubinatus* was the natural marriage, and the only one which those who did not enjoy the *jus connubii* were permitted to contract. The Roman law recognized two species of marriage, the one civil, and the other natural, in the same manner as there were two kinds of relationship, the *agnatio* and *cognatio*. The *justæ nuptiæ* or *justum matrimonium*, or civil marriage, could only be contracted by Roman citizens and by those to whom the *jus connubii* had been conceded: this kind of marriage alone produced the paternal power, the right of inheritance, etc.

But the rapid rise and extraordinary greatness of the city attracted immense crowds of strangers, who, not possessing the *jus connubii*, could form no other union than that of the *concubinatus*, which, though authorized by law, did not give rise to those legal effects which flowed from the *justæ nuptiæ*. By adoption, the person adopted was transferred from one family to another; he passed from the paternal power of one *pater-familias* to that of another: consequently, no one who was *sui juris* could be adopted in the strict sense of that word. But there was another species of adoption, called *adrogatio*, by which a person *sui juris* entered into another family, and subjected himself to the paternal power of its chief. The effect of the adrogation was not confined to the person adrogated alone, but extended over his family and property. 1 Marcade 75.

This extraordinary organization of the Roman family, and the unlimited powers and authority vested in the *pater-familias*, continued until the reign of Justinian, who by his 118th Novel, enacted on the 9th of August, 544, abolished the distinction between the *agnatio* and *cognatio*, and established the order of inheritance which, with some modifications, continues to exist at the present day in all countries whose jurisprudence is based on the civil law. See Maine, Anc. L. Ch. 5; GENS; PATRIA POTESTAS; PECULIUM.

PATERNA PATERNIS (Lat. the father's to the father's). **In French Law.** An expression used to signify that, in a succession, the property coming from the father of the deceased descends to his paternal relations.

PATERNAL. That which belongs to the father or comes from him: as paternal power, paternal relation, paternal estate, paternal line. See LINE.

PATERNAL POWER. The authority lawfully exercised by parents over their children. See FATHER; PATRIA POTESTAS.

PATERNAL PROPERTY. That which descends or comes from the father and other ascendants or collaterals of the paternal stock. Domat, Liv. Prél. tit. 3, s. 2, n. 11.

PATERNITY. The state or condition of a father.

The husband is *prima facie* presumed to be the father of his wife's children born during coverture or within a competent time afterwards: *pater is est quem nuptiæ demonstrant;* Tate v. Penne, 7 Mart. N. S. (La.) 553. So if the child is *en ventre sa mere* at time of marriage; Co. Litt. 123; 8 East 192. In civil law the presumption holds in case of a child born before marriage as well as after; 1 Bla. Com. 446, 454; Fleta, lib. 1, c. 6. In cases of marriage of a widow within ten months after decease of husband, the paternity is to be decided by circumstances; Hargrave, note to Co. Litt. § 188. Marriage within ten months after decease of husband was forbidden by Roman, Danish, and Saxon law, and English law before the Conquest; 1 Beck, Med. Jur. 481; Brooke, Abr. *Bastardy*, pl. 18; Palm. 10; 1 Bla. Com. 456. See ANNUS LUCTUS.

The presumption of paternity may always be rebutted by showing circumstances which render it impossible that the husband can be the father; Com. v. Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; 2 Myl. & K. 349; Cross

v. Cross, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; 1 S. & S. 150.

The declarations of one or both of the spouses, however, cannot affect the condition of a child born during the marriage; Tate v. Penne, 7 Mart. N. S. (La.) 553; Cross v. Cross, 3 Paige, Ch. (N. Y.) 139, 23 Am. Dec. 778. See ACCESS; BASTARD; BASTARDY; LEGITIMACY; PREGNANCY; PARENT AND CHILD.

PATHOLOGY. In Medical Jurisprudence. The science or doctrine of diseases. In cases of homicides, abortions, and the like, it is of great consequence to the legal practitioner to be acquainted in some degree with pathology. 2 Chitty, Pr. 42, n.

PATIBULUM. A gallows or gibbet. Fleta, l. 2, c. 3, § 9.

PATRIA (Lat.). The country; the men of the neighborhood competent to serve on a jury; a jury. This word is nearly synonymous with *pais*, which see.

PATRIA POTESTAS (Lat.). **In Civil Law.** The paternal power; the authority which the law vests in the father over the persons and property of his legitimate children.

In the early period of the Roman history, the paternal authority was unlimited: the father had the absolute control over his children, and might even, as the domestic magistrate of his family, condemn them to death. They could acquire nothing except for the benefit of the *pater-familias;* and they were even liable to be sold and reduced to slavery by the author of their existence. But in the progress of civilization this stern rule was gradually relaxed.

There are several instances given in which the emperors interfered to moderate the severity of fathers, and the power to kill the child was restricted and finally abolished during the empire. The father could originally abandon his male child to relieve himself of responsibility for it, but this was forbidden by the institutes. Inst. 4, 8, 7. Over the property of the child the rights of the father were as absolute as over that of the slave; but this power was also moderated under the emperors until in the time of Justinian it was practically destroyed. The power of the *pater-familias* extended to all descendants in the male line, and it was not lost even over those who held the highest offices in the state or became victorious generals.

The children of a daughter were not subject to the paternal authority of her own father but entered into the family of her husband. The paternal power was never exercised by a woman, even if she were herself *sui juris*. It is for this reason, Ulpian observes, that the family of which a woman, *sui juris*, was the head, *mater-familias*, commenced and ended with her: *mulier autem familiæ suæ et caput et finis est.* 1 Ortolan 191.

See PATER-FAMILIAS; PECULIUM

The modern civil law has hardly preserved any features of the old Roman jurisprudence concerning the paternal power.

The Louisiana code provides that a child owes honor, respect, and obedience to the parents, but even the power of correction ceases with the age of puberty, and boys at fourteen and girls at twelve years of age may leave the paternal roof in opposition to the will of their parents. By modern law the paternal authority is vested in both parents, but usually exercised by the father alone. During the marriage the parents are entitled to the property of their minor children, subject to the obligation of support and education, paying taxes, repairs, etc. The paternal power ceases with the death of one spouse and is succeeded by tutorship, which, however, usually devolves upon the surviving parent, who can also at death appoint a testamentary tutor.

PATRICIDE. One guilty of killing his father. See PARRICIDE.

PATRIMONIAL. A thing which comes from the father, and, by extension, from the mother or other ancestor.

PATRIMONIUM. In Civil Law. That which is capable of being inherited.

Things capable of being possessed by a single person exclusively of all others are, in the Roman or civil law, said to be *in patrimonio;* when incapable of being so possessed, they are *extra patrimonium.*

Most things may be inherited; but there are some which are said to be *extra patrimonium,* or which are not in commerce. These are such as are *common,* as the light of heaven, the air, the sea, and the like; things *public,* as rivers, harbors, roads, creeks, ports, arms of the sea, the sea-shore, highways, bridges, and the like; things *which belong to cities and municipal corporations,* as public squares, streets, market-houses, and the like. See 1 Bouvier, Inst. n. 421.

PATRIMONY. Any kind of property. Such estate as has descended in the same family; estates which have descended or been devised in a direct line from the father, and, by extension, from the mother or other ancestor. It has been held that the word is not necessarily restricted to property inherited directly from the father. 5 Ir. Ch. Rep. 525.

PATRINUS (Lat.). A godfather.

PATRON. In Ecclesiastical Law. He who has the disposition and gift of an ecclesiastical benefice.

In Roman Law. The former master of a freedman. Dig. 2. 4. 8. 1.

PATRONAGE. The right of appointing to office; as, the patronage of the President of the United States, if abused, may endanger the liberties of the people.

In Ecclesiastical Law. The right of presentation to a church or ecclesiastical benefice. 2 Bla. Com. 21.

PATRONIZE. To act as patron towards. The occupants of a house cannot be said to patronize it; Raymond v. People, 9 Ill. App. 344. See More v. Bennett, 48 N. Y. 472.

PATRONUS (Lat.). **In Roman Law.** A modification of the Latin word *pater*, father. A denomination applied by Romulus to the first senators of Rome, and which they always afterwards bore.

It is said that Romulus at first appointed a hundred of them. Seven years afterward, in consequence of the association of Tatius to the Romans, a hundred more were appointed, chosen from the Sabines. Tarquinius Priscus increased the number to three hundred. Those appointed by Romulus and Tatius were called *patres majorum gentium,* and the others were called *patres minorum gentium.* These and their descendants constituted the nobility of Rome. The rest of the people were called plebeians, every one of whom was obliged to choose one of these fathers as his *patron.* The relation thus constituted involved important consequences.

The plebeian, who was called *cliens* (a client)

was obliged to furnish the means of maintenance to his chosen patron, to furnish a portion for his patron's daughters, to ransom him and his sons if captured by an enemy, and pay all sums recovered against him by judgment of the courts. The patron, on the other hand, was obliged to watch over the interests of his client, whether present or absent, to protect his person and property, and especially to defend him in all actions brought against him for any cause. Neither could accuse or bear testimony against the other, or give contrary votes, etc. The contract was of a sacred nature; the violation of it was a sort of treason, and punishable as such. According to Cicero (De Repub. ii. 9), this relation formed an integral part of the governmental system, *Et habuit plebem in clientelas principum descriptum,* which he affirms was eminently useful. Blackstone traces the system of vassalage to this ancient relation of patron and client. It was, in fact, of the same nature as the feudal institutions of the middle ages, designed to maintain order in a rising state by a combination of the opposing interests of the aristocracy and of the common people, upon the principle of reciprocal bonds for mutual interests. Ultimately, by force of radical changes in the institution, the word *patronus* came to signify nothing more than an advocate.

PATROON. **In New York.** The lord of a manor. A proprietor of a tract of land with manorial privileges granted under the Dutch government of New York and New Jersey. Cent. Dict.

PATRUELIS (Lat.). **In Civil Law.** A cousin-german by the father's side; the son or daughter of a father's brother. Dig. 38. 10. 1.

PATRUUS (Lat.). **In Civil Law.** An uncle by the father's side; a father's brother. Dig. 38. 10. 10. *Patruus magnus* is a grandfather's brother, grand-uncle. *Patruus major* is a great-grandfather's brother. *Patruus maximus* is a great-grandfather's father's brother.

PAUPER (Lat. poor). One so poor that he must be supported at the public expense.

A laboring man, who has always been able to make a living, and who, until his last sickness, has never had occasion to ask or receive charity, is not a pauper, although without money or property with which to pay the expense of that sickness; Lander Co. v. Humboldt Co., 21 Nev. 415, 32 Pac. 849. See 16 Viner, Abr. 259; Woodf. Landl. & T. 201.

Before a person can be admitted to sue or defend as a pauper, proof must be given that he is not worth £25, his wearing apparel and the subject-matter of the cause or matter only excepted. He is exempt from court fees. Counsel may be assigned to him, and no fees can be taken from him. Brett, Comm. 681. See POOR; IN FORMA PAUPERIS.

PAUPERIES (Lat.). **In Civil Law.** Poverty. In a technical sense, *Damnum absque injuria: i. e.* a damage done without wrong on the part of the doer: *e. g.* damage done by an irrational being, as an animal. L. 1, § 3, D. *si quod paup. fec.;* Calvinus, Lex.

PAVE. To cover with stone, brick, concrete, or any other substantial matter, making a smooth and level surface. In re Phillips, 60 N. Y. 22.

To lay or cover with stone, brick, or other material, so as to make a firm, level, or convenient surface for horses, carriages, or persons on foot to travel on. It means as well to cover with asphalt or concrete, as to lay or cover with stone; Morse v. West Port, 110 Mo. 502, 19 S. W. 831.

The laying of a cross walk comes within the general designation of paving; In re Petition of Burke, 62 N. Y. 224; paving includes flagging, as well as other modes of making a smooth surface for streets and sidewalks; In re Petition of Burmeister, 76 N. Y. 181; Schenectady v. Union College, 66 Hun 179, 21 N. Y. Supp. 147. A footway made up with gravel, but not paved with stone or flags is a pavement; 15 Q. B. D. 652; 54 L. J. M. C. 147. To pave a street has been held not to include curbing and sidewalks; McAllister v. Tacoma, 9 Wash. 272, 37 Pac. 447, 658.

PAVIAGE. A contribution or tax for paving streets or highways.

PAWN. A pledge. A pledge includes, in Louisiana, a *pawn* and an *antichresis;* but sometimes pawn is used as the general word, including pledge and antichresis. La. Civ. Code, art. 3101; Hennen, Dig. *Pledge.* See PLEDGE.

PAWNBROKER. One whose business it is to lend money, usually in small sums, upon pawn or pledge. An ordinance requiring pawnbrokers to keep a book in which shall be entered a description of all property left in pawn, with the name and description of the pledgor and to submit such book to the inspection of the mayor or any police officer on demand, is a valid police regulation; St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577; Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625. And one forbidding them to purchase certain specified articles is not unreasonable as imposing upon pawnbrokers a penalty for doing that which is lawful for other persons to do, as a city may not only regulate their business, but suppress and prohibit it; Kuhn v. Chicago, 30 Ill. App. 203.

An ordinance requiring pawnbrokers to take out a license is not authorized by a statute empowering city councils to make by-laws and ordinances not inconsistent with the laws of the state and necessary to carry out the object of the corporation; Shuman v. Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378. See Schaul v. Charlotte, 118 N. C. 733, 24 S. E. 526; LICENSE; ORDINANCE; POLICE POWER.

PAWNEE. He who receives a pawn or pledge. See PLEDGE.

PAWNOR. One who, being liable to an engagement, gives to the person to whom he is liable a thing to be held as a security for

the payment of his debt or the fulfilment of his liability. 2 Kent 577. See PLEDGE.

PAX REGIS (Lat.). That peace or security for life and goods which the king promises to all persons under his protection. Bract. lib. 3, c. 11. See PEACE.

In ancient times there were certain limits which were known by this name. The *pax regis*, or verge of the court, as it was afterwards called, extended from the palace-gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barleycorns; Crabb, C. L. 41; or from the four sides of the king's residence, four miles, three furlongs, nine acres in breadth, nine feet, nine barleycorns, etc.; LL. Edw. Conf. c. 12; LL. Hen. I.

PAY. To discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged. Beals v. Ins. Co., 36 N. Y. 527. See Tolman v. Ins. Co., 1 Cush. (Mass.) 76.

PAY. A fixed and definite amount given by law to persons in military service in consideration of and as compensation for their personal services. Sherburne v. U. S., 16 Ct. Cl. 496. See LONGEVITY PAY.

Payable in trade. Payable in such article as the promisor deals in. Dudley v. Vose, 114 Mass. 34.

PAYEE. The person in whose favor a bill of exchange is made payable. See BILLS OF EXCHANGE.

PAYMENT. The fulfilment of a promise, or the performance of an agreement.

The discharge in money of a sum due.

It implies the existence of a debt, of a party to whom it is owed, and of a satisfaction of the debt to that party; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677.

The word payment is not a technical term: it has been imported into legal proceedings from the exchange, and not from law treatises. When payment is pleaded as a defense, the defendant must prove the payment of money, or something accepted in its stead, made to the plaintiff or to some person authorized in his behalf to receive it; 2 Greenl. Ev. 509.

Payment, in its most general acceptation, is the accomplishment of every obligation, whether it consists in giving or in doing: *solutio est præstatio ejus quod in obligatione est.*

It follows, therefore, that every act which, while it extinguishes the obligation, has also for its object the release of the debtor and his exemption from liability, is not payment. Payment is doing precisely what the payer has agreed to do. *Solvere dicitur cum aliquis fecit quod facere promisit.*

However, practically, the name of payment is often given to methods of release which are not accompanied by the performance of the thing promised. *Restrinximus solutiones ad compensationem, ad novationem, ad delegationem, et ad numerationem.*

In a more restricted sense, payment is the discharge in money of a sum due. *Numeratio est nummariæ solutio.* 5 Massé, *Droit commerciel* 229.

That a payment may extinguish a debt, it must be made by a person who has a right to make it, to a person who is entitled to receive it, in something proper to be received both as to kind and quality, and at the appointed place and time.

In the civil law, it is said, where payment is something to be done, it must be done by the debtor himself. If I hire a mechanic to build a steam-engine for me, he cannot against my will substitute in his stead another workman. Where it is something to be given, the general rule is that it can be paid by any one, whether a co-obligor, or surety, or even a third person who has no interest; except that in this last case subrogation will prevent the extinction of the debt as to the debtor, unless the payer at the time of payment act in the name of the debtor, or in his own name to release the debtor. See SUBROGATION.

What constitutes payment. According to Comyns, payment by merchants must be made in money or by bill; Com. Dig. *Merchant* (F).

Payment must be made in money, unless the obligation is, by the terms of the instrument creating it, to be discharged by other means. Congress has, by the constitution, power to decide what shall be a legal tender; that is, in what form the creditor may demand his payment or must receive it if offered; and congress has determined this by statutes. The same power is exercised by the government of all civilized countries. See LEGAL TENDER.

In England, Bank of England notes are legal tender. But the creditors may waive this right, and anything which he has accepted as satisfaction for the debt will be considered as payment. What the parties agree shall constitute payment, the law will adjudge to be payment; Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24.

The character of the money current at the time fixed for performance of, and not at the time of making, a contract, is the medium in which payment may be made; San Juan v. Gas Co., 195 U. S. 510, 25 Sup. Ct. 108, 49 L. Ed. 299, 1 Ann. Cas. 796. Although a coin is worn and cracked, yet if it still retains evidence of being genuine, it is not deprived of its legal tender quality, and is valid for payment of a street car fare; Cincinnati Northern T. Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, 35 L. R. A. (N. S.) 1030, Ann. Cas. 1912C, 639.

A debt contracted in a foreign country is payable in the currency of that country, and therefore, where the creditor sues in the United States, he is entitled to recover such sum in the money of the United States as equals the debt in the foreign country where it was payable; Grunwald v. Freese, 4 Cal. Unrep. 182, 34 Pac. 73. Where rent is payable in coin, its value is to be estimated at the market price of the coin at the time and place of payment; Gilbreath v. Dilday, 152 Ill. 207, 38 N. E. 572. See GOLD.

Upon a plea of payment, the defendant may prove a discharge in bank-notes, negotiable notes of individuals, or a debt already due from the payee, delivered and accepted or discounted as payment; Phil. Ev. Cowen & H. ed. n. 387. Bank-notes, in conformity to usage and common understanding, are regarded as cash; 1 Burr. 452; Keith v. Jones, 9 Johns. (N. Y.) 120; Foley v. Mason, 6 Md. 37; unless objected to; Wheeler v.

Knaggs, 8 Ohio 169; 2 Cr. & J. 16, n.; Seawell v. Henry, 6 Ala. 226. Treasury notes are not cash; Foquet v. Hoadley, 3 Conn. 534. Giving a check is not considered as payment; the holder may treat it as a nullity if he derives no benefit from it, provided he has not been guilty of negligence so as to cause injury to the drawer; 4 Ad. & E. 952; People v. Howell, 4 Johns. (N. Y.) 296; Barnet v. Smith, 30 N. H. 256, 64 Am. Dec. 290; Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20 Pac. 28. See National Park Bank v. Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475; Good v. Singleton, 39 Minn. 340, 40 N. W. 359; Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227; Barton v. Hunter, 59 Mo. App. 610. But see Downey v. Hicks, 14 How. (U. S.) 240, 14 L. Ed. 404. Giving a check is a conditional payment, and the debt is discharged only when the check is paid, unless it was agreed that the check should be received in satisfaction of the debt; Greenwich Ins. Co. v. Imp. Co., 76 Hun 194, 27 N. Y. Supp. 794.

Payment in forged bills is generally a nullity, both in England and this country; Bank of U. S. v. Bank of Georgia, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; Markle v. Hatfield, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446; Keene v. Thompson, 4 Gill & J. (Md.) 463; Simms v. Clark, 11 Ill. 137; Ramsdale v. Horton, 3 Pa. 330; Eagle Bank v Smith, 5 Conn. 71, 13 Am. Dec. 37. So also of counterfeit coin; but an agreement to sell goods and accept specific money is good, and payment in these coins is valid even though they be counterfeit; 1 Term 225; Curcier v. Pennock, 14 S. & R. (Pa.) 51. The forged notes must be returned in a reasonable time, to throw the loss upon the debtor, Pindall's Ex'rs v. Bank, 7 Leigh (Va.) 617; Simms v. Clark, 11 Ill. 137. Payment to a bank in its own notes which are received and afterwards discovered to be forged is a good payment; 2 Parsons, Contr. *622, n. A forged check received as cash and passed to the credit of the customer is good payment; Levy v. Bank, 4 Dall. (U. S.) 234, 1 L. Ed. 814; Bank of St. Albans v. Bank, 10 Vt. 141, 33 Am. Dec. 188. Payment in bills of an insolvent bank, where both parties were innocent, has been held no payment; 7 Term 64; Ontario Bank v. Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; Pool v. Hathaway, 22 Me. 85. On the other hand, it has been held good payment in Bayard v. Shunk, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; Young v. Adams, 6 Mass. 185; Scruggs v. Gass, 8 Yerg. (Tenn.) 175, 29 Am. Dec. 114. See Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. The point is still unsettled, and it is said to be a question of intention rather than of law; Story, Pr. Notes 125*, 477*, 641. The payment of bonds, secured by a mortgage, made in Confederate money during the Civil War is held to have been received in good faith, and if accepted and acquiesced in for a long time, a court of equity will not interfere; Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822, 36 L. Ed. 680.

If a bill of exchange or promissory note be given to a creditor and accepted as payment, it shall be a good payment; Benj. Sales 726; Com. Dig. *Merchant* (F); Coburn v. Odell, 30 N. H. 540; Mooring v. Ins. Co., 27 Ala. 254; Viser v. Bertrand, 14 Ark. 267; Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657. But regularly a bill of exchange or note given to a creditor shall not be a discharge of the debt till payment of the bill, unless so accepted; 1 Salk. 124.

If the debtor gives his own promissory note, it is held generally not to be payment, unless it be shown that it was so intended; Peter v. Beverly, 10 Pet. (U. S.) 567, 9 L. Ed. 522; Smith v. Smith, 27 N. H. 244; Burdick v. Green, 15 Johns. (N. Y.) 247; 26 E. L. & E. 56.

If payment be made in the note of a factor or agent employed to purchase goods, or intrusted with the money to be paid for them, if the note be received as payment, it will be good in favor of the principal; 1 B. & Ald. 14; 7 B. & C. 17; but not if received conditionally; and this is a question of fact for the jury; Corlies v. Cumming, 6 Cow. (N. Y.) 181.

It is said that an agreement to receive the debtor's own note in payment must be expressed; Porter v. Talcott, 1 Cow. (N. Y.) 359; Combination S. & I. Co. v. Ry. Co., 47 Minn. 207, 49 N. W. 744; Price v. Barnes, 7 Ind. App. 1, 31 N. E. 809, 34 N. E. 408; and when so expressed it extinguishes the debt; New York State Bank v. Fletcher, 5 Wend. (N. Y.) 85; Caldwell v. Hall, 49 Ark. 508, 1 S. W. 62, 4 Am. St. Rep. 64; Pritchard v. Smith, 77 Ga. 463; but if such be not the express agreement of the parties, it only operates to extend the period of the payment of the debt; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125. Whether there was such an agreement is a question for the jury; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125. Acceptance of an indorsed note of a debtor in payment for goods sold, merges and extinguishes the original debt; Strauss v. Trotter, 6 Misc. 77, 26 N. Y. Supp. 20. But the giving of a void note for an indebtedness does not pay it; Hartshorn v. Hartshorn, 67 N. H. 163, 29 Atl. 406.

A bill of exchange drawn on a third person and accepted discharges the debt as to the drawer; 10 Mod. 37; and in an action to recover the price of goods, payment by a bill not dishonored has been held a good defence; 4 Bingh. 454; 5 Maule & S. 62.

Retaining a draft on a third party an unreasonable length of time will operate as payment if loss be occasioned thereby; Raymond v. Baar, 13 S. & R. (Pa.) 318, 15

Am. Dec. 603; Gallagher v. Roberts, 2 Wash. C. C. 191, Fed. Cas. No. 5,195. Ans. Contr. 359. The receipt of a draft, in the absence of an express agreement, does not constitute a payment of the debt for which the draft is drawn; Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748.

In the sale of a chattel, if the note of a third person be accepted for the price, it is good payment; Rew v. Barber, 3 Cow. (N. Y.) 272; 1 D. & B. 291. Not so, however, if the note be the promise of one of the partners in payment of a partnership debt; Horton v. Child, 15 N. C. 460.

In Maine and Massachusetts, the presumption, where a negotiable note is taken, whether it be the debtor's promise or that of a third person, is that it is intended as payment; Maneely v. McGee, 6 Mass. 143, 4 Am. Dec. 105; Gooding v. Morgan, 37 Me. 419. The fact that a note was usurious and void was allowed to overcome this presumption; Johnson v. Johnson, 11 Mass. 361. Generally, the question will depend upon the fact whether the payment was to have been made in notes or the receiving them was a mere accommodation to the purchaser; Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111. And the presumption never attaches where non-negotiable notes are given; Edmond v. Caldwell, 15 Me. 340.

Payment may be made through the intervention of a third party who acts as the agent of both parties: as, for example, a stakeholder. If the money be deposited with him to abide the event of a legal wager, neither party can claim it until the wager is determined, and then he is bound to pay it to the winner; 4 Campb. 37. If the wager is illegal, the depositor may reclaim the money at any time before it is paid over; 8 B. & C. 221; 29 E. L. & E. 424. And at any time after notice given in such case he may hold the stakeholder responsible, even though he may have paid it over; see 2 Pars. Contr. 138.

An auctioneer is often a stakeholder, as in case of money deposited to be made over to the vender if a good title is made out. In such case the purchaser cannot reclaim except on default in receiving a clear title. But if the contract has been rescinded by the parties there need be no notice to the stakeholder in case of a failure to perform the condition; 2 M. & W. 244; 1 M. & R. 614.

A payment of a debt by a stranger without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned, and also as to the debtor, if he ratify it; Crumlish's Adm'r v. Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872.

A transfer of funds, called by the civil-law phrase a payment by delegation, is payment only when completely effected; 2 Pars. Contr. 137; and an actual transfer of claim or credit assented to by all the parties is a good payment; 5 B. & Ald. 228; Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Heaton v. Angier, 7 N. H. 397, 28 Am. Dec. 353; Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154. This seems to be very similar to payment by drawing and acceptance of a bill of exchange.

Where a purchaser contracts to pay a certain amount in printing, the seller cannot enforce the collection of such amount in cash, as a profit presumably attaches to the printing; Allen v. Wall, 7 Wash. 316, 35 Pac. 65; unless, of course, the party declines to pay in printing.

Foreclosure of a mortgage given to secure a debt operates as payment made when the foreclosure is complete; but if the property mortgaged does not produce a sum equal in value to the amount of the debt then due, it is payment *pro tanto* only; 2 Greenl. Ev. § 524; Amory v. Fairbanks, 3 Mass. 562; Case v. Boughton, 11 Wend. (N. Y.) 106. A transfer of a worthless mortgage in payment of a debt, does not discharge the debt where neither party at the time of the transfer knew that the mortgage was worthless; Walrath v. Abbott, 75 Hun 445, 27 N. Y. Supp. 529. A *legacy* also is payment, if the intention of the testator that it should be so considered can be shown, and if the debt was liquidated at the death of the testator; 1 Esp. 187; Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Williams v. Crary, 5 Cow. (N. Y.) 368; Blair v. White, 61 Vt. 110, 17 Atl. 49. See LEGACY.

When money is sent by letter, even though the money is lost, it is good payment and the debtor is discharged, if he was expressly authorized or directed by the creditor so to send it, or if such authority can be presumed from the course of trade; Benj. Sales 727; 11 M. & W. 233; and in the case of an insurance premium, such premium is held to be paid when the letter containing it is deposited in the postoffice, addressed to the company; McCluskey v. Nat. L. Ass'n, 77 Hun 556, 28 N. Y. Supp. 931. But, even if the authority be given or inferred, at least ordinary diligence must be used by the debtor to have the money safely conveyed. See Wakefield v. Lithgow, 3 Mass. 249; Ry. & M. 149; 1 Exch. 477.

The payment must have been accepted knowingly. Many instances are given in the older writers to illustrate acceptance; thus if the money is counted out, and the payee takes a part and puts it in a bag, this is a good payment, and if any be lost it is the payee's loss; 5 Mod. 398. Where A paid B £100 in redemption of a mortgage, and B bade C put it in his closet, and C did so, and A demanded his papers, which B refused to deliver, and A demanded back his money, and B directed C to give it to him, and C did, it was held to be a payment of the mortgage; Viner, Abr. *Payment* (E).

When interest coupons on railroad bonds

have been presented and paid at the usual place of payment, with money furnished by a third party, a private arrangement between such third party and the mortgagor that the transaction shall constitute a purchase of the coupons and not payment, will not be enforced against the bondholders; Fidelity Ins. T. & S. D. Co. v. R. Co., 138 Pa. 494, 21 Atl. 21, 21 Am. St. Rep. 911. One who lends money to a company to take up its coupons, is not entitled to be paid out of funds in the hands of the receiver; Newport & C. B. Co. v. Douglass, 12 Bush (Ky.) 673.

Generally, there can be but little doubt as to acceptance or non-acceptance, and the question is one of fact for the jury to determine under the circumstances of each particular case.

Evidence of payment. Evidence that any thing has been done and accepted as payment is evidence of payment.

A *receipt* is *prima facie* evidence of payment; but a receipt acknowledging the payment of ten dollars and acquitting and releasing from all obligations would be a receipt for ten dollars only; 5 B. & Ald. 696; Rich v. Lord, 18 Pick. (Mass.) 325. And a receipt is only *prima facie* evidence of payment; 2 Taunt. 241; Southwick v. Hayden, 7 Cow. (N. Y.) 334; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369. For cases explaining this rule, see, also, Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Johnson v. Weed, 9 Johns. (N. Y.) 310; Agnew v. McGill, 96 Ala. 496, 11 South. 537. And it may be shown that the particular sum stated in the receipt was not paid, and, also, that no payment has been made; 2 Term 366; Fuller v. Crittenden, 9 Conn. 401, 23 Am. Dec. 364; Dutton v. Tilden, 13 Pa. 46. As against strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; Ellison v. Albright, 41 Neb. 93, 59 N. W. 703, 29 L. R. A. 737. See RECEIPT.

Payment may be presumed by the jury in the absence of direct evidence; thus, possession by the debtor of a security after the day of payment, which security is usually given up upon payment of the debt, is *prima facie* evidence of payment by the debtor; 1 Stark. 374; Weidner v. Schwelgart, 9 S. & R. (Pa.) 385; Smith v. Gardner, 36 Neb. 741, 55 N. W. 245.

If an acceptor produce a bill of exchange, this is said to afford in England no presumption of payment unless it is shown to have been in circulation after he accepted it; 2 Campb. 439. But in the United States such possession is *prima facie* evidence of payment; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116; People v. Howell, 4 Johns. (N. Y.) 296; Dennie v. Hart, 2 Pick. (Mass.) 204. Payment is conclusively presumed from lapse of time. After twenty years' non-demand, unexplained, the court will presume a payment without the aid of a jury; 1 Campb. 27; Williams v. Mitchell, 112 Mo. 300, 20 S W. 647; In re Smith's Estate, 152 Pa. 102, 25 Atl. 315; Idler v. Borgmeyer, 65 Fed. 910, 13 C. C. A. 198. Facts which destroy the reason of this rule may rebut the presumption; Knight v. McKinney, 84 Me. 107, 24 Atl. 744; Beekman v. Hamlin, 23 Or. 313, 31 Pac. 707. See Matter of Looram, 73 Hun 177, 25 N. Y. Supp. 877. And a jury may infer payment from a shorter lapse of time, especially if there be attendant circumstances favoring the presumption; Lesley v. Nones, 7 S. & R. (Pa.) 410. The statute of limitations does not apply to an action by a legatee to collect a legacy which is a charge on land, and no presumption of payment arises from the lapse of twenty years; Williams v. Williams, 82 Wis. 393, 52 N. W. 429. Where an indebtedness is shown, it is presumed to remain unpaid until the contrary is shown; Diel v. Stegner, 56 Mo. App. 535.

In a suit to enforce a vendor's lien the acknowledgment of payment contained in the deed is only *prima facie* evidence of payment; Koch v. Roth, 150 Ill. 212, 37 N. E. 317.

A presumption may rise from the course of dealing between the parties, or the regular course of trade; Tayl. Ev. 194. Thus, after two years it was presumed that a workman had been paid, as it was shown that the employer paid his workmen every Saturday night, and this man had been seen waiting among others; 1 Esp. 296.

A receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rents previously due; Brewer v. Knapp, 1 Pick. (Mass.) 332. If the last instalment on a bond is paid in due form, it is evidence that the others have been paid; if paid in a different form, that the parties are acting under a new agreement.

Where receipts had been regularly given for the same amount, but for a sum smaller than was due by the agreement, it was held evidence of full payment; Girod v. Mayor, 4 Mart. O. S. (La.) 698.

Who may make payment. Payment may be made by the primary debtor, and by other persons from whom the creditor has a right to demand it.

An agent may make payment for his principal. An attorney may discharge the debt against his client; 5 Bingh. 506. One of any number of joint and several obligors, or one of several joint obligors, may discharge the debt; Viner, Abr. *Payment* (B). Payment may be made by a third person, a stranger to the contract.

It may be stated, generally, that any act done by any person in discharge of the debt, if accepted by the creditor, will operate as payment. In the civil law there are many exceptions to this rule, introduced by the operation of the principle of subrogation. Most of these have no application in the

common law, but have been adopted, in some instances, as a part of the law merchant. See SUBROGATION; CONTRIBUTION.

To whom payment may be made. Payment is to be made to the creditor. But it may be made to an authorized agent. And if made in the ordinary course of business, without notice requiring the payment to be made to himself, it is binding upon the principal; 4 B. & Ald. 395; Smith v. Cordage Co., 41 La. Ann. 1, 5 South. 413. Payment to a third person by appointment of the principal will be substantially payment to the principal; 1 Phill. Ev. 200. Payment to an agent who made the contract with the payee (without prohibition) is payment to the principal; Anderson v. Turnpike Co., 16 Johns. (N. Y.) 86; 10 B. & C. 755. But payment may be made to the principal after authority given to an agent to receive; 6 Maule & S. 156. Payments made to an agent after the death of the principal do not discharge the debtor's obligation, even if made in ignorance of the principal's death; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167. Payment to a broker or factor who sells for a principal not named is good; 11 East 36. Payment to an agent, when he is known to be such, will be good, if made upon the terms authorized; 11 East 36; if there be no notice not to pay to him; 3 B. & P. 485; and even after notice, if the factor had a lien on the money when paid; 5 B. & Ald. 27. If the broker sells goods as his own, payment is good though the mode varies from that agreed on; 1 Maule & S. 147; 2 C. & P. 49. Bankers are not agents of the owner to receive payment of the notes by reason simply of the fact that the notes were made payable at their bank; and moneys left with them to be used as payment are not thereby the moneys of the owner of the notes; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818.

Payment to an attorney is as effectual as payment to the principal himself; Duquette v. Richar, 102 Mich. 483, 60 N. W. 974. So, also, to a solicitor in chancery after a decree; 2 Ch. Cas. 38. The attorney of record may give a receipt and discharge the judgment; Lewis v. Gamage, 1 Pick. (Mass.) 347; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Richardson v. Talbot, 2 Bibb (Ky.) 382; if made within one year; Gray v. Wass, 1 Greenl. (Me.) 257. Not so of an agent appointed by the attorney to collect the debt; 2 Dougl. 623. Payment by an officer to an attorney whose power has been revoked before the officer received the execution did not discharge the officer; Parker v. Downing, 13 Mass. 465. Payment to one of two co-partners discharges the debt; Shepard v. Ward, 8 Wend. (N. Y.) 542; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; 6 Maule & S. 156; even after dissolution; 4 C. & P. 108. So payment to one of two joint creditors is good, though they are not partners; Morrow's Heirs v. Starke's Adm'r, 4 J. J. Marsh. (Ky.) 367. But payment by a banker to one of several joint depositors without the assent of the others was held a void payment; 4 E. L. & E. 342.

Payment to the wife of the creditor is not a discharge of the debt, unless she is expressly or impliedly his agent; 2 Scott N. R. 372; Thrasher v. Tuttle, 22 Me. 335; as to payment to the husband, see O'Callaghan v. Barrett, 66 Hun 633, 21 N. Y. Supp. 368. One who purchases the property of a married woman through the agency of her husband, must pay for it precisely as if he had purchased through an agent who sustained no such relation; Runyon v. Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839. An auctioneer employed to sell real estate has no authority to receive the purchase-money by virtue of that appointment merely; 1 M. & R. 326. Usually, the terms of sale authorize him to receive the purchase-money; 5 M. & W. 645. Payment was made to a person sitting in the creditor's counting-room and apparently doing his business, and it was held good; 1 M. & M. 200; but payment to an apprentice so situated was held not to be good; 2 Cr. & M. 304. Payment to a person other than the legal owner of the claim must be shown to have been made to one entitled to receive the money; Seymour v. Smith, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683. Generally, payment to the agent must be made in money, to bind the principal; 10 B. & C. 760; Nicholson v. Pease, 61 Vt. 534, 17 Atl. 720; Scully v. Dodge, 40 Kan. 395, 19 Pac. 807. Power to receive money does not authorize an agent to commute; Kingston v. Kincaid, 1 Wash. C. C. 454, Fed. Cas. No. 7,822; Lewis v. Gamage, 1 Pick. (Mass.) 347.

An agent authorized to receive money cannot bind his principal by receiving goods; 4 C. & P. 501; or a note; 5 M. & W. 645; but a subsequent ratification would remedy any such departure from authority; and it is said that slight acts of acquiescence will be deemed ratification. Payment to one of several joint creditors of his part will not alter the nature of the debt so as to enable the others to sue separately; 4 Tyrwh. 488. Payment to one of several executors has been held sufficient; 3 Atk. 695. Payment to a trustee generally concludes the *cestui que trust* in law; 5 B. & Ad. 96. Payment of a debt to a marshal or sheriff having custody of the person of the debtor does not satisfy the plaintiff; 4 B. & C. 32. Interest may be paid to a scrivener holding the mortgage deed or bond, and also the principal, if he deliver up the bond; otherwise of a mortgage-deed as to the principal, for there must be a re-conveyance; 1 Salk. 157. It would seem, then, that in those states where no re-conveyance is needed, a payment of the

principal to a person holding the security would be good, at least *prima facie*.

Subsequent ratification of the agent's acts is equivalent to precedent authority to receive money; Pothier, Obl. n. 528.

When to be made. Payment must be made at the exact time agreed upon. This rule is held very strictly in law; but in equity payment will be allowed at a time subsequent, generally when damages can be estimated and allowed by way of interest; 8 East 208; City Bank v. Cutter, 3 Pick. (Mass.) 414. Where payment is to be made at a future day, nothing can be demanded till the time of payment, and, if there be a condition precedent to the liability, not until the condition has been performed. And where goods had been sold "at six or nine months' credit," the debtor was allowed the option; 5 Taunt. 338.

Where no time of payment is specified, the money is to be paid immediately on demand; Bank of Columbia v. Hagner, 1 Pet. (U. S.) 455, 7 L. Ed. 219; Bailey v. Clay, 4 Rand. (Va.) 346. When payment is to be made at a certain time, it may be made at a different time if the plaintiff will accept; Viner, Abr. *Payment* (H); and it seems that the debtor cannot compel the creditor to receive payment before the debt is due. The time of payment of a pecuniary obligation is a material provision in the contract, and a creditor cannot be compelled by statute to accept payment in advance; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

Where to be made. Payment must be made at the place agreed upon, unless both the parties consent to a change. If no place of payment is mentioned, the payer must seek the payee; Moore, P. C. 274; Shepp. Touchst. 378; 2 M. & W. 223.

The debtor, if no place is specified in the contract, must seek the creditor, unless he shall have left the state in which was his domicile when the contract was made, in which case, readiness to pay within the state will suffice; Hale v. Patton, 60 N. Y. 236, 19 Am. Rep. 168; Dockham v. Smith, 113 Mass. 320, 18 Am. Rep. 495. But where an insurance company owed money on a fire policy (with the option of replacing the building) it was held to be the intent of the parties that payment should be made at the domicile of the insured; Pennsylvania L. M. F. Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, where it was said that all debts are payable everywhere, unless there be some special limitation or provision in respect to the payments; debts, as such, have no *situs* or *locus*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere, and that in general the debtor is bound to seek the creditor.

Refusal to receive payment offered at a place other than the stipulated place of payment, except upon certain conditions, is an implied waiver of the right to have the payment made in the place agreed on; Union M. L. Ins. Co. v. Plaster Co., 37 Fed. 286, 3 L. R. A. 90. Where there is a covenant for the payment of rent, the tenant must seek the landlord; 8 Exch. 689. A lessor must demand the rent upon the land on the day when it becomes due at a convenient time before sunset, in order to re-enter for breach of condition upon non-payment; Camp v. Scott, 47 Conn. 366; Jenkins v. Jenkins, 63 Ind. 415, 30 Am. Rep. 229. It has been held that a licensor of a patent must apply to the licensee for an account and payment; Dare v. Boylston, 6 Fed. 493. A telephone subscriber is bound to pay for services at the office of the company, and cannot require presentment of bills at his home; Magruder v. Tel. Co., 92 Miss. 716, 46 South. 404, 16 L. R. A. (N. S.) 560.

So, too, the creditor is entitled to call for payment of the whole of his claim at one time, unless the parties have stipulated for payment otherwise.

Questions often arise in regard to the payment of debts and legacies by executors and administrators. These questions are generally settled by statute regulations.

As a general rule, debts are to be paid first, then specific legacies. The personal property is made liable for the testator's debts, and, after that is exhausted, the real estate, under restrictions varying in the different states.

See EXECUTOR AND ADMINISTRATOR; LEGACY.

In the payment of mortgages, if the mortgage was made by the deceased, the personal estate is liable to discharge the mortgage debts; 2 Cruise, Dig. 147. But where the deceased acquired the land subject to the mortgage, the mortgaged estate must pay the debt; Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 252, 8 Am. Dec. 492; 2 Bro. C. C. 57; Appeal of Hoff, 24 Pa. 203. See MORTGAGE.

Effect of Payment. The effect of payment is—*first*, to discharge the obligation; and it may happen that one payment will discharge several obligations by means of a transfer of the evidence of obligations; Pothier, Obl. 554, n. Payment by one who is primarily liable to one entitled to collect the debt is an extinguishment of the debt and all liability thereunder, and however held, transferred, or assigned, it is ever afterwards a mere nullity; Smith v. Waugh, 84 Va. 806, 6 S. E. 132. *Second*, payment does not prevent a recovery back when made under mistake of fact. The general rule is that a mistake or ignorance of law furnishes no ground to reclaim money paid voluntarily under a claim of right; 2 Kent 491; Campbell v. Clark, 44 Mo. App. 249; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342. But acts done under a mistake or ignorance of an essential

fact are voidable and relievable both in law and equity; Poll. Cont. 439; Pensacola & A. R. Co. v. Braxton, 34 Fla. 471, 16 South. 317. Laws of a foreign country are matters of fact; Story, Const. 5th ed. § 1304; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; and the several United States are foreign to each other in this respect. See CONFLICT OF LAWS; FOREIGN LAWS. In Kentucky and Connecticut there is a right of recovery back equally in cases of mistake of law and of fact; Northrop's Ex'rs v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Ray v. Bank, 3 B. Monr. (Ky.) 510, 39 Am. Dec. 479. In Ohio it may be remedied in equity; McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731. In New York a distinction is taken between ignorance of the law and mistakes of law, giving relief in the latter case; Champlin v. Laytin, 18 Wend. (N. Y.) 422, 31 Am. Dec. 382. In England, money paid under a mistake of law cannot be recovered back; 4 Ad. & E. 858. Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when, in fact, he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, the money may be recovered back without previous demand; U. S. v. Bank, 214 U. S. 316, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184. The payment of a note for the purchase price of land, after the discovery of a mistake in computing the price, is no bar to an action to recover an overpayment resulting from such mistake; Cardinal v. Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492. See IGNORANCE; MISTAKE. A payment under protest is nevertheless voluntary, unless there was duress or coercion; Wessel v. Mortg. Co., 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529. *Third*, part payment of a note will have the effect of waiver of notice of protest. *Fourth*, payment of part of the debt will bar the Statute of Limitations as to the residue; Whipple v. Stevens, 22 N. H. 219; Baxter v. Penniman, 8 Mass. 134; 28 E. L. & E. 454; even though made in goods and chattels; 4 Ad. & E. 71. But it must be shown conclusively that the payment was made as part of a larger debt; 6 M. & W. 824; Smith v. Westmoreland, 12 Smedes & M. (Miss.) 663. See EARNEST; PROTEST, PAYMENT UNDER.

The burden of proof, on a plea of payment, is on the party pleading it; Claflin v. Watch Co., 7 Misc. 668, 28 N. Y. Supp. 42; Lanier v. Huguley, 91 Ga. 791, 18 S. E. 39; Curtis v. Perry, 33 Neb. 519, 50 N. W. 426. As to *appropriation of payments*, see that title.

See NOVATION; APPROPRIATION; LEX LOCI; DISCHARGE; RECEIPT; ACCORD AND SATISFACTION; PERFORMANCE.

In Pleading. The name of a plea by which the defendant alleges that he has paid the debt claimed in the declaration; this plea must conclude to the country. See Chitty, Plead. In Pennsylvania a plea of payment, with leave, etc., is in common use; under it a defendant may give in evidence anything tending to show that, of right, the plaintiff cannot recover.

PAYMENT INTO COURT. **In Practice.** Depositing a sum of money with the proper officer of the court by the defendant in a suit, for the benefit of the plaintiff and in answer to his claim.

It may be made in some states under statutory provisions; State v. Weaver, 18 Ala. 293; Mason v. Croom, 24 Ga. 211; Brock v. Jones' Ex'r, 16 Tex. 461; Clark v. Mullenix, 11 Ind. 532; and in most by a rule of court made for the purpose; Mazyck & Bell v. McEwen, 2 Bail. (S. C.) 28; State v. Broughton, 29 N. C. 100, 45 Am. Dec. 507; in which case notice of an intention to apply must, in general, have been previously given.

The *effect* is to divest the defendant of all right to withdraw the money; Murray v. Bethune, 1 Wend. (N. Y.) 191; Clement v. Bixler, 3 Watts (Pa.) 248; except by leave of court; Mott v. Pettit, 1 N. J. L. 298; and to admit conclusively every fact which the plaintiff would be obliged to prove in order to recover it; 6 M. & W. 9; Goslin v. Hodson, 24 Vt. 140; Elliott v. Ins. Co., 66 Pa. 27, 5 Am. Rep. 323; as, that the amount tendered is *due;* 1 Campb. 558; Boyden v. Moore, 5 Mass. 365; Spalding v. Vandercook, 2 Wend. (N. Y.) 431; for the cause laid in the declaration; 2 B. & P. 550; Jones v. Hoar, 5 Pick. (Mass.) 285; to the plaintiff in the character in which he sues; 2 Campb. 441; the jurisdiction of the court; 5 Esp. 19; that the *contract* was made; 3 Campb. 52; and broken as alleged; 1 B. & C. 3; but only in reference to the amount paid in; Johnston v. Ins. Co., 7 Johns. (N. Y.) 315; 3 E. L. & E. 548; and nothing beyond such facts; 1 Greenl. Ev. § 206.

Under the rule in England money may be paid into court in satisfaction, and with or without denying liability therefor.

Generally, it relieves the defendant from the payment of further costs unless judgment is recovered for a sum larger than that paid in; Aikins v. Colton, 3 Wend. (N. Y.) 326; Broughton v. Richardson, 2 Rich. (S. C.) 64; Goslin v. Hodson, 24 Vt. 140; Coghlan v. R. Co., 32 Fed. 316.

Payment of money into court, when the declaration is on a special contract, is an acknowledgment of the right of action to the amount of the sum brought in, and no more; 1 Tidd's Pr. 624. It does not waive the benefit of a defence, though that be to the whole claim; Funk v. Smith, 66 Pa. 27, 5 Am. Rep. 326; Branch v. U. S., 100 U. S. 673, 25 L. Ed. 759. But no defence can deprive the plaintiff of the right to the money in court. See TENDER.

PAYS. Country. Trial *per pays*, trial by jury (the country). See IN PAIS; PAIS.

PEACE. The concord or final agreement in a fine of land. 18 Edw. I. *modus levandi finis.*

The tranquillity enjoyed by a political society, internally by the good order which reigns among its members, and externally by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security as opposed to one of violence or warfare, but likewise a state of public order and decorum. Hamm. N. P. 139; 12 Mod. 566; People v. Johnson, 86 Mich. 175, 48 N. W. 870, 13 L. R. A. 163, 24 Am. St. Rep. 116.

The term *peace* in English and American law is used in a general way to express that condition which is violated by the commission of crime. In modern times it is expressed in England by the phrase *king's peace*, and in this country *peace of the state* or *commonwealth*. (There is a peace of the United States; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.) Originally the phrase king's peace had no such broad meaning, but was used only in connection with crimes committed against persons, or in places, or at times and seasons, which were under the special protection of the king. See PAX REGIS. "Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order; it made the wrong-doer the king's enemy. The notion of the king's peace appears to have had two distinct origins. These were, first, the special sanctity of the king's house, which may be regarded as differing only in degree from that which Germanic usage attached everywhere to the homestead of a freeman; and, secondly, the special protection of the king's attendants and servants, and other persons whom he thought fit to place on the same footing. . . . The rapid extension of the king's peace till it becomes, after the Norman Conquest, the normal and general safeguard of public order, seems peculiarly English. On the continent the king appears to have been recognized as protector of the general peace, besides having power to grant special protection or peace of a higher order, from a much earlier time." 1 Poll. & Maitl. 22.

There was the peace of the church, both that of the parish and the minister; so there was the peace of the sheriff, and of each lord, and indeed of every householder, for the breach of which atonement could be exacted. In writing of the criminal law of England in the twelfth century it is said, "The time has not yet come when the king's peace will be eternal and cover the whole land. Still we have here an elastic notion; if the king can bestow his peace on a privileged person by a writ of protection, can he not put all men under his peace by proclamation." See 2 Poll. & Maitl. 451-2. The phrase peace of the king was in that period used to express the idea that the crime which was alleged to be in breach of the "peace of God and of our lord the king," was one of those reserved as specially punishable in behalf of the king himself. These crimes were the original pleas of the crown but the king's peace by an easy process extended itself "until it had become an all-embracing atmosphere;" *id.* 462. That general peace which is now denominated the peace of the king or of the state, as the case may be, was in the early days protected only by the hundred court and the ealdorman. It is possible that mediæval usage which applied to an inferior court the phrase the peace of the lord, who held it, dates from the earliest period of the administration of justice. There is said to be some evidence that in the tenth century the phrase *peace of the witan*, was used, but no authority for the use of the term *folk-peace*; 1 Poll. & Maitl. 23. See also Pollock, The King's Peace, Oxford Lectures; Inderwick, The King's Peace.

Judges of the federal supreme and district courts, commissioners of district courts and judges and other magistrates of the several states may hold to security of the peace in cases under the United States constitution and laws; U. S. Comp. Stat. § 727.

See, generally, Bacon, Abr. *Prerogative* (D 4); Hale, Hist. Comm. Pleas 160; Harrison, Dig. *Officer* (V 4); 2 Benth. Ev. 319, note; GOOD BEHAVIOR; SURETY OF THE PEACE; ARTICLES OF THE PEACE; BREACH OF THE PEACE; CONSERVATOR OF THE PEACE; TREATY OF PEACE.

PEACE OF GOD. The words, "in the peace of God and the said commonwealth, then and there being," as used in indictments for homicide and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war, provided such killing occur in the actual exercise of war; Whart. Cr. Law § 310; State v. Gut, 13 Minn. 341 (Gil. 315).

PEACE OF GOD AND THE CHURCH. The freedom from suits at law between the terms. Spelman, Gloss.; Jacob, Law Dict. See PEACE.

PEACEABLE ASSEMBLY. See ASSEMBLY; LIBERTY OF SPEECH.

PECK. A measure of capacity, equal to two gallons. See MEASURE.

PECULATION. The unlawful appropriation by a depository of public funds, of the property of the government intrusted to his care, to his own use or that of others. Domat, *Suppl. au Droit Public*, l. 3, tit. 5. See EMBEZZLEMENT.

PECULIARS. See COURT OF PECULIARS.

PECULIUM (Lat.). **In Civil Law.** Private property.

The most ancient kind of *peculium* was the *peculium profectitium* of the Roman law, which signified that portion of the property acquired by a son or slave which the father or master allowed him, to be managed as he saw fit. In later civil law there are other kinds of *peculium*, viz.: *peculium castrense*, which includes all movables given to a son by relatives and friends on his going on a campaign, all the presents of comrades, and his military pay and the things bought with it: *peculium quasi-castrense*, which includes all acquired by a son by performing the duties of a public or spiritual office or of an advocate, and also gifts from the reigning prince; *peculium adventitium*, which includes the property of a son's mother and relatives on that side of the house, and all which comes to him on a second marriage of his parents, and, in general, all his acquisitions which do not come from his father's property and do not come under *castrense* or *quasi-castrense peculium*.

The *peculium profectitium* remains the property of the father. The *peculium castrense* and *quasi-castrense*, are entirely the property of the son. The *peculium adventitium* belongs to the son; but he cannot alien it nor dispose of it by will; and the father had the usufruct; nor can the father, unless under peculiar circumstances, alien it without consent of the son. Mackeldey, Civ. Law, § 557;

Inst. 2. 9. 1; Dig. 15. 1. 5. 3; Pothier, ad Pand. lib. 50, tit. 17, c. 2, art. 3.

PECUNIA (Lat.). **In Civil Law.** Property, real or personal, corporeal or incorporeal. Things in general (*omnes res*).

The law of the Twelve Tables said, *uti quisque pater familias legassit super pecunia tutelave rei suæ ita jus esto:* in whatever manner a father of a family may have disposed of his *property* or of the tutorship of his things, let this disposition be law. 1 *Lecons Elém. du Dr. Civ. Rom.* 288. But Paulus, in l. 5, D. *de verb. signif.*, gives it a narrower sense than *res*, which he says means what is not included within patrimony, *pecunia* what is. Vicat, Voc. Jur. In a still narrower sense, it means those things only which have measure, weight, and number, and most usually strictly money. *Id.* The general sense of property occurs, also, in the old English law. Leg. Edw. Confess. c. 10.

Flocks were the first riches of the ancients; and it is from *pecus* that the words *pecunia, peculium, peculatus,* are derived. In old English law *pecunia* often retains the force of *pecus*. So often in Domesday: *pastura ibidem pecuniæ villæ, i. e.* pasture for *cattle* of the village. So *vivæ pecuniæ,* live stock. Leg. Edw. Confess. c. 10; Emendat. Willielmi Primi ad Leges Edw. Confess.; Cowell.

PECUNIA NON-NUMERATA (Lat.). Money not paid or numbered.

The *exceptio non-numeratæ pecuniæ* (plea of money not paid) is allowed to the principal or surety by the creditor. Calvinus, Lex.

PECUNIA NUMERATA (Lat.). Money given in payment of a debt.

Properly used of the creditor, who is properly said to *number, i. e.* count out, the money to the debtor which he must pay, and improperly of the debtor, who is said to number or count out the money to the creditor, *i. e.* to pay it. Vicat, Voc. Jur.; Calvinus, Lex.

PECUNIA TRAJECTITIA (Lat.). A loan of money which, either itself or in the shape of goods bought with it, is to be carried over the sea, the lender to take the risk from the commencement of the voyage till arrival at the port of destination, and on that account to have higher interest; which interest is not essential to the contract, but, if reserved, is called *fœnus nauticum.* Mackeldey, Civ. Law § 398 *b*. The term *fœnus nauticum* is sometimes applied to the transaction as well as the interest, making it coextensive with *pecunia trajectitia.*

PECUNIARY. That which relates to money. A *pecuniary provision* does not apply to a provision in an agreement for alimony specifically dividing personal property of the parties; Davis v. Davis, 61 Me. 395. The exemption from registration of annuities without regard to *pecuniary consideration* was held to include the case of a grantee's giving up his business to the grantor; 4 Term 790. Bank notes; 3 *id.* 554; 1 B. & P. 208; checks; 8 Term 328; and a verbal promise to pay a debt in full; Phelps v. Thomas, 6 Gray (Mass.) 327; are pecuniary considerations. But the assignment of a leasehold interest is not; 2 B. & B. 702; or a transfer of stock; 3 B. & A. 602; or a surrender of a life interest in a sum of money and of a contingent interest in the corpus; 2 El. & Bl. 374; 2 B. & C. 875.

PECUNIARY CAUSES. Causes in ecclesiastical courts where satisfaction is sought for withholding ecclesiastical dues or the doing or neglecting some act connected with the church. 3 Bla. Com. 88. As to what causes are ecclesiastical, see 2 Burn, Eccl. Law 39.

PECUNIARY LEGACY. See LEGACY.

PECUNIARY LOSS. A loss of money, or of something by which money or something of money value may be acquired. Green v. R. Co., 32 Barb. (N. Y.) 33.

PECUNIARY PROFIT. An academy is not a corporation for pecuniary profit. Santa Clara F. Academy v. Sullivan, 116 Ill. 376, 6 N. E. 183, 56 Am. Rep. 776.

PEDAGIUM (Lat. *pes,* foot). Money paid for passing by foot or horse through any forest or country. Cassan de Coutum. Burgund. p. 118; Rot. Vasc. 22 Edw. III. m. 34.

PEDAULUS (Lat. *pes,* foot). **In Civil Law.** A judge who sat at the foot of the tribunal, *i. e.* on the lowest seats, ready to try matters of little moment at command of the prætor. Calvinus, Lex.; Vicat, Voc. Jur.

PEDDLER. Persons who travel about the country with merchandise for the purpose of selling it.

An itinerant trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader who has goods for sale, and sells them, at a fixed place of business. A petty chapman, or other trading person going from town to town, or to other men's houses, and travelling either on foot or with horses, or otherwise, carrying to sell or expose to sale, any goods, wares, or merchandise. Graffty v. Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; Com. v. Ober, 12 Cush. (Mass.) 493; Stamford v. Fisher, 63 Hun 123, 17 N. Y. Supp. 609.

An itinerant individual, ordinarily without local habitation or place of business, who travels about the country carrying commodities for sale. Davenport v. Rice, 75 Ia. 74, 39 N. W. 191, 9 Am. St. Rep. 454.

The distinctive feature has been held not to consist in the *mode* of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that the peddler goes from house to house or place to place carrying his merchandise with him and concurrently sells and delivers it; Ballou v. State, 87 Ala. 144, 6 South. 393; Stamford v. Fisher, 140 N. Y. 187, 35 N. E. 500. One who, having a place of business in another town, goes about delivering goods at the houses of his customers, in pursuance of orders previously taken, and takes orders for future delivery, is not a peddler; Com. v. Eichenberg, 140 Pa. 158, 21 Atl. 258; State v.

Lee, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649; but one who manufactures and deals in proprietary medicines who, although having a permanent manufactory and residence, yet attends county fairs and publicly recommends his medicines as a cure for certain ailments, is held a peddler; State v. Gouss, 85 Ia. 21, 51 N. W. 1147.

The driver of a delivery wagon who takes orders for goods and subsequently delivers them is not a peddler; Hewson v. Englewood, 55 N. J. L. 522, 27 Atl. 904, 21 L. R. A. 736; nor is one who merely delivers goods previously sold by another; Stuart v. Cunningham, 88 Ia. 191, 55 N. W. 311, 20 L. R. A. 430; or a canvasser; Cerro Gordo v. Rawlings, 135 Ill. 36, 25 N. E. 1006; or one who exhibits samples of cloth and takes orders for clothing to be made therefrom; Radebaugh v. Plain City, 28 Wkly. L. Bul. (Ohio) 107.

But one who goes from house to house with merchandise, selling the same on the instalment plan is held a peddler; People v. Sawyer, 106 Mich. 428, 64 N. W. 333; South Bend v. Martin, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531.

A state may impose a tax upon itinerant peddlers and require them to take out a license to practice their trade; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; but it may not discriminate between its own citizens and non-residents; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. Ed. 449; Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Wrought Iron R. Co. v. Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273; nor charge a higher price to the latter for a license than it imposes on the former; State v. Wiggin, 64 N. H. 508, 15 Atl. 128, 1 L. R. A. 56. See COMMERCE; LICENSE; COMMERCIAL TRAVELLER; DRUMMER.

PEDIGREE. A succession of degrees from the origin: it is the state of the family as far as regards the relationship of the different members, their births, marriages, and deaths. This term is applied to persons or families who trace their origin or descent.

On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, *hearsay evidence* has been admitted to prove a pedigree: As declarations of deceased persons who were related by blood or marriage may be given in evidence in matters of pedigree; Fulkerson v. Holmes, 117 U. S. 397, 6 Sup. Ct. 780, 29 L. Ed. 915. See Rawle, Covenants § 17 N. 1; Warv. Abs. of Title 33, 313. See DECLARATION; FAMILY BIBLE; HEARSAY.

The pedigree of a dog may be shown by its registration; Citizens' Rapid T. Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754.

PEDIS POSITIO (Lat. a planting or placing of the foot). A term used to denote an actual corporal possession. *Possessio est quasi pedis positio:* possession is as it were a planting of the foot. 3 Co. 42. See PEDIS POSSESSIO.

PEDIS POSSESSIO. (Lat.). A foothold; an actual possession. To constitute adverse possession, there must be *pedis possessio*, or a substantial inclosure. Bailey v. Irby, 2 N. & M'C. (S. C.) 343, 10 Am. Dec. 609; Jackson v. Sellick, 8 Johns. (N. Y.) 269, per Kent, C. J.; Waggoner v. Hastings, 5 Pa. 303.

PEERAGE. See PARLIAMENT; PEERS.

PEERESS. A woman may be a peeress by creation, descent or marriage. If one who is a peeress in her own right marry a commoner, she retains her rank; otherwise, if she be only noble by her previous marriage; but even in such case, if she marry a peer, she retains her first rank, for all the nobility are *pares*. A woman, noble in her own right, or by a previous marriage, when she marries a commoner, communicates no rank to him. A woman, noble by a previous marriage, when afterwards marrying a commoner, is usually, by courtesy, addressed by the style and title she bore before her second marriage. All peeresses, whether in their own right or by marriage, shall be tried before the same judicature as peers. See Jacob, Law Dict.

PEERS (Lat. *pares*). The vassals of a lord; the freeholders of a neighborhood, before whom livery of seisin was to be made, and before whom, as the jury of the county, trials were had. 2 Bla. Com. 316. These vassals were called *pares curiæ*, which title see. 1 Washb. R. P. *23. The term was formerly used to designate co-vassalship, without restriction as to rank or condition; Harcourt, The Lord Steward 225.

Trial by a man's peers or equals is one of the rights reserved by Magna Carta. 4 Bla. Com. 349.

The nobility of England, though of different ranks, viz., dukes, marquesses, earls, viscounts, and barons, are equal in their privileges of sitting and voting in the house of lords; they are called peers of the realm.

They are created by writ summoning them to attend the house of lords by the title intended to be given, or by letters patent directly conferring the dignity. The former is the more ancient way; but the grant by patent is more certain. See Sullivan, Lect. 19 *a;* 1 Wood. Lect. 37.

In 1856, Baron Parke was created a life peer; the house of lords decided that a life peer could not sit and vote in parliament.

Bishops who sit in parliament are peers; but the word spiritual is generally added; *e. g.* "lords temporal and spiritual." 1 Sharsw. Bla. Com. 401*, n. 12.

The titles of all temporal peers are now hereditary; May, Law of Parl. 14; except

certain peers holding judicial office, whose peerage is a life peerage only.

Scotch and Irish peers are not entitled to sit in the lords, but sixteen representative Scotch peers are elected to each parliament, and twenty-eight Irish peers are elected to sit in the lords for life.

A peerage is not transferable, except with consent of parliament; *id.* Succession to the title is destroyed by attainder; see 1 Bla. Com. 412*. A peerage cannot be surrendered, extinguished, or in any way got rid of unless the blood be corrupted; [1907] A. C. 10.

When an English peer has been adjudicated a bankrupt, he cannot sit in the house of lords; he loses no other privilege thereby. When the bankruptcy is determined he may resume his seat. If he obtains his discharge with a certificate that bankruptcy was the result of misfortune, the disqualification may be removed. But in the case of Scotch or Irish representative peers in the house of lords, bankruptcy not determined within a year vacates their seat.

A member of the house of commons, when he becomes an English or Scotch peer is disqualified to sit in the commons.

Peers formerly could vote by proxy, but the right was suspended by a standing order in 1868.

If a resolution is passed contrary to the sentiment of any member of the house, he may "protest" and enter his dissent on its journal. See PROTEST.

As to the trial of peers, see tit. *Lord High Steward*, in 8 Encyc. Laws of Eng.; Harcourt, The Lord Stewart; Round, Peerage; Pike, Constit. Hist. of H. of L.; COURT OF THE LORD HIGH STEWARD; PARLIAMENT.

PEINE FORTE ET DURE (L. Fr.). A punishment formerly inflicted in England on a person who, being arraigned of felony, refused to plead and put himself on his trial, and stubbornly stood mute.

A jury was impanelled to try whether he stood "mute of malice," or "mute by the visitation of God," and if the latter the trial proceeded; but if the former the prisoner was solemnly warned by the judges of the terrible consequences described by Lord Coke, in the trial of Sir Richard Weston in 1615 for the murder of Sir Thomas Overbury, by the words—*opere, frigore, et fame.* Warnings were given (*trina admonitio*) and time was given for reflection and often the unfortunate was subjected to entreaties of friends and others, but if he remained obdurate he was adjudged to suffer the sentence of *penance*, or *peine* (which is said by Blackstone to be a corrupted abbreviation of *prisone*) *forte et dure.* The judgment was that he return from whence he came, to a low dungeon into which no light could enter; he was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords tied to posts, a sharp stone under his back, and as much weight of iron or stone as he could bear, or more than he could bear, placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died. This punishment was vulgarly called *pressing to death;* 4 Bla. Com. 324; Cowell; Britton c. 4. fol. 11*. This punishment dates back to a period between 31 Edw. III. and 8 Hen. IV.; 4 Bla. Com. 324; Year B. 8 Hen. IV. 1. It did not at first include the *pressing.* Originally when asked how he would be tried the accused must choose between a trial "by God" (by ordeal) and "by my country" (by jury). After the former method of trial was abolished about 1215 the other method remained a privilege to be claimed and in those days the idea did not occur to any one of trying a prisoner by jury without his consent. By standing mute a prisoner put the court in difficulty, and at first he was put to death for not consenting to be tried "according to the law and custom of the realm." This was thought too severe and in the Parliament of Westminster under Edward I. there was provided for notorious felons confinement in *prison forte et dure;* which included all possible harsh features except death. Then to conquer obduracy, starvation was resorted to; but this being too slow, under Henry IV. the *peine* was substituted for the *prison.* It continued until 1772 although occasionally something stronger than exhortation was resorted to, as tying up by the thumbs in the presence of the court, at the Old Bailey in 1734. It only ended when standing mute, by statute, in England, became equivalent to a confession or verdict of guilty; 12 Geo. III. c. 20; but in 1827 it was enacted "that in such cases a plea of not guilty should be entered for the accused."

The obvious effect of standing mute was to avoid the forfeiture of goods consequent upon conviction of felony and the results of corruption of blood, by an attainder, in case of capital felony. Often, indeed usually, in treason cases certainly, conviction was sure and the fortitude required to endure this death by torture would save his children or other heirs from disinheritance. Great numbers did in fact undergo the punishment which was recorded by the clerk's entry or record, "mortuus en pen' fort' et dur'." The number in rural Middlesex alone in 1609–1618 was thirty-two, of whom three were women, and peers were not protected from it by their privilege. A case is recorded in the last year of George I. and one at least in the reign of George II.

The only instance in which this punish-

ment has even been inflicted in this country is that of Giles Cory, of Salem, who refused to plead when arraigned for witchcraft; Washb. Jud. Hist. 142; 1 Chandl. Cr. Tr. 122.

See Jacob, Law Dict.; 4 Bla. Com. 324; 15 Viner, Abr., *Mute.*

PELL, CLERK OF THE. Pell is a roll of parchment. The Clerk of the Pell was an officer of the exchequer in England who entered every teller's bill on a parchment roll (pell of receipts) and made another roll (pell of disbursements). Abolished. Cent. Dict.

PENAL ACTION. An action for recovery of statute penalty. 3 Steph. Com. 535. See Hawk. Pl. Cr. *Informatio.* It is distinguished from a popular or *qui tam* action, in which the action is brought by the informer, to whom part of the penalty goes. A penal action or information is brought by an officer, and the penalty goes to the king; 1 Chitty, Gen. Pr. 25; 2 Archb. Pr. 188.

PENAL ACTIONS. Actions brought in England under a statute forbidding or requiring an act to be done and rendering an offender liable to pay a sum of money to be recovered from him in a civil action. Sometimes the plaintiff is the person aggrieved, sometimes the attorney-general; but most frequently a "common informer." They are not criminal actions. Odgers, C. L. 944.

PENAL BILL. The old name for a bond with condition by which a person is bound to pay a certain sum of money or do a certain act, or, in default thereof, pay a certain sum of money by way of penalty. Jacob, Law Dict. *Bill.*

PENAL CLAUSE. That particular clause or subdivision of a statute which fixes the penalty for a violation of previous provisions. See STATUTE; PENAL STATUTES.

A secondary obligation entered into for the purpose of enforcing the performance of a primary obligation. La. Civ. Code, art. 2117.

PENAL LAWS. See PENAL STATUTES.

PENAL SERVITUDE. A punishment which consists in keeping an offender in confinement and compelling him to labor.

PENAL STATUTES. Those which inflict a penalty for the violation of some of their provisions. Strictly and properly, they are those laws imposing punishment for an offence committed against the state, which the executive has power to pardon, and the expression does not include statutes which give a private action against a wrong-doer. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.

A solely penal law will not be enforced in another state, but a statute is not penal, so as not to be enforced by the courts of another state, merely because it awards punitive damages as the measure of the liability of the wrong-doer; Southern Ry. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678. An action for violation of the United States safety appliance act is civil in its nature; Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

See INTERPRETATION.

PENALTY. A clause in an agreement, by which the obligor agrees to pay a certain sum of money if he shall fail to fulfil the contract contained in another clause of the same agreement.

A penal obligation differs from an alternative obligation, for the latter is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligor has his option to require the fulfilment of the first obligation, or the payment of the penalty, in those cases which cannot be relieved in equity, when the penalty is considered as liquidated damages. Dalloz, Dict. *Obligation avec Clause penale.*

A distinction is made in courts of equity between penalties and forfeitures. In cases of forfeiture for the breach of any covenant other than a covenant to pay rent, relief will not be granted in equity, unless upon the ground of accident, fraud, mistake, or surprise, when the breach is capable of compensation; Eden, Inj. 22; 3 Ves. 692; 18 *id.* 58.

For the distinction between a penalty and liquidated damages, see LIQUIDATED DAMAGES.

The penalty remains unaffected, although the condition may have been partially performed: as, in a case where the penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars, which had been paid for ten years, the penalty was still valid; Blackmer v. Blackmer's Adm'r, 5 Vt. 355.

The punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment; see Stearns v. Barrett, 1 Pick. (Mass.) 451, 11 Am. Dec. 223; 1 Saund. 58, n.; 16 Viner, Abr. 301; Torbett v. Godwin, 62 Hun 407, 17 N. Y. Supp. 46; U. S. v. Mathews, 23 Fed. 74; The Strathairly, 124 U. S. 571, 8 Sup. Ct. 609, 31 L. Ed. 580; although not restricted to it; State v. Hardman, 16 Ind. App. 357, 45 N. E. 345.

When a statute creating a forfeiture does not prescribe the mode of collecting it, either debt, information, or indictment will lie; U. S. v. Stocking, 87 Fed. 858. Section 975 of U. S. R. S. recognized the right to institute suits, but there are authorities which maintain that unless authorized by statute, the informer cannot sue in his own name for the penalty; U. S. v. Stocking, 87 Fed. 861.

See QUI TAM.

The words penal and penalty in their strict and primary sense, denote a punish-

ment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offence against its laws; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.

PENANCE. In Ecclesiastical Law. An ecclesiastical punishment inflicted by an ecclesiastical court for some spiritual offence. Ayliffe, Parerg. 420.

PENCIL. An instrument made of plumbago, red chalk, or other suitable substance, for writing without ink.

It has been held that a will written with a pencil is valid; 1 Phill. Eccl. 1; 2 *id.* 173; Beach, Wills § 23. See WILL.

PENDENTE LITE (Lat.). Pending the continuance of an action; while litigation continues.

An administrator is appointed *pendente lite*, when a will is contested. See ADMINISTRATOR; LIS PENDENS.

PENDENTES (Lat.). In Civil Law. The fruits of the earth not yet separated from the ground; the fruits hanging by the roots. Erskine, Inst. b. 2, tit. 2, s. 4.

PENDING. See LIS PENDENS.

PENDING SUIT. See AUTER ACTION PENDANT; UNITED STATES COURTS.

PENETRATION. See RAPE.

PENITENTIALS. A compilation or list of sins and other penances, compiled in the Eastern Church and in the extreme west about the sixth century. Stubbs, Canon Law, in 1 Sel. Essays in Anglo-Amer. L. H. 252.

PENITENTIARY. A prison for the punishment of convicts.

A prison or place of punishment. The place of punishment in which convicts, sentenced to confinement and hard labor, are confined by the authority of the law. Millar v. State, 2 Kan. 174; State v. Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486.

There are two systems of penitentiaries in the United States, each of which is claimed to be the best by its partisans,—the Pennsylvania system and the New York system. By the former, convicts are lodged in separate, well-lighted, and well-ventilated cells, where they are required to work during stated hours. During the whole time of their confinement they are never permitted to see or speak with each other. Their usual employments are shoemaking, weaving, winding yarn, picking wool, and such like business. The only punishments to which convicts are subject are the privation of food for short periods, and confinement *without labor* in dark but well-aired cells: this discipline has been found sufficient to keep perfect order; the whip and all other corporal punishments are prohibited. The advantages of the plan are numerous. Men cannot long remain in solitude without labor; convicts, when deprived of it, ask it as a favor, and, in order to retain it, use, generally, their best exertions to do their work well; being entirely secluded, they are of course unknown to their fellow-prisoners, and can form no combination to escape while in prison, or associations to prey upon society when they are out; being treated with kindness, and afforded books for their instruction and amusement, they become satisfied that society does not make war upon them, and more disposed to return to it, which they are not prevented from doing by the exposure of their fellow-prisoners when in a strange place; the labor of the convicts tends greatly to defray the expenses of the prison. The disadvantages which were anticipated have been found to be groundless. Among these were that the prisoners would be unhealthy; experience has proved the contrary: that they would become insane; this has also been found to be otherwise: that solitude is incompatible with the performance of business: that obedience to the discipline of the prison could not be enforced. These, and all other objections to this system, are by its friends believed to be without force.

The New York system, adopted at Auburn, which was probably copied from the penitentiary at Ghent, in the Netherlands, called La Maison de Force, is founded on the system of isolation and separation, as well as that of Pennsylvania, but with this difference, that in the former the prisoners are confined to their separate cells during the night only; during the working-hours in the daytime they labor together in workshops appropriated to their use. They eat their meals together, but in such a manner as not to be able to speak with each other. Silence is also imposed upon them at their labor. They perform the labor of carpenters, blacksmiths, weavers, shoemakers, tailors, coopers, gardeners, woodsawyers, etc. The discipline of the prison is enforced by stripes inflicted by the assistant keepers, on the backs of the prisoners; though this punishment is rarely exercised. The advantages of this plan are that the convicts are in solitary confinement during the night: that their labor, by being joint, is more productive; that, inasmuch as a clergyman is employed to preach to the prisoners, the system affords an opportunity for mental and moral improvements. Among the objections made to it are that the prisoners have opportunities of communicating with each other and of forming plans of escape, and, when they are out of prison, of associating together in consequence of their previous acquaintance, to the detriment of those who wish to return to virtue, and to the danger of the public; that the discipline is degrading, and that it engenders bitter resentment in the mind of the convict.

PENNSYLVANIA. One of the thirteen original states of the United States of America.

It received its name from a royal charter granted March 4, 1681, by Charles II. to William Penn. By that charter, Penn was constituted the proprietary and governor of the province, and vested with power to enact laws, with the consent of the freemen, to execute the laws, to appoint judges and other officers, incorporate towns, establish ports, levy customs, import and export goods, sell lands creating a tenure, levy troops, make war, and exercise other attributes of sovereign power. Appeals in judicial matters lay to the crown, and all laws could be annulled by the crown within five years after their passage.

The first frame of government was adopted and promulgated on April 25, 1682. The government was to be by the governor and freemen in a provincial council and general assembly. Both of the latter were chosen annually by the people. All laws were to originate with the council. A governor, judges, and other officers were to be appointed, during good behavior, by the governor from a double list presented by the council or assembly.

On April 2, 1683, a new frame was adopted, reducing the numbers both of the council and assembly. In 1693 the proprietary was deprived of his government and the province placed under the government of New York. But in 1694 Penn was duly reinstated.

A new frame of government adopted on October 26, 1696, made some material alterations in the existing order of things. The power of originating laws was thereby first conferred on the assembly.

The charter of privileges granted by the proprietary and accepted by the assembly on October 28, 1701, confirming the foregoing provisions and making numerous others, continued the supreme law of the province during the residue of the proprietary government.

In 1776, after the declaration of American independence, a constitution was formed adapted to the altered circumstances of the country, which continued in force until 1790, when a new one was substituted. This was amended in 1837 by the introduction of some very radical changes. Other amendments were made in 1850, in 1857, and in 1864. In 1874 a new constitution was adopted, which remains still in force with minor amendments.

PENNY. An English coin, of the value of one-twelfth part of a shilling. Its weight is approximately, 1–3 oz. avoird.; of a half penny, 1–5 oz.; of a farthing, 1–10 oz. A half penny is one inch in diameter. Whittaker's Alm.

PENNYWEIGHT. A troy weight of twenty-four grains, or one-twentieth part of an ounce. See WEIGHTS.

PENSION. A stated and certain allowance granted by the government to an individual, or those who represent him, for services performed by him for the country.

The act of August 26, 1776, of the old congress promised pensions to soldiers and seamen who might be disabled in the war; and the act of May 15, 1778, promised half pay for seven years after the end of the war to all commissioned officers who should serve until the end of the war. The earliest act of the United States congress was that of September 29, 1789, which directed that pensions that had been paid by the states should be paid by the United States. The act of July 4, 1836, was the foundation of pensions to widows and orphans.

Originally the secretary of war was directed to make out the list of pensioners. The law of May 15, 1828, was executed at the treasury department, but by resolution of June 28, 1832, all duties devolved on that department were transferred to the war department. On March 2, 1833, an independent pension bureau was established in the war department. For a time navy pension laws were executed in the navy department, but on March 4, 1840, this was transferred to the pension bureau. The act of March 3, 1849, created the Department of the Interior and transferred the pension business to that Department, where it now is; it is in charge of a commissioner of pensions.

Pensions have been divided into "invalid pension," "gratuitous or service pensions" and "land bounties."

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which congress has the right to give, distribute, or recall at its discretion." U. S. v. Teller, 107 U. S. 68, 2 Sup. Ct. 39, 27 L. Ed. 352. But by an act of December 21, 1893, payment of a pension cannot be withheld or suspended without notice to the grantee of not less than thirty days.

The following abstract is taken from a compilation published by authority of the government:

War of the Revolution, Service Pensions. Widows of soldiers who served 14 days or more, or were in battle during the war, were entitled, if not being married, to $8 a month after March 9, 1878, and $12 a month after March 19, 1886. The widow of a soldier who was granted a pension received a pension at the same rate, notwithstanding the marriage, upon proof of present widowhood. There is no law granting pensions to the descendants of soldiers. The daughters of Revolutionary soldiers have in some cases been placed on the pension list by special acts.

War of 1812, Service Pensions. Soldiers and sailors who served 14 days or more, or were in any engagement, and were honorably discharged, and the widows of such received $8 per month by the act of March 9, 1878; and by the act of March 19, 1886, such widow pensioners receive $12 per month. There is no law granting the service pensions to the descendants of soldiers or sailors.

Indian Wars from 1832 to 1842, Service Pensions. The act of July 27, 1892, provides pensions for surviving officers and enlisted men, including the marines, who were in the service for 30 days in the Black Hawk War, the Creek War, the Cherokee Disturbances or the Florida Seminole War, and honorably discharged, or personally named in any resolution of Congress, and for their widows, if they have not remarried. The amount was $8 a month, irrespective of rank. It was raised to $12 a month for widows.

Indian Wars from 1817 to 1858. The same acts apply to officers and enlisted men, in-

cluding marines and those in the naval service, who served for 30 days or more and were honorably discharged, in certain specified Indian wars. Provision was also made for surviving widows, who had not remarried.

Indian Wars from 1855 to 1860. By act of May 30, 1908, the provisions of the act of July 27, 1892, were extended to the surviving officers and enlisted men of the Texas Volunteers, who served against Mexico and Indian depredators and to their surviving widows, if not remarried.

Mexican War, Service Pensions. By act of January 29, 1887, officers and enlisted men in the military or naval service for 60 days or who were in battle and honorably discharged or who were personally named in any resolution of Congress are entitled to a pension at 62 years of age; or, if not, upon proof of pensionable disability and dependence.

By act of January 29, 1887, the pension commences on that date if the pensionable condition existed at that date, in survivors' claims, by reason of age or dependence; if not, then on the date the applicant became 62 years of age or dependent or disabled. The rate was $8 a month, irrespective of rank. It was increased by the act of January 5, 1893, to $12 a month, but its benefits were limited to those who were pensioners on that date. To secure the increase there must be disability for manual labor and such destitute circumstances that $8 a month is insufficient for the necessities of life. The act of April 23, 1900, removed the limitations imposed by the act of January 5, 1893.

The act of March 3, 1903, pensions all survivors of the Mexican war at $12 a month, but does not increase the pension to a widow.

By act of April 19, 1908, a widow's pension was increased to $12 a month.

By act of February 6, 1907, any person who served 60 days in the Mexican War in either service and was honorably discharged and has reached 62 years of age is entitled to a pension irrespective of rank: At 62 years $12 a month; at 70 years $15 a month, and at 75 years $20 a month.

Pensions for Disability or Death Prior to March 4, 1861. Soldiers wounded or injured or who contracted disease in the line of duty are entitled to a pension corresponding in degree to the disability. Those in the naval service receive a like pension, except engineers, firemen or coal-heavers, for disability incurred prior to August 21, 1842. The widows or children under 16 years of age of soldiers who served prior to March 4, 1861, are entitled to a pension, if the soldier's death was due to causes contracted in time of actual war. Widows or children under 16 of sailors who served prior to March 4, 1861, are entitled to pensions only when the sailor's death occurred in the service and in the line of duty. There is no law granting a pension to parents, brothers or sisters.

Invalids Since March 4, 1861. R. S. §§ 4692, 4693, provide for applications setting forth the company and regiment of service, or of the vessel if a sailor, and the nature of the wound and how received, etc. The act of June 27, 1890, as amended May 9, 1900, provided that any officer, soldier, sailor or marine who served 90 days or more during the War of the Rebellion and was honorably discharged and was suffering from a permanent disability not the result of vicious habits, which incapacitates him for manual labor in such degree as to render him unable to earn a support, is entitled to a pension of not less than $6 nor more than $12 per month. The act of May 9, 1900, amending the act of June 27, 1890, provides that each infirmity shall be considered and the aggregate of the disabilities shall be rated.

The act of February 6, 1907, provided that any person who served 90 days or more in either service during the Civil War and was honorably discharged is entitled to the following rates irrespective of rank: At 62 years of age $12 a month; at 70 years of age $15 a month; at 75 years or over $25 a month. A pensioner may file an application for an increase of invalid pension.

Navy Service Pensions under R. S. §§ 4756, 4757. Pensions for 20 years' service and for 10 years' service respectively are allowed by the Secretary of the Navy to enlisted men and appointed petty officers who have not been discharged for misconduct.

Pensions to Widows Since March 4, 1861. To obtain a pension under R. S. §§ 4702 and 4703, it must be shown that the soldier or sailor died of a disability contracted in the service and in the line of duty. Marriage may be proved in the usual way and by the testimony of two or more witnesses who knew that the parties lived together as husband and wife and were recognized as such; and as to the claims of widows and children of Indian and colored soldiers and sailors, there need be only proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife, and were so recognized by neighbors and lived together up to the date of enlistment when the husband died in the service, or, if otherwise, to the date of his death. By act of June 27, 1890, as amended by act of May 9, 1900, pensions are granted to widows upon proof that the soldier or sailor served at least 90 days during the War of the Rebellion, that he was honorably discharged and was dead, but his death need not have been the result of his service (under the act of March 13, 1896, his death may

be presumed); that the widow is without support except by daily labor and that her actual net income did not exceed $250 per year and that she married the soldier or sailor prior to June 27, 1890.

By act of April 19, 1908, pensions are granted to widows upon proof that the soldier or sailor served at least 90 days during the Civil War and that he was honorably discharged or is dead, but his death need not have been the result of service and it may be presumed. Also, that she was married prior to June 27, 1890.

Pensions to Minors Since March 4, 1861. Pensions are provided under R. S. §§ 4702, 4703, for minor children of one who died of disability in the service and in the line of duty, and by the act of June 27, 1890, as amended May 9, 1900, minor children have title under these acts upon the death or remarriage of the widow, but where the widow of the soldier or sailor did not marry prior to June 27, 1890, and his death-cause did not originate in service or in the line of duty or where she has lived in open and adulterous cohabitation, the minor takes title, even though the widow be alive and unmarried.

Pensions to Helpless Children. The act of June 27, 1890, as amended May 9, 1900, continues the pension of a minor child who is insane, idiotic, or otherwise physically or mentally helpless, after it becomes 16 years of age and during its lifetime or during disability, and the benefits of this act are extended to all pensions granted before June 27, 1890, or thereafter granted under any statute. The helplessness of the child must have originated prior to 16 years of age and must have continued thereafter.

Pensions to Dependent Relatives. By R. S. § 4707, where a soldier or sailor died of a disease contracted in the service and in the line of duty, a pension is provided for the dependent mother, whether he left a widow or minor or surviving children, the mother being a widow or abandoned by her husband and unable to support herself. Provision is also made for a dependent father and dependent minor brothers and sisters, if the soldier or sailor was a celibate. No distinction is made in the pension laws between brothers and sisters of the half, and those of the whole blood.

The act of March 3, 1901, amending R. S. § 4708, and the act of February 28, 1903, provide for the restoration of pensions to certain remarried widows on renewed widowhood.

The act of August 5, 1892, provides pensions for army nurses.

The act of March 3, 1899, provides for the division of pensions under twenty-one rules, as to which reference must be made to the act.

Inmates of the Government Hospital for the Insane. By act of February 2, 1909, the pension accruing to an inmate of such hospital must be paid to the Superintendent or disbursing agent and used for the benefit of the pensioner, and in the case of a male pensioner, his wife, minor children and dependent parents, or, if a female pensioner, her minor children, if any, in the order named.

By act of May 11, 1912, any person who served 90 days or more in the military or naval service during the Civil War, who was honorably discharged, and has reached the age of 62 years or over, is entitled to a pension according to a sliding scale beginning with 62 years of age and 90 days' service with a pension of $13 a month, and increasing to 75 years of age and service of two years or over with a pension of $30 a month. If wounded, and by reason thereof not fit for manual labor or by reason of disease incurred in service or in the line of duty, the maximum pension is $30 without regard to length of service or age. And any person who served 60 days or over in the Mexican war and has been honorably discharged shall be entitled to $30 a month.

By R. S. § 4741, officers and men on revenue cutters co-operating with the navy are placed on the navy pension list. Special acts provide for a navy pension fund and a privateer pension fund and the pensioners thereon.

No person can draw a pension as an invalid and the pay of his rank for any period, unless his disability caused his employment in a lower grade or in the civil branch of the service; R. S. § 4724; and no person can draw two pensions; R. S. § 4715. No pension shall be paid to any person or to the widow or children or heirs of any deceased person who voluntarily engaged in or aided or abetted the rebellion; R. S. § 4716; unless such person afterwards voluntarily enlisted in the army or navy and incurred disability therein; act of March 3, 1877, amended August 1, 1892.

An offence against the act of June 27, 1890, is committed when a sum greater than ten dollars has been taken, regardless of the fact whether the pension has or has not been received, and it is not necessary to aver a demand for the return of the money wrongfully taken; Frisbee v. U. S., 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657. Where one fraudulently obtained pension money from a client he is not guilty of wrongfully withholding money from the pensioner under R. S. § 4786; it applies to money before it reaches the hands of the pensioner; Ballew v. U. S., 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388. See MILITARY BOUNTY LANDS.

R. S. § 4747, protects pension money from seizure or attachment under process while in the hands of the pension office or in transmission to the pensioner. But this does not protect it after it has reached his hands; Cranz v. White, 27 Kan. 319, 41 Am. Rep. 408; a pension check handed to the wife is

protected against the husband's creditors; Bullard v. Goodno, 73 Vt. 88, 50 Atl. 544.

A Kentucky act (1912) granting pensions to indigent Confederate soldiers is not obnoxious to the Kentucky constitution, which prohibits the grant of separate emoluments to any man except for "public service"; the service to the state by serving in the Confederate army was a "public service"; Bosworth v. Harp, 154 Ky. 559, 157 S. W. 1084, 45 L. R. A. (N. S.) 692.

In re Opinion of the Justices, 190 Mass. 611, 77 N. E. 820, it was said that gratuities to civil war veterans may legitimately be made in the payment of money, the erection of statues, etc. And it is said in Judson, Taxation § 349, that whatever legitimately tends to inspire patriotic sentiments, etc., is a lawful purpose and will justify taxation or the exercise of the power of eminent domain. But it is held that the payment by a state of pensions to the widows and orphans of civil war veterans is illegal; Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946.

Pensions to School Teachers. Acts exist in some states relating to such pensions. A New York act of 1895 authorizes towns to pension school teachers; an Ohio act creates a school teachers' fund in certain cities, and requires the board of education to deduct one per cent. of the salaries paid to all teachers and pay the same into a school teachers' fund. Where the board of education required teachers contracting for employment to consent to directing one per cent. of their salaries to a pension fund, it was held that its action was invalid; State v. Rogers, 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663.

Pensions or Relief Funds for Policemen and Firemen are provided for in some states; California, Illinois, New York, Rhode Island and Wisconsin. Under the New York act the deduction of $2 a month from each policeman's pay is compulsory; People v. McClare, 3 How. Prac. N. S. (N. Y.) 8. Acts in New York, Illinois and Ohio (as to Cincinnati) provide for relief funds for firemen.

A reasonable appropriation of municipal funds for a police pension is for a strictly municipal use and is valid; Com. v. Walton, 182 Pa. 373, 38 Atl. 790, 61 Am. St. Rep. 712.

Pensions to Mothers. In a few states acts have recently been passed giving pensions to needy mothers.

Pensions, Old Age. By act of 1908, every British subject, male and female, who has attained the age of 70 years, and if he or she has been a British subject, natural born or naturalized, for at least 20 years, and has, save for temporary absences, resided in the British kingdom for 20 years, and is not in receipt of an income amounting to £31. 10s. a year, is entitled to receive for the rest of his or her life a pension of from 1s. to 5s. a week according to the amount of the recipient's income, so as to bring that income just over 13s. per week. The right is unalienable by any act of the person; it does not pass in bankruptcy; but conviction of certain classes of crimes during the last 10 years, and in some cases the receipt of parochial relief, are a bar.

PENSIONARY PARLIAMENT. A Parliament of Charles II which was prolonged for nearly 18 years.

PENSIONER. One who is supported by an allowance at the will of another. The head of one of the Inns of Court, otherwise the Treasurer. *Pension* was used to designate meetings of the Benchers in Gray's Inn.

PENT ROAD. A road shut up or closed at its terminal points. Wolcott v. Whitcomb, 40 Vt. 41.

PEONAGE. A status or condition of compulsory service based upon the indebtedness of the peon to the master. The basal fact is indebtedness. It is involuntary servitude within the 13th amendment to the United States constitution. R. S. U. S. §§ 1990, 5526 constitute it a crime; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. The system existed in New Mexico and other territories derived from Spain. The earliest case is Jaremillo v. Romero, 1 N. M. 190. Inducing one to labor in payment of debt by threats of prosecution may amount to peonage, if by reason of the different character of the parties such threats overcome the will of the servant; U. S. v. Clement, 171 Fed. 974. The offense is complete, whether the condition of peonage exists by virtue of a local law or custom, or in violation or without the sanction of the law; Peonage Cases, 123 Fed. 671.

A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor may, at his will, break his contract; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105, where a statute was held invalid which provided for the imprisonment of one who wilfully and unlawfully breaks a contract to perform farm labor, after having received advances. The same act was held invalid in Ex parte Drayton, 153 Fed. 986. So an Alabama act making it a misdemeanor for a laborer, under contract to work farm lands, to break it and enter into a contract with a different person without the consent of his employer and without excuse and without giving notice, was held invalid as restricting the right to make contracts for employment; Toney v. State, 141 Ala. 120, 37 South. 332, 67 L. R. A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Peonage Cases, 123 Fed. 671.

PEONIA. In Spanish Law. A portion of land which was formerly given to a simple soldier on the conquest of a country. It is

now a quantity of land of different size in different provinces. In the Spanish possessions in America it measured fifty feet front and one hundred feet deep. 2 White, N. Rec. 49; Strother v. Lucas, 12 Pet. (U. S.) 444, 9 L. Ed. 1137.

PEOPLE. A state: as, the people of the state of New York. A nation in its collective and political capacity. 4 Term 783. See U. S. v. Quincy, 6 Pet. (U. S.) 467, 8 L. Ed. 458. The aggregate or mass of the individuals who constitute the state. Solon v. State, 54 Tex. Cr. R. 261, 114 S. W. 349.

In neutrality laws, a government recognized by the United States. The Three Friends, 78 Fed. 175.

"People of the county" and "the county" may be regarded as interchangeable. St. Louis County Ct. v. Griswold, 58 Mo. 175.

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention; the people choose the officers under the constitution, and so on. For these and similar purposes, the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected; Cooley, Const. (2d Ed.) 40, 267; Cooley, Const. L. 278.

In a policy of insurance, "detainments of all kings, princes, and people," the word does not include insurance against any promiscuous or lawless rabble which may be guilty of attacking or detaining a ship; 2 Marsh. Ins. 508. See INSURGENTS; NATION.

The term people of the United States is synonymous with citizens; White v. Clements, 39 Ga. 261.

Sovereign people. Every citizen is one of this people, and a constituent member of the sovereignty; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691; it includes registered voters as well as tax payers; In re Incurring State Debts, 19 R. I. 610, 37 Atl. 14.

Where a state constitution required process to run in the name of the *State*, it is deficient if it run in the name of the *People;* Manville v. Smelting Co., 17 Fed. 126; Perkins v. State, 60 Ala. 9.

PER. By. When a writ of entry is sued out against the alienee, or descendant of the original disseisor, it is then said to be brought in the *per*, because the writ states that the tenant had not the entry but *by* the original wrong-doer. 3 Bla. Com. 181. See ENTRY, WRIT OF; POST.

PER ÆS ET LIBRAM (Lat. *æs*, brass, *libra*, scale). **In Civil Law.** A sale was said to be made *per æs et libram* when one called *libripens* held a scale (*libra*), which the one buying struck with a brazen coin (*æs*), and said, "I say, by the right of a Roman, this thing is mine," and gave the coin to the vendor, in presence of at least three witnesses. This kind of sale was used in the emancipation of a son or slave, and in making a will. Calvinus, Lex. *Mancipatio.*

PER AGREEMENT. The addition of these words in a bill of particulars for services does not preclude from recovering the value of the services specified, although no agreement for the payment of a specified sum is proven. Robinson v. Weil, 45 N. Y. 810.

PER ALLUVIONEM (Lat.). **In Civil Law.** By alluvion, or the gradual and imperceptible increase arising from deposit by water. Vocab. Jur. Utr. *Alluvio;* Ang. & A. Waterc. 53.

PER AND CUI. When a writ of entry is brought against a second alienee or descendant from the disseisor, it is said to be in the *per* and *cui*, because the form of the writ is that the tenant had not entry but *by* and *under* a prior alienee, *to* whom the intruder himself demised it. 3 Bla. Com. 181. See ENTRY, WRIT OF.

PER ANNULUM ET BACULUM (Lat.). **In Ecclesiastical Law.** The symbolical investiture of an ecclesiastical dignity was *per annulum et baculum, i. e.* by the ring and staff. 1 Bla. Com. 378; 1 Burn, Eccl. Law 209.

PER ANNUM. Strictly speaking, by the year or through the year. Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092.

PER AVERSIONEM (Lat.). **In Civil Law.** By turning away. Applied to a sale not by measure or weight, but for a single price for the whole in gross; *e. g.* a sale of all the wine of a vineyard for a certain price. Vocab. Jur. Utr. *Aversio.* Some derive the meaning of the phrase from a *turning away* of the risk of a deficiency in the quantity from the seller to the buyer; others, from *turning away* the head, *i. e.* negligence in the sale; others think *aversio* is for *adversio.* Calvinus, Lex.; 2 Kent 640; 4 *id.* 517.

PER CAPITA (Lat. by the head or polls). When descendants take as individuals, and not by right of representation (*per stirpes*), they are said to take *per capita.* For example, if a legacy be given to the issue of A B, and A B at the time of his death shall have two children and two grandchildren, his estate shall be divided into four parts, and the children and grandchildren shall each have one of them; 2 Bla. Com. 218; Knapp v. Windsor, 6 Cush. (Mass.) 158; 2 Jarm. Wills (6th Am. Ed.) 945; 3 Beav. 451.

PER CURIAM (Lat. by the court). A phrase which occurs constantly in the re-

ports. It distinguishes the opinion or decision of the court from that of a single judge; Abb. Law Dict. 353; though frequently it merely precedes the opinion—"by the court"—without the last mentioned significance. See OPINION. It designates, in Pennsylvania, opinions written by the chief justice of the supreme court.

PER FORMAM DONI (Lat. by the form of the gift). According to the line of descent prescribed in the conveyance of the ancestor or donor of estate-tail. 2 Bla. Com. 113; Partridge v. Dorsey's Lessee, 3 Harr. & J. (Md.) 323; 1 Washb. R. P. 74, 81.

PER FRAUDEM (Lat.). A replication to a plea where something has been pleaded which would be a discharge if it had been honestly pleaded that such a thing has been obtained by fraud; for example, where, on debt on a statute, the defendant pleads a prior action depending, if such action has been commenced by fraud, the plaintiff may reply *per fraudem*. 2 Chitty. Pl. *675.

PER INCURIAM. Through want of care; through inadvertence. 35 E. L. & Eq. 302.

PER INFORTUNIUM (Lat. by misadventure). Homicide *per infortunium*, or by misadventure, is said to take place when a man in doing a lawful act, without any intent to hurt, unfortunately kills another. Hawk. Pl. Cr. b. 1, c. 11; Co. 3d Inst. 56.

PER LEGEM TERRÆ. By the law of the land.

PER MINAS (Lat. by threats). When a man is compelled to enter into a contract by threats or menaces, either for fear of loss of life or mayhem, he may avoid it afterwards. 1 Bla. Com. 131; Bac. Abr. *Duress, Murder* (A). See DURESS.

PER MY ET PER TOUT (Law Fr. by the moiety, or half, and by the whole). The mode in which joint tenants hold the joint estate, the effect of which, technically considered, is that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal. 1 Washb. R. P. 406; 2 Bla. Com. 182; Chal. R. P. 335.

PER PAIS TRIAL. Trial by the country, *i. e.* by jury.

PER PROC. By procuration; by letter of attorney. It does not necessarily mean that the act is done under procuration. 27 L. J. Ex. 468; 3 H. & W. 554. A signature of a promissory note or bill of exchange by procuration operates as notice that the agent has but limited authority to sign, and the principal is only bound by such signature if the agent was acting within the actual limits of his authority, 12 C. B. N. S. 373.

PER QUOD CONSORTIUM AMISIT (Lat. by which he lost her company). If a man's wife is so badly beaten or ill used that thereby he loses her company and assistance for any time, he has a separate remedy by an action of trespass (in the nature of an action on the case) *per quod consortium amisit*, in which he shall recover satisfaction in damages. 3 Bla. Com. 140; Cro. Jac. 501.

PER QUOD SERVITIUM AMISIT (Lat. by which he lost her or his service). Where a servant has been so beaten or injured that his or her services are lost to the master, the master has an action of trespass *vi et armis, per quod servitium amisit*, in which he must allege and prove the special damage he has sustained. 3 Bla. Com. 142. This action is commonly brought by the father for the seduction of his daughter, in which case very slight evidence of the relation of master and servant is necessary; but still some loss of service, or some expense, must be shown; 5 B. & P. 466; 5 Price 641; Kendrick v. McCrary, 11 Ga. 603; Phelin v. Kenderdine, 20 Pa. 354. See SEDUCTION.

PER SALTUM. By sudden movement; passing over certain proceedings. 8 East 511.

PER SAMPLE. By sample. A purchase so made is a collateral engagement that the goods shall be of a particular quality. 4 B. & Ald. 387.

PER SE. Taken alone; in itself; by itself.

PER STIRPES (Lat. *stirps*, trunk or root of a tree or race). By or according to stock or root; by right of representation. Knapp v. Windsor, 6 Cush. (Mass.) 158; 2 Bla. Com. 217; 2 Kent 425.

When descendants take by representation of their parent, they are said to take *per stirpes;* that is, children take among them the share which their parent would have taken, if living.

PER TOUT ET NON PER MY (Law Fr. by the whole and not by the moiety). Where an estate in fee is given to a man and his wife, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*. 2 Bla. Com. 182. The late married woman's acts have been held to abolish estates by entireties; Cooper v. Cooper, 76 Ill. 57; Clark v. Clark, 56 N. H. 105; Meeker v. Wright, 76 N. Y. 262; *contra*, Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Fisher v. Provin, 25 Mich. 350; Diver v. Diver, 56 Pa. 106. See ENTIRETY.

PER UNIVERSITATEM (Lat. by the whole). Used of the acquisition of any property as a whole, in opposition to an acquisition by parts: *e. g.* the acquisition of an inheritance, or of the separate property of the son (*peculium*), etc. Calvinus, Lex. *Universitas.*

PER YEAR. Equivalent to the word "annually." Curtiss v. Howell, 39 N. Y. 213.

PERAMBULATION. A travelling survey. A district within which a person has the right of inspection. A method in early Scotch and English history, and thence followed in the colonial period in United States, of determining and maintaining boundaries and monuments between tenants, and between neighboring parishes. Cent. Dict. See BEATING THE BOUNDS; DE PERAMBULATIONE FACIENDA.

PERAMBULATIONE FACIENDA, WRIT DE. In English Law. The name of a writ which is sued by consent of *both* parties when they are in doubt as to the bounds of their respective estates; it is directed to the sheriff to make perambulation, and to set the bounds and limits between them in certainty. Fitzh. N. B. 309.

"The writ *de perambulatione facienda* is not known to have been adopted in practice in the United States, but in several of the states remedies somewhat similar in principle have been provided by statutes." Greenl. Ev. § 146.

PERCEPTION (From *per* and *capere*). The taking possession of. For example, a lessee or tenant before perception of the crops, *i. e.* before harvesting them, has a right to offset any loss which may happen to them, against the rent; but after the perception they are entirely at his risk. Mackeldey, Civil Law § 378. Used of money, it means the counting out and payment of a debt. Also used for food due to soldiers. Vicat, Voc. Jur.

PERCH. The length of sixteen feet and a half; a pole or rod of that length. Forty perches in length and four in breadth make an acre of land.

PERCOLATION. See SUBTERRANEAN WATERS; WATERS.

PERDONATIO UTLAGARIÆ (Lat.). **In English Law.** A pardon for a man who, for contempt in not yielding obedience to the process of the king's courts, is outlawed, and afterwards, of his own accord, surrenders.

PERDUELLIO (Lat.). **In Civil Law.** At first, an honorable enmity to the republic; afterwards, a traitorous enmity of a citizen; consisting in being of a hostile disposition towards the republic, *e. g.* treason aiming at the supreme power, violating the privileges of a Roman citizen by beating him, etc., attempting anything against the person of the emperor, and, in general, any open hostility to the republic. Sometimes used for the enemy or traitor himself. *Perduellio* was distinguished from *crimen imminutæ majestatis*, as being an attempt against the whole republic, punishable in *comitia centuriata*, by crucifixion and by infamy after death. Calvinus, Lex.; Vicat, Voc. Jur.

PEREGRINI. The name given to aliens in Rome. The *prætor peregrinus* decided disputes between them and their disputes with Roman citizens and principally built up the body of law which received the name of *jus gentium*. Bryce, Rome & England. See PRÆTOR.

Under the denomination of *peregrini* were comprehended all who did not enjoy any capacity of the law, namely, slaves, alien enemies, and such foreigners as belonged to nations with which the Romans had not established relations. Savigny, Dr. Rom. § 66.

PEREMPT. To waive or bar an appeal by one's own act so as partially to comply with or acquiesce in a sentence of a court. Phill. Eccl. L. 1275; Rog. Eccl. L. 47.

PEREMPTORIUS (Lat. from *perimere*, to destroy). **In Civil Law.** That which takes away or destroys forever; hence, *exceptio peremptoria*, a plea which is a perpetual bar. See PEREMPTORY. Bract. lib. 4, c. 20; Fleta, lib. 6, c. 36, § 3; Calvinus, Lex.

PEREMPTORY. Absolute; positive. A final determination to act, without hope of renewing or altering. Joined to a substantive, this word is frequently used in law; as, peremptory action; Fitzh. N. B. 35, 38, 104, 108; peremptory nonsuit; *id.* 5, 11; peremptory exception; Bract. lib. 4, c. 20; peremptory undertaking; 3 Chitty, Pr. 112, 793; peremptory challenge of jurors; Inst. 4. 13. 9; Code 7. 50. 2; 8. 36. 8; Dig. 5. 1. 70. 73.

PEREMPTORY CHALLENGE. See CHALLENGE.

PEREMPTORY DAY. A precise time when certain business by rule of court ought to be spoken to.

PEREMPTORY DEFENCE. A defence which insists that the plaintiff never had the right to institute the suit, or that, if he had, the original right is extinguished or determined. 4 Bouvier, Inst. n. 4206.

PEREMPTORY EXCEPTION. Any defence which denies entirely the ground of action. 1 White, Rec. 283. So of a demurrer; Lambeth v. Turner, 1 Tex. 364.

PEREMPTORY MANDAMUS. A mandamus requiring a thing to be done absolutely. It is usually granted after failure to show satisfactory cause on an alternative mandamus. No other return will be permitted but absolute obedience; 3 Bla. Com. *110; Tapp. Mand. 400. See MANDAMUS.

PEREMPTORY PAPER. A court paper containing a list of all motions.

PEREMPTORY PLEA. A plea which goes to destroy the right of action itself; a plea in bar or to the action. 3 Steph. Com. 11th ed. 541; 2 Saund. Pl. & Ev. 645.

PEREMPTORY RULES. Rules entered as of course in the office of the clerk of a court, on motion of counsel; they are made absolute in the first instance and do not come before

the court, unless in some subsequent proceedings. Mitchell, Motions & Rules 9.

PERFECT. Complete. The word implies either physical, moral, or mechanical perfection. 17 C. B. N. S. 601. A guaranty that goods are perfect is construed to mean that they are perfect for the use intended; Roe v. Bacheldor, 41 Wis. 360.

The term is applied to obligations in order to distinguish those which may be enforced by law, which are called *perfect*, Aycock v. Martin, 37 Ga. 128, 92 Am. Dec. 56, from those which cannot be so enforced, which are said to be *imperfect*.

A *perfect title* is one which is good both at law and in equity. Warner v. Mut. A. Co., 21 Conn. 449.

PERFIDY. The act of one who has engaged his faith to do a thing, and does not do it, but does the contrary. Wolff § 390.

PERFORMANCE. The act of doing something. It is synonymous with fulfilling. Ætna Ins. Co. v. Kittles, 81 Ind. 97.

The thing done: as, Paul is exonerated from the obligation of his contract by its performance.

When a contract has been made by parol, which under the statute of frauds could not be enforced, because it was not in writing, and the party seeking to avoid it has received the whole or a part performance of such agreement, he cannot afterwards avoid it; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; L. R. 1 Ch. 35; Denver & R. G. R. Co. v. Ristine, 77 Fed. 58, 23 C. C. A. 13, 40 U. S. App. 579; and such part performance will enable the other party to prove it *aliunde;* Thompson v. Tod, 1 Pet. C. C. 380, Fed. Cas. No. 13,978; Smith v. Brailsford, 1 Des. (S. C.) 350; Ebert v. Wood, 1 Binn. (Pa.) 218, 2 Am. Dec. 436.

The statute of frauds does not apply to a contract which has been fully performed by one party and partially, at least, by the other; Warwick & C. Water Co. v. Allen (R. I.) 35 Atl. 579. An agreement for constructing a party wall is so performed as to take it out of the statute when built by one owner and used by the other; Duvelmeyer v. Duvelmeyer, 7 Ohio Dec. 426. Part performance of a verbal contract for the sale of land is not sufficient to avoid the statute; Washington v. Soria, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555; though in some cases it is; Goodwin v. Smith, 89 Me. 506, 36 Atl. 997; as where the land was selected and a conveyance made; Lingeman v. Shirk, 15 Ind. App. 432, 43 N. E. 33; and where there has been an entry into possession under a parol promise and a deed has been tendered, it is sufficient part performance to sustain an action for the purchase money, though it would not have been for compelling specific performance; Stephens v. Harding, 48 Neb. 659, 67 N. W. 746.

If it is a parol contract for the sale of land, the general rule in equity is that it is taken out of the statute of frauds if there has been such part performance as to make it a fraud not to complete the contract; but if adequate compensation can be had in damages, the party is left to his suit. Where the performance has been in giving personal service, specific performance has been decreed; Lothrop v. Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; Davison v. Davison, 13 N. J. Eq. 246; *contra*, 8 App. Cas. 467.

The question what is sufficient delivery to operate as part performance to avoid the statute is one of frequent occurrence, and must usually be determined upon the circumstances of each case and is not a subject upon which it is easy to generalize. See St. Paul & M. Trust Co. v. Howell, 59 Minn. 295, 61 N. W. 141; Agnew v. Dumas, 64 Vt. 147, 23 Atl. 634; Curtis v. Lumber Co., 114 N. C. 530, 19 S. E. 374; Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088; Powder River L. S. Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019; Hudson Furniture Co. v. Carpet Co., 10 Utah, 31, 36 Pac. 132.

The question of performance becomes important where it is necessary to determine whether the non-performance of one party according to the exact terms of the contract will prevent a recovery upon it, or in case that is not permitted, upon a *quantum meruit.* As to the effect of a contract for services, where the employé is discharged for good cause before the termination of his contract, the authorities conflict. See Timberlake v. Thayer, 71 Miss. 279, 14 South. 446, 24 L. R. A. 231, where the authorities are collected. See also MASTER AND SERVANT. Where there is a contract for permanent employment, a substantial performance by the employer would have the effect of releasing him from liability upon his contract to an employé who refused to comply with the terms of the contract; Chicago, B. & Q. R. Co. v. Cochran, 42 Neb. 531, 60 N. W. 894.

One who abandons a contract or refuses to perform it, the other party being willing to complete his performance, cannot recover on a *quantum meruit* for labor expended on partial performance; Johnson v. Fehsefeldt, 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N. S.) 1069; Mikolajewski v. Pugell, 62 Misc. 449, 114 N. Y. Supp. 1084; *contra*, if the part performance is beneficial to the other party; Cleveland, C., C. & St. L. R. Co. v. Scott, 39 Ind. App. 420, 79 N. E. 226.

Where workmen refuse to perform a contract for their services and their employer makes a new contract with them at a greater price, he is bound to perform such new contract; Domenico v. Packers' Ass'n, 112 Fed. 554.

The non-performance of a building contract is not excused by inevitable accident; Haynes & Co. v. Second B. Church, 88 Mo.

285, 57 Am. Rep. 413; School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Dermott v. Jones, 2 Wall. (U. S.) 1, 17 L. Ed. 762; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; nor by the acceptance of the buildings when not finished in due time; Dermott v. Jones, 23 How. (U. S.) 220, 16 L. Ed. 442; but it may be by acts of the other party which delay completion, even if acquiesced in by the contractor; Mansfield v. R. Co., 102 N. Y. 205, 6 N. E. 386. The prevention of performance by the destruction of a building before completion, if the contract is entire, will prevent recovery for any part; L. R. 2 C. P. 651; so where the house was completed all but the painting; Annis v. Saugy (R. I.) 74 Atl. 81; but where there is a provision for payment from time to time, it is otherwise; 4 M. & W. 699. There may be waiver of strict performance as to time; Fallon v. Lawler, 102 N. Y. 228, 6 N. E. 392; and a recovery for work actually done; Knotts v. Stearns, 91 U. S. 640, 23 L. Ed. 252; a vendor who has waived performance at the time specified cannot rescind without reasonable notice to the vendee; Harris v. Troup, 8 Paige (N. Y.) 423; Cummings v. Rogers, 36 Minn. 317, 30 N. W. 892; Wallace v. Pidge, 4 Mich. 573. Nothing can be recovered for part performance of a contract unless full performance was waived or prevented; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; Holden Steam Mill Co. v. Westervelt, 67 Me. 449; but see Avery v. Willson, 81 N. Y. 341, 37 Am. Rep. 503. See 2 Benj. Sales § 1032.

A builder may recover upon an entire contract which he has substantially performed less damages for actual incompleteness; Foeller v. Heintz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327; Philip Hiss Co. v. Pitcairn, 107 Fed. 425; Elizabeth v. Fitzgerald, 114 Fed. 547, 52 C. C. A. 321; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995; McCartan v. Trenton, 57 N. J. Eq. 571, 41 Atl. 830. Minor defects and omissions, if not wilful, do not prevent a recovery for substantial performance; Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. 723; and recovery is even allowed in cases where payment is conditioned on the production of an architect's certificate which the architect has refused because he is dissatisfied with the work; Wicker v. Messinger, 12 Ohio C. D. 425; but one who invokes that doctrine must himself have faithfully endeavored to perform; Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36. See Boettler v. Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52.

Whether a contract is entire or severable with respect to its performance depends generally upon the consideration, and not the subject matter; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; if the latter is apportioned, either expressly or impliedly, the contract is severable; Morgan v. McKee, 77 Pa. 228; so also where it provides for the performance of different things at different times; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; or where the price is apportioned to different items to be separately performed; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; 5 B. & Ald. 942. See Katz v. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826.

Where no time is fixed for performance, a reasonable time will be presumed to have been intended; Gruaz v. Le Crone, 45 Ill. App. 624; Peabody v. Bement, 79 Mich. 47, 44 N. W. 416; Russell v. Ormsbee, 10 Vt. 274; 4 Q. B. D. 133; Wheelock v. Tanner, 39 N. Y. 481; Whiting v. Gray, 27 Fla. 482, 8 South. 726, 11 L. R. A. 526. What is a reasonable time will depend upon the circumstances of the case; Greene v. Dingley, 24 Me. 131; L. R. 1 C. P. 385; Cameron v. Wells, 30 Vt. 633; Boyd & Co. v. Gunnison & Co., 14 W. Va. 1; and is a question for the jury; 18 N. Y. L. J. 1809; and may be shown by the acts of the parties or by expert evidence; Goddard v. Crefield Mills, 75 Fed. 818, 21 C. C. A. 530; delivery of goods at six o'clock in the morning after the day fixed for performance is substantial performance; New Jersey Co. v. Wise Co., 55 Misc. 294, 105 N. Y. Supp. 231.

Where no time has been fixed, or where performance at an appointed time has been waived, either party may limit a reasonable period within which it must be performed, giving notice thereof to the other party; 16 Beav. 59, 239; L. R. 10 Eq. 281.

A contract for the delivery of a number of personal chattels of the same kind is severable in its nature, and if a part is accepted and appropriated to the use of the vendee, he must pay the stipulated price for such part, less damages sustained by reason of the failure to make complete delivery; Saunders v. Short, 86 Fed. 225, 30 C. C. A. 462.

Where the contract is silent as to the mode of performance, it should be according to the usage of the place where it is made; 11 Ex. 645; but it must be substantial and *bona fide*, conforming to the true intent and meaning, and not merely the letter, of the agreement: 4 *id.* 128. Conditions precedent must be performed; 3 Addison, Contr. 8th ed. [1189]. A contract to deliver personal property means only delivery at some convenient place subject to the disposal of the buyer upon notification to him; Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; and if the shipments are to be made to places designated by the buyer who does not give the necessary orders, the seller is not required to tender the goods at the buyer's place of business; Seligman v. Beecher, 36 Pa. Super. Ct. 475. Where

payment and delivery are to be at a specified time and place concurrently and one party is absent, the other party need only show that he was ready and willing to perform; Catlin v. Jones, 52 Or. 337, 97 Pac. 546.

One who prevents another from performing his part of a contract is estopped from insisting that any rights were lost by such failure to perform, but must give a reasonable time therefor after the obstruction is removed; Blodgett v. Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Elkhart Car-Works Co. v. Ellis, 113 Ind. 215, 15 N. E. 249.

Where the buyer accepts a late shipment of one order for goods he does not waive his right to object to late deliveries of the other orders under the same contract; Braitsch v. Kiel Co., 114 N. Y. Supp. 872.

A party who is himself in default cannot insist on performance by the other party as a condition precedent to his performance; Harris Lumber Co. v. Lumber Co., 88 Ark. 491, 115 S. W. 168; *contra*, Tronson v. Colby University, 9 N. D. 559, 84 N. W. 474, where a note was given in consideration of the promisee's promise to discharge certain claims against the promisor and the promisee failed to pay the claims, such failure was no defense to an action on the note.

Difficulty or impossibility of performance, short of impossibility, will not excuse nonperformance; Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162; but this does not apply to executory contracts for personal services, for the sale of specific chattels, or for the use of particular buildings; *id.*

See CONDITION.

In Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247, Sanborn, J., distinguished the case from Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Bowes v. Shand, 2 App. Cas. 467, and Telfner v. Russ, 162 U. S. 170, 16 Sup. Ct. 695, 40 L. Ed. 930, in that the questions in those cases related to the performance of executory contracts of sale under which the defendant had received no benefit for partial performance by the plaintiff for which they had not paid, and the broken covenants were covenants which went to the whole consideration of the contract, while in the case at bar the defendants had received the benefits of a substantial performance by the plaintiff without paying the agreed consideration therefor, and the covenant was a subordinate covenant, the breach of which could be readily compensated in damages. He stated the following rules:

Where one party to a contract has received and retains the benefit of a substantial partial performance thereof by another, he cannot rescind, but must perform his part, and his remedy for the breach of complete performance by the other party is limited to compensation in damages.

Where a party to a contract has conferred upon the other party the benefits of a substantial partial performance thereof, but has not completely performed the contract, he may sue the other party for specific performance or for damages for the latter's failure to perform, upon the ground of his own partial performance but not his complete performance; and the defendant may recoup his damages for the plaintiff's failure of the complete performance, or may recover them in an independent action.

The breach of a dependent covenant, which goes to the whole consideration, gives the injured party the right to rescind, or to treat the contract as broken and recover damages for a total breach.

The breach of an independent covenant, which does not go to the whole consideration, is not a breach of the entire contract and does not warrant its rescission by the injured party. The latter is still bound to perform his part of the contract and his only remedy is compensation in damages.

An open cessation of performance, even if justified, excuses the other party; The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406.

A seller cannot repudiate the entire contract if the buyer has refused to pay for one instalment on delivery as stipulated; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; *contra*, Webster v. Moore, 108 Md. 572, 71 Atl. 466.

See ELECTION OF RIGHTS OR REMEDIES; FROM; BREACH; INDEPENDENT PROMISES; SPECIFIC PERFORMANCE.

PERIL. The risk, contingency, or cause of loss insured against, in a policy of insurance. See RISK; INSURANCE.

PERIL OF DEATH. A term used to denote that condition of apprehension of death in which it is necessary that the donor should be, in order to make a valid gift *mortis causa*.

In the cases on this subject there is found a great lack of precision of definition. The result of an examination of the authorities is thus stated by Bates, Ch., in Robson v. Robson's Adm'r, 3 Del. Ch. 51, 63: "I have labored to obtain from the authorities a clear view of what is implied in these terms, peril of death, in other words, what is that precise condition of disability in consideration of which it is that the law gives effect to a gift *causa mortis*. Thus much is certain, that the gift, to be valid, in the first instance must be made under apprehension of death, as likely to result from some present peril, usually that of sickness. It is further certain that to render the gift finally effectual death must in fact ensue from the sickness or other peril under which it was made. But on another question I am unable to derive from the text books and decisions any settled conclusion: That question is, whether the apprehension of death must be an apprehension of death as *pres-*

ently imminent, the donor being, as it is said, *in extremis;* or, whether it is sufficient for the validity of the gift if death be contemplated as the probable result of the sickness, a result likely or even certain to occur but after an indefinite interval, it may be of weeks or months; as in the case of chronic diseases generally." After adverting to the difference of view to be found in the leading English cases, the chancellor continues: "The question is uncontrolled by any decisions known to me in our own courts; and as between the English cases I confess a strong preference for the narrower construction of these terms 'peril of death,' the one which seems to have been at first held. It is consistent with the original object of admitting these gifts into the English law; it guards the policy of the statute of wills; and prevents frauds and uncertainties of title." This view of the proper construction of the phrase "peril of death," was founded upon the theory that gifts *mortis causa* were testamentary in their nature. But Gibson, C. J., in Nicholas v. Adams, 2 Whart. (Pa.) 17, held to the contrary, "that these gifts are not testamentary, but, as he describes them, are gifts executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril." By way of comment on the last cited case it has been suggested that, "that able judge (and this is said with great deference) seems to have been misled by a consideration of gifts *causa mortis* under the civil law. Under that law these gifts formed quite an expanded system. They embraced all cases of gifts made in consideration of mortality, *whether made in present danger or not.*" Robson v. Robson's Adm'r, 3 Del. Ch. 66.

See DONATIO MORTIS CAUSA.

PERILS OF THE SEA. All marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

A phrase contained in bills of lading, and a class of dangers to goods carried, the effects of which the carriers do not undertake to insure against in virtue of their general undertaking.

Bills of lading generally contain an exception that the carrier shall not be liable for "perils of the sea." What is the precise import of this phrase is not, perhaps, very exactly settled. In a strict sense, the words perils of the sea denote the natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural causes.

Perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. It is a loss happening in spite of all human effort and sagacity; 2 Kent 597, approved in The Majestic, 166 U. S. 386, 17 Sup. Ct. 597, 41 L. Ed. 1039. It is said to have a broader signification than the act of God and includes calamities not caused by violence or a convulsion of nature, such as lightning, flood, or tempest; The Majestic, 60 Fed. 624, 9 C. C. A. 161, 20 U. S. App. 503, on appeal in The Majestic, 166 U. S. 386, 17 Sup. Ct. 597, 41 L. Ed. 1039, where Fuller, C. J., said that this might be the case, but did not decide the exact point.

Generally speaking the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance. There is a difference in their effect in the two cases of contract. Where negligence of the master or crew of the vessel contributes to a loss by a peril of the sea, an insurer is liable, because the insured does not warrant that his servants shall use due care, whereas the exception of perils of the sea in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care, unless prevented by the excepted perils; but when it is distinctly found that there is no negligence, there is no reason for much inconvenience in holding that the words have different meanings in the two kinds of commercial contract; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; Compania De Navigacion la Flecha v. Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398.

The damage must be due to an accident, of a kind peculiar to the sea, directly and exclusively, without any negligence on the part of the ship-owner or his servants, and must not be due to unseaworthiness of the ship when she started on the voyage; Pollock, Bill of Lading 40. "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure;" 12 App. Cas. 509.

Perils of the sea *include* a capture by pirates; Gage v. Tirrell, 9 Allen (Mass.) 310; loss by fire; Slater v. Rubber Co., 26 Conn. 128; Miller v. Nav. Co., 10 N. Y. 431; hidden obstructions in a river, recently brought there by the current; Redpath v. Vaughan, 52 Barb. (N. Y.) 489; but see Friend v. Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119; loss due to motion of the sea; Christie v. The Craigton, 41 Fed. 62; but not by the natural and inevitable action of winds and waves; 12 App. Cas. 509; by a tidal wave and flood of unusual violence; Pearce v. The Thomas Newton, 41 Fed. 106. Also the following, if the immediate damage is caused by salt water; rolling and pitching of the ship in rough weather; 32 L. T. 847; running ashore in a fog; L. R. 9 Ex. 339; foundering in a collision; 12 App. Cas. 509;

rough seas although not extraordinary; The Newport News, 199 Fed. 968; a loss caused by water entering a water-tight compartment through an open deadlight; Starbuck v. Ins. Co., 19 App. Div. 139, 45 N. Y. Supp. 995; damage to a cargo by sea water entering the hold around a loose rivet is a loss by perils of the sea; The Sandfield, 92 Fed. 663, 34 C. C. A. 612.

An accident happening in the course of necessary repairs is a peril *ejusdem generis* with those named in the policy and is covered by the general clause; Swift v. Ins. Co., 122 Mass. 573; but not where the accident is the necessary and inevitable result of the means of repair adopted; Eureka F. & M. Ins. Co. v. Purcell, 19 Ohio Cir. Ct. R. 135.

The loss of logs which broke loose from a raft by reason of a high wind after they had been towed out to a steamer for loading in the open sea is such loss; Munson Steamship Line v. Steiger & Co., 136 Fed. 772, 69 C. C. A. 492; rats eating a hole in a ship and letting water in; 12 App. Cas. 527; the destruction of goods at sea by rats has been held a peril of the sea, the carrier not being in default; Garrigues v. Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493. See *Infra*.

It *includes* striking on a sunken rock not on the chart, or a rock from which the light has been removed, or an iceberg, or a vessel without lights; 12 App. 514; or a sword fish making a hole in the ship; *id.* 525; rough seas, though not extraordinary; The Newport News, 199 Fed. 968.

Where the vessel's main shaft was broken by a cause coming within perils of the sea and by the necessary delays for repairs the cargo was destroyed and the plaintiff lost the entire freight, it was held that this was a claim consequent on the disabling of the vessel by peril of the sea; 75 L. T. 155. Where a cargo was damaged by sea water, which, during the voyage, was caused by the giving way of a bolt used to fasten a stanchion, and it appeared that the ship had encountered very heavy weather, but the evidence showed that the stanchion had withstood with much heavier cargo on a former voyage, and there was no fault in the original construction shown, it was held that the loss came within the exemption clause; The Exe, 57 Fed. 399, 6 C. C. A. 410, 14 U. S. App. 626.

The stranding of a steamer by reason of the negligence of a local pilot, by which the anchor dragged and a portion of her cargo was damaged, is a sea peril and the steamer is not responsible for the negligence of the pilot; The Etona, 71 Fed. 895, 18 C. C. A. 380, 38 U. S. App. 50.

It *does not include:* Restraint of princes and rulers; Parkhurst v. Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105; 10 Q. B. 517; Howland v. Greenway, 22 How. (U. S.) 502; loss by rats; The Miletus, 5 Blatch. 335, Fed. Cas. No. 9,545; 17 Q. B. Div. 670 (*contra*, Garrigues v. Coxe, 1 Binn. [Pa.] 592, 2 Am. Dec. 493); destruction by vermin in certain seas, where such injury is to be expected; Martin v. Ins. Co., 2 Mass. 429; 12 App. Cas. 524; by worms; The Giles Loring, 48 Fed. 463; confiscation of cargo as contraband by a foreign court; 10 Q. B. 517; damage caused by an accident to machinery that would equally have occurred on land under similar condition; 12 App. Cas. 592; retardation of the voyage by which meats are spoiled; L. R. 4 C. P. 206; encountering heavy seas; The Gulnare, 42 Fed. 861; an explosion by which a hole was made in a ship's bottom and the cargo was injured by water; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234.

A wrongful jettison of sound cattle by order of the master from unfounded apprehensions during rough weather was held not a loss by peril of the sea; Compania de Navigacion la Flecha v. Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398.

If the jettison of cargo or damage thereto is rendered necessary by, or due to, any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case; Corsar v. Spreckles & Bros. Co., 141 Fed. 260, 72 C. C. A. 378.

Where a cargo was damaged by water which reached it through a pipe which had been gnawed by rats, it was held that the ship was responsible for the whole damage to the cargo, less such portion as could be shown affirmatively to have been done by sea peril; The Euripides, 71 Fed. 728, 18 C. C. A. 226, 38 U. S. App. 1.

Where the loss might not have occurred but for the unseaworthiness of the ship or the negligence or breach of contract of the owner or master, it would seem that the owner is not exonerated by the fact that the proximate cause of the loss was a peril of the sea; The Portsmouth, 9 Wall. (U. S.) 684, 19 L. Ed. 754; 14 C. B. N. S. 59.

The owner of a ship cannot enforce contribution from the owners of the cargo to defray expenses incurred in rescuing the vessel from a peril encountered from bad seamanship or from the untrustworthy character of the vessel, but is entitled to such contribution where the peril incurred was one solely incident to navigation, unmixed with negligence on the part of the owner or the crew; Berry Coal & Coke Co. v. R. Co., 116 Mo. App. 214, 92 S. W. 714.

The mere fact of a collision at sea is not proof that it occurred in such a way as to be a peril of the sea; 11 P. D. 170. The burden of proof is on the shipowner; The Giava, 56 Fed. 243; The Mascotte, 51 Fed. 605, 2 C. C. A. 399, 1 U. S. App. 251; if goods are lost, the presumption is that it

was the fault of the carrier; Christie v. The Craigton, 41 Fed. 62.

The exception in a charter-party as to dangers of the seas and navigation, is not applicable to the perils which arise from a breach of the ship-owner's obligation; Bowring v. Hebaud, 56 Fed. 520, 5 C. C. A. 640, 11 U. S. App. 648.

The mere fact that goods are damaged by sea water entering the ship does not create a presumption of damage by peril of the sea even when aided by the presumption of seaworthiness, for the water may still have got in through negligence; The Queen of The Pacific, 75 Fed. 74. But where sea perils have been encountered adequate to cause damage to a seaworthy ship and there is general proof of seaworthiness, the damage is presumptively due to such perils; The Sandfield, 79 Fed. 371.

Freight or passage money paid in advance may be recovered back if the voyage be broken up by a peril of the sea and the carrier fails to complete the contract; Chase v. Ins. Co., 9 Allen (Mass.) 311.

See ACT OF GOD; FORTUITOUS EVENT; HARTER ACT; PILOT; RESTRAINT OF RULES; SEAWORTHY.

PERINDE VALERE. A writ of dispensation granted by the pope to a clerk admitted to a benefice, although incapable. Gibs. 87; 3 Burn, Eccl. L. 111.

PERIOD. A stated and recurring interval of time, a round or series of years, by which time is measured. People v. Leask, 67 N. Y. 528.

When used to designate an act to be done or to be begun, though its completion may take an uncertain time, as for instance, the act of exportation, it must mean the day on which the exportation commences. Sampson v. Peaslee, 20 How. (U. S.) 579, 15 L. Ed. 1022. See TIME.

PERIODICAL PAYMENTS. Payments occurring periodically, that is, at fixed times from some antecedent obligation and not at variable periods at the discretion of individuals. 42 L. J. Ch. 337.

PERIODICAL PUBLICATIONS. This term in the post office act of March 3, 1879, as used in its obvious and actual sense, denotes the generally understood class of publications commonly called by the name of periodicals. Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888. A periodical, in the postal laws, implies that no single number of a series is a complete book in itself; Smith v. Hitchcock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119.

A post office department order relating to the transportation of periodicals was held not illegal as constituting an unjust discrimination against certain periodicals; Review of Reviews Co. v. Hitchcock, 192 Fed. 359.

See PERIODICAL WORK.

PERIODICAL WORK. Within the copyright act, 5 & 6 Vict., one that comes out from time to time and is miscellaneous in its articles; 16 L. J. Ch. 142; but a newspaper has been held not a periodical within that act; 39 L. J. Ch. 132; L. R. 9 Eq. 324; *contra*, 50 L. J. Ch. 621; 17 Ch. D. 708.

See PERIODICAL PUBLICATION.

PERIPHRASIS. Circumlocution; the use of other words to express the sense of one.

Some words are so technical in their meaning that in charging offences in indictments they must be used or the indictment will not be sustained; for example, an indictment for treason must contain the word *traitorously;* an indictment for burglary, *burglariously;* and *feloniously* must be introduced into every indictment for felony; Co. 3d Inst. 15; 2 Hale, Pl. Cr. 172; 4 Bla. Com. 307; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Cro. Car. c. 37.

PERISH. To come to an end; to cease to be; to die.

What has never existed cannot be said to have perished.

When two or more persons die by the same accident, as a shipwreck, no presumption arises that one perished before the other.

See SURVIVOR.

PERISHABLE. Subject to speedy decay. Webster v. Peck, 31 Conn. 498.

PERISHABLE GOODS. Goods which are lessened in value and become worse by being kept.

Losses due to the natural decay, deterioration, and waste of perishable goods in the hands of a carrier are excusable. Reference must always be had, however, to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place, and under the general circumstances, while in the charge of a carrier of ordinary prudence, and their condition when entrusted to him; Schoul. Bail. 397; American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 567.

In admiralty practice, property in its nature perishable, or liable to deterioration, injury, or decay, may be sold pending suit and the proceeds brought into court to abide the event of the suit; Jones v. Springer, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. 161; or the court may order it appraised and deliver it to the claimant, upon his paying into court such sum of money, or giving such bond as the court may direct; Bened. Adm. § 444; The Alligator, 1 Gall. 148, Fed. Cas. No. 248; The Struggle, 1 Gall. 476, Fed. Cas. No. 13,550.

There is a similar practice in equity and in most of the states such property when taken in execution or under attachment, on petition may be ordered sold, pending suit; in which case the proceeds of sale are held

in place of the property. See COMMON CARRIERS.

In order to authorize the court to order property levied upon under a warrant of attachment, to be sold as being perishable, it must appear that such property is inherently liable to deterioration and decay and it is not sufficient to show that it will depreciate in value because of changes in fashion; Fisk v. Spring, 25 Hun (N. Y.) 367. Fattened cattle are perishable property; McCall v. Peachy's Adm'r, 3 Munf. (Va.) 288; also potatoes; Williams v. Cole, 16 Me. 208; skins and furs; Astor v. Ins. Co., 7 Cow. (N. Y.) 202; kid gloves; Fisk v. Spring, 25 Hun (N. Y.) 367; but not merchantable corn; Illinois Cent. R. Co. v. McClellan, 54 Ill. 67, 5 Am. Rep. 83.

A vessel chartered mainly for the transportation of bananas from Port Limon to New York, with knowledge by her owners of a practice to cut and prepare the bananas in expectation of her arrival on a certain date to load, was held liable for damage from deterioration of the fruit by delay in reaching Port Limon through unseaworthiness; The Georg Dumois, 88 Fed. 537.

The doctrine applies to real estate in litigation and liable to deteriorate; Middleton v. R. Co., 26 N. J. Eq. 269.

See BONA PERITURA.

PERJURY. The wilful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 2 Whart. C. L. § 1244.

The wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry. 2 Bish. N. Cr. Law § 1015.

It consists in swearing wilfully and corruptly to some matter which is untrue. State v. Smith, 63 Vt. 201, 22 Atl. 604.

Various false statements in one oath constitute but a single offense; Black v. State (Ga.) 79 S. E. 173.

The intention must be wilful. The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise, or mistake of the import of the question, there was no corrupt motive; Hawk. Pl. Cr. b. 1, c. 69, s. 2; Cro. Eliz. 492; U. S. v. Babcock, 4 McLean 113, Fed. Cas. No. 14,488; 11 Q. B. 1028; State v. Lea, 3 Ala. 602; People v. Brown, 74 Cal. 306, 16 Pac. 1. But one who swears wilfully and deliberately to a matter which he really believes, and which is false, and which he had no probable cause for believing, is guilty of perjury; Com. v. Cornish, 6 Binn. (Pa.) 249. And so is one who swears falsely, though he testifies against his will; Com. v. Turner, 98 Ky. 526, 33 S. W. 88. Where a bankrupt, having submitted the facts fairly to his counsel, swore to a schedule wrongly made out on his advice, it was not perjury; U. S. v. Conner, 3 McLean 573, Fed. Cas. No. 14,847; but advice of counsel sought as a cover, in bad faith, is no excuse; Tuttle v. People, 36 N. Y. 431; nor is intoxication; People v. Willey, 2 Park. Cr. C. (N. Y.) 19; Schaller v. State, 14 Mo. 502; though it may be considered by the jury on the question of intent; Lytle v. State, 31 Ohio St. 196.

The oath must be false. The party must believe that what he is swearing to is fictitious; and if, intending to deceive, he asserts that which may happen to be done without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him; Co. 3d Inst. 166; Hawk. Pl. Cr. b. 1, c. 69, s. 6; 1 Bish. N. Cr. L. § 437. See People v. Burden, 9 Barb. (N. Y.) 467; 1 C. & K. 519; Gibson v. State (Tex.) 15 S. W. 118. As, if a man swears that C D revoked his will in his presence, if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury; Hetl. 97. Knowledge by a witness that his testimony is false, is tested, like intention generally, by sound mind and discretion, and by all the circumstances; soundness of mind, where nothing to the contrary appears, being assumed; McCord v. State, 83 Ga. 521, 10 S. E. 437.

The party must be lawfully sworn. The person by whom the oath is administered must have competent authority to receive it; an oath, therefore, taken before a private person, or before an officer or court having no jurisdiction, will not amount to perjury, "For where the court hath no authority to hold plea of the cause, but it is *coram non judice*, there perjury cannot be committed;" Jackson v. Humphrey, 1 Johns. (N. Y.) 498; 3 C. & P. 419; Com. v. White, 8 Pick. (Mass.) 453; 12 Q. B. 1026; Co. 3d Inst. 166; State v. Wymberly, 40 La. Ann. 460, 4 South. 161; U. S. v. Hall, 131 U. S. 50, 9 Sup. Ct. 663, 33 L. Ed. 97. See Renew v. State, 79 Ga. 162, 4 S. E. 19; Anderson v. State, 24 Tex. App. 715, 7 S. W. 40; Butler v. State, 36 Tex. Cr. R. 483, 38 S. W. 46; State v. Gates, 107 N. C. 832, 12 S. E. 319; State v. Wilson, 87 Tenn. 693, 11 S. W. 792.

But it has been held that the indictment need not aver jurisdiction of the case in which the perjury was committed; Com. v. Hatfield, 107 Mass. 227; State v. Newton, 1 G. Greene (Iowa) 160, 48 Am. Dec. 367. And generally there need be no averment as to how the authority of the officer or jurisdiction was acquired; 6 B. & C. 102; Eighmy v. People, 79 N. Y. 546; State v. Dayton, 23

N. J. L. 49, 53 Am. Dec. 270; only a general allegation of jurisdiction is required; Stafer v. State, 3 W. Va. 689.

Where a defect in the proceedings is waived, perjury may be committed; Maynard v. People, 135 Ill. 416, 25 N. E. 740. A false affidavit will be perjury where the officer who administered the oath was a minor, in the absence of a statutory disqualification of minors from holding office; Harkreader v. State, 35 Tex. Cr. R. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

The proceedings must be judicial; Pegram v. Styron, 1 Bail. (S. C.) 595; Com. v. Warden, 11 Metc. (Mass.) 406; Lamden v. State, 5 Humphr. (Tenn.) 83; Waggoner v. Richmond, Wright (Ohio) 173; R. & R. 459. Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose; 2 Russ. Cr. 518. See Arden v. State, 11 Conn. 408; State v. Stephenson, 4 McCord (S. C.) 165. Perjury cannot be committed where the matter is not regularly before the court; State v. Alexander, 11 N. C. 182; State v. Wyatt, 3 N. C. 56; State v. Hayward, 1 N. & M'C. (S. C.) 546; Cook v. Staats, 18 Barb. (N. Y.) 407; State v. Keene, 26 Me. 33; State v. Hall, 7 Blackf. (Ind.) 25; 5 B. & Ald. 634. An oath not administered pursuant to, or required or authorized by, any law, cannot be made the basis of a charge of perjury; State v. McCarthy, 41 Minn. 59, 42 N. W. 599.

The assertion must be absolute. If a man, however, swears that he *believes* that to be true which he knows to be false, it will be perjury; 10 Q. B. 670; Com. v. Cornish, 6 Binn. (Pa.) 249. It is immaterial whether the testimony is given in answer to a question or voluntarily; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; Com. v. Pollard, 12 Metc. (Mass.) 225. Perjury cannot be assigned upon the valuation, under oath, of a jewel or other thing the value of which consists in estimation; 1 Kebl. 510. But in some cases a false statement of opinion may become perjury; 10 Q. B. 670; Fergus v. Hoard, 15 Ill. 357; State v. Lea, 3 Ala. 602; Com. v. Edison (Ky.) 9 S. W. 161.

The oath must be material to the question depending; 1 Term 63; Com. v. Knight, 12 Mass. 274, 7 Am. Dec. 72; White v. State, 1 Smedes & M. (Miss.) 149; Steinman v. McWilliams, 6 Pa. 170; State v. Smith, 40 Kan. 631, 20 Pac. 529; State v. Lawson, 98 N. C. 759, 4 S. E. 134; People v. Perazzo, 64 Cal. 106, 28 Pac. 62. See Gandy v. State, 23 Neb. 436, 36 N. W. 817; State v. Blize, 111 Mo. 464, 20 S. W. 210. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to perjury; 2 Russ. Cr. 521; Co. 3d Inst. 167; 8 Ves. 35; Bac. Abr. *Perjury* (A); Hinch v. State, 2 Mo. 158; People v. Ah Sing, 95 Cal. 657, 30 Pac. 796. But all false statements wilfully and corruptly made by a witness as to matters which affect his credit are material; [1895] 1 Q. B. 797; and so is every question on cross-examination which goes to the credit of a witness, as, whether he has been before convicted of felony; 3 C. & K. 26; 1 C. & M. 655. And see Com. v. Pollard, 12 Metc. (Mass.) 225; Williams v. State, 28 Tex. App. 301, 12 S. W. 1103. False evidence, whereby, on the trial of a cause, the judge is induced to admit other material evidence, even though the latter evidence is afterwards withdrawn by counsel, or though it was not legally receivable, is indictable as perjury; 2 Den. C. C. 302; 3 C. & K. 302.

It is perjury where the witness swears falsely in giving evidence legally inadmissible, but which becomes material by being introduced in evidence; Meyers v. U. S., 5 Okl. 173, 48 Pac. 186.

The materiality of the false oath is for the court and not for the jury; U. S. v. Singleton, 54 Fed. 488; People v. Lem You, 97 Cal. 224, 32 Pac. 11; Stanley v. U. S., 1 Okl. 336, 33 Pac. 1025.

Formerly it required the testimony of *more than one witness* to convict one accused of perjury; 4 Bla. Com. 358; 2 Russ. Cr. 1791; but this rule is relaxed so as to permit a conviction on the testimony of one witness with corroborating circumstances; U. S. v. Wood, 14 Pet. (U. S.) 440, 10 L. Ed. 527; Com. v. Butland, 119 Mass. 317; State v. Heed, 57 Mo. 252; Hashagen v. U. S., 169 Fed. 396, 94 C. C. A. 618; even where the statute makes the crime an exception to the requirement of only one witness; State v. Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749; but the corroboration must be strong; Woodbeck v. Keller, 6 Cow. (N. Y.) 118; and to a material point; State v. Buie, 43 Tex. 532; though it may be circumstantial; Hernandez v. State, 18 Tex. App. 134, 51 Am. Rep. 295.

A *defendant in a criminal prosecution,* who testifies in his own behalf and of his own accord, is guilty of perjury if he testifies falsely. He is to be treated the same as any other witness; State v. Hawkins, 115 N. C. 712, 20 S. E. 623; Murphy v. State, 33 Tex. Cr. R. 314, 26 S. W. 395; Hutcherson v. State, 33 Tex. Cr. R. 67, 24 S. W. 908; State v. Park, 57 Kan. 431, 46 Pac. 713.

Where one person arranges with another to commit perjury, both are *in pari delicto;* Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. An attempt to induce a person to commit perjury on the contemplated trial of an indictment not yet returned, has been held not to be subornation of perjury; State v. Howard, 137 Mo. 289, 38 S. W. 908.

The immunity from prosecution on account of testimony by a bankrupt under examination does not protect him from indict-

ment for perjury; Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, and note; *contra*, U. S. v. Simon, 146 Fed. 89; In re Gaylord, 112 Fed. 668, 50 C. C. A. 415, the latter being, on this point, a *dictum;* in the first case a writ of certiorari was denied; Edelstein v. U. S., 205 U. S. 543, 27 Sup. Ct. 791, 51 L. Ed. 922, and subsequently the decision thus "left undisturbed by the supreme court" (as Lacombe, J., expresses it) was followed in another circuit court of appeals; Wechsler v. U. S., 158 Fed. 579, 86 C. C. A. 37.

Punishment of perjury is provided for by statutes in all the states, and also by the United States when it is committed in any proceeding by or under federal laws; U. S. R. S. §§ 5392–5396. For a form of indictment approved as correct in every substantial part, see Bucklin v. U. S., 159 U. S. 682, 16 Sup. Ct. 182, 40 L. Ed. 304.

The power of punishing witnesses for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had; Re Loney, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949. In general, perjury is committed as well by making a false affirmation as a false oath. See OATH.

It is unnecessary, in an indictment for perjury in making an affidavit under R. S. § 5396, to set out the affidavit at length; U. S. v. Law, 50 Fed. 915.

The accused may show that his memory had become unreliable by reason of the near approach of paresis; State v. Coyne, 214 Mo. 344, 114 S. W. 8, 21 L. R. A. (N. S.) 993; Leaptrot v. State, 51 Fla. 57, 40 South. 616; People v. Doody, 172 N. Y. 165, 64 N. E. 807.

As to the effect of perjury upon a judgment obtained by means of it, the general rule is that false swearing or perjury at the trial is not alone sufficient to warrant the setting aside of the judgment; Ross v. Wood, 70 N. Y. 8; Greene v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 13 L. R. A. 336, 25 Am. St. Rep. 159; Graves v. Graves, 132 Ia. 199, 109 N. W. 707, 10 Ann. Cas. 1104, 10 L. R. A. (N. S.) 216, and note to this and two other cases from Kansas and North Carolina, where the cases are collected with the result of sustaining the general rule as stated, though with some conflict of decision. The rule is declared in U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, but some doubt was raised by Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; but in U. S. v. Gleeson, 90 Fed. 778, 33 C. C. A. 272, the court declined to treat the latter case as limiting the rule of the former. In Kersey v. Rash, 3 Del. Ch. 321, it was said by Bates, Ch., that "if a verdict were obtained by means of perjury which the defendant at law, through surprise or the disability of sickness, was unable to meet, a court of law would grant a new trial, or if the perjury were discovered too late for application to a court of law, equity might well relieve." But in Steele v. Culver, 157 Mich. 344, 122 N. W. 95, 23 L. R. A. (N. S.) 564, it was held that where a judgment was confessedly obtained by perjury, equity will not enjoin its enforcement; so in Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; *contra*, Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A. (N. S.) 1080. The note above cited in 10 L. R. A. (N. S.) 216, shows some conflict in the state courts and also in England and Canada, and it may be referred to for cases too numerous for citation here.

No civil action lies for perjury so long as the judgment procured by it stands; Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231; Verplanck v. Van Buren, 76 N. Y. 247; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140.

One who has lost a case by perjury of a witness against him cannot sue the witness; Godette v. Gaskill, 151 N. C. 52, 65 S. E. 612, 24 L. R. A. (N. S.) 265, 134 Am. St. Rep. 964; Horner v. Schinstock, 80 Kan. 136, 101 Pac. 996, 23 L. R. A. (N. S.) 134, 18 Ann. Cas. 21; Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Cro. Jac. 601; Cro. Eliz. 520.

See a note collecting the cases on nearly every point of the law of perjury in 85 Am. Dec. 488–501.

PERMANENT. This word does not always embrace the idea of absolute perpetuity; Hascall v. Madison University, 8 Barb. (N. Y.) 185; or forever, or lasting forever, or existing forever; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; Bassett v. Johnson, 2 N. J. Eq. 155. Where the citizens of a locality are induced to give large sums of money for the establishment of an educational institution, it means that the place agreed on shall be the site of the institution so long as it shall endure; Hascall v. Madison University, 8 Barb. (N. Y.) 186.

PERMANENT ABODE. A domicil, a home, which a party is at liberty to leave, as interest or whim may dictate, but without any present intention of changing it. Dale v. Irwin, 78 Ill. 181. See NON-RESIDENT; DOMICIL; HOME.

PERMANENT EMPLOYMENT. Employment for an indefinite time which may be severed by either party. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82; Perry v. Wheeler, 12 Bush (Ky.) 541; 4 C. B. 479.

PERMANENT TRESPASS. A trespass consisting of trespasses of one and the same kind, committed on several days, which are, in their nature, capable of renewal or continuation, and are actually renewed or con-

tinued from day to day, so that the particular injury done on each particular day cannot be distinguished from what was done on another day. In declaring for such trespasses, they may be laid with a continuando; 3 Bla. Com. 212; Bac. Abr. *Trespass* (B 2, I 2); 1 Saund. 24, n. 1; Pollock, Torts 482. See CONTINUANDO; TRESPASS.

PERMISSION. A license to do a thing; an authority to do an act which without such authority would have been unlawful. A permission differs from a law: it is a check upon the operations of the law.

A negation of law, arising either from the law's silence, or its express declaration. Ruth. Nat. L. b. 1, c. 1.

Express permissions derogate from something which before was forbidden, and may operate in favor of one or more persons, or for the performance of one or more acts, or for a longer or shorter time.

Implied permissions are those which arise from the fact that the law has not forbidden the act to be done.

PERMISSIVE. Allowed; that which may be done: as, permissive waste, which is the permitting real estate to go to waste. When a tenant is bound to repair, he is punishable for permissive waste. See WASTE.

PERMISSIVE LETTERS. In a note by the secretary of the navy, October 1, 1861, this term was used as indicating an authority something less than a grant of letters of marque. See 2 Hall. Int. L. Baker's ed. 120.

PERMIT. A license or warrant to do something not forbidden by law: as to land goods imported into the United States, after the duties have been paid or secured to be paid. Act of Congr. March 2, 1799, s. 49, cl. 2. See form of such a permit, Gordon Dig. App. II. 46.

It denotes a decided assent; Chicago v. Stearns, 105 Ill. 558. It may mean suffer; 7 Ch. Div. 145; although it is more positive than allow or suffer; Chicago v. Stearns, 105 Ill. 558. It implies consent given or leave granted; Loosey v. Orser, 4 Bosw. (N. Y.) 391. It has been defined to mean allow by not prohibiting. Com. v. Curtis, 9 Allen (Mass.) 266. Every definition of suffer or permit includes knowledge of what is to be done under the sufferance or permission and intention that what is done was what was to be done; Gregory v. U. S., 17 Blatch. 325, Fed. Cas. No. 5,803.

See EASEMENT; LICENSE.

PERMUTATION. In Civil Law. Exchange; barter.

This contract is formed by the consent of the parties; but delivery is indispensable, for without it it is a mere agreement. Dig. 31. 77. 4; Code 4. 64. 3.

Permutation differs from sale in this, that in the former a delivery of the articles sold must be made, while in the latter it is unnecessary. It agrees with the contract of sale, however, in the following particulars: that he to whom the delivery is made acquires the right or faculty of prescribing; Dig. 41. 3. 4. 17; that the contracting parties are bound to guarantee to each other the title of the things delivered; Code 4. 64. 1; and that they are bound to take back the things delivered when they have latent defects which they have concealed; Dig. 21. 1. 63. See Aso & M. Inst. b. 2, t. 16, c. 1; MUTATION; TRANSFER.

PERMUTATIONE. A writ to an ordinary commanding him to admit a clerk to a benefice upon exchange made with another. Cowell.

PERNANCY (from Fr. *prendre*, to take). A taking or receiving, *e. g.* of rents.

PERNOR OF PROFITS. He who receives the profits of lands, etc. A *cestui qui use*, who is legally entitled and actually does receive the profits, is the pernor of profits. *Termes de la Ley.*

An expression used in early English statutes to designate one who had a beneficial interest in property conveyed to uses. 2 Holdsw. Hist. E. L. 402.

PERPARS. A part of the inheritance. Fleta.

PERPETRATOR. Within the meaning of a statute giving an action against the perpetrator of an act, where a servant of a railroad company is killed through the negligence of a fellow-servant, the company itself may be regarded as the perpetrator. Philo v. R. Co., 33 Ia. 47.

PERPETUAL. That which is to last without limitation as to time: as, a perpetual statute, which is one without limit as to time, although not expressed to be so.

PERPETUAL CURACY. The office of a curate in a parish where there is no spiritual rector or vicar, but where the curate is appointed to officiate by the impropriator. 2 Burn, Eccl. Law 55.

The church of which the curate is perpetual. 2 Ves. Sen. 425. See 2 Steph. Com. 11th ed. 695; 2 Burn, Eccl. Law 55; 9 Ad. & E. 556. As to whether such curate may be removed, see 2 Burn, Eccl. Law 5.

PERPETUAL EDICT. In Roman Law. See EDICT.

PERPETUAL INJUNCTION. Opposed to an injunction *ad interim* or an interlocutory injunction; an injunction which finally disposes of the suit, and is indefinite in point of time. See INJUNCTION.

PERPETUAL SUCCESSION. The continuous existence which enables a corporation to manage its affairs and hold property without the necessity of conveyances for the purpose of transmitting it. By reason of

this quality, this ideal and artificial person remains, in its legal entity and personality, the same, though frequent changes may be made of its members; and although all of its members may be changed, and new ones substituted for the old, it still legally remains the same. Field, Corp. § 50; Scanlan v. Crawshaw, 5 Mo. App. 340.

PERPETUATING TESTIMONY. The act by which testimony is reduced to writing as prescribed by law, so that the same shall be read in evidence in some suit or legal proceedings to be thereafter instituted.

The origin of this practice may be traced to the canon law, cap. 5, X, *ut lite non contestata*, etc. 8 Toullier, n. 22. Statutes exist in most of the states for this purpose. Equity also furnishes means, to a limited extent, for the same purpose.

See BILL TO PERPETUATE TESTIMONY; IN PERPETUAM REI MEMORIAM.

PERPETUITY. Any limitation tending to take property out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Randall, Perp. 48.

Such a limitation of property as renders it inalienable beyond the period allowed by law. Gilbert, Uses, Sugd. ed. 260, n.

"A future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest till after the expiration of or which will not necessarily vest within, the period prescribed by law for the creation of future estates, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." Lewis, Perpetuities ch. 12. This was said by Gibson, C. J., to be the nearest approach to a perfect definition of a perpetuity; Hillyard v. Miller, 10 Pa. 334.

It is suggested that some confusion has arisen in connection with the law of perpetuities because of a certain ambiguity in the legal definition of the term itself. "The original meaning of a perpetuity is an inalienable, indestructible interest. The second artificial meaning is, an interest which will not vest to a remote period. This latter is the meaning which is attached to the term when the rule against perpetuities is spoken of;" Gray, Perp. § 140. The author last cited considers it a matter of regret that the rule should not have been known as the rule against remoteness, rather than the rule as against perpetuities.

The comment was made upon this statement that notwithstanding the declaration quoted from this author, "yet in all his illustrations he shows that interests which were destructible were not perpetuities"; Miffin's Appeal, 121 Pa. 205, 15 Atl. 525, 1 L. R. A. 453, 6 Am. St. Rep. 781, where it is held that indestructibility of the estate of the person, for the time being entitled to the property, is essential to constitute a perpetuity.

The following is suggested as the true form of the rule: "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest;" Gray, Perp. 201. A later work adheres more closely to the familiar phraseology (a course which has great advantages in the discussion of common-law rules of decision), in defining it as a rule which "forbids the postponement of the vesting of real or personal property for an estate in fee-simple, in tail or absolute interest, during a longer period than lives in being and twenty-one years after, an extension being allowed for gestation if gestation exists;" Brett, L. Cas. Mod. Eq. 47. See, also, McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; L. R. 44 Ch. D. 85. The rule against perpetuities as distinguished from that against making estates indefinitely inalienable, concerns itself only with the vesting or assignment of estates and not with their termination; Brooks v. Belfast, 90 Me. 318, 38 Atl. 222; and when properly so limited, it is applicable to a gift in trust for charity; *id.* An interesting case in Colorado holds that notwithstanding statutory adoption, in that state, of the common law prior to 4 James I., English decisions after that year are to be regarded as authority in determining what the common law as to perpetuities was at that time; Chilcott v. Hart, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41.

The rule against perpetuities is one of decision only, and in England is affected only by statute under what is known as the Thelluson Act, the passage of which was occasioned by litigation arising under the will of Peter Thelluson who died in 1797. See Thelluson v. Woodford, 4 Ves. Jr. 227; 11 Ves. 112. For the text of the act see Gray, Perp. Appx. B. note; and for the history of the litigation which led to it, see Hargrave, Thelluson Case, ch. 1.

The act was directed against trusts for accumulation. Such a trust which violates the rule against perpetuities is wholly void, but one which is good within the rule might violate the Thelluson Act and be void for the excess; Gray, Perp. § 687. The act prohibits accumulations other than during four distinct periods, the language being: "For any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa*

mere at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated." And only one of these periods can be taken; 16 Sim. 391; 25 Ch. D. 729. In Pennsylvania there is a statute of the same kind, Act 1853, Apr. 18, § 9, the text of which will be found in Gray, Perp. Appx. B. In Alabama accumulations are prohibited for more than ten years, or to the termination of minority in case of a minor in being at the date of conveyance or death of the testator.

The legislation on the subject of perpetuities has been classified as of three kinds: 1. A general provision that perpetuities shall not be allowed. 2. A short and simple statute declaring or modifying the law. 3. An elaborate scheme to be substituted for the common law.

The first class consists mainly of constitutional provisions in Arkansas, Nevada, North Carolina, Tennessee, Texas, and Vermont. A similar provision existed formerly in Florida, but was omitted in the last constitution. The second class includes Georgia, Iowa, and Kentucky, with statutes properly declaratory of the common law; and Alabama, Connecticut, North and South Dakota, the District of Columbia, Idaho, Indiana, Mississippi, New Jersey, Ohio, and Pennsylvania, where the common-law rule is somewhat modified. The third class embraces the states which have followed, in the main, the New York statute, providing against, (1) remoteness of interests in land; (2) accumulation of land and profits therefrom; (3) the same as to personal property. Michigan and Minnesota have followed the first and second parts of the New York system, and Indiana substantially the whole of it. The prohibition of this legislation is against a restraint upon the power of alienation for more than two lives in being at the creation of the estate. But in Indiana, California, and Dakota, where the New York system to a large extent was followed, the restraint was not confined to two existing lives. In Wisconsin, where the New York statute was first followed exactly, in 1887, the period was extended to two lives in being and twenty-one years thereafter. See Gray, Perp. Appx. B. & C.; 1 Stims. Am. Stat. L. § 1440. The rule affects both legal and equitable interests and real and personal estate; it is not of feudal origin, but the outgrowth of necessities of modern times; and while strictly applied, regard is had rather to substance than form; Gray, Perp. §§ 202, 203.

Under the common-law rule there is no limit to the number of lives that can be taken; 11 Ves. 146.

A trust for as long a period under the statute as is possible is legal at common-law and is limited for the lives of the annuitants and 21 years after the last survivor's death; Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202, where there were forty annuitants (lives) in being.

The limitations of an estate *pur auter vie* cannot be too remote; 3 P. Wms. 262. Gift to support animals during their lives and the life of the survivor was held good within the rule; 41 Ch. Div. 552. For the purposes of the rule men and women are deemed capable of having issue as long as they live; 1 Cox 324. A condition subsequent in a conveyance giving a right of re-entry for condition broken is subject to the rule when attached to the fee or the grantor's entire interest; [1899] 2 Ch. 540. In the United States, these rights of re-entry are not subject to the rule, on the ground that they are old common law rights. By statute some states provide that no condition can be imposed to continue in effect for more than a specified time, usually from twenty to thirty years.

A testatrix gave an estate to a trustee to accumulate the income until her youngest living grandchild should reach 21, and then to pay over annually to her grandchildren. The gift was held bad on the ground that payment need not be made until one year after the fund accrues, which would be 22 years from the creation of the interest; Fosdick v. Fosdick, 6 Allen (Mass.) 41.

Powers are within the rule and generally are prevented from being too remote, because they can last only during the continuance of the trust and generally some one is found within the rule who has an absolute vested interest, and then these powers of sale simply cease altogether or else they are considered as existing, but are destructible by the one having the absolute interest, and so are not too remote; Pultizer v. Livingston, 89 Me. 359, 36 Atl. 635.

1. If a power can be exercised at too remote a period, any estate appointed under it is bad. 2. It does not follow, because appointments may be bad, that the power is bad. 3. Remoteness of appointment depends on its distance from the creation and not the exercise of the power.

Where the donee of the power appoints to one of the objects of the power by giving her a general power of appointment to such persons as she sees fit, the appointment is good on the ground that giving a general power of appointment is considered the same as giving the absolute estate; 2 Cl. & F. 453.

Where a testator devised his property in trust for his children living at his death and if any are dead then the share of such to go to his children, and gave the trustee power to sell the property, such power is valid, in-

asmuch as the objects have the equitable estate and can call for a conveyance of the legal estate at any time; Cooper's Estate, 150 Pa. 576, 24 Atl. 1057, 30 Am. St. Rep. 829. The testator devised property upon trust for A for life and then to A's children as he shall by deed or will appoint. By will, A directed that £2000 be paid to each of his daughters when attaining 24, the residue to be divided among his sons equally when attaining 24. A died and at his death two of his children were under 3 years of age. Held that the gifts to daughters were independent gifts, and those of them which came within the rule were good, but that the gifts to sons were to them as a class, and that they all failed; 30 Beavan 111. We are not, solely, limited to read the exact words of the appointment into the original power in order to determine whether the gift as created comes within the rule, but can as part of the description take the persons designated by the donee with their actual circumstances at the time of the appointment, *e. g.* if all the sons had been over 3 years of age at testator's death, then the appointment would have been good; *id.* So at the time the power was created, was it certain that if donee made an appointment such as he actually made it would have vested within the power; L. R. 16 Eq. 1; *contra*, Smith's Appeal, 88 Pa. 492. When English courts speak of a general power, they mean a general power to appoint by deed or will; 39 L. J. Ch. N. S. 188; however, in 29 Chan. Div. 251, it was decided that giving a general power to appoint by will is just like giving absolute ownership, and this case would seem to overrule the preceding case in 39 L. J. Ch. N. S. 188.

Gifts to charity are an exception to the rule and a gift over from one charity to another at a period beyond the rule is good; [1891] 3 Ch. 252.

The rule is not one to carry out testator's intentions and you cannot vary the same on account of the rule.

In the application of the rule, a child *en ventre sa mere* is to be considered as in being, irrespective of whether it be for the child's benefit or not; 7 Term 100.

The principle controlling the allowance of the period of gestation under the rule is, that life begins from conception and it is sufficient if the person entitled to a future interest at majority is begotten though not born within a life in being at its creation; Gray, Perp. § 220. This principle has been extended to allow two periods of gestation; 7 Term 100; and it has been a subject of discussion whether three might be allowed; 3 Yo. & Coll. 328; Lewis, Perp. 726; Gray, Perp. § 222. The time runs only from the creation of the interest, and if by will, then the situation is taken as it is at the testator's death and not at the time of making the will.

An interest is not obnoxious to the rule if it begins within the required limits although it may end beyond them; Pulitzer v. Livingston, 89 Me. 359, 36 Atl. 635.

Where a future interest is void as against the rule, prior limitations will be treated precisely as if the void limitation had been omitted; Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; 4 Ves. Jr. 427; Saxton v. Webber, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509. See an extended note classifying and analyzing the cases, 20 L. R. A. 509. Subsequent limitations though not in themselves too remote, following an interest too remote were held by Sugden, L. C., to fail. The authorities relied upon for this view are to be found in his argument as counsel in Beard v. Westcott, 5 B. & Ald. 801, and his decision as chancellor in Monypenny v. Dering, 2 De G. M. & G. 145. In Beard v. Westcott, the limitation was held good in the common pleas; 5 Taunt. 393; and bad in the king's bench; 5 B. & Ald. 801. The latter view is seriously controverted as not supported by the authorities cited in Sudgen's argument; Gray, Perp. §§ 251–257; Lewis, Perp. 421, 661.

A limitation of a legal estate to the unborn children of an unborn person, *i. e.* a contingent remainder, is bad and not within the rule, on the ground that a possibility limited on a possibility is bad; 44 Ch. Div. 85. This rule applies to equitable as well as legal estates, but the technical doctrine would be limited to contingent remainders.

A vested interest is not subject to the rule, and therefore it does not affect reversions and vested remainders and analogous equitable interests and interests in personalty; Gray, Perp. § 205. Whether contingent remainders are so has been the subject of much discussion involving the mooted question of limiting a possibility upon a possibility. That they are within the rule is contended by many authorities; Gray, Perp. §§ 284–298, where it is earnestly contended that contingent remainders and all future interests should fall within the rule, which conclusion is also supported by Lewis, Perp. c. 16, Suppl. 97. See, also, 20 Ch. D. 562; 1 Jarm. Wills 255, 260; 2 *id.* 845; Wood v. Griffin, 46 N. H. 230; 60 L. T. 247; *contra*, Wms. R. P. 6th Am. ed. 274; 2 H. L. Cas. 186. See L. R. 43 Ch. D. 246.

The rule applies to personal property; Lewis, Perp. 613; Gray, Perp. § 315; and future estates in personalty are treated just the same as in realty, and hence it would seem that there can be a life estate in personalty with a vested future interest, instead of stating that all future estates in personalty must be executory devises; 3 Chan. Div. 211. In case of chattels real, technically there could not be future vested interests. Equitable interests are affected by analogy to legal estates; those vested are not

subject, and those not vested are subject to the rule; *id.* §§ 322, 323.

An option to purchase land is an equitable interest and within the application of the rule; 20 Ch. Div. 562. In England, the practice was said to be to give an option for the lives of the present descendants of Queen Victoria, but as a general rule the option is only for 21 years, because of the difficulty of finding a life. The fact that the option is too remote to recover the lands may or may not affect the right to bring an action on the breach of the contract for damages. An action was allowed in [1906] 2 Ch. 532. Where land was conveyed to a corporation on their agreement to build a tunnel when called upon, specific performance was allowed against the corporation, and it was held that the rule did not apply; [1910] 1 Chan. 12. For a criticism of these cases, see the articles in 51 Solicitor's Jour. 648, 669; 54 *id.* 471, 501.

An option on coal lands, to be accepted "at any future time whatsoever," is void as constituting a perpetuity, and equity will decree its cancellation on a bill to remove a cloud from the title to the land: Barton v. Thaw, 41 C. C. Rep. (Pa.) 396, following L. R. 2 Ch. D. 257, 532; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352 (where an agreement to purchase land at any time before it otherwise should be sold was held void as being within the rule against perpetuities); Starcher v. Duty, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990, where an option made for one year, but to be extended from year to year, was held void for the same reason.

The rule against perpetuities does not affect contracts unless they are such as create rights of property; *id.* § 329; L. R. 43 Ch. D. 265. The rule is not applicable to a resulting trust which arises on the failure of an estate granted for a particular use which has ceased; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739; nor to a power to sell, upon the expiration of an estate tail, and divide the proceeds among persons then ascertainable; Barber v. R. Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

The statutes against perpetuities were directed at private trusts and accumulations and not at public, charitable, or eleemosynary trusts or uses; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Potter v. Chapin, 6 Paige (N. Y.) 639. The rule cannot be invoked to defeat a charitable use; White v. Keller, 68 Fed. 796, 15 C. C. A. 683; but a gift for the encouragement of yacht-racing is not such a use and may therefore be void as a perpetuity; [1895] 2 Ch. 657.

Where a gift over may take effect on a number of different contingencies, which contingencies would make some gifts good and others bad, then, if the testator has expressly separated them, the court will give effect to the good limitations; however, if the testator has not separated the contingencies, then there is no reason for the court separating them at one place any more than another, and hence they will hold the gift bad; 2 W. Bl. 704; 2 H. Bl. 358. There is an exception to the above rule, when by means of separation it is possible to have a contingent legal remainder in realty, in which case the court will so separate the gifts, even though the testator has not; 7 H. L. Cas. 531.

If a gift by will to a class is void as to one of the class because against the rule as to perpetuities, it is void as to all; Coggin's Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565. When a gift is made to a class, the share which each member of the class is to receive must be fully determined within the limits of the rule (*e. g.* a gift to a class, such as to A's children when they reach 25). Those living at testator's death will reach 25 during their life and when they reach 25 the class is closed and the interests become vested; however, some of the other members may die before reaching 25, and this will increase the shares of the others, so it cannot be told what share each will get until they all reach 25 or die, and hence the share which each member will get on final distribution has to be determined within the period of the rule, or the gift is bad; 2 Mer. 363. Although persons may popularly be spoken of as not belonging to the same class, still they may legally belong to the same class, as a gift to A's nephews and testator's children at 25; 6 Sim. 485.

What appears to be a gift to a class may in some cases be considered as separate and independent gifts to the members of the class, as a gift to the testator's children at 21 and if any die such child's share to go to its children at 21, such gift is good, as the shares are determined during a life in being and are not dependent on any contingency that may arrive after this time; 11 Hare 372; 3 De G., M. & G. 390.

Where an absolute interest is given in the first place, and later the testator introduces clauses modifying the gift, and such clauses are too remote, then, for the purpose of saving the bequest and preventing an intestacy, the modifying clauses will be disregarded; 2 Beavan 352; but an absolute interest must have been given in the first instance; 22 L. J. Ch. N. S. 1020. However, in England, where a gift was made to A for life and then to an unborn daughter, with a restraint against anticipation, the latter clause was disregarded and the court held that there cannot be a restraint to last after the limits of the rule. So a restraint on a daughter unborn at the testator's death is bad; 11 Ch. Div. 645. See 15 Ch. Div. 610.

Where limitations are to take effect during or at the determination of an estate tail,

such limitations are not obnoxious to the rule, since they are at all times within the absolute control of the person who has the present estate, for he can bar them, and this is true even though the present estate is in the hands of a minor and he is under disability to convey; 2 Bro. C. C. 215; 1 Lev. 35.

Mr. Justice Powell, in Scattergood v. Edge, 12 Mod. 278, distinguished perpetuities into two sorts, absolute and qualified; meaning thereby, as it is apprehended, a distinction between a plain, direct, and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate, nevertheless, from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law. But this distinction would not now lead to a better understanding or explanation of the subject, for whether an estate be so limited that it cannot take effect until a period too much protracted, or whether on a contingency which may happen within a moderate compass of time, it equally falls within the line of perpetuity, and the limitation is therefore void; for it is not sufficient that an estate *may* vest within the time allowed, but the rule requires that it *must;* Randall, Perp. 49; Rand v. Butler, 48 Conn. 293; 7 Sim. 173; Odell v. Odell, 10 Allen (Mass.) 1; Coggin's Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565. See Cruise, Dig. tit. 32, c. 23; 1 Belt, Suppl. to Ves. Jr. 406; 2 Ves. 357; 3 Saund. 388; Com. Dig. *Chancery* (4 G 1); 3 Ch. Cas. 1; Davis v. Williams, 85 Tenn. 646, 4 S. W. 8.

Under statutes of the New York class, a devise which suspends the power of alienation for a specific time, not measured by two lives, but by a term of years, is void; Trowbridge v. Metcalf, 5 App. Div. 318, 39 N. Y. Supp. 241; Montignani v. Blade, 74 Hun 297, 26 N. Y. Supp. 670. That a contingency may arise which will make the estate alienable is immaterial, but the validity of the provision must be determined independently of any possible agreement of parties; Winsor v. Mills, 157 Mass. 362, 32 N. E. 352; but a power is not rendered void because by its terms an appointment might possibly be made which would not take effect within the required period; In re Lawrence's Estate, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925.

See OPTION.

PERQUISITES. In its most extensive sense, perquisites signifies anything gotten by industry or purchased with money, different from that which descends from a father or ancestor. Bract. l. 2, c. 30, n. 3; l. 4, c. 22. In a more limited sense, it means something gained by a place or office beyond the regular salary or fee.

PERSON. A man considered according to the rank he holds in society, with all the right to which the place he holds entitles him, and the duties which it imposes. People v. R. Co., 134 N. Y. 506, 31 N. E. 873.

The term is, however, more extensive than *man.* It may include artificial beings, as corporations; 1 Bla. Com. 123; 4 Bingh. 669; People v. Com'rs of Taxes, 23 N. Y. 242; *quasi*-corporations; Sedgw. Stat. & Const. L. 372; L. R. 5 App. Cas. 857; territorial corporations; Seymour v. School District, 53 Conn. 507, 3 Atl. 552; and foreign corporations; People v. McLean, 80 N. Y. 259; under statutes, forbidding the taking of property without due process of law and giving to all persons the equal protection of the laws; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; concerning claims arising from Indian depredations; U. S. v. Transp. Co., 164 U. S. 686, 17 Sup. Ct. 206, 41 L. Ed. 599; relating to taxation and the revenue laws; People v. McLean, 80 N. Y. 254; to attachments; Bray v. Wallingford, 20 Conn. 416; usurious contracts; Philadelphia Loan Co. v. Towner, 13 Conn. 249; applying to limitation of actions; Olcott v. R. Co., 20 N. Y. 210, 75 Am. Dec. 393; North Mo. R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183; and concerning the admissibility as a witness of a party in his own behalf when the opposite party is a living person; La Farge v. Ins. Co., 22 N. Y. 352. A corporation is also a person under a penal statute; U. S. v. Amedy, 11 Wheat. (U. S.) 392, 6 L. Ed. 502. Corporations are "persons" as that word is used in the first clause of the XIVth Amendment; Covington & L. Turnp. Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; People v. Fire Ass'n, 92 N. Y. 311, 44 Am. Rep. 380; U. S. v. Supply Co., 215 U. S. 50, 30 Sup. Ct. 15, 54 L. Ed. 87; *contra,* Central P. R. Co. v. Board, 60 Cal. 35. But a corporation of another state is not a "person" within the jurisdiction of the state until it has complied with the conditions of admission to do business in the state; Fire Ass'n of Phila. v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; and a statutory requirement of such conditions is not in conflict with the XIVth Amendment; Pembina Consol. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sup. Ct. 737, 31 L. Ed. 650.

It has been held that when the word person is used in a legislative act, *natural* persons will be intended unless something appear in the context to show that it applies to artificial persons; Blair v. Worley, 1 Scam. (Ill.) 178; Appeal of Fox, 112 Pa. 337, 4 Atl. 149; but as a rule corporations will be considered persons within the statutes unless the intention of the legislature is manifestly to exclude them; Stribbling v. Bank, 5 Rand. (Va.) 132.

A county is a person in a legal sense; Lancaster Co. v. Trimble, 34 Neb. 752, 52 N. W. 711; but a sovereign is not; In re Fox, 52 N. Y. 535, 11 Am. Rep. 751; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; but *contra* within the meaning of a statute, providing a penalty for the fraudulent alteration of a public record with intent that any "person" be defrauded; Martin v. State, 24 Tex. 61; and within the meaning of a covenant for quiet and peaceful possession against all and every person or persons; Giddings v. Holter, 19 Mont. 263, 48 Pac. 8. An Indian is a person; U. S. v. Crook, 5 Dill. 459, Fed. Cas. No. 14,891; and a slave was so considered, in so far, as to be capable of committing a riot in conjunction with white men; State v. Thackam, 1 Bay (S. C.) 358. The estate of a decedent is a person; Billings v. State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; and where the statute makes the owner of a dog liable for injuries to any person, it includes the property of such person; Brewer v. Crosby, 11 Gray (Mass.) 29; but where the statute provided damages for the bite of a dog which had previously bitten a person, it was held insufficient to show that the dog had previously bitten a goat; [1896] 2 Q. B. 109; a dog will not be included in the word in an act which authorizes a *person* to kill dogs running at large; Heisrodt v. Hackett, 34 Mich. 283, 22 Am. Rep. 529.

It includes women; Opinion of Justices, 136 Mass. 580; Warwick v. State, 25 Ohio St. 21; Belles v. Burr, 76 Mich. 1, 43 N. W. 24; but see In re Goodell, 39 Wis. 232, 20 Am. Rep. 42; In re Bradwell, 55 Ill. 535, where the statute was in reference to admission to the bar, and it was held that, while the term was broad enough to include them, such a construction could not be presumed to be the legislative intent.

Where the statute prohibited any person from pursuing his usual vocation on the Lord's Day, it was held to apply to a judge holding court; Bass v. Irvin, 49 Ga. 436.

A child *en ventre sa mere* is not a person; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242; but an infant is so considered; Madden v. Springfield, 131 Mass. 441.

In the United States bankruptcy act of 1898, it is provided that the word "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and, when used with reference to the commission of acts which are therein forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or their controlling bodies, of corporations.

Persons are the subject of rights and duties; and, as a subject of a right, the person is the object of the correlative duty, and conversely. The subject of a right has been called by Professor Holland, the person of inherence; the subject of a duty, the person of incidence. "Entitled" and "bound" are the terms in common use in English and for most purposes they are adequate. Every full citizen is a person; other human beings, namely, subjects who are not citizens, may be persons. But not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law. . . . A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being considered as having such attributes is what lawyers call a *natural* person. Pollock, First Book of Jurispr. 110. See Gray, Nature and Sources of Law, ch. II.

PERSONA (Lat.). **In Civil Law.** Character, in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus, one man may unite many characters (*personæ*); as, for example, the characters of father and son, of master and servant; Mackeldey, Civ. Law § 117.

In its original signification, a mask; afterwards, a man in reference to his condition or character (*status*). Vicat, Voc. Jur. It is used metaphorically of things, among which are counted slaves. It is often opposed to *res:* as, *actio in personam* and *actio in rem.*

Power and right belonging to a person in a certain character (*pro jure et potestate personæ competente*). Vicat, Voc. Jur. Its use is not confined to the living, but is extended to the dead and to angels. *Id.*

A statue in a fountain whence water gushes.

So far as the language of the Roman law is any authority, a slave was a person. Both Gaius and Justinian include them among persons, and that is conclusive as to the Roman use of the word; Hunter, Roman Law 160. "Modern writers on Roman law concurrently say that a slave was not a person, but it is certain that the Roman lawyers sometimes use *persona* so as to include slaves"; Pollock, First Book of Jurispr. 111.

PERSONA GRATA. A term used in diplomacy to indicate that a representative of one nation is personally acceptable, in that capacity, to the government to which he is accredited.

PERSONA MISERABILIS. See FORUM.

PERSONAL. Belonging to the person.

PERSONAL ACTION.

In Civil Law. An action in which one person (the *actor*) sues another (the *reus*) in respect of some obligation which he is

under to the actor either *ex contractu* or *ex delicto*. It will be seen that this includes all actions against a person, without reference to the nature of the property involved. In a limited sense of the word action in the civil law, it includes only personal action, all others being called petitions. See REAL ACTION.

In Common Law. An action brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. Such arise either upon contracts as, account, assumpsit, covenant, debt, and detinue (see these words), or for wrongs, injuries, or torts, as trespass, trespass on the case, replevin, trover (see these words). Other divisions of personal actions are made in the various states; in Vermont and Connecticut an action is in use called an action of book debt. See PERSONAL PROPERTY.

PERSONAL ASSETS. See ASSETS.

PERSONAL CHATTELS. See CHATTELS.

PERSONAL CONTRACT. A contract as to personal property. A covenant (or contract) personal relates only to matters personal as distinguished from real, and is binding on the covenantor (contractor) during his life, and on his personal representatives after his decease, in respect of assets. 3 Co. 22 *a*.

PERSONAL COVENANT. A covenant which binds only the covenantor and his personal representatives in respect to assets, and can be taken advantage of only by the covenantee.

A covenant which must be performed by the covenantor in person. Fitzh. N. B. 340.

All covenants are either personal or real; but some confusion exists in regard to the division between them. Thus, a covenant may be personal as regards the covenantor, and real as regards the covenantee; and different definitions have been given, according to whether the rights and liabilities of the covenantor or the covenantee have been in consideration. It is apprehended, however, that the prevalent modern usage is to hold a covenant real, if it is real,—that is, runs with the land so as to apply to an assignee, either as regards the covenantor or the covenantee. See Platt, Cov. 61; 4 Bla. Com. 304; Thomas v. Poole, 7 Gray (Mass.) 83. See COVENANT.

PERSONAL EFFECTS. In a will, the words are held not to include personal property in the testator's house, such as furniture and pictures. Lippincott's Estate, 173 Pa. 368, 34 Atl. 58. See WILL.

PERSONAL ESTATE. The term is sometimes used as synonymous with personal property, but its use should not lead to the supposition that there can be any such thing as an estate in personalty, properly so called. Will. Pers. Prop. 8.

But Dicey (Confl. Laws, Moore's ed. 311) considers *personal estate* and *personal property* synonymous. They are so used in Acts of Parliament.

PERSONAL GOODS. That property which passes by hand and property which marriage passed from the wife to the husband. Co. Litt. 185 *b*. See PERSONAL PROPERTY.

PERSONAL INJURY. Bodily injury. State v. Clayborne, 14 Wash. 622, 45 Pac. 303.

PERSONAL LIABILITY. The statutory liability of stockholders of corporations by which they are held individually liable for the debts of the corporation. See STOCKHOLDERS; JOINT STOCK COMPANY.

PERSONAL LIBERTY. Freedom from physical and personal restraint; the right to the pursuit of happiness; freedom to go where one chooses and to pursue such lawful occupations as may seem suitable.

In its broad sense personal liberty would include freedom from unlawful arrest and restraint, from unlawful seizures and searches, from assault and battery, from libel and slander, from general warrants of arrest, from unfair monopolies in trade, and from quartering soldiers in time of peace; and it would include also the right of trial by jury, liberty of conscience, freedom of the press, the right to travel and emigrate, to bear arms and to petition the government for redress of grievances. But in its stricter sense it includes only freedom to move about as one pleases and to pursue any lawful calling; Munn v. Illinois, 94 U. S. 142, 24 L. Ed. 77; Slaughter-House Cases, 16 Wall. (U. S.) 106, 21 L. Ed. 394; Butchers' Union Co. v. Slaughter-House Co., 111 U. S. 757, 4 Sup. Ct. 652, 28 L. Ed. 585; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34. See CONSTITUTIONAL; POLICE POWER; ASSAULT; CORRECTION; IMPRISONMENT; HABEAS CORPUS; EXPATRIATION; PHYSICAL EXAMINATION; SEARCH; PRELIMINARY EXAMINATIONS; LIBERTY OF CONTRACT; LIBERTY.

PERSONAL PROPERTY. The right or interest which a man has in things personal.

The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.

Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property. The essential idea of personal property is that of property in a thing movable or separable from the realty, or of perishability or possibility of brief duration of interest as compared with the

owner's life, in a thing real, without any action on the part of the owner. See 2 Bls. Com. 14 and notes, 384 and notes.

It includes money, chattels, things in action and evidence of debt; Streever v. Birch, 62 Hun 298, 17 N. Y. Supp. 195; McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99; and the right which a vendor has to enforce a contract for the sale of real property; People v. Willis, 133 N. Y. 383, 31 N. E. 225. It does not include dogs untaxed; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599.

A crop growing in the ground is personal property so far as not to be considered an interest in land, under the statute of frauds; Smith v. Jones, 12 Me. 337; 5 B. & C. 829; 10 Ad. & E. 753.

It is a general principle of American law that stock in corporations is to be considered as personal property; 4 Dane, Abr. 670; 1 Hill, R. P. 18; Tregear v. Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. Rep. 245; though it was held that such stock was real estate; Griswold v. Penniman, 2 Conn. 567; but the rule was then changed by the legislature.

Title to personal property is acquired—*first*, by original acquisition by occupancy; as, by capture in war, by finding a lost thing; *second*, by original acquisition by accession; *third*, by original acquisition by intellectual labor: as, copyrights and patents for inventions; *fourth*, by transfer, which is by act of law, by forfeiture, by judgment, by insolvency, by intestacy; *fifth*, by transfer by act of the party, by gift, by sale. See Graves, Title to Pers. Prop; Pew; Property; Real Property; Possession.

Possession of personal property is *prima facie* title thereto; Crawford v. Kimbrough, 76 Ga. 299. See Lowery v. Erskine, 113 N. Y. 52, 20 N. E. 588.

PERSONAL REPRESENTATIVES. The executors or administrators of the person deceased. 5 Ves. 402; 1 Madd. 108; Cox v. Curwen, 118 Mass. 198. The personal representative of a lessee for years is his assignee. 1 Ld. Raym. 553; 12 Eng. Rul. Cas. 59.

In wills, these words are sometimes construed to mean *next of kin;* 3 Bro. C. C. 224; 2 Jarm. Wills 112; 1 Beav. 46; that is, those who would take the personal estate under the statute of distributions. They have been held to mean *descendants;* 19 Beav. 448. See Legal Personal Representatives.

PERSONAL SECURITY. The legal and uninterrupted enjoyment by a man of his life, his body, his health, and his reputation. 1 Bouvier, Inst. n. 202.

PERSONAL SERVICE. The delivery of a writ to the person therein named in person. Leaving a copy at his place of abode is not personal service; Moyer v. Cook, 12 Wis. 336.

PERSONAL SERVICES. See Specific Performance.

PERSONAL STATUTE. A law whose principal, direct, and immediate object is to regulate the condition of persons.

The term is not properly in use in the common law, although Lord Mansfield, in 2 W. Bla. 154, applied it to those legislative acts which respect personal transitory contracts, but it is occasionally used in the sense given to it in civil law and which is adopted as its definition. It is a law, ordinance, regulation, or custom, the disposition of which affects the person and clothes him with a capacity or incapacity which he does not change with his abode. See 2 Kent 613.

PERSONALITY. A term used to desig nate that quality of a law which concerns the condition, state, or capacity of persons.

An *action in personality* is one brought against the right person, or the person against whom it lies. Fitzh. N. B. 92.

The *personality of laws* is a phrase used by foreign jurists to designate all laws concerning the condition, state, or capacity of persons, as distinguished from the reality of laws, which means all laws concerning property or things. To express the idea that the operation of a law is universal, it is termed a *personal statute*, and, on the other hand, to express the idea that its operation is confined to the country of its origin it is designated a *real statute*. Sto. Confl. L. § 16.

Livermore used the words *personality* and *reality*, and Henry the words *personalty* and *realty;* Story preferred the former, as less likely to lead to mistakes, as, in our law, *personalty* and *realty* are used exclusively to designate personal and real property. *Id.*

See Situs.

PERSONALTY. That which is movable; that which is the subject of personal property and not of a real property.

PERSONATE. In Criminal Law. To assume the character of another without lawful authority, and, in such character, do something to his prejudice, or to the prejudice of another, without his will or consent.

The bare fact of personating another for the purpose of fraud is no more than a cheat or misdemeanor at common law, and punishable as such; 2 East, Pl. Cr. 1010; 2 Russ, Cr. 479.

By statute punishment is inflicted in the United States courts for false personation of any person under the naturalization laws, and of any person holding a claim or debt against the government; R. S. §§ 5424, 5436. See, generally, Renoard v. Noble, 2 Johns. Cas. (N. Y.) 293; 16 Viner, Abr. 336; Comyns, Dig. ***Action on the Case for a Deceit*** **(A 3).**

PERSONNEL OF NAVY ACT. See RANK; NAVY PERSONNEL ACT.

PERSUADE, PERSUADING. To persuade is to induce to act. Persuading is inducing others to act. Inst. 4. 6. 23; Dig. 11. 3. 1. 5.

In the act of the legislature which declared that "if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by *persuading* others to enlist for that purpose, etc., he shall be adjudged guilty of high treason," the word persuading thus used means to succeed; and there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause; Respublica v. Roberts, 1 Dall. (U. S.) 39, 1 L. Ed. 27; 4 C. & P. 369; 9 *id.* 79. The attempt to persuade a servant to steal his master's goods, or other person to undertake a larceny or other crime, is an indictable misdemeanor, although the person approached declines the persuasion; 1 Bish. Cr. L. § 767.

If one counsels another to suicide, and it is done in his presence, the adviser is as guilty as the principal. Accordingly, where two persons, agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other; 8 C. & P. 418; 1 Bish. Cr. L. § 652; Whart. Cr. L. § 448.

PERSUASION. The act of influencing by expostulation or request. While the persuasion is confined within those limits which leave the mind free, it may be used to induce another to make his will, or even to make it in his own favor. But if such persuasion should so far operate on the mind of the testator that he would be deprived of a perfectly free will, it would vitiate the instrument; Miller v. Miller, 3 S. & R. (Pa.) 269, 8 Am. Dec. 651.

PERTINENT. That which tends to prove or disprove the allegations of the parties. Willes 319. Matters which have no such tendency are called impertinent; 8 Toullier, n. 22.

PERTURBATION. A technical word which signifies disturbance or infringement of a right. It is usually applied to the disturbance of pews or seats in a church. In the ecclesiastical courts, actions for these disturbances are technically called "suits for perturbation of seat." 1 Phill. Eccl. 323. See PEW.

PERVERSE VERDICT. A verdict rendered by a jury which choose not to take the law from the judge, but will act on their own erroneous view of the law. In such cases, however honest the intentions of the jury may be, their verdict is perverse. 14 Eng. L. & Eq. 532.

PERVISE, PARVISE. The palace yard at Westminster.

A place where counsel used to advise with their clients.

An afternoon exercise or moot for the instruction of students. Cowell; Blount.

PESAGE. In England, a toll charged for weighing avoirdupois goods other than wool. 2 Chitty, Com. Law 16.

PESO. The name of gold and silver coins in the Philippine Islands and in Cuba. See LEGAL TENDER.

PESQUISIDOR. In Spanish Law. A coroner. White, New Recop. b. 1, tit. 1, § 3.

PETENS. A demandant; the plaintiff in a real action. Bract. fol. 102, 106 *b*.

PETER'S PENCE. An ancient levy or tax of a penny on each house throughout England paid to the pope. It was called Peter's Pence because collected on the day of St. Peter, *ad vincula;* by the Saxons it was called *Rome-feoh, Rome-scot,* and *Rome-penny-ing,* because collected and sent to Rome; and lastly, it was called *hearth money,* because every dwelling-house was liable to it, and every religious house, the abbey of St. Albans alone excepted.

It had its origin with the Mercian king Offa, who by a liberal tribute to Rome procured a new bishopric for Lichfield. It goes back to the tenth century. Stubbs, Const. Hist. of England.

PETIT (sometimes corrupted into *petty*). A French word signifying little, small. It is frequently used: as, *petit larceny, petit jury, petit treason* (*q. v.*).

PETIT ASSIZE. A jury to decide on questions of possession. Britton c. 42; Glanv. lib. 2, c. 6, 7. Used in contradistinction to the *grand assize,* which was a jury to decide on questions of property. See GRAND ASSIZE.

PETIT CAPE. See CAPE; GRAND CAPE.

PETIT JURY or PETTY JURY. The "little" jury, so called to distinguish it from the "grand" (or "large") jury. Brett, Comm. 1162, n.

PETIT SERJEANTY. See SERJEANTY.

PETIT TREASON. In English Law. The killing of a master by his servant, a husband by his wife, a superior by a secular or religious man. In the United States, this is like any other murder. See HIGH TREASON; TREASON.

PETITIO. A count or declaration. Glanv.

PETITION. An instrument of writing or printing, containing a prayer from the person presenting it, called the petitioner, to the body or person to whom it is presented, for the redress of some wrong or the grant of some favor which the latter has the right to give.

By the constitution of the United States, the right "to petition the government for a

redress of grievances" is secured to the people. Amend. art. 1.

See CONSTITUTION OF UNITED STATES.

Petitions are frequently presented to the courts in order to bring some matters before them. It is a general rule in such cases that an affidavit should be made that the facts therein contained are true as far as known to the petitioner, and that those facts which he states on information he believes to be true. It is said that the sufficiency of a petition must be determined by its face, and can neither be aided nor destroyed by the accompanying exhibits, the exhibits being no part of it; Merrill v. Trust Co., 46 Mo. App. 230.

PETITION OF RIGHT. In English Law. A proceeding in chancery by which a subject may recover property in the possession of the king.

This is in the nature of an action against a subject, in which the petitioner sets out his right to that which is demanded by him, and prays the king to do him right and justice; and, upon a due and lawful trial of the right, to make him restitution. It is called a petition of right because the king is bound of right to answer it and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. The petition is presented to the king, who subscribes it with these words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor to be executed according to law. Co. 4th Inst. 419, 422 *b*; Mitf. Eq. Pl. 30, 31; Cooper, Eq. Pl. 22, 23.

The modern practice is regulated by statute 23 and 24 Vict. c. 34, which provides that the petition shall be left with the home secretary for Her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done, whereupon the fiat having been served on the solicitor of the treasury, an answer, plea, or demurrer shall be made, in behalf of the crown, and the subsequent pleadings be assimilated as far as practicable to the course of an ordinary action; Mozl. & W.

A statute which Charles I. approved June 7, 1628. As it was not drawn in the common form of an act of parliament, it was so called. It is one of the four great charters of British liberty. It recited that by the laws of England subjects "should not be compelled to contribute to any tax, tallage, aid or any like charge not set by common consent in parliament"; yet the people of England were required to lend certain sums to the crown and many of them, upon their refusal, had been constrained to appear before the Privy Council and be imprisoned, etc.

It recited that by the Great Charter no individual should be taken, imprisoned or disseised of his freeholds or liberties, or be outlawed or exiled, etc., but by the law of the land, nevertheless, divers subjects had been imprisoned without cause shown, and when brought up on habeas corpus and no cause certified, had been returned back to prison. It complained that soldiers and mariners had been quartered on the people.

It complained that commissioners had been appointed, with power to proceed "according to the justice of martial law" against such soldiers and mariners, etc. And "by such summary course as is agreeable to martial law and is used in armies in time of war," to try, condemn and execute such offenders "according to the law martial." The petition prayed that these wrongs be righted and that no man thereafter be compelled to make any gift, loan, benevolence, etc. The petition being read June 2, 1628, the king made an evasive answer, but on June 7 he gave his answer in the accustomed form: "Soit droit fait comme il est désiré." See the text in 2 Larned's History for Ready Reference 875.

PETITORY. That which demands or petitions; that which has the quality of a prayer or petition; a right to demand.

A petitory suit or action is understood to be one in which the mere title to property is to be enforced by means of a demand, petition, or other legal proceeding, as distinguished from a suit where only the right of possession and not the mere right of property is in controversy. 1 Kent 371; U. S. v. King, 7 How. (U. S.) 846, 12 L. Ed. 934. Admiralty suits touching property in ships are either *petitory*, in which the mere title to the property is litigated, or *possessory*, to restore the possession to the party entitled thereto.

The American courts of admiralty exercise unquestioned jurisdiction in petitory as well as possessory actions; The Amelia, 23 Fed. 406; Wood v. Two Barges, 46 Fed. 204; but admiralty will not enforce a merely equitable title; The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269. In England the courts of law, some time after the restoration in 1660, claimed exclusive cognizance of mere questions of title until the statute of 3 & 4 Vict. c. 65. By that statute the court of admiralty was authorized to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry in any cause of possession, salvage, damage, wages, or bottomry, instituted in such court after the passing of that act; Ward v. Peck, 18 How. (U. S.) 267, 15 L. Ed. 383; The Friendship, 2 Curt. C. C. 426, Fed. Cas. No. 5,123.

PETROLEUM. See OIL.

PETTIFOGGER. One who pretends to be a lawyer, but possesses neither knowledge of the law nor conscience.

An unprincipled practitioner of law, whose business is confined to petty cases.

PETTY. See PETIT.

PETTY AVERAGE (called, also, customary average). Several petty charges which are borne partly by the ship and partly by the cargo, such as the expense of tonnage, beaconage, etc. Abb. Sh. 13th ed. 658; 2 Pars. Mar. Law 312; 1 Bell, Com. 567. See AVERAGE.

PETTY BAG OFFICE. In English Law. An office in the court of chancery, appropriated for suits against attorneys and officers of the court, and for process and proceedings by extent on statutes, recognizances *ad quod damnum*, and the like. *Termes de la Ley.*

PETTY CONSTABLE. The ordinary constable, as distinguished from the high constable of the hundred. 1 Bla. Com. 355; Bac. Law Tr. 181, *Office of Constable;* Wille. Cons. c. 1, § 1. See CONSTABLE.

PETTY LARCENY. See LARCENY.

PETTY SESSIONS. See SESSION.

PEW. A seat in a church, separate from all others, with a convenient place to stand therein.

It is an incorporeal interest in the real property. The pewholder does not own the soil; Cooper v. Presbyterian Church, 32 Barb. (N. Y.) 234; Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159. And although a man has the exclusive right to it, yet it seems he cannot maintain trespass against a person entering it; 1 Term 430; but case is the proper remedy; 3 B. & Ald. 361; 8 B. & C. 294. In First Baptist Church v. Witherell, 3 Paige Ch. (N. Y.) 296, 24 Am. Dec. 223; it was held that the owner of a pew can, if disturbed in its use, maintain trespass, case, or ejectment, according to the circumstances.

The right to pews is limited and usufructuary, and does not interfere with the right of the parish or congregation to pull down and rebuild the church; Price v. Methodist Church, 4 Ohio 541; Freligh v. Platt, 5 Cow. (N. Y.) 496; Sohier v. Trinity Church, 109 Mass. 21; Com. v. St. Mary's Church, 6 B. & R. (Pa.) 508; indemnifying those whose pews are destroyed; Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159. See 2 Bla. Com. 429; 19 Am. L. Reg. N. S. 1; Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 161; First Baptist Church v. Witherell, 3 Paige Ch. (N. Y.) 296, 24 Am. Dec. 230. The pewholder's right is only to occupy his pew during public worship; How v. Stevens, 47 Vt. 262.

His right is subject to the paramount rights of the parish; First Baptist Society in Leeds v. Grant, 59 Me. 250; but it is held that a rule of the Roman Catholic Church forbidding a layman to control his pew will not be regarded by the courts, unless it was part of the contract; O'Hear v. De Goesbriand, 33 Vt. 602, 80 Am. Dec. 653 (criticised in 15 Am. L. Reg. 280).

When pews are removed from a church merely as a matter of expediency, the owners are entitled to payment; Aylward v. O'Brien, 160 Mass. 118, 35 N. E. 313, 22 L. R. A. 206. See PERTURBATION.

A pew may be used only for divine service and for meetings of the congregation held for temporal purposes. The pewowner must preserve order, while enjoying his pew; Wall v. Lee, 34 N. Y. 149.

Where not otherwise provided by statute the interest is considered as real estate, subject to the incidents of that kind of property; 1 Washb. R. P. 9; O'Hear v. De Goesbriand, 33 Vt. 602, 80 Am. Dec. 653; (see also Heeney v. St. Peters Church, 2 Edw. Ch. [N. Y.] 608); White v. Bailey, 14 Conn. 279; Third Presbyterian Congregation v. Andruss, 21 N. J. L. 325. In Massachusetts and New Hampshire pews are personal property by statute. In Pennsylvania they are held personal property as to devolution, although, strictly speaking, an interest in real estate; Church v. Wells' Ex'r, 24 Pa. 251. See, generally, State v. Trinity Church, 45 N. J. L. 230; Best, Pres. 111; Crabb, R. P. § 481; Baum, Church Law.

PHARMACY. See DRUGGIST.

PHAROS. A watch-tower, at sea mark, which cannot be erected without lawful warrant and authority. 3 Inst. 204.

PHILIPPINE ISLANDS. War was declared with Spain on April 25, 1898. On May 1, 1898, the forces of the United States captured Manila bay and harbor. The protocol of August 12, 1898, provided that the United States would occupy and hold the city, bay and harbor of Manila pending the control, disposition and government of the Philippines. Manila was opened as a port of entry on August 20, 1898, and Cebu on March 14, 1899. The executive order of July 12, 1898, was not proclaimed in Cebu until February 22, 1899, or later. The treaty of peace was signed on December 10, 1898, but ratifications were not exchanged until April 11, 1899. The Spanish forces evacuated the island of Cebu on December 25, 1898, having first appointed a provisional governor. Shortly thereafter the native inhabitants formerly in insurrection against Spain took possession of the island, formed a so-called republic and administered the affairs of the island until possession was surrendered to the United States on February 22, 1899, prior to which time the United States had not been in possession of the islands.

After the treaty of peace with Spain, the Philippines ceased to be a "foreign country" in the view of the tariff act; De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; the subsequent insurrection did not constitute it such; Lincoln v. U. S., 197 U. S. 419, 25 Sup. Ct. 455, 49 L. Ed. 816. No distinction can be made, so far as concerns the matters decided in De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041,

between Porto Rico and the Philippines; Fourteen Diamond Rings v. U. S., 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138. The inhabitants continuing to reside there, who were Spanish subjects on April 11, 1899, and resided there and their children born subsequently thereto are made citizens of the Philippines and entitled to the protection of the United States, excepting such as have elected to remain subjects of Spain.

For a history of matters growing out of the Spanish-American war, see U. S. v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; Macleod v. U. S., 229 U. S. 416, 33 Sup. Ct. 955, 57 L. Ed. 1260.

Congress in dealing with the Philippine Islands may delegate legislative authority to such agencies as it may select; U. S. v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688. In 1901 it had been held that while the president, as commander-in-chief, had authority to impose customs duties in Porto Rico on goods coming into that country from the United States prior to the ratification of the treaty, no such executive power existed after that ratification; De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041. After the ratification of the treaty with Spain, congress passed the Foraker Act, imposing tariff duties. These, too, were held lawful because they were imposed, not simply by virtue of the authority of the president, acting under the military power, but in conformity with a valid act of congress; Dooley v. U. S., 183 U. S. 151, 22 Sup. Ct. 62, 43 L. Ed. 128.

On the same day, in a case involving the validity of tariff duties levied on diamonds brought into the United States from the Philippines, it was held that such duties were unlawful; Fourteen Diamond Rings v. U. S., 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138; because the Philippines were not foreign territory. In January and in March, 1902, in two cases, it was sought to recover duties paid on goods taken into the Philippines, after the ratification of the treaty with Spain and before the passage of the act of congress of March 8, 1902. It was held that the president was without power, after the ratification of the treaty, and in the absence of express authority from congress, to impose the duties in question; Lincoln v. U. S., 197 U. S. 419, 25 Sup. Ct. 455, 49 L. Ed. 816; *id.*, 202 U. S. 484, 26 Sup. Ct. 728, 50 L. Ed. 1117. An act of congress of June 30, 1906, then ratified the collection of duties levied under the order of the president. In a case commencing after the decision in Fourteen Diamond Rings v. U. S., 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138, it was contended that congress had not the power to ratify, by legislation, an order which the president had no right to make without express authority from congress, and that congress could not delegate to the president the right of prescribing a tariff of duties. The court held that, though the duties were illegally exacted, the illegality was not the result of an inherent want of power in the United States to have authorized the imposition of the duties, but simply arose from the failure to delegate to the official the authority essential to give immediate validity to his conduct in enforcing the payment of the duties; that the illegal act of the president might be ratified by congress in accordance with the law of agency, and that congress might delegate legislative authority to the president or to any other agent it might select; U. S. v. Heinszen, 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688.

PHOTOGRAPH. The mechanical process of photography is judicially recognized as a means of producing true likenesses which are admissible in evidence in the trial of civil and criminal cases. The difference between the images produced upon a photographic plate and upon the human eye does not render a photograph inadmissible in evidence, but bears only upon the effect of such evidence; 1 Greenl. Ev. 92; Scott v. New Orleans, 75 Fed. 373, 21 C. C. A. 402; Maclean v. Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209. A photograph of the subject-matter in controversy is admissible in evidence, when proved to have been fairly taken; Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; Chicago, R. & Q. R. Co. v. Upton, 194 Fed. 371, 115 C. C. A. 379; Church v. Milwaukee, 31 Wis. 512; Franklin v. State, 69 Ga. 42, 47 Am. Rep. 748; Kansas City, M. & B. R. Co. v. Smith, 90 Ala. 25, 8 South. 43, 24 Am. St. Rep. 753; Udderzook v. Com., 76 Pa. 340; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Barker v. Perry, 67 Ia. 146, 25 N. W. 100; Ordway v. Haynes, 50 N. H. 159. There should be preliminary proof of care and accuracy in the taking, and of their relevancy; Cunningham v. R. Co., 72 Conn. 244, 43 Atl. 1047; McKarren v. R. Co., 194 Mass. 179, 80 N. E. 477, 10 Ann. Cas. 961. The testimony of the photographer is not essential; *id.*; New York, S. & W. R. Co. v. Moore, 105 Fed. 725, 45 C. C. A. 21.

While the reported cases do not always show that the photograph offered in evidence was first authenticated, yet there is no case which holds that such proof is unnecessary. The following cases show that such proof was assumed to be necessary or was given; Cooper v. R. Co., 54 Minn. 379, 56 N. W. 42; Geer v. Min. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; People v. Fish, 125 N. Y. 136, 26 N. E. 319; State v. Kelley, 46 S. C. 55; Buzard & Hilliard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 South. 371, 24

Am. St. Rep. 863; Miller v. R. Co., 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416. It has been said that photographs are merely secondary evidence; Duffin v. People, 107 Ill. 113, 47 Am. Rep. 431; Leathers v. Wrecking Co., 2 Woods 680, Fed. Cas. No. 8,164; but they are of a high order of proof; Beardslee v. Columbia Tp., 188 Pa. 496, 41 Atl. 617, 68 Am. St. Rep. 883. Where the jury has viewed the premises in question a photograph of them is generally inadmissible; Blair v. Pelham, 118 Mass. 420; Church v. Milwaukee, 31 Wis. 512; but where the photographs themselves are the subject of the controversy, or the original subject of the photograph cannot for any reason be produced, it is otherwise; Barnes v. Ingalls, 39 Ala. 193; Chicago, M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398; Perkins v. Buaas (Tex.) 32 S. W. 240; Omaha S. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Church v. Milwaukee, 31 Wis. 512; Wilcox v. Wilcox, 46 Hun (N. Y.) 32; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Daly v. Maguire, 6 Blatch. 137, Fed. Cas. No. 3,551. The discretion of the court in the admission of photographs does not differ from the exercise of that power with reference to other kinds of evidence; Oritz v. State, 30 Fla. 256, 11 South. 611; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373; Archer v. R. Co., 106 N. Y. 598, 13 N. E. 318; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

Photographs are admissible to show the physical condition, characteristics, and identity of persons and property, in civil and criminal cases; Brown v. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; Taylor, B. & H. Ry. Co. v. Warner, 88 Tex. 642, 32 S. W. 868; People v. Webster, 139 N. Y. 73, 34 N. E. 730; Gilbert v. Ry. Co., 160 Mass. 403, 36 N. E. 60; Malachi v. State, 89 Ala. 134, 8 South. 104; State v. Holden, 42 Minn. 350, 44 N. W. 123; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Com. v. Connors, 156 Pa. 147, 27 Atl. 366; 4 Fost. & F. 103; State v. Windahl, 95 Ia. 470, 64 N. W. 420; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; also of places; 3 Fost. & F. 73; Omaha S. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Church v. Milwaukee, 31 Wis. 512; Bliss v. Johnson, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Dyson v. R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82; Missouri, K. & T. Ry. v. Moore (Tex.) 15 S. W. 714; Cleveland, C., C. & St. L. R. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869; State v. O'Reilly, 126 Mo. 597, 29 S. W. 577; Keyes v. State, 122 Ind. 527, 23 N. E. 1097; Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 South. 371, 24 Am. St. Rep. 863; to show the condition of a highway; Glazier v. Hebron, 62 Hun 137, 16 N. Y. Supp. 503; and a change of grade in a street; Church v. Milwaukee, 31 Wis. 512; Williams v. Carterville, 97 Ill. App. 160; to show resemblance of parent and child; Shorten v. Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Farrell v. Weitz, 160 Mass. 288, 35 N. E. 783; and the physical condition of a plaintiff who was too ill to be present at a trial; Cooper v. Ry. Co., 54 Minn. 379, 56 N. W. 42; also the appearance of a person at some time in the past; State v. Ellwood, 17 R. I. 763, 24 Atl. 782; Com. v. Morgan, 159 Mass. 375, 34 N. E. 458; to show the identity of a person who passed under different names; U. S. v. A Lot of Jewelry, 59 Fed. 684; of documents in general; Geer v. Min. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Arthur v. Roberts, 60 Barb. (N. Y.) 580; Duffin v. People, 107 Ill. 113, 47 Am. Rep. 431; Daly v. Maguire, 6 Blatch. 137, Fed. Cas. No. 3,551; and public records that cannot be brought into court, but the handwriting must be proved; Leathers v. Salvor Wrecking etc. Co., 2 Woods 680, Fed. Cas. No. 8,164; for comparison of handwriting; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594; Tome v. v. R. Co., 39 Md. 36, 17 Am. Rep. 540; Howard v. Russell, 75 Tex. 176, 12 S. W. 525; Marcy v. Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; White S. M. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; to show certain premises where inspection is impossible; Omaha S. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; and eye-witnesses may verify their accuracy; Nies v. Broadhead, 75 Hun 255, 27 N. Y. Supp. 52; to show things in general; Chicago, M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398; Wurmser v. Frederick, 62 Mo. App. 634; People's Pass. R. Co. v. Green, 56 Md. 84.

They may be received in evidence under certain circumstances to assist the jury in understanding the case, having been first verified as true representations of the subject; Chicago v. Vesey, 105 Ill. App. 191; Smith v. Territory, 11 Okl. 669, 69 Pac. 805; Dederichs v. R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802. Nothwithstanding they may have been taken some time, as a year, after the occurrence of the transaction which they represent; Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547; but not where the original can be readily exhibited, unless for use in identifying handwriting or detecting forgery; Baxter v. R. Co., 104 Wis. 307, 80 N. W. 644, they must, however, show conditions actually existing and are inadmissible where they merely show persons in assumed positions to illustrate the claims of parties. They have been admitted in actions for personal injury to show the condition of the injured person soon after the injury; People's G. L. & C. Co. v. Amphlett, 93 Ill. App. 194; and also when taken nine years before to show emaci-

ation; Rock Island v. Drost, 71 Ill. App. 613; also when taken just before and after the injury; Davis v. R. Co., 136 N. C. 115, 48 S. E. 591, 1 Ann. Cas. 214; also to show the hoops which were around a tank which burst and caused the injury; Hupfer v. Distilling Co., 127 Wis. 306, 106 N. W. 831. They have been rejected when offered to show the healthy conditions of deceased in an action on a life policy where the defense was a false representation as to health; Brown v. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; and in an action for injuries which were capable of verbal description; Cirello v. Exp. Co., 88 N. Y. Supp. 932; Selleck v. Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892. In an action for negligently causing the death of a wife, her photograph is not admissible in evidence to show that she was a beautiful woman; Smith v. R. Co., 177 N. Y. 379, 69 N. E. 729. They may also be rejected as improper and indecent where the evidence may be obtained by private examination out of court and expert testimony given as the result of it; Guhl v. Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

They may be used to show the station where the decedent was killed and the condition of the tracks; MacFeat v. R. Co., 5 Pennewill (Del.) 52, 62 Atl. 898; a jetty causing injury to a tug, taken three months after the accident; Tracy v. R. Co., 98 Fed. 633; the place of a defect in a highway which was the cause of injury; Sterling v. Detroit, 134 Mich. 22, 95 N. W. 986; the scene of the derailment of a railroad train, taken just after the accident; Bach v. R. Co., 112 Ia. 241, 83 N. W. 959; or the scene of a railroad wreck; Maynard v. R. Co., 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477. Radiographs are receivable, like any other photograph; De Forge v. R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159.

It is doubtful if they ought to be admitted to show the health, strength, or agility of a person; Gilbert v. R. Co., 160 Mass. 403, 36 N. E. 60.

Upon a criminal trial, photographic likenesses taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life as aids in the identification; Ruloff v. People, 45 N. Y. 215. Where a mutilated body was found, the witness was allowed to testify that the face resembled a photograph of a person alleged to be the one found, though he had not known the man before death; Udderzook v. Com., 76 Pa. 340. The healthy condition of the deceased may be proved by a colored photograph taken a short time before death; Washington L. Ins. Co. v. Schaible, 1 W. N. C. (Pa.) 369; and in an indictment for bigamy a photograph of the first husband may be shown to a witness to the first marriage to prove his identity with the person mentioned in the marriage certificate; 4 F. & F. 103.

A photograph of scenery may be misleading as to distances and should be looked at with caution; Com. v. Keller, 191 Pa. 122, 43 Atl. 198; so when slight differences of height, etc., would be important; Cunningham v. R. Co., 72 Conn. 244, 43 Atl. 1047.

See note in Dederichs v. R. Co., 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802.

A photograph made by the cathode or X-ray process will be admitted as secondary evidence; its competency depends upon the science, skill, experience, and intelligence of the person who took the picture and testified with regard to it. Lacking these important qualifications, it should not be admitted, and it is to be weighed like other competent evidence. In an action for personal injuries it was held competent to submit to the jury an X-ray photograph, taken by a surgeon, showing the overlapping bones of one of the plaintiff's legs, where it was broken at the time of the accident, and where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and the surgeon testified that the photograph accurately represented the condition of the leg at the point of the fracture, and that by the aid of the X-rays he was enabled to see the fracture and overlapping bones as if they were uncovered to the sight; Bruce v. Breall, 99 Tenn. 303, 41 S. W. 445.

In a criminal case in New York the prosecution claimed that a bullet struck the victim in the jaw, and split, one piece being deflected into the jaw and the other piece into the back of his head. The defence claimed that the piece lodged in the back of the victim's head was not a fragment but a bullet. To prove this, the defence introduced an X-ray photograph of the head and neck showing the lodgment of the bullet, and the testimony of the physician who took the photograph; 56 Alb. L. J. 309; 15 Med. Leg. J. 246.

An X-ray photograph is admissible in evidence if properly taken; De Forge v. R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464; to show the internal tissues of the body; Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628; but they are not infallible; Miller v. Mintun, 73 Ark. 183, 83 S. W. 918; it need not be shown that it was taken by a competent person, or that the apparatus was such as to secure an accurate picture; it need only appear, by the evidence of competent witnesses, that it truly represents the object; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159; its admission is within the discretion of the trial court; Jameson v. Weld, 93 Me. 345, 45 Atl. 299; Dolan v. Mut. R. F. Life Ass'n, 173

Mass. 197, 53 N. E. 398. The same rules apply as to ordinary photographs; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816. See an article in 35 Am. L. Rev. 617.

It is a breach of contract and violation of confidence for a photographer to make unauthorized copies of his customer's photograph. A private individual may enjoin the publication of his photograph, but a public character may not, in the absence of a breach of contract or violation of confidence in procuring the likeness from which the publication is made. A statesman, author, artist, or inventor who seeks public recognition, may be said to have surrendered this right to the public; Corliss v. Walker Co., 64 Fed. 280, 31 L. R. A. 283; 40 Ch. D. 345. See PRIVACY; INJUNCTION.

One who reproduces a copyrighted photograph cannot escape liability as an infringer by merely showing that the copy which he reproduced did not bear the notice of copyright when he purchased it, but he must also show that it bore no notice when it left the custody of the owner of the copyright; Falk v. Engraving Co., 54 Fed. 890, 4 C. C. A. 648. Violation of the right in a copyrighted photograph is subject by statute to a penalty. See Bolles v. Outing Co., 77 Fed. 966, 23 C. C. A. 594, 46 L. R. A. 712. See COPYRIGHT.

PHRENASTHENIA. A morbid condition, also known as the insanity of the degenerates, used to indicate the general mental infirmity of degenerates or individuals with vices of organization who are insane, but whose insanity presents special characteristics growing out of mental infirmity. It is usually hereditary and congenital. The insanity is a secondary phenomenon, vice of organization being the primary one; 2 Clevenger, Med. Jur. 856.

PHYSICAL EXAMINATION. The question as to whether, and under what circumstances, courts will permit the physical examination of litigants and of persons accused of crime, and also of property in litigation, has been much mooted. A physical examination of a woman under the writ of *de ventre inspiciendo* was known to the common law under special circumstances. See JURY OF WOMEN. This early practice has been urged as a precedent for permitting a physical examination in certain civil and criminal cases.

In Union Pacific R. Co. v. Bottsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the question was the right of a federal court to order a surgical examination of the plaintiff, in an action of tort. Mr. Justice Gray referred to the common-law writ of *de ventre inspiciendo* in capital cases, and also in civil cases involving the rightful succession to property of a decedent against fraudulent claims of bastards, and said that the learning and research of counsel for the plaintiff in error (John F. Dillon) had "failed to produce an instance of its even having been considered in any part of the United States as suited to the habits and conditions of the people." He added that "so far as the books within our reach show, no order to inspect the body in a personal action appears to have been made or even moved for, in any of the English courts of common law, at any period of their history." The ruling of the court below, refusing such an examination, was sustained. See, also, Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; McQuigan v. R. Co., 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507; Illinois Cent. R. Co. v. Griffin, 80 Fed. 278, 25 C. C. A. 413; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588.

That the court has no inherent power to order a physical examination is held in Camden & S. R. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721; Larson v. Salt Lake City, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462; May v. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, 4 Ann. Cas. 605. That trial courts have the inherent power to order a medical examination by experts of the person of a plaintiff seeking a recovery for personal injuries, if the examination is applied for and made before entering upon the trial, is held in Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 94 Pac. 342, 15 L. R. A. (N. S.) 663, 126 Am. St. Rep. 165; Wanek v. Winona, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354; Harvey v. Traction Co., 26 W. N. C. (Pa.) 231; South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; Brown v. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564; see Larson v. Salt Lake City, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462. After the right had been denied in New York, a statute was passed; but it has been held that such an act will be strictly construed; Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. Supp. 251; Bowe v. Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919; Potter v. Hammondsport, 112 App. Div. 91, 98 N. Y. Supp. 186. Where they do not so provide, they will not be extended to compel answers to questions; 16 P. R. (Ont.) 496. See also 14 *id.* 171.

The New Jersey act providing for such examination was held binding on a federal court; Camden & S. R. Co. v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721.

The question whether a court has at common law the power to compel a plaintiff in an action for a personal injury to submit to a surgical examination, is a matter of practice and not of evidence, and as a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject are binding on federal courts under R. S. § 721, providing that, with certain exceptions, the laws of

the several states shall be regarded as rules of decisions in trials at common law in such courts, which, as to such matters are governed by the decisions of the supreme court of the United States; Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560.

Where a plaintiff in an action for an injury to his knee, while on the witness stand, voluntarily exhibits the injured knee to the jury, the defendant is entitled to require him to submit the same to surgical examination, and the court has power, independently of any statute, to compel such submission; Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560. Such an order was held *ultra vires;* 46 L. J. 696. But the statute 31 & 32 Vict. c. 19, § 26, authorizes any judge of a court in which an action is pending to recover damages for a railway accident to order an examination of the person injured; 43 L. J. Rep. Exch. 150.

But while it has been held that the defendant has no *absolute* right to have a personal physical examination of the plaintiff made, in an action for personal injuries, yet in the discretion of the court such examination *may* be made, if essential for the ascertainment of truth or to subserve the ends of justice; Owens v. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Ala. G. S. R. R. Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; Hall v. Manson, 99 Ia. 698, 68 N. W. 922, 34 L. R. A. 207; Edwards v. Three Rivers, 96 Mich. 625, 55 N. W. 1003; Carrico v. Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; Richmond & D. R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189; White v. Ry. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; Lane v. Ry. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821; Schroeder v. R. Co. 47 Ia. 375.

A plaintiff, in an action for personal injuries alleged to have caused the secretion of albumen and sugar, may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him; the privacy of his person not being thereby invaded; Cleveland, C. C. & St. L. Ry. Co. v. Huddleston, 151 Ind. 540, 46 N. E. 678, 36 L. R. A. 681, 68 Am. St. Rep. 238. See 13 Harv. L. Rev. 224.

It is within the discretion of the court to refuse to require the plaintiff to submit to a physical examination which requires the administration of anæsthetics; Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616.

In some courts plaintiffs are allowed to exhibit to the jury their injuries, and to perform physical acts showing the nature and extent of their injuries; Schroeder v. R. Co., 47 Ia. 375; Hatfield v. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14; but other courts hold this to be improper, because such evidence cannot be preserved in a bill of exceptions for use in an appellate court; 19 Cent. L. J. 144; and where a juror was allowed to manipulate the plaintiff's injured hand, it was error, although exhibiting it was proper; Vance v. Drug Co., 149 Ill. App. 499.

In a trial of an action of trespass for assault and battery, it is not error to permit the jury to examine with their fingers scars on the plaintiff's head caused by a blow from defendant's pistol; Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

A court of equity will not, in a patent case, even if it had the power, require the respondent, claiming under an alleged anticipating patent, to perform experiments in the presence of plaintiff's witnesses, except where so extraordinary a course is necessary; Simonds Rolling Mach. Co. v. Mfg. Co., 83 Fed. 490.

In an action for breach of warranty on a sale of a horse, the court has no power to order that the defendant have the privilege of sending a veterinary surgeon into the plaintiff's stable to examine the horse; Martin v. Elliott, 106 Mich. 130, 63 N. W. 998, 31 L. R. A. 169.

In a suit for divorce on the ground of impotence a court has power to compel the parties to submit to a surgical examination when facts essential to a correct decision may thereby be ascertained; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443; Anonymous, 89 Ala. 291, 7 South. 100, 7 L. R. A. 425, 18 Am. St. Rep. 116; 32 L. J. Mat. 12; in divorce proceeding because of malformation of the wife the court made an order for her inspection, but did not require the husband to submit to inspection; 16 Week. Rep. 943.

The measurement in the presence of the jury of a woman's foot and her leg six inches above the ankle, in a suit for injuries to the foot and ankle, must be permitted by the court when there is a direct conflict as to such measurement by the medical men called by the respective parties,—at least if the witness herself does not object; Hall v. Manson, 99 Ia. 698, 68 N. W. 922, 34 L. R. A. 208.

The better practice seems to be to apply to the party to be examined, before trial, for permission to make the examination, and upon his refusal, to present a motion for leave, by affidavit, showing the refusal, and also the probability that the examination will result in some material disclosure. The party applying for the order for examination should also offer to pay the expense of such examination; Richmond & D. R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189. In practice, some courts order a private physical examination of a party to be made by a physician, who

may then testify in regard thereto at the trial of the cause.

A physical examination, if made, must be made by physicians agreed upon by the parties or selected by the court, care being taken to prevent danger to life, pains of body, or any indignity to the person; Schroeder v. R. Co., 47 Ia. 375; Miami & M. T. Co. v. Baily, 37 Ohio St. 104; McGovern v. Hope, 63 N. J. L. 76, 42 Atl. 830; Lane v. R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821.

Where an order for physical examination is made, the court will enforce it by refusing to try the cause until it is complied with; Hess v. R. Co., 7 Pa. Co. Ct. Rep. 565; by dismissing the action, or refusing to allow the plaintiff to give evidence to establish his injury; Miami & M. T. Co. v. Baily, 37 Ohio St. 104; or by striking out and withdrawing from the consideration of the jury the allegations relative to his injury, or punishing him for contempt; Schroeder v. R. Co., 47 Ia. 375; Hatfield v. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14. A refusal to submit to a physical examination, if the court permit him to prosecute his claim will be very strong evidence against the person refusing; Kinney v. Springfield, 35 Mo. App. 97; and may be considered by the jury as reflecting on his good faith; Union P. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734.

Upon an appeal of mayhem where the issue joined is whether it is mayhem or no mayhem, it will be decided by the court upon inspection with the assistance of surgeons, if desired; 3 Bla. Com. 332.

In criminal proceedings there is no power to undress and medically examine the person of a prisoner, without his consent, although such examination might further the ends of justice; 13 Cox, C. C. 625. It is error for a court to require a person on trial for murder to exhibit his leg at the place where it was amputated, although a certain material fact may be established thereby; State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1. Where a prisoner refused to make a print of his foot in a pan of soft earth in order that the witnesses for the prosecution might testify as to similarity of such tracks with those found at the scene of the crime, the court said it was optional with the accused, who refused, and upon conviction a new trial was granted; Stokes v. State, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72; *contra*, Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595. A woman indicted for the murder of her illegitimate child refused to allow physicians selected by the coroner to examine whether she had recently been delivered of a child, and upon being threatened, yielded. The court ruled out the testimony of the physicians upon the ground that no person shall, in any criminal case, be compelled to be a witness against himself; People v. McCoy, 45 How. Pr. (N. Y.) 216.

On the other hand, it has been held not to be error to compel the defendant to exhibit tattoo marks on his body, to the existence of which a witness had testified; State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; or to compel the accused to make his footprints in an ash heap, and to allow the prosecution to show that they corresponded with those found at the scene of the crime; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; or for an officer to compel the accused to put his foot in print found at the place where the crime was committed and at the trial testify to the result of the comparison; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; Blackwell v. State, 67 Ga. 76, 44 Am. Rep. 717; and it is held that the state has power in a prosecution for rape to order an examination by a physician of the vagina of the prosecutrix; People v. Preston, 19 Cal. App. 675, 127 Pac. 660.

See INCRIMINATION; JURY OF WOMEN; PRIVACY; VIEW.

PHYSICAL FACT. A fact, the existence of which is perceptible by the senses.

"A fact considered to have its seat in some inanimate being, or, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings." 1 Benth. Jud. Ev. 45.

PHYSICIAN. A person, who has received the degree of doctor of medicine from an incorporated institution.

One lawfully engaged in the practice of medicine.

As used in a policy of life insurance, the term "family physician" has been held to mean the physician who usually attends, the members of a family in the capacity of a physician, whether or not he usually attended or was consulted by the insured himself; Price v. Ins. Co., 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166.

In the Roman law and at common law until 1422 the practice of medicine and surgery was free to all. A statute in that year confined it to those who had studied the subject in a university and who were bachelors of science.

A statute forbidding the practice of medicine without a license covers osteopathy; Bandel v. Department of Health, 193 N. Y. 133, 85 N. E. 1067, 21 L. R. A. (N. S.) 49; Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; *contra*, State v. McKnight, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; State v. Liffring, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358; Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439; Ex parte Collins, 57 Tex. Cr. R. 2, 121 S. W. 501; one who practices "suggestive therapeutics" without drugs or surgery;

Witty v. State, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1297; a "magnetic healer" in the nature of an osteopath; People v. Trenner, 144 Ill. App. 275; one who pretends to heal by rubbing; State v. Yates, 145 Ia. 332, 124 N. W. 174; one who practices "vital healing," professing to cure without drugs or surgery; State v. Adkins, 145 Ia. 671, 124 N. W. 627; one who treats the eye and fits spectacles, having "Dr." on his office door; State v. Blumenthal, 141 Mo. App. 502, 125 S. W. 1188; one who advertises as "the Masseur Doctor," though he used no medicine; Newman v. State, 58 Tex. Cr. R. 223, 124 S. W. 956; one who treats diseases without drugs; 70 L. R. 835.

A "healer by divine gift" was held guilty of practicing medicine without a license; Smith v. People, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; where it was held that evidence as to religious belief is not admissible, the object of the statute being to make certain requirements for the public health; see cases collected in Witty v. State, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1302; State v. Bresee, 137 Ia. 673, 114 N. W. 45, 24 L. R. A. (N. S.) 103.

Giving Christian Science treatment for a fee for the cure of disease is within an act requiring a certificate from the board of medical registration; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898. But praying for those suffering from disease, or teaching that disease will disappear and physical perfection be attained as a result of prayer, was held not to constitute the practice of medicine; State v. Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

The business of massage does not violate a statute forbidding the practice of medicine without a license; Smith v. Lane, 24 Hun (N. Y.) 632; but prescribing patent medicine does; Thompson v. Staats, 15 Wend. (N. Y.) 395; Jordan v. Overseers of Dayton, 4 Ohio 295. The law does not recognize any difference between schools of medicine; Corsi v. Maretzek, 4 E. D. Sm. (N. Y.) 1.

A law providing that no person shall be licensed to practice medicine except after examinations by the state board, is not in conflict with the fourteenth amendment of the United States constitution; State v. Carey, 4 Wash. 424, 30 Pac. 729; nor is a statute making it a misdemeanor to practice medicine without a certificate from the state board of health that the practitioner is a graduate of a reputable medical college, unconstitutional, as depriving him of property without due process of law; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; nor is a Texas act establishing a state board of health and requiring osteopaths to be registered; Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439.

Bad or unskilful practice in a physician or other professional person, whereby the health of the patient is injured, is usually called malpractice (*mala praxis*).

Wilful malpractice takes place when the physician purposely administers medicines or performs an operation which he knows and expects will result in damage or death to the individual under his care; as in the case of criminal abortion; Elw. Malp. 243; People v. Lohman, 2 Barb. (N. Y.) 216.

Negligent malpractice comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the situation of the patient requires; as if a physician should administer medicines while in a state of intoxication, from which injury would arise to his patient.

Ignorant malpractice is the administration of medicines calculated to do injury, which do harm, which a well-educated and scientific medical man would know were not proper in the case; Elw. Malpr. 198; Com. v. Thompson, 6 Mass. 134; 5 C. & P. 333; 5 Cox, C. C. 587; Whart. & St. Med. Jur. 755.

This offence is a misdemeanor (whether it be occasioned by curiosity and experiment or neglect), because it breaks the trust which the patient has put in the physician, and tends directly to his destruction. See 3 Chitty, Cr. Law 863; 4 Wentw. Pl. 360; 2 Russ. Cr. 277; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Rice v. State, 8 Mo. 561; 3 C. & P. 629.

Besides the public remedy for malpractice, in many cases the party injured may bring a civil action; Landon v. Humphrey, 9 Conn. 209, 23 Am. Dec. 333; Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338.

Civil cases of malpractice are of very frequent occurrence on those occasions where surgical operations are rendered necessary, or supposed to be so, by disease or injury, and are so performed as either to shorten a limb or render it stiff, or otherwise prevent the free, natural use of it, by which the party ever after suffers damage. This may embrace almost every kind of surgical operation; but nine-tenths of all such cases arise from amputations, fractures, or dislocations; Elw. Malpr. 55.

To the performance of all surgical operations the surgeon is bound to bring at least ordinary skill and knowledge. He must apply without mistake what is settled in his profession. He must possess and practically exercise that degree and amount of knowledge and science which the leading authorities have pronounced as the result of their researches and experience up to the time, or within a reasonable time, before the issue or question to be determined is made; Elwell, Malpract. 55; 6 Am. L. Reg. N. S. 774; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252.

Although the physician is civilly and criminally responsible for his conduct while dis-

charging the duties of his profession, he is in no sense a warrantor or insurer of a favorable result, without an express contract to that effect; Elwell, Malp. 20; 7 C. & P. 81.

Every person who offers his services to the public generally, impliedly contracts with the employer that he is in possession of the necessary ordinary skill and experience which are possessed by those who practice or profess to understand the art or science, and which are generally regarded by those most conversant with the profession as necessary to qualify one to engage in such business successfully. This ordinary skill may differ according to locality and the means of information; Elw. Malp. 22, 201; 3 C. & P. 629; Smothers v. Hanks, 34 Ia. 286, 11 Am. Rep. 141, n.; Dorris v. Warford, 124 Ky. 768, 100 S. W. 312, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602; Rogers v. Kee, 171 Mich. 551, 137 N. W. 260; Hallam v. Means, 82 Ill. 379, 25 Am. Rep. 328; State v. Housekeeper, 70 Md. 162, 16 Atl. 382, 2 L. R. A. 587, 14 Am. St. Rep. 340; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1038.

It is not the highest order of skill attainable, but that which is possessed by the average of the profession in good standing; Wohlert v. Seibert, 23 Pa. Super. Ct. 213. Skill in diagnosis and treatment should be determined by the rules of his own school; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870. If the treatment of the patient has been honest and intelligent, only ordinary care and skill is required of defendant and errors of judgment will be overlooked; Carpenter v. Blake, 75 N. Y. 21. Experimenting with a patient outside of the rules of practice renders the practitioner liable in damages; McNevins v. Lowe, 40 Ill. 209. Any one who treats patients as a clairvoyant must be held to the same degree of care as a regular practitioner; Bibber v. Simpson, 59 Me. 181; Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900.

One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation; failing in this he must be held liable for any damages proximately caused by unskilful treatment of his patient; Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900. Gross negligence may constitute criminal liability; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; State v. Hardister, 38 Ark. 605, 42 Am. Rep. 5; and an unlicensed practitioner may be guilty of manslaughter; 1 Witth. & Beck. Med. Jur. 79.

The law imposes on a surgeon the duty of being reasonably skilled in his profession, and the exercise of care and prudence in the application of that skill, and if he be wanting in either, to the injury of his patient, he is liable for damages; Rowe v. Lent, 62 Hun 621, 17 N. Y. Supp. 131; although there may be no contractual relation between the patient and the physician; Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529. If one physician, being unable to attend, sends another in his stead, the former is not liable to one who is injured by the unskilfulness of the latter, since the latter, being engaged in a distinct and independent occupation of his own, is not the servant or agent of the former; Myers v. Holborn, 58 N. J. L. 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606. See 8 East 347; McCandless v. McWha, 22 Pa. 261; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219, 56 Am. Dec. 563.

A specialist must exercise a higher degree of skill and care than an ordinary practitioner; Rann v. Twitchell, 82 Vt. 79, 71 Atl. 1045, 20 L. R. A. (N. S.) 1030; Feeney v. Spalding, 89 Me. 111, 35 Atl. 1027; Baker v. Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38.

What is proper and usual practice in diagnosis and treatment and what constitutes ordinary care can only be shown by expert testimony; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870; Klodek v. Logging Co., 71 Wash. 573, 129 Pac. 99.

Where a physician recommends a method of treatment approved by the standard authorities and consults another physician of intelligence, it cannot be held as a matter of law that he failed to exercise ordinary care; McKee v. Allen, 94 Ill. App. 147. Where there is a difference of opinion among skilful surgeons, a surgeon may exercise his own judgment; Vanhooser v. Berghoff, 90 Mo. 487, 3 S. W. 72; if he keeps within approved methods, he is not liable for a mistake of judgment; Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147; nor where the patient negligently failed to observe his directions or purposely disobeyed them; Geiselman v. Scott, 25 Ohio St. 86; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870; nor where he called in two other competent surgeons who testified that the injury was difficult to detect; English v. Free, 205 Pa. 624, 55 Atl. 777; nor if he requests additional assistance and is refused, even though he made a mistake in treatment; Haering v. Spicer, 92 Ill. App. 449; nor if prevented from reducing a dislocation by the refusal of the patient to submit to an operation; Littlejohn v. Arbogast, 95 Ill. App. 605 (but if the patient is in a condition in which it would be dangerous to break and re-set an arm, and the patient refuses to permit it, the defendant is not relieved of liability for want of ordinary skill; Morris v. Despain, 104 Ill. App. 452).

If an office patient receives careful and skilful treatment and then fails to return

to the physician, and in consequence suffers injury, the patient has no right of action: Dashiell v. Griffith, 84 Md. 363, 25 Atl. 1094.

If an arm was unskilfully dressed, resulting in a defective arm, the surgeon would be liable, although the neglect of the patient or those in charge of him made it worse; such neglect affected only the damages; Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338; Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529; McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354.

The fact that the injured limb is defective after treatment is no evidence of negligence; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870; nor is the death of the patient immediately after the operation (amputation of a limb); Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712.

He is liable for negligence where he fails to remove a piece of surgical gauze after an operation; Ruth v. Johnson, 172 Fed. 191, 96 C. C. A. 643. Where a surgical sponge was left in the body of a person operated on, it was held that the surgeon could not rely on the count of sponges by the nurse; he also must exercise care in determining whether any foreign substance remains in the body; Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007, 46 L. R. A. (N. S.) 611.

A physician (X-ray) called in by another physician, to operate, is not required to make a special study of the case or to give advice as to possibility of injury resulting therefrom; Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815.

The physician's responsibility is the same when he is negligent as when he lacks ordinary skill, although the measure of indemnity and punishment may be different; Elw. Malp. 27; 3 Maule & S. 14; 1 Lew. C. C. 169; Broom, Leg. Max. 168, 169; Rowe v. Lent, 62 Hun 621, 17 N. Y. Supp. 131. See Lewis v. Dwinell, 84 Me. 497, 24 Atl. 945. Where a physician is charged with manslaughter, resulting from a surgical operation performed by him, it is error to charge that if deceased consented to the performance of the operation, defendant must be acquitted; State v. Gile, 8 Wash. 12, 35 Pac. 417.

It is proper in an action for malpractice to show the treatment given after the defendant gave up the case; Bower v. Self, 68 Kan. 825, 75 Pac. 1021.

The rule as to using X-rays is the same as to other cases requiring ordinary care and prudence; Henslin v. Wheaton, 91 Minn. 219, 97 N. W. 882, 64 L. R. A. 126, 103 Am. St. Rep. 504, 1 Ann. Cas. 19.

He cannot perform an operation more serious than the one to which the patient has assented; Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197. But when a patient's assent was given to an operation less grave and dangerous to life, and while the person was under an anæsthetic a rupture was found in the right groin, it was held that the operation on the latter was justified; Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948.

Where a surgeon was employed to operate on a patient's right ear, and also operated on the left ear while the patient was unconscious, it was held to be an assault, though the family consented thereto; Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303. A surgeon may operate on a child in an emergency without the parents' consent when told it was impracticable to obtain it; Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. (N. S.) 290; but a surgical operation is ordinarily unlawful when performed without the express or implied consent of the patient; Awde v. Cole, 99 Minn. 361, 109 N. W. 812.

Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks the plaintiff performed an operation, soon after which she died, it was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment, it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant; McClallen v. Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

If physicians attending a woman deem it necessary for the preservation and prolongation of her life, to perform an operation, they are justified in doing so if she consents, whether her husband consents or not; State v. Housekeeper, 70 Md. 162, 16 Atl. 382, 2 L. R. A. 587, 14 Am. St. Rep. 340.

In *England*, at common law, a physician could not maintain an action for his fees for anything done as physician either while attending to or prescribing for a patient; but a distinction was taken when he acted as a surgeon or in any other capacity than that of physician, and in such cases an action for fees would be sustained; 1 C. & M. 227, 370; 3 Q. B. 928. But now by 21 & 22 Vict. c. 90, a physician who is registered under the act may bring an action for his fees, if not precluded by any by-law of the college of physicians; 2 H. & C. 92. It has not been denied in this country; Adams v. Stevens, 26 Wend. (N. Y.) 451.

In this country, the various states have statutory enactments regulating the practice

of medicine. See Witth. & Beck. Med. Jur. An unlicensed physician can not maintain an action for medical attendance and medicines; Bailey v. Mogg, 4 Den. (N. Y.) 60; Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399; Holland v. Adams, 21 Ala. 680; *contra*, Hewitt v. Wilcox, 1 Metc. (Mass.) 154.

In a suit for medical services the plaintiff is presumed to have been licensed; McPherson v. Cheadell, 24 Wend. (N. Y.) 15. See, also, Chicago v. Wood, 24 Ill. App. 42. An act providing that no person shall practice medicine who has ever been convicted of felony, applies to persons who had been convicted of felony before the passage of the act, and does not conflict with the federal constitution; Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002.

Contracts for contingent compensation are valid; Coughlin v. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Smith v. Hyde, 19 Vt. 54.

In assumpsit by a physician for his services, the defendant cannot prove the professional reputation of the plaintiff; Jeffries v. Harris, 3 Hawks (N. C.) 105. Physicians can recover for the services of their students in attendance upon their patients; People v. Monroe, 4 Wend. (N. Y.) 200. Partners in the practice of medicine are within the law merchant, which includes the *jus accrescendi* between traders; Allen v. Blanchard, 9 Cow. (N. Y.) 631. An agreement between physicians whereby, for a money consideration, one promises to use his influence with his patrons to obtain their patronage for the other, is not contrary to public policy; Hoyt v. Holly, 39 Conn. 326, 12 Am. Rep. 390. If a physician carries contagious disease into a family, on a suit for services this may be shown to reduce his claim; Piper v. Menifee, 12 B. Monr. (Ky.) 465, 54 Am. Dec. 547. A physician who has been guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily lose his right to recover any compensation whatever for his services; but the amount of his recovery, if any, depends on the amount of damages suffered because of negligence; Whitesell v. Hill (Ia.) 66 N. W. 894.

Where one who has received personal injury through the negligence of another uses reasonable and ordinary care in the selection of a physician, the damages awarded him will not be reduced because more skilful medical aid was not secured; Collins v. Council Bluffs, 32 Ia. 324, 7 Am. Rep. 200.

Hospital records containing entries by a nurse are not competent evidence; Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78; nor are city hospital records, though kept by law; Connor v. Ins. Co., 78 Mo. App. 131; nor the temperature chart kept by the bedside to prove facts therein stated; Griebel v. R. Co., 184 N. Y. 528, 76 N. E. 1096. Hospital records are not admissible unless supplemented by the evidence of the person who made them, if such person can be produced; Cashin v. R. Co., 185 Mass. 543, 70 N. E. 930; entries made daily by a physician are admissible to show the state of health of a patient in an asylum; 9 N. J. L. J. 118.

See CONFIDENTIAL COMMUNICATIONS; EXPERT; OPINION; EVIDENCE; VITAL STATISTICS; RELIGION; CHRISTIAN SCIENCE.

PHYSICIANS' DEFENSE COMPANIES. See INSURANCE.

PIA FRAUS. A pious fraud; a fraud considered morally justifiable on account of the ends sought to be promoted.

PICAROON. A robber; a plunderer.

PICKETING. Picketing by members of a trade union or strikers, consists in posting members at all the approaches to the works struck against for the purpose of reporting the workman going to or coming from the works; and to use such influence as may be in their power to prevent the workman from accepting work there. Dav. Friend. Soc. 212.

It is the establishment and maintenance of an organized espionage upon the works and upon those going to or coming from them. Otis Steel Co. v. Union No. 218, 110 Fed. 701. It may constitute an intimidation of the employees and patrons of the person whose establishment is picketed; Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; Otis Steel Co. v. Union No. 218, 110 Fed. 698.

The massing of unnecessary numbers of pickets at a point which must be passed by non-union men is in itself an act of intimidation; though picketing, if confined to gaining information and to peaceful persuasion, is not forbidden by law; Goldfield Consol. Mines Co. v. Union No. 220; 159 Fed. 500. The carrying near a place of business of banners calling upon laborers to remain away from such place has been treated as a form of menace directed against those who might seek employment; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

See LABOR UNION; STRIKE; BOYCOTT.

PICKPOCKET. A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny.

PICTURE. A frame is part of a picture as used in a carrier's act. L. R. 5 Ex. 90; 39 L. J. Ex. 55; 37 L. J. C. P. 83. See PAINTING; COPYRIGHT; PHOTOGRAPH; FIXTURES.

PIE-POUDRE, PIE POWDER. See COURT OF PIE POWDER.

PIER. A wharf. A structure erected for ferry purposes which was simply a ferry

rack and bridge was held not a pier. Stevens v. Rhinelander, 5 Robt. (N. Y.) 285. See DOCK; HARBOR; PORT; RIPARIAN RIGHTS.

PIERAGE. The duty for maintaining piers and harbor.

PIGNORATIO (Lat. *from pignorare*, to pledge). In Civil Law. The obligation of a pledge. L. 9 D. *de pignor.* Sealing up (*obsignatio*). A shutting up of an animal caught in one's field and keeping it till the expenses and damage have been paid by its master. New Decis. 1, 34, 13.

PIGNORATIVE CONTRACT. In Civil Law. A contract by which the owner of an estate engages it to another for a sum of money and grants to him and his successors the right to enjoy it until he shall be reimbursed, voluntarily, that sum of money. Pothier, Obl.

PIGNORI ACCEPTUM. See BAILMENT.

PIGNORIS CAPTIO (Lat.). In Roman Law. The name given to one of the *legis actiones* of the Roman law. It consisted chiefly in the taking of a pledge, and was, in fact, a mode of execution. It was confined to special cases determined by positive law or by custom, such as taxes, duties, rents, etc., and is comparable in some respects to distress at common law. The proceeding took place in the presence of a prætor.

PIGNUS (Lat.). In Civil Law. Pledge, or pawn. The contract of pledge. The right in the thing pledged.

"It is derived," says Gaius, "from *pugnum*, the fist, because what is delivered in pledge is delivered in hand." Dig. 50. 16. 238. 2. This is one of several instances of the failure of the Roman jurists when they attempted etymological explanations of words. The elements of *pignus* (*pig*) are contained in the word *pan(g)o* and its cognate forms. See Smith, Dict. Gr. & Rom. Antiq.

Though pledge is distinguished from mortgage (*hypotheca*), as being something delivered in hand, while mortgage is good without possession, yet a pledge (*pignus*) may also be good without possession. Domat, Civ. Law b. iii. tit. 1, § 5; Calvinus, Lex. *Pignus* is properly applied to movables, *hypotheca* to immovables; but the distinction is not always preserved. *Id.*

PILA. That side of money which was called *pile*, because it was the side on which there was an impression of a church built on piles. Fleta, lib. 1, c. 39.

PILFER. To steal. To charge another with pilfering is to charge him with stealing and is slander; Becket v. Sterrett, 4 Blackf. (Ind.) 499.

PILFERER. One who steals petty things.

PILLAGE. The taking by violence of private property by a victorious army from the citizens or subjects of the enemy. This in modern times is seldom allowed, and then only when authorized by the commanding or chief officer at the place where the pillage is committed. The property thus violently taken belongs, in general, to the common soldiers. It is expressly forbidden under the rules of the Brussel's Conference, 1874, which however have never been adopted by the European nations. See Dalloz, Dict. *Propriété*, art. 3, § 5; Wolff § 1201; BOOTY; PRIZE; WAR.

PILLORY. A wooden machine, in which the neck of the culprit is inserted.

This punishment has in most of the states been superseded by the adoption of the penitentiary system. See 1 Chitty, Cr. L. 797. The punishment of standing in the pillory, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 27, 1839, § 5, and in England in 1837.

PILOT. An officer serving on board of a ship during the course of a voyage, and having charge of the helm and of the ship's route. An officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into port.

Pilots of the second description are established by legislative enactments at the principal seaports in this country, and have rights, and are bound to perform duties, agreeably to the provisions of the several laws establishing them.

Pilots have been established in all maritime countries. After due trial and experience of their qualifications, they are licensed to offer themselves as guides in difficult navigation; and they are usually, on the other hand, bound to obey the call of a ship-master to exercise their functions; Abb. Sh. 13th ed. 190; Snell v. Rich, 1 Johns. (N. Y.) 305; Bussy v. Donaldson, 4 Dall (U. S.) 206, 1 L. Ed. 802; 5 B. & P. 82; 5 Rob. Adm. 308; Laws of Oleron, art. 23; Act of Congr. of August 7, 1789, § 4; Pardessus, n. 637.

The master of a vessel may decline the services of a pilot, but in that event he must pay the legal fees; Camp v. The Marcellus, 1 Cliff. 492, Fed. Cas. No. 2,347. A pilot who first offers his services, if rejected, is entitled to his fee; The America, 2 Am. Law Rev. 458, Fed. Cas. No. 289; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234.

The pilot is to conduct the navigation, regulate the course of the ship and the management of the sails; 7 Moore, P. C. 171, 134. He is not liable for damages to the vessel unless caused by his failure to use ordinary diligence, *i. e.*, the degree of skill commonly possessed by others in the same employment; Wilson v. Pilots' Ass'n, 57 Fed. 227. A river pilot is bound to be familiar with the channel of the river, and with the various obstructions to navigation, and is liable for damages occasioned by the want of

such knowledge, but not for damages occasioned by an error of judgment on his part; The Tom Lysle, 48 Fed. 690. Shipowners are responsible to third parties for obedience to the pilot; his orders ordinarily, are to be implicitly obeyed. In The China, 7 Wall. (U. S.) 53, 19 L. Ed. 67, it was held in admiralty that a steamship is liable for damages arising out of a collision with another steamship, due solely to the negligence of a compulsory pilot. In Ralli v. Troop, 157 U. S. 386, 402, 15 Sup. Ct. 657, 39 L. Ed. 742, the rule of The China was followed; the opinion of the court placing it upon "a distinct principle of the maritime law that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer." (But this responsibility does not include the cargo; *id.*) The continental cases are in accord, but the English rule holds that the ship is not liable in admiralty; Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742; 2 W. Rob. 10 (and now by statute in England in all cases). In a common law action the owners are not liable in such a case; thus, in Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, a steamship, by the negligence of a compulsory pilot, struck a pier; in an action at common law the shipowners were held not liable. And the rule is the same in England; Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742.

Of the judgment of the court in The China, 7 Wall. (U. S.) 53, 19 L. Ed. 67, John C. Gray says (Nature and Sources of the Law 47) that "Judge Holmes [in Com. Law 28] speaks of this decision with more tenderness than it deserves."

The owner remains liable for the ship's management in all things that do not relate to mere navigation; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

A compulsory pilot differs from an ordinary employé and may be held liable to the vessel for damages she has been compelled to pay by reason of his negligence; Guy v. Donald, 157 Fed. 527, 85 C. C. A. 291, 14 L. R. A. (N. S.) 1114, 13 Ann. Cas. 947, C. C. A. 4th Circ.

The compulsory pilotage law applies within the three mile limit; The Earnwell, 70 Fed. 331, 17 C. C. A. 136. As to the place where the pilot ceases to be compulsorily in charge on arrival in a harbor, see [1904] P. 52. Where a steamer in need of a pilot disregarded the speaking pilot and it appeared that the speaking pilot was within the three mile limit, the pilot was held entitled to recover his fee; The Earnwell, 70 Fed. 331, 17 C. C. A. 136, 28 U. S. App. 593.

By acts of Aug. 7, 1789, March 2, 1837, each state has authority over pilotage on its navigable waters, though not exclusive; The Clymene, 9 Fed. 164. State laws regulating pilots are valid until congress has legislated on the subject; Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224. Congress has permitted such state regulations and they are valid; Thompson v. Darden, 198 U. S. 310, 25 Sup. Ct. 660, 49 L. Ed. 1064.

A Delaware pilot may recover for services upon the Delaware River and to Philadelphia, although a Pennsylvania act prohibits any one acting as such without a Pennsylvania license; The Clymene, 12 Fed. 346. The state of Delaware cannot exclude pilots of other states, on the Delaware River; The William Law, 14 Fed. 792. A state law may permit or direct a pilot to tender his services beyond the three mile limit.

The usual signal by which a pilot tenders his services is the Union Jack set at the main truck, by day, and "flare-ups" by night; The Ullock, 19 Fed. 207.

There is no inherent right of any citizen to be a pilot; Williams v. Molther, 189 Fed. 700; Olsen v. Smith, 195 U. S. 344, 25 Sup. Ct. 52, 49 L. Ed. 224.

Captains of naval vessels may employ pilots, wherever, in their judgment, it is necessary. Coast pilots shall not be employed except on special authority from the Navy Department. A pilot's presence on board does not relieve the captain of any responsibility.

PILOTAGE. The compensation given to a pilot for conducting a vessel in or out of port. Pothier, *Des Avaries*, n. 147.

Pilotage is a lien on the ship, when the contract has been made by the master or *quasi*-master of the ship or some other person lawfully authorized to make it; The Anne, 1 Mas. 508, Fed. Cas. No. 412; see The Pirate, 32 Fed. 486; and the admiralty court has jurisdiction when services have been performed at sea; The Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. Ed. 358; Bened. Adm. § 289; The Lord Clive, 10 Fed. 135. The statutes of the several states regulating the subject of pilotage are, in view of the numerous acts of congress recognizing and adopting them, to be regarded as constitutionally made, until congress supersedes them; Cooley v. Board of Wardens, 12 How. (U. S.) 312, 13 L. Ed. 996; Re McNeil, 13 Wall. (U. S.) 236, 20 L. Ed. 624.

PIMP. One who provides for others the means of gratifying lust; a procurer; a panderer. The word pimp is not a technical one, nor has it acquired any peculiar or appropriate meaning in the law; and is therefore to be construed and understood according to the common and approved usage of the language; People v. Gastro, 75 Mich. 127, 42 N. W. 937, where the court disapproved the action of the judge at *nisi prius* who defined the term to mean a man who has intercourse with a loose woman, who usually is supporting him.

The Indiana statutes provide: "Whoever, being a male person, frequents houses of ill-fame or of assignation, or associates with females known or reputed as prostitutes, or frequents gambling-houses with prostitutes, or is engaged in or about a house of prostitution, is a pimp." R. S. (1881) § 2002. See Fahnestock v. State, 102 Ind. 156, 1 N. E. 372, which was an indictment for being a pimp under that statute.

PIMP-TENURE. A very singular and odious kind of tenure mentioned by old writers, "*Wilhelmus Hoppeshort tenet dimidiam virgatam terræ per servitium custodiendi sex damisellas, scil. meretrices, ad usum domini regis.*" 12 Edw. 1.

PIN-MONEY. Money allowed by a man to his wife to spend for her own personal comforts.

It has been conjectured that the term *pin-money* has been applied to signify the provision for a married woman because anciently there was a tax laid for providing the English queen with pins; Barrington, Stat. 181.

When pin-money is given to but not spent by the wife, on the husband's death it belongs to his estate; 4 Viner, Abr. 133, *Baron & Feme* (E a. 8); 2 Eq. Cas. Abr. 156; 2 P. Will. 341; 1 Ves. 190, 267; 1 Madd. 489.

In England it was adjudged that a promise to a wife, by the purchaser, that if she would not hinder the bargain for the sale of the husband's lands he would give her ten pounds, was valid, and might be enforced by an action of assumpsit instituted by husband and wife; Rolle, Abr. 21.

In the French law, the term *épingles*, pins, is used to designate the present which is sometimes given by the purchaser of an immovable to the wife or daughters of the seller to induce them to consent to the sale. This present is not considered as a part of the consideration, but a purely voluntary gift. *Dict. de Jur. Epingles.*

PINT. A liquid measure, containing half a quart or the eighth part of a gallon.

PIOUS USES. See CHARITABLE USES.

PIPE LINES. A connected series of pipes for the transportation of oil, gas, or water.

A line of pipes running upon or in the earth carrying with it the right to the use of the soil in which it is placed. Dietz v. Transfer Co., 95 Cal. 92, 30 Pac. 380.

The right to construct a pipe line is a public use, as is also that of laying pipes for a proper purpose in the streets of a city. See EMINENT DOMAIN.

A pipe line company for conveying oil is a common carrier bound to receive and transport for all persons alike, all goods entrusted to its care, and is not in any sense, or at any time, an agent for the person committing oil to its care; Giffin v. Pipe Lines, 172 Pa. 580, 33 Atl. 578.

Pipe lines between the states are "common carriers" and under the control of the interstate commerce commission. They may cross an interstate stream without state authority if the United States permits; Hubbard v. Fort, 188 Fed. 987. A statute of Oklahoma prohibiting foreign corporations from building pipe lines across highways and transporting natural gas to points outside the state was held unconstitutional as an interference with interstate commerce and a deprivation of property without due process of law; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193. The Hepburn act subjecting such companies to the interstate commerce act is not unconstitutional; Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. ——.

A pipe line for the transportation of oil is not rendered a nuisance by the mere fact that its presence enhances the rates of insurance in the neighborhood; Benton v. Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 906.

A pipe line is held to create an additional servitude on a country highway but not on city or borough streets; Sterling's Appeal, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246; McDevitt v. Gas Co., 160 Pa. 372, 28 Atl. 948. The company may remove its pipes and abandon its easement; Clements v. Philadelphia Co., 184 Pa. 28, 38 Atl. 1090, 39 L. R. A. 532.

See Bryan, Nat. Gas; GAS; OIL.

PIPE ROLL. In English Law. The name of a roll in the exchequer, otherwise called the *Great Roll.*

A measure, containing two hogsheads: one hundred and twenty-six gallons is also called a pipe.

PIPE ROLLS. These were the Great Rolls of the Exchequer and contained the account of the king's profits and rents in all the counties of England. They exist in a continuous series (676 rolls) from 1156 to 1833 (except 1216 and 1403). The Chancellor's Roll from 1255 to 1833 is a duplicate of the Pipe Rolls. A single roll of Henry I, but not complete, is extant. 2 Holdsw. Hist. E. L. 129. The Pipe Rolls are our earliest records; *id.* 138. They are said to be most instructive as to legal rules and institutions; Brunner, 2 Sel. Essays in Anglo-Amer. L. H. 24.

PIRACY. A robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility. U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471; U. S. v. Smith, 5 Wheat. (U. S.) 153, 163, 5 L. Ed. 57; U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494. This is the definition of this offence by the law of nations; 1 Kent 183.

It was not a felony at common law. In the 14th century suits in piracy become frequent, but they were for restitution, disregarding the criminal aspect.

"Depredation upon the high seas, without authority from any sovereign." It is not necessary that the motive be plunder or that the depredations be directed against the vessels of all nations indiscriminately. As in robbery upon land, it is only necessary that the spoliation or intended spoliation be felonious, that is, with intent to injure, and without legal authority or lawful excuse; The Ambrose Light, 25 Fed. 408.

All nations and individuals are warranted in seizing pirates. It has been held by many authorities that insurgents who have not been accorded belligerent rights are pirates, although it may be their intention to prey upon no ships except those of their mother country whom they are resisting. The American colonists in the American Revolution were declared to be pirates by Great Britain, and so were the cruisers of the confederate government by the federal government during the American Civil War; Snow, Lect. Int. Law 52.

Piracy has two aspects: As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only, in prize courts; as a violation of the municipal law of the place where the offenders are tried; Whart. Cr. L. § 2830; 1 Phil. Int. Law 488. Acts hostile in their nature, done for plunder, hatred, revenge, or mischief, or in the wanton exercise of power, are piratical; Harmony v. U. S., 2 How. (U. S.) 210, 11 L. Ed. 239, where the subject is elaborately discussed.

Property found on board a pirate ship goes to the Crown, of strict right; but the claim of the original owner is admitted, on application; 1 Hagg. Adm. 142. Vessels recaptured from pirates, after whatever length of time, are always restored to the owner on payment of salvage; 4 C. Rob. 3.

Congress may define and punish piracies and felonies on the high seas, and offences against the law of nations; Const. U. S. art. 1, s. 7, n. 10; U. S. v. Bevans, 3 Wheat. (U. S.) 336, 4 L. Ed. 404; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76, 5 L. Ed. 37; U. S. v. Smith, 5 Wheat. (U. S.) 153, 5 L. Ed. 57; U. S. v. Furlong, 5 Wheat. (U. S.) 184, 5 L. Ed. 64. The following are the sections of the Criminal Code:

Every person who on the high seas commits the crime of piracy as defined by the Law of Nations, and is afterward brought into or found in the United States, shall be imprisoned for life; § 290. Every seaman who lays violent hands upon his commander, thereby to hinder and prevent his fighting in the defence of his vessel or the goods entrusted to him, is a pirate and shall be imprisoned for life; § 294. Robbery on shore committed by the crew of a piratical vessel is piracy punishable by imprisonment for life, § 302. Every citizen who commits murder or robbery or act of hostility against the United States or any citizen thereof on the high seas under color of any commission from any foreign prince or state or on pretence of authority from any person, is a pirate punishable by imprisonment for life; § 304. Every subject of a foreign state found upon the sea making war upon the United States or cruising against its vessels or citizens contrary to the provisions of any treaty between the United States and the state of which he is a subject, when by such treaty such acts are declared to be piracy, is guilty of piracy, and shall be imprisoned for life; § 305. Every person who knowingly receives any vessel or other property feloniously taken by any robber or pirate, against the laws of the United States, and any person who, knowing that said pirate has committed any act of piracy or robbery on the land or sea, receives or conceals him, is accessory after the fact, and shall be imprisoned for not more than ten years; § 334.

See RECAPTURE.

In Torts. By piracy is understood the plagiarism of a book, engraving, or other work for which a copyright has been taken out; infringement of copyright may be by unfair quotation; by piratical copying; by piratical use other than copying.

Where the violation of the copyright consists of excerpts from plaintiff's book, the court is bound to consider the quantity and quality of the matter appropriated and the extent to which the plaintiff is injured by it and the damage to the defendant by an injunction. It seems that the complainant is not always bound to prove pecuniary damage to entitle him to an injunction. Where the parts of the complainant's book are scattered through the defendant's book and cannot be separated, the whole will be enjoined; Farmer v. Elstner, 33 Fed. 494.

Piratical copying was held to be established in the case of a society directory by proof that out of 2800 names, 39 common errors were found to exist; List Pub. Co. v. Keller, 30 Fed. 772; and by proof that out of 60,000 names there were 67 common errors; Chicago Dollar Directory Co. v. Directory Co., 66 Fed. 977, 14 C. C. A. 213. Two common errors in maps were held sufficient to establish the fact that one map had been copied from the other; Chapman v. Ferry, 18 Fed. 539; in a mercantile agency book, the existence of 15 common errors was held sufficient to establish the use of the complainant's book by the defendant; Jewelers' Mercantile Agency v. Pub. Co., 84 Hun 12, 32 N. Y. Supp. 41. It is not necessary to point out many common errors to establish a presumption of piracy; Jewelers' Mercantile Agency v. Pub. Co., 66 Hun 38, 20 N. Y. Supp. 749. The court does not feel bound to go through the whole of the defendant's book to ascertain the extent of the piracy; 19 L. J. N. S. Ch. 90. In 2 Beav. 6, the court enjoined the defendant who had pirated parts of a topographical dictionary, without waiting until the whole of the pirated parts could be ascertained, and held that if the parts which had been copied could not be separated from those which were original without destroying the use and value of the original matter, the defendant must suffer the consequences.

In List Pub. Co. v. Keller, 30 Fed. 772, it

was intimated that the injunction would be modified at the final hearing, if the proofs of the defendant tended to segregate any part of the material which had been made subject to the injunction.

The rule is well settled that although the entire copyrighted work is not copied in the infringement, but only portions, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendant will be given to the plaintiff; Belford v. Scribner, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514. See 2 Russ. 385; Elizabeth v. Pav. Co., 97 U. S. 126, 24 L. Ed. 1000.

It is the unfair appropriation of the compiler's labor in the case of the syllabus of a legal opinion that constitutes infringement. Identity of language will often prove that the offence was committed, but it is not the sole proof. If the subsequent digestor has made an unfair use of any part of a syllabus of his predecessor, the burden is on him to show that there were parts of it that he did not use. Where the defendant's editor, in compiling a digest of reports, digested some 13,300 cases from the complainant's pamphlet reports and a partial comparison of the copyrighted syllabi with the digest showed internal evidence of piracy in some 400 instances, it was held that this indicated a general, systematic, and unfair use of the copyrighted work, coupled with an attempt to disguise such use, and made out a *prima facie* case, which was not rebutted by the simple denial of the defendant's editors that they had made use of the complainant's syllabi. It was held that the whole work, so far as taken from the complainant's pamphlet reports, should be enjoined, with liberty to defendant to show by further proofs what paragraphs were digested by non-offending editors and to move to have them excluded from the injunction; West Pub. Co. v. Pub. Co., 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400. See COPYRIGHT; MEMORIZATION.

PIRATE. A sea-robber, who, to enrich himself, by subtlety or open force, setteth upon merchants and others trading by sea, despoiling them of their loading, and sometimes bereaving them of life and sinking their ships. Ridley, View pt. 2, c. 1, s. 3. One guilty of the crime of piracy. Merlin, *Répert.* See, for the etymology of this word, Bac. Abr. *Piracy.* See PIRACY.

PIRATICALLY. In Pleading. This is a technical word, essential to charge the crime of piracy in an indictment, which cannot be supplied by another word or any circumlocution. Hawk. Pl. Cr. b. 1, c. 37, s. 15; Co. 3d Inst. 112; 1 Chitty, Cr. L. *244.

PISCARY. The right of fishing in the waters of another. Bac. Abr.; 5 Com. Dig. 366. See FISHERY.

PISTAREEN. A small Spanish coin. It is not made current by the laws of the United States. U. S. v. Gardner, 10 Pet. (U. S.) 618, 9 L. Ed. 556.

PIT. A hole dug in the earth, which was filled with water, and in which women thieves were drowned, instead of being hung. The punishment of the pit was formerly common in Scotland.

PLACE. The word is associated with objects which are, in their nature, fixed and territorial. U. S. v. Bevans, 3 Wheat. (U. S.) 336, 4 L. Ed. 404. See VENUE.

It is applied to any locality, limited by boundaries however large or however small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated by it must, generally, be determined by the connection in which it is used; Law v. Fairfield, 46 Vt. 432.

Any piece of ground appropriated by its owner or occupier for the time being is a place within the English betting houses act; 51 L. J. M. C. 56; but the ground must be so appropriated and must be an ascertained place; 14 Q. B. D. 588. The habitual standing or using a table in Hyde Park does not make it a place for betting; 19 C. B. N. S. 765; as habitual user is not of the essence of place; 10 Q. B. 102; but a piece of ground bounded on one side by a boarding and on two other sides by stays which support the boarding is a *place* under 16 & 17 Vic. c. 119, relating to betting; [1896] 1 Q. B. 295. See [1897] 1 Q. B. 579.

A private residence may become a public place when it is used for the purpose of public amusement, recreation, business, or religious worship; White v. State, 39 Tex. Cr. R. 269, 45 S. W. 702, 46 S. W. 825.

PLACE OF AMUSEMENT. A hall containing a stage whereon a nightly programme of music, vocal and instrumental, is rendered is a place of amusement; Gartenstein's License, 4 D. R. (Pa.) 37; and a dance hall is a public amusement. Com. v. Quinn, 164 Mass. 11, 40 N. E. 1043.

The proprietor of a place of public amusement to which he invites the public, charging admission fees thereto, also owes a high degree of care as to the safety of his patrons. The proprietors of a hall were held liable for the giving away of a guard rail against which customers were accustomed to lean; Schofield v. Wood, 170 Mass. 415, 49 N. E. 636; so where the floor of a building used for conducting a fair gave way; Brown v. Agr. Soc., 47 Me. 275, 74 Am. Dec. 484; and where an injury was caused by insecure fastening of a guy rope at a balloon ascension; Peckett v. Beach Co., 44 App. Div. 559, 60 N. Y. Supp. 966; or by the fall of a pole used in an exhibition; Richmond & M. R. Co. v. Moore's Adm'r, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

See NEGLIGENCE.

PLACE OF BUSINESS. The place where a man usually transacts his affairs or business.

When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually transacts his business at the counting-house, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a postoffice, and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there; Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 582, 7 L. Ed. 269; Granite Bank v. Ayers, 16 Pick. (Mass.) 392, 28 Am. Dec. 253; Byles, Bills 296.

It is a general rule that a notice of the non-acceptance or non-payment of a bill, or of the non-payment of a note, may be sent either to the domicil or place of business of the person to be affected by such notice; and the fact that one is in one town and the other in the other will make no difference, and the holder has his election to send to either. A notice to partners may be left at the place of business of the firm or of any one of the partners; Story, Pr. Notes § 312; Dan. Neg. Instr. § 1016. See NOTICE.

PLACE OF CONTRACT. See LEX LOCI.

PLACE OF DELIVERY. The place where goods sold are to be delivered. If no place is specified in the contract they must, generally, be delivered at the place where they are at the time of the sale. Hatch v. Oil Co., 100 U. S. 134, 25 L. Ed. 554.

PLACER. See MINES AND MINING.

PLACET (Fr.). The name of a document in French practice requesting an audience of the court. Outside of Paris the request is made verbally, in Paris the *arouè* of the plaintiff sends his request to the clerk of the court who puts the case on the list.

PLACITA COMMUNIA (Lat.). Common pleas. All civil actions between subject and subject. 3 Bla. Com. 38, *40; Cowell, *Plea.* See PLACITUM.

PLACITA CORONÆ (Lat.). Pleas of the crown. All trials for crimes and misdemeanors, wherein the king is plaintiff, on behalf of the people. 3 Bla. Com. 40*; Cowell, *Plea.*

PLACITA JURIS (Lat.). Arbitrary rules of law. Bac. Law Tr. 73; Bac. Max. Reg. 12.

PLACITUM (Lat. from *placere*). **In Civil Law.** Any agreement or bargain. A law; a constitution or rescript of the emperor; the decision of a judge or award of arbitrators. Vicat, Voc. Jur.; Calvinus, Lex; Dupin, *Notions sur le Droit.*

In Old English Law (Ger. *plats*, Lat. *platea*, *i. e.* fields or streets). An assembly of all degrees of men, where the king presided and they consulted about the great affairs of the kingdom: first held, as the name would show, in the fields or street. Cowell.

So on the continent. Hinc. *de Ordine Palatii*, c. 29; Bertinian, Annals of France in the year 767; Const. Car. Mag. cap. ix.; Hinc. *Epist.* 197, 227; Laws of the Longobards, *passim.*

A lord's court. Cowell.

An ordinary court. *Placita* is the style of the English courts at the beginning of the record at *nisi prius;* in this sense, *placita* are divided into pleas of the crown and common pleas, which see. Cowell.

A trial or suit in court. Cowell; Jacobs.

A fine. Black Book of Exchequer, lib. 2, tit. 13; 1 Hen. I. cc. 12, 13.

A plea. This word is *nomen generalissimum*, and refers to all the pleas in the case. 1 Saund. 388, n. 6. By *placitum* is also understood the subdivisions in abridgments and other works, where the point decided in a case is set down separately, and, generally, numbered. In citing, it is abbreviated as follows; Viner, Abr. *Abatement* pl. 3.

Placitum nominatum is the day appointed for a criminal to appear and plead.

Placitum fractum. A day past or lost to the defendant. 1 Hen. I. c. 59.

PLAGIARISM. The act of appropriating the ideas and language of another and passing them for one's own.

When this amounts to piracy, the party who has been guilty of it will be enjoined when the original author has a copyright. See COPYRIGHT; PIRACY; QUOTATION.

PLAGIARIUS (Lat.). **In Civil Law.** He who fraudulently concealed a freeman or slave who belonged to another.

The offence itself was called *plagium.*

It differed from larceny or theft in this, that larceny always implies that the guilty party intended to make a profit, whereas the *plagiarius* did not intend to make any profit. Dig. 48. 15. 6; Code 9. 20. 9. 15.

PLAGIUM (Lat.). Man-stealing; kidnapping. This offence is the *crimen plagii* of the Romans. Alison, Cr. L. 280.

PLAIN STATEMENT. One that can be readily understood not merely by lawyers but by all who are sufficiently acquainted with the language in which it is written. Mann v. Morewood, 5 Sandf. (N. Y.) 564. See Webber v. Webber, 79 N. C. 574.

PLAIN TYPE. Large or ordinary sized type, not that of very small size. Potter v. Gilkey, 57 Mo. 235.

PLAINT. In English Law. The exhibiting of any action, real or personal, in writing. The party making his plaint is called the plaintiff.

PLAINTIFF (Fr. *pleyntife*). He who complains. He who, in a personal action, seeks a remedy for an injury to his rights. 3 Bla. Com. 25; Hamm. Part.; 1 Chitty, Pl.; 1 Com. Dig. 36, 205, 308.

The legal plaintiff is he in whom the legal title or cause of action is vested.

The *equitable* plaintiff is he who, not having the legal title, yet is in equity entitled to the thing sued for. For example: when a suit is brought by B. for the use of A., B. the legal, and A. the equitable, plaintiff. This is the usual manner of bringing suits when the cause of action is not assignable at law but is so in equity.

The word plaintiff occurring alone means the plaintiff on record, not the real or equitable plaintiff. After once naming the plaintiff in pleading, he may be simply called the plaintiff. 1 Chitty, Pl. 266; Henry v. Bank, 5 Hill (N. Y.) 523; Stevens v. White, *id.* 548; 7 Term 50.

PLAINTIFF IN ERROR. A party who sues out a writ of error; and this, whether in the court below he was plaintiff or defendant.

PLAN. The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance, representing the position and the relative proportions of the different parts.

A plan referred to in a deed describing land as bounded by a way laid down upon a plan may be used as evidence in fixing the locality of such way; Stetson v. Dow, 16 Gray (Mass.) 374; and if a plan is referred to in the deed for description, and in it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself; 3 Washb. R. P. 430.

When houses are built by one person agreeably to a plan, and one of them, with windows and doors in it, is sold to a person, the owner of the others cannot shut up those windows, nor has his grantee any greater right; 1 Price 27; 2 Ry. & M. 24; 2 Saund. 114, n. 4; 1 Mood. & M. 396. See Story v. Odin, 12 Mass. 159, 7 Am. Dec. 46; Hamm. N. P. 202; Com. Dig. *Action on the Case for a Nuisance* (A). ANCIENT LIGHTS; PLAT; MAP; WINDOWS.

PLANT. The fixtures and tools necessary to carry on any trade or mechanical business. Liberty Co. L. Co. v. Barnes, 77 Ga. 752, 1 S. E. 378. The term does not cover property forming part of a separate business; Maxwell v. Mfg. Co., 77 Fed. 938. As used in the business of a wharfinger, a horse was held part of the plant; 19 Q. B. D. 647; and a legacy of plant and good will was held to pass the house of business held by lease; 8 W. R. 410.

PLANTATIONS. Colonies; dependencies. 1 Bla. Com. 107.

In England, this word, as it is used in stat. 12 Car. II. c. 18, is never applied to any of the British dominions in Europe, but only to the colonies in the West Indies and America; 1 Marsh. Ins. 69.

In its ordinary use it is nearly synonymous with farm, and includes all the land forming the parcel or parcels under culture as one farm, or even what is worked by one set of hands. Attorney General v. State Board, 38 Cal. 291. It has been held that in order to constitute a plantation, the estate should be under the control of one proprietor. Robson v. Du Bose, 79 Ga. 721, 4 S. E. 329. The devise of a plantation passes the stock, implements, utensils, etc., on it; 1 Sim. 435; but plantation stock does not include cotton seed; Purnell v. Dudley, 57 N. C. 203.

PLASTERING. Plastering a building includes lathing. Higgins v. Lee, 16 Ill. 502; Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407.

PLAT. A map of a piece of land, on which are marked the courses and distances of the different lines, and the quantity of land it contains.

Such a plat may be given in evidence in ascertaining the position of the land and what is included, and may serve to settle the figure of a survey and correct mistakes; Alexander v. Lively, 5 T. B. Monr. (Ky.) 160, 17 Am. Dec. 50. See Davis v. Rainsford, 17 Mass. 211; McIver v. Walker, 4 Wheat. (U. S.) 444, 4 L. Ed. 611.

PLATE. Articles inlaid with enamel or set with precious stones on a foundation of gold or silver are plate within the meaning of the English Customs Act; [1907] 1 K. B. 95. Silver mounted jugs, known as black jacks, were held not to pass under bequest of plate; [1910] W. N. 6.

PLEA. In Equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. Mitf. Eq. Pl. Jer. ed. 219; Coop. Eq. Pl. 223; Story, Eq. Pl. § 649.

The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which resting on the foundation of a new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question; Mitf. Eq. Pl. Jer. ed. 13; Ocean Ins. Co. v. Fields, 2 Sto. 59, Fed. Cas. No. 10,406; Story, Eq. Pl. § 437.

Pleas are said to be *pure* which rely upon foreign matter to discharge or stay the suit, and *anomalous* or *negative* which consist mainly of denials of the substantial matters set forth in the bill; Story, Eq. Pl. §§ 651, 667; 2 Dan. Ch. Pr. 97, 110; Beames, Eq. Pl. 123; Adams, Eq. 236.

Pleas to the jurisdiction assert that the court before which the cause is brought is not the proper court to take cognizance of the matter.

Pleas to the person may be to the person of the plaintiff or defendant. Those of the former class are mainly *outlawry*, *excommunication*, *popish recusant convict*, which are never pleaded in America and very rarely now in England; *attainder*, which is now seldom pleaded; 2 Atk. 399; *alienage*, which is not a disability unless the matter respect lands, when the alien may not hold them, or he be an alien enemy not under license; 2 V. & B. 323; *infancy*, *coverture*, and *idiocy*, which are pleadable as at law (see ABATEMENT); *bankruptcy* and *insolvency*, in which case all the facts necessary to establish the plaintiff as a legally declared bankrupt must be set forth; 3 Mer. 667; though not necessarily as of the defendant's own knowledge; 4 Beav. 554; 1 Y. & C. 39; *want of character in which he sues*, as that he is not an administrator; 2 Dick. 510; is not heir; 2 V. & B. 159; 2 Bro. C. C. 143; is not a creditor; 2 S. & S. 274; is not a partner; 6 Madd. 61; as he pretends to be; that the plaintiff named is a fictitious person, or was dead at the commencement of the suit; Story, Eq. Pl. § 727. Those to the person of the defendant may show that the defendant is not the person he is alleged to be, or does not sustain the character given by the bill; 6 Madd. 61; Cas. *temp.* Finch 334; or that he is bankrupt, to require the assignees to be joined; Story, Eq. Pl. § 732. These pleas to the person are pleas in abatement, or, at least, in the nature of pleas in abatement.

Pleas to the bill or the frame of the bill object to the suit as framed, or contend that it is unnecessary. These may be—the *pendency of another suit*, which is analogous to the same plea at law and is governed in most respects by the same principles; Story, Eq. Pl. § 736; 2 My. & C. 602; 1 Mitf. Eq. Pl. Jer. ed. 248; see AUTER ACTION PENDANT; the other suit must be in equity, and not at law; Beames, Eq. Pl. 146; *want of proper parties*, which goes to both discovery and relief, where both are prayed for; Story, Eq. Pl. § 745; but not to a bill of discovery merely; Mitchell v. Lennox, 2 Paige Ch. (N. Y.) 280; Milligan v. Milledge, 3 Cra. 220, 2 L. Ed. 417; a *multiplicity of suits;* 1 P. Wms. 428; West v. Randall, 2 Mas. 190, Fed. Cas. No. 17,424; *multifariousness*, which should be taken by way of demurrer, when the joining or confession of the distinct matters appears from the face of the bill, as it usually does; Story, Eq. Pl. § 271. A plea to the jurisdiction which sets up matters affecting the validity of the service, matters showing want of proper citizenship, and also the pendency of a prior suit, is bad for duplicity; Briggs v. Stroud, 58 Fed. 717.

Pleas in bar rely upon *a bar created by statute;* as, the statute of limitations; 1 S. & S. 4; 3 Sumn. 152; which is a good plea in equity as well as at law, and with similar exceptions; Cooper, Eq. Pl. 253; see LIMITATION, STATUTE OF; the statute of frauds, where its provisions apply; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; 4 Ves. 24, 720; 2 Bro. C. C. 559; or some other public or private statute; 2 Story, Eq. Jur. § 768; *matter of record or as of record in some court*, as a common recovery; 1 P. Wms. 754; a judgment at law; 2 My. & C. 602; Story, Eq. Pl. § 781, n.; the sentence or judgment of a foreign court or a court not of record; 12 Cl. & F. 368; especially where its jurisdiction is of a peculiar or exclusive nature; 12 Ves. 307; Gains v. Chew, 2 How. (U. S.) 619, 11 L. Ed. 402; with limitation in case of fraud; 1 Ves. 284; Story, Eq. Pl. § 788; or a decree of the same or another court of equity; Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; 2 S. & S. 464; 2 Y. & C. 43; *matters purely in pais*, in which case the pleas may go to discovery, relief, or either, both, or a part of either, of which the principal (though not the only) pleas are: Account, stated or settled; Weed v. Smull, 7 Paige, Ch. (N. Y.) 573; 1 My. & K. 231; accord and satisfaction; 1 Hare 564; award; 2 V. & B. 764; purchase for valuable consideration; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; 2 Yo. & C. 457; release; 3 P. Wms. 315; lapse of time analogous to the statute of limitations; 1 Yo. & C. 432, 453; 1 Hare 594; Ellison v. Moffatt, 1 Johns. Ch. (N. Y.) 46; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. Ed. 289; title in the defendant; Story, Eq. Pl. § 812.

The same pleas may be made to bills seeking discovery as to those seeking relief; but matter which constitutes a good plea to a bill for relief does not necessarily to a bill for discovery merely. See Story, Eq. Pl. § 816; Mitf. Eq. Pl. Jer. ed. 281. The same kind of pleas may be made to bills not original as to original bills, in many cases, according to their respective natures. Peculiar defences to each may, however, be sometimes urged by plea; Story, Eq. Pl. § 826; Mitf. Eq. Pl. Jer. ed. 288.

Effect of a plea. A plea may extend to the whole or a part, and if to a part only must express which part, and an answer over-rules a plea if the two conflict; 3 Yo. & C. 683; Milligan v. Milledge, 3 Cra. (U. S.) 220, 2 L. Ed. 417. The plea may be accompanied by an answer fortifying it with a protest against waiver of the plea thereby; Story, Eq. Pl. § 695. A plea or argu-

ment may be allowed, in which case it is a full bar to so much of the bill as it covers, if true; Mitford, Eq. Pl. Jer. ed. 301; or the benefit of it may be saved to the hearing, which decides it valid so far as then appears, but allows matter to be disclosed in evidence to invalidate it, or it may be ordered to stand for an answer, which decides that it may be a part of a defence; Leacraft v. Demprey, 4 Paige, Ch. (N. Y.) 124; but is not a full defence, that the matter has been improperly offered as a plea, or it is not sufficiently fortified by answer, so that the truth is apparent; Orcutt v. Orms, 3 Paige, Ch. (N. Y.) 459.

While a defendant cannot plead merely the facts averred in the bill of complaint, but must present his objection to their sufficiency by demurrer, yet he may present a good plea by averring along with the facts contained in the bill, other and additional facts, if both together establish a defence to the bill; Missouri P. Ry. Co. v. R. Co., 50 Fed. 151.

A plea which avoids the discovery prayed for is no evidence for defendant, even when under oath and denying a material averment in the bill; Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. Ed. 684.

Pleas are abolished by the new equity rules of the United States supreme court (rule 29). Defenses formerly made by plea may be made in the answer; every point of law going to the whole or a material part of the cause of action in the bill may be disposed of before trial at the discretion of the court.

At Law. The defendant's answer by matter of *fact* to the plaintiff's declaration, as distinguished from a demurrer, which is an answer by matter of *law*.

It includes as well the denial of the truth of the allegations on which the plaintiff relies, as the statement of facts on which the defendant relies. In an ancient use it denoted action, and is still used sometimes in that sense: as, "summoned to answer in a plea of trespass;" Steph. Pl. 38. In a popular, and not legal, sense, the word is used to denote a forensic argument. It was strictly applicable in a kindred sense when the pleadings were conducted orally by the counsel. Steph. Pl. App. n. 1.

Pleas are either *dilatory*, which tend to defeat the particular action to which they apply on account of its being brought before the wrong court, by or against the wrong person, or in an improper form; or *peremptory*, which impugn the right of action altogether, which answer the plaintiff's allegations of right conclusively. Dilatory pleas are to the jurisdiction of the court, in suspension of the action, or in abatement of the writ. Peremptory pleas are in bar of the action. Steph. Pl. And. ed. 136; 1 Chitty, Pl. 425; Lawes, Pl. 36.

Of the dilatory pleas, the plea to the jurisdiction, if successful, disposes of the case so far as the present court is concerned; the plea in suspension temporarily suspends the progress of the cause, and the plea in abatement, with an effect midway between the other two, if sustained, disposes of the suit as instituted, but leaves the plaintiff free by a new suit, or, more commonly, in modern practice, by amendment, to proceed anew, avoiding the mistake which was the subject of the plea.

Pleas are of various kinds. *In abatement.* See ABATEMENT. *In avoidance*, called also, *confession and avoidance*, which admits, in words, or in effect, the truth of the matters contained in the declaration, and alleges some new matter to avoid the effect of it and show that the plaintiff is, notwithstanding, not entitled to his action. 1 Chitty, Pl. 540; Lawes, Pl. 122.

Pleas in bar deny that the plaintiff has any cause of action. 1 Chitty, Pl. 407; Co. Lit. 303 *b*. They either conclude the plaintiff by matter of estoppel, show that he never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. Steph. Pl. And. ed. 448; Britt. 92 § 190. They either deny all or some essential part of the averments in the declaration, in which case they are said to traverse it, or, admitting them to be true, allege new facts which obviate and repel their legal effect, in which case they are said to confess and avoid; Steph. Pl. And. ed. 146.

Every allegation made in the pleadings subsequent to the declaration which does not go in denial of what is before alleged on the other side is an allegation of new matter. See Gould, Pl. § 195.

The term pleas in bar is often used in a restricted sense to denote what are with propriety called special pleas in bar. These pleas are of two kinds; the general issue, and special pleas in bar. The general issue denies or takes issue upon all the material allegations of the declaration, thus compelling the plaintiff to prove all of them that are essential to support his action. There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*. Lawes, Pl. 110, 145; Co. Litt. 126 *a*; Gould, Pl. 5th ed. ch. ii. § 38, ch. vi. § 8. The matter which ought to be so pleaded is now very generally given in evidence under the gener-

al issue. 1 Chitty, Pl. 415. A plea which merely amounts to the general issue, though not such in form, is bad; Spencer v. Patten, 84 Md. 414, 35 Atl. 1097.

Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue. Ld. Raym. 88. They are very various, according to the circumstances of the defendant's case: as, in personal action the defendant may plead any special matter in denial, avoidance, discharge, excuse, or justification of the matter alleged in the declaration, which destroys or bars the plaintiff's action; or he may plead any matter which estops or precludes him from averring or insisting on any matter relied upon by the plaintiff in his declaration. The latter sort of pleas are called pleas in *estoppel*. In real action, the tenant may plead any matter which destroys and bars the demandant's title; as, a general release; Steph. Pl. 115.

The general qualities of a plea in bar are —*first*, that it be adapted to the nature and form of the action, and also conformable to the count. Co. Litt. 303 *a*; 285 *b*; Bac. Abr. *Pleas* (I); Rolle 216. *Second*, that it answers all it assumes to answer, and no more. Co. Litt. 303 *a*; Com. Dig. *Pleader* (E 1, 36); 1 Saund. 28; 2 B. & P. 427. *Third*, in the case of a special plea, that it confess and admit the fact. 3 Term 298; 1 Saund. 28, 14; Kennedy v. Strong, 10 Johns. (N. Y.) 289. *Fourth*, that it be single. Co. Litt. 307; Bac. Abr. *Pleas* (K 1, 2); 2 Saund. 49. *Fifth*, that it be certain. Com. Dig. *Pleader* (E 5–11, C. 41). See CERTAINTY; PLEADING. *Sixth*, it must be direct, positive, and not argumentative. See Fletcher v. Peck, 6 Cra. (U. S.) 126, 3 L. Ed. 162; Spencer v. Southwick, 9 Johns. (N. Y.) 314; *Seventh*, it must be capable of trial. *Eighth*, it must be true and capable of proof.

The parts of a plea are—*first*, the title of the court. *Second*, the title of the term. *Third*, the names of the parties in the margin. These, however, do not constitute any substantial part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's: as, "Roe v. Doe." *Fourth*, the commencement, which includes the statement of the name of the defendant, the appearance, the defence, see DEFENCE, the actio non, see ACTIO NON. *Fifth*, the body, which may contain the inducement, the protestation, see PROTESTATION, ground of defence, *quæ est eadem*, the traverse. *Sixth*, the conclusion.

Dilatory pleas go to destroy the particular action, but do not affect the right of action in the plaintiff, and hence delay the decision of the cause upon its merits. Gould, Pl. ch. ii. § 33. This class includes pleas to the jurisdiction, to the disability of the parties, and all pleas in abatement. All dilatory pleas must be pleaded with the greatest certainty, must contain a distinct, clear, and positive averment of all material facts, and must in general, enable the plaintiff to correct the deficiency or error pleaded to; And. Steph. Pl. 136. See ABATEMENT; JURISDICTION.

Pleas in discharge admit the demand of the plaintiff, and show that it has been discharged by some matter of fact. Such are pleas of judgment, release, and the like.

Pleas in excuse admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all in his power to satisfy the former, or not having been the culpable author of the latter. A plea of tender is an example of the former, and a plea of *son assault demesne* an instance of the latter.

Foreign pleas go to the jurisdiction; and their effect is to remove the action, from the county in which the venue is originally laid. Carth. 402. Previous to the statute of Anne, an affidavit was required. 5 Mod. 335; Carth. 402; 1 Saund. Pl. 98, n. 1; Viner, Abr. *Foreign Pleas;* 1 Chitty, Pl. 382; Bacon, Abr. *Abatement* (R).

Pleas of justification assert that the defendant has purposely done the act of which the plaintiff complains, and in the exercise of his legal rights. 8 Term 78; 3 Wils. 71. No person is bound to justify who is not *prima facie* a wrong-doer; Cowp. 478; Clark v. Com., 4 Pick. (Mass.) 126; 1 Chitty, Pl. 436.

Pleas puis darrein continuance introduce new matter of defence, which has arisen or come to the plaintiff's knowledge since the last continuance. In most of the states, the actual *continuance* of a cause from one term to another, or from one particular day in term to another day in the same term, is practically done away with, and the prescribed times for pleading are fixed without any reference to terms of court. Still, this right of a defendant to change his plea so as to avail himself of facts arising during the course of the litigation remains unimpaired; and though there be no *continuance*, the plea is still called a plea *puis darrein continuance*, —meaning, now, a plea upon facts arising since the *last stage of suit*. They are either in bar or in abatement. Matter which arises after purchase or issue of the writ, and before issue joined, is properly pleaded in bar of the further maintenance of the suit; 4 East 502; Yeaton v. Lynn, 5 Pet. (U. S.) 224, 8 L. Ed. 105; Semmes v. Naylor, 12 Gill & J. (Md.) 358; while matter subsequent to issue joined must be pleaded *puis darrein continuance;* Rowell v. Hayden, 40 Me. 582; Longworth v. Flagg, 10 Ohio 300. Their object is to present matter which has arisen since issue joined, and which the defendant

cannot introduce under his pleadings as they exist, for the rights of the parties were at common law to be tried as they existed at the time of bringing the suit, and matters subsequently arising come in as it were by exception and favor. See Jackson v. Rich, 7 Johns. (N. Y.) 194.

Among other matters, it may be pleaded that the plaintiff has become an alien enemy; 3 Camp. 152; that an award has been made after issue joined; 2 Esp. 504; Henry v. Porter, 29 Ala. 619; that there has been accord and satisfaction; Watkinson v. Inglesby, 5 Johns. (N. Y.) 392; Yeaton v. Lynn, 5 Pet. (U. S.) 231, 8 L. Ed. 105; that the plaintiff has become bankrupt; Wheelock v. Rice, 1 Dougl. (Mich.) 267; 15 East 622; that the defendant has obtained a bankrupt-certificate, even though obtained before issue joined; 9 East 82; see 3 B. & C. 23; Sandford v. Sinclair, 3 Den. (N. Y.) 269; that a feme plaintiff has taken a husband; Bull. N. P. 310; Templeton v. Clary, 1 Blackf. (Ind.) 288; that judgment has been obtained for the same cause of action; Bowne v. Joy, 9 Johns. (N. Y.) 221; 5 Dowl. & R. 175; that payment has been made; Herod v. Snyder, 61 Ind. 453; that letters testamentary or of administration have been granted; 1 Saund. 265, n. 2; or revoked; Com. Dig. *Abatement* (I 4); that the plaintiff has released the defendant; Jessup v. King, 4 Cal. 331; Campbell v. Reeves, 3 Sneed (Tenn.) 52; Wade v. Emerson, 17 Mo. 267. See Wisheart v. Legro, 33 N. H. 179. But the defendant in ejectment cannot plead release from the lessor of the plaintiff; 4 Maule & S. 300; and the release will be avoided in case of fraud; 4 B. & Ad. 419; Hoitt v. Holcomb, 23 N. H. 535. In ejectment a right to the land obtained by defendant since the commencement of the action, must be set up by a plea *puis darrein continuance;* Jennings v. Dockham, 99 Mich. 253, 58 N. W. 66.

As a general rule, such matters must be pleaded at the first continuance after they happen or come to the plaintiff's knowledge; Jackson v. McConnell, 11 Johns. (N. Y.) 424; though a discharge in insolvency or bankruptcy of the defendant; Morgan v. Dyer, 9 Johns. (N. Y.) 255; Mechanics' Bank v. Hazard, *id.* 392; and coverture of the plaintiff existing at the purchase of the suit, are exceptions; Bull. N. P. 310; in the discretion of the court; Morgan v. Dyer, 10 Johns. (N. Y.) 161; Wilson v. Hamilton, 4 S. & R. (Pa.) 239; 5 Dowl. & R. 521; Nettles v. Sweazea, 2 Mo. 100. *Great certainty* is required in pleas of this description; Cro. Jac. 261; Vicary v. Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323. They must state the day of the last continuance, and of the happening of the new matter; Bull. N. P. 309; And. Steph. Pl. 356, n.; Augusta v. Moulton, 75 Me. 551; cannot be awarded after assizes are over; 2 McC. & Y. 350; must be verified on oath before they are allowed; 1 Stra. 493; 1 Const. S. C. 455; and must then be received; 3 Term 554; Stevens v. Thompson, 15 N. H. 410. They stand as a substitute for former pleas; Adler v. Wise, 4 Wis. 159; Culver v. Barney, 14 Wend. (N. Y.) 161, and demurrers; 32 E. L. & E. 280; may be pleaded after a plea in bar; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; and if decided against the defendant, the plaintiff has judgment in chief; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74.

Sham pleas are those which are known to the pleader to be false, and are entered for the purpose of delay. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed: as, for example, the common plea of *judgment recovered*, that is, that judgment has been already recovered by the plaintiff for the same cause of action; Steph. Pl. 444, 445. See Caswell v. Bushnell, 14 Barb. (N. Y.) 393. The later practice of courts in regard to sham pleas is to strike them out on motion, and give final judgment for the plaintiff, or impose terms (in the discretion of the court) on the defendant, as a condition of his being let in to plead anew. The motion is made on the plea itself, or on affidavits in connection with the plea.

Pleas in suspension of the action show some ground for not proceeding in the suit at the present period, and pray that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of the parties, and termed parol demurrer. Steph. Pl. And. ed. 138.

A plea which avers a legal conclusion is bad, as "that a dam is no higher than the statute authorized;" Pumpelly v. Canal Co., 13 Wall. (U. S.) 175, 20 L. Ed. 557.

In ecclesiastical courts, a plea is called an allegation. See ALLEGATION.

PLEA ROLLS. See ROLLS.

PLEAD, TO. To answer the indictment or, in a civil action, the declaration of the plaintiff, in a formal manner. To enter the defendant's defence upon record.

In a popular use, to make a forensic argument. The word is not so used by the legal profession. Steph. Pl. App. n. I; Story, Eq. Pl. § 4, n.

PLEADING. The written allegation of what is affirmed on the one side, or denied on the other, disclosing to the court or jury having to try the cause, the real matter in dispute between the parties. Desnoyer v. Hereux, 1 Minn. 17 (Gil. 1).

In Chancery Practice. It consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of-

which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments to the court. Story, Eq. Pl. § 4. The substantial object of pleading is the same, but the forms and rules of pleading are very different, at law and in equity.

The system of pleading in equity was derived partly from the common law system, but chiefly from that of the civil law as administered in the English ecclesiastical courts. The latter is called the civil-law system, not because it ever prevailed among the ancient Romans, but because it has grown out of the latest Roman procedure and prevails generally in those countries which derive their procedure from the Romans. Langdell, Equity Pleading.

See PLEADINGS.

In Common Law Practice. The stating in a logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defence: it is the formal mode of alleging that on the record which constitutes the support or the defence of the party in evidence. 3 Dougl. 278; Com. Dig. *Pleader* (A); Bac. Abr. *Pleas and Pleading*. Pleading is used to denote the act of making the pleadings.

The object of pleading is to secure a clear and distinct statement of the claims of each party, so that the controverted points may be exactly known, examined, and decided, and the appropriate remedy or punishment administered. See Cowp. 682; Dougl. 159. The object is to develop the real issue; Thomas v. Mann, 28 Pa. 522. A pleading must proceed upon some single definite theory, and it must be good upon the theory on which it proceeds; Baker v. Ludlam, 118 Ind. 87, 20 N. E. 648. Good pleading consists in good matter pleaded in good form, in apt time, and due order. Co. Litt. 303. *Good matter* includes all facts and circumstances necessary to constitute the cause of complaint or ground of defence and no more. It does not include arguments or matters of law. But some matters of fact need not be stated, though it be necessary to establish them as facts. Such are, among others, *facts of which the courts take judicial notice;* see JUDICIAL NOTICE; *facts which the law presumes;* as, the innocence of a party, illegality of an act, etc.; 4 Maule & S. 105; Dubois' Ex'rs v. Van Orden, 6 Johns. (N. Y.) 105; Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Case v. Humphrey, 6 Conn. 130; *matters which the other party* should plead, as being more within his knowledge; 1 Sharsw. Bla. Com. 293, n.; 2 H. Bla. 530; Postmaster General v. Cochran, 2 Johns. (N. Y.) 415; People v. Edwards, 9 Cal. 286; *mere matters of evidence of facts;* 9 Co. 96; Hyatt v. McMahon, 25 Barb. (N. Y.) 457; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; *unnecessary matter:* as, a second breach of condition, where one is sufficient; 1 Saund. 58, n. 1; State v. Bank, 33 Miss. 474; Hand v. Taylor, 4 Ind. 409; Morse v. Eaton, 23 N. H. 415; see DUPLICITY; or intent to defraud, when the facts alleged constitute fraud; McMahan v. Rice, 16 Tex. 335; *irrelevant matter;* 1 Chitty, Pl. 209. Such matter may be rejected without damage to the plea, if wholly foreign to the case, or repugnant; Thomas v. Roosa, 7 Johns. (N. Y.) 462; Wilmarth v. Mountford, 8 S. & R. (Pa.) 124; Raymond v. Sturges, 23 Conn. 134; Magee v. Fisher, 8 Ala. 320; but in many cases the matter must be proved as stated, if stated; Jerome v. Whitney, 7 Johns. (N. Y.) 321; U. S. v. Porter, 3 Day (Conn.) 283, Fed. Cas. No. 16,074. The matter must be true and susceptible of proof; but legal fictions may be stated as facts; 2 Burr. 667; 4 B. & P. 140. Facts necessarily implied from direct averments will be treated as having been pleaded; Weaver v. Harlan, 48 Mo. App. 319; Wineman v. Hughson, 44 Ill. App. 22; and facts and not conclusions should be pleaded; Gerrity v. Brady, 44 Ill. App. 203.

The form of statement should be according to the established forms; Co. Litt. 303; 6 East 351; 8 Co. 48 *b*. This is to be considered as, in general, merely a rule of caution, though it is said the courts disapprove a departure from the well-established forms of pleading; 1 Chitty, Pl. 212. In most of the states, and in England since 1852, many radical changes have been introduced into the law of pleading: still, it is apprehended that a reasonable regard to the old forms will be profitable, although the names of things may be changed. See 3 Sharsw. Bla. Com. 301, n.; Sampson v. Shaeffer, 3 Cal. 196; Cooper v. Benson, 28 Miss. 766; Hill v. Barrett, 14 B. Monr. (Ky.) 83. In general, it may be said that the facts should be stated logically, in their natural order, with certainty, that is, clearly and distinctly, so that the party who is to answer, the court, and the jury may readily understand what is meant; 2 B. & P. 267; Co. Litt. 303; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; with precision; People v. Dunlap, 13 Johns. (N. Y.) 437; and with brevity; Smith v. R. Co., 36 N. H. 458; 1 Chitty, Pl. 212. The facts stated must not be insensible or repugnant; 7 Co. 25; Sherwood v. Stevenson, 25 Com. 431; nor ambiguous or doubtful in meaning; 5 Maule & S. 38; nor argumentative; Co. Litt. 303; Hurst v. Purvis, 5 Blackf. (Ind.) 557; nor by way of recital; Ld. Raym. 1413; and should be stated according to their legal effect and operation; Steph. Pl. And. ed. 366; Johnson v. Carter, 16 Mass. 443.

The time within which pleas must be filed is a matter of local regulation, depending upon the court in which the action is brought. *The order* of pleading different matters is of

importance as affecting the defendant, who may oppose the plaintiff's suit in various ways. The order is as follows:

First, to the jurisdiction of the court.

Second, to the disability, etc., of the person: *first*, of the plaintiff; *second*, of the defendant.

Third, to the count or declaration.

Fourth, to the writ: *first*, to the form of the writ,—*first*, matter apparent on the face of it, secondly, matters dehors; *second*, to the action of the writ.

Fifth, to the action itself in bar.

This is said to be the natural order of pleading, because each subsequent plea admits that there is no foundation for the former; Shaw v. Usher, 41 Me. 102; Cole v. Ackerman, 7 Gray (Mass.) 38; Gardner v. James, 5 R. I. 235; Symons v. Northern, 49 N. C. 241; Alliston v. Lindsey, 12 Smedes & M. (Miss.) 656. An exception exists where matter is pleaded *puis darrein continuance;* see PLEA; and where the subject-matter is one over which the court has no jurisdiction, a failure to plead to the puis cannot confer jurisdiction; Wright v. Guy, 10 S. & R. (Pa.) 229; Horton v. Wheeler, 17 Tex. 52.

The science of pleading, as it existed at common law, has been much modified by statutory changes; but, under whatever names it is done,—whether under rules of court, or of the legislative power, by the parties, the court, or the jury,—it is evident that, in the nature of things, the end of pleading must be attained, namely, the production of one or more points of issue, where a single fact is affirmed by one party and denied by the other. By pleading at the common law, this was done by the parties; in the civil law, by the court.

In England, pleadings in actions are now governed by the provisions of the Judicature Act, ord. xix., which made a number of changes in the old common-law methods. See JUDICATURE ACTS.

Up to judgment pleadings are construed most strongly against the pleader, and unknown, unrecited facts are not assumed in his favor; Hughes v. Murdock, 45 La. Ann. 935, 13 South. 182. See Loehr v. Murphy, 45 Mo. App. 519; Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578.

But it is said that they must be construed reasonably, and not with such strictness as to refuse to adopt the natural construction because a particular fact might have been more distinctly alleged, although its existence is reasonably to be presumed from the averments; Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263.

"It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled which is distinctly alleged in the bill and admitted in the answer;" Jones v. Morehead, 1 Wall. (U. S.) 165, 17 L. Ed. 662.

Pleadings are not to be treated as allegations of the truth of the facts stated for all purposes, but only for that case; Parke, B. in 2 Exch. 665.

"Technical forms of pleading in equity are abolished" by the new equity rules of the supreme court (rule 18) unless "otherwise provided by statute or by the rules themselves." See 226 U. S. 649, 33 Sup. Ct. xix.

In Criminal Practice the rules of pleading are the same as in civil practice. There is, however, less liberty of amendment of the indictment. The order of the defendant's pleading is as follows: *First*, to the jurisdiction; *second*, in abatement; *third*, special pleas in bar: as, autrefois acquit, autrefois attaint, autrefois convict, pardon; *fourth*, the general issue.

PLEADING, SPECIAL. By special pleading is meant the allegation of special or new matter, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, s. 18. See SPECIAL PLEADING.

PLEADINGS. In Chancery Practice. The written allegations of the respective parties in the suit. The pleadings in equity are less formal than those at common law.

The parts of the pleadings are—the *bill*, which contains the plaintiff's statement of his case, or *information*, where the suit is brought by a public officer in behalf of the sovereign; the *demurrer*, by which the defendant demands judgment of the court, whether he shall be compelled to answer the bill or not; the *plea*, whereby he shows some cause why the suit should be dismissed or barred; the *answer*, which, controverting the case stated by the bill, confesses and avoids it; or traverses and denies the material allegations in the bill, or, admitting the case made by the bill, submits to the judgment of the court upon it, or relies upon a new case or upon new matter stated in the answer, or upon both; *disclaimer*, which seeks at once a termination of the suit by the defendants, disclaiming all right and interest in the matter sought by the bill; Story, Eq. Pl. § 546; Mitf. Eq. Pl. by Jer. 13, 106; Cooper, Eq. Pl. 108; Ocean Ins. Co. v. Fields, 2 Sto. 59, Fed. Cas. No. 10,406.

In Common Law Practice. The statements of the parties, in legal and proper manner, of the causes of action and grounds of defence. The result of pleading. They were formerly made by the parties or their counsel, orally, in open court, under the control of the judge. They were then called the parole; 3 Bla. Com. 293.

The parts of the pleadings may be arranged under two heads: The regular, which occur in the ordinary course of a suit; and the irregular or collateral, which are occasioned by errors in the pleadings on the other side.

The regular parts are—the *declaration* or count; the *plea*, which is either to the jurisdiction of the court, or suspending the action, as in the case of a parol demurrer, or in abatement, or in bar of the action, or in replevin, an avowry or cognizance; the *replication*, and, in case of an evasive plea, a *new assignment*, or, in replevin, the *plea in bar* to the avowry or cognizance; the *rejoinder*, or, in replevin, the replication to the plea in bar; the *sur-rejoinder*, being in replevin the rejoinder; the *rebutter;* the *surrebutter;* Viner, Abr. *Pleas and Pleading* (C); Bac. Abr. *Pleas and Pleadings* (A); pleas *puis darrein continuance*, when the matter of defence arises pending the suit.

The irregular or collateral parts of pleading are stated to be—*demurrers* to any part of the pleadings above mentioned; *demurrers to evidence* given at trials; *bills of exceptions; pleas in scire facias;* and *pleas in error.* Viner, Abr. *Pleas and Pleadings* (C).

In Admiralty, the proceedings might go on, by turns, as long as the mode of pleadings require it. The successive pleadings, after the replication, were called duplication, triplication, and quadruplication, and so on; but they are now obsolete; Bened. Adm. § 482.

In Criminal Practice, the pleadings are—*first*, the *indictment; second*, the *plea;* and the other pleadings as in civil practice.

PLEAS OF THE CROWN. In English Law. A phrase employed to signify criminal causes in which the king is a party. Formerly it signified royal causes for offences of a greater magnitude than mere misdemeanors. Pleas of the crown, were so called because the sovereign is supposed by law to be the person injured by every wrong done to the community. 4 Bla. Com. 2.

These were left to be tried in the courts of the barons; whereas the greater offences, or royal causes, were to be tried in the king's courts, under the appellation of pleas of the crown. 1 Robertson, Hist. Charles V. 48.

PLEAS ROLL. In English Practice. A record which contains the declaration, plea, replication, rejoinder, and other pleadings, and the issue. Eunom. Dial. 2, § 29, p. 111.

PLEBEIAN. One who is classed among the common people, as distinguished from the nobles.

PLEBISCITUM (Lat.). **In Roman Law.** A law established by the people (*plebs*), on the proposal of a popular magistrate, as a tribune. Calvinus, Lex.; Mackeldey, Civ. Law §§ 27, 37. The term is used in France to express a popular vote (*plébiscite*).

PLEDGE. A bailment of personal property as security for some debt or engagement.

The word is also applied to the *res* or personal property forming the subject-matter of the bailment. *Pawn* was synonymous with *pledge* at common law, but modern usage tends to restrict these words to the bailment of tangible chattels for money advanced, and has introduced the term *collateral security*, or simply *collateral*, to designate the subject-matter of a pledge given as security for an engagement other than a simple borrowing of money, and particularly when the subject-matter consists of incorporeal chattels such as stocks, bonds, or choses in action.

A pledge or pawn (Lat. *pignus*), according to Story, is a bailment of personal property as security for some debt or engagement. Story, Bailm. § 286, which see for the less comprehensive definitions of Sir Wm. Jones, Lord Holt, Pothier, etc. Domat broadly defines it as an appropriation of the thing given for the security of an engagement. But the term is commonly used as Sir Wm. Jones defines it: to wit, as a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. Jones, Bailm. 117; 2 Ld. Raym. 909; Pothier, *De Naut.* art. prelim. 1; Code Civ. 2071; Domat b. 3, tit. 1, § 1; La. Civ. Code 3100; Doak v. Bank, 28 N. C. 309. The pledgee secures his debt by the bailment, and the pledgor obtains credit or other advantage. See 1 Pars. Contr. 591.

A legal obligation, made by the deposit with the pledgee of personalty as security for a debt or other engagement, with an implied power of sale on default, the pledgor retaining the general ownership, subject to the lien of the pledgee. Tennent v. Ins. Co., 133 Mo. App. 345, 112 S. W. 754.

In Louisiana there are two kinds of pledges: the pawn and the antichresis. The former relates to movable securities, and the latter to immovables. If a creditor have not a right to enter on the land and reap the fruits, the security is not an antichresis; Hagan v. Sompeyrac, 3 La. 157. A pledge of negotiable paper is not valid against third parties without transfer from debtor to creditor; Charbonnet v. Toledano, 2 La. 387; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Casey v. Schneider, 96 U. S. 496, 24 L. Ed. 790.

Pledge is distinguished from mortgage because the essential feature of pledge is transfer of *possession*, while the essential feature of mortgage is transfer of *title* only; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779 (see MORTGAGE). The same distinction exists at the civil law between *pignus* and *hypotheca;* Story, Bailm. § 286. In modern transactions title is often transferred under a pledge, but this arises from the nature of the collateral security, and is not a necessity of the relation. In a mortgage, at common law, the property on non-payment of the debt passes wholly to the mortgagee. In a pledge, the property is sold, and only so much of the proceeds as will pay his debt passes to the

pledgee. A mortgage is a conditional conveyance of property, which becomes absolute unless redeemed at a specified time. A pledge is not strictly a conveyance at all, nor need any day of redemption be appointed for it. A mortgagee can sell and deliver the thing mortgaged, subject only to the right of redemption. A pledgee cannot sell and deliver the thing pledged until the debt is due and payment denied (though he can assign his contract, and with it the collateral security, or pledge).

Whether a particular contract be held a pledge or a mortgage is often a question of importance, and the courts hold it to be whichever seems best to effectuate the intention of the parties without regard to the language employed; Langdon v. Buell, 9 Wend. (N. Y.) 80; Newton v. Van Dusen, 47 Minn. 437, 50 N. W. 820; Jensen v. Bowles, 8 S. D. 570, 67 N. W. 627; leaning, however, to pledge rather than mortgage as ordinarily more favorable to the debtor; Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Clark v. Henry, 2 Cow. (N. Y.) 324.

Subject of pledge. Any personal property capable of delivery or transfer may be pledged, except for the peculiar rules of maritime law which are applicable to shipping, and except, also, that on the ground of public policy the common law (apart from statutory prohibitions which are frequent) does not permit the pay and emoluments of officers and soldiers to be pledged; 1 H. Bla. 627; 4 Term 248. Hence, probably, a fishing bounty could not be pledged, nor any form of government pension or bounty given for the personal benefit of the donee.

Not only goods and chattels and money, but also negotiable paper, may be put in pledge; Appleton v. Donaldson, 3 Pa. 381; Goldsmidt v. First Methodist Church, 25 Minn. 202; Joliet I. & S. Co. v. Brick Co., 82 Ill. 548, 25 Am. Rep. 341; Alexandria, L. & H. R. Co. v. Burke, 22 Gratt. (Va.) 262. So may choses in action, patent rights, coupon bonds, and manuscripts of various sorts; 2 Taunt. 268; Jarvis v. Rogers, 15 Mass. 389; Fisher v. Bradford, 7 Greenl. (Me.) 28; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Morris C. & B. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423. So may bonds secured by a mortgage on personal property and corporate franchises; White Mountains R. R. v. Iron Co., 50 N. H. 57; and coupon bonds; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; and chattel mortgages of every description; and policies of life insurance; Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Stout v. Mill. Co., 13 Fed. 803; lease may be taken in pledge; Dewey v. Bowman, 8 Cal. 145; L. R. 10 Eq. 92; for leases are but chattels real; or a mortgage of real estate, which, before foreclosure, is to be ranked with personal property; Campbell v. Parker, 9 Bosw. (N. Y.) 322. Incorporeal things could probably be pledged immediately, under the civil law, and so in the Scotch law, or, at all events, by assignment; 1 Domat b. 3, tit. 1, § 1; Pothier, *de Naut.* n. 6; 2 Bell, Com. 23. In the civil law, property of which the pledgor had neither present possession nor title could be pledged,—though this was rather a contract for pledge, called a hypothecation. The pledge became complete when the property was acquired by the pledgor. The same rule holds in our law, where a hypothecary contract gives a lien which attaches when the property is vested; 1 Hare 549; Macomber v. Parker, 13 Pick. (Mass.) 175; Parshall v. Eggert, 54 N. Y. 18; Goodenow v. Dunn, 21 Me. 86; Huntington v. Sherman, 60 Conn. 463, 22 Atl. 769. And it has been held that a pledge may be made to secure an obligation not yet risen into existence; Wolf v. Wolf, 12 La. Ann. 529. In an agreement to pledge a vessel not then completed, the intent of the parties governs in determining when the property passes; Bonsey v. Amee, 8 Pick. (Mass.) 236; 24 E. L. & E. 220.

Buying and selling through a broker on deposit of a "margin" with him is held in New York to create the relation of pledgor and pledgee; so that, on the pledgor's failure to keep his "margin" good, the pledgee or broker cannot sell the stock, except upon the pledge formalities, for repayment of his advances and commissions; Markham v. Jaudon, 41 N. Y. 235; and the rule has been adopted in other states; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

Delivery of possession is essential to a pledge. Unless the pledgee take and retain possession there is no pledge; Christian v. R. Co., 133 U. S. 243, 10 Sup. Ct. 260, 33 L. Ed. 589; Beeman v. Lawton, 37 Me. 543; Moors v. Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; Textor v. Orr, 86 Md. 392, 38 Atl. 939; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210; Delogny v. Creditors, 48 La. Ann. 488, 19 South. 614. The intent to pledge is not a pledge; Hook v. Ayers, 80 Fed. 978, 26 C. C. A. 287.

If possession be given to a third person for the pledgee such person must know of the trust and accept the obligation it imposes; Succession of Lanaux, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577. But a constructive delivery is all that is required, that is, such delivery as the nature or situation of the goods admits. Hence goods in transit or in store will pass by transfer of the bill of lading or warehouse receipt; Douglas v. Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276; Forbes v. R. Co., 133 Mass. 154; Heilbron v. Trust Co., 13 Wash. 645, 43 Pac. 932; Citizens' Banking Co. v. Peacock, 103 Ga. 171, 29 S. E. 752; Friedman v. Peters, 18 Tex. Civ. App. 11, 44 S. W. 572.

If incorporeal property is pledged, a symbolical delivery suffices; Little v. Berry (Ky.) 113 S. W. 902. A pledgee of automobiles, not taking possession within less than four months before the pledgor goes into bankruptcy, loses his lien as against the bankrupt trustee; Bank of North America v. Car Co., 235 Pa. 194, 83 Atl. 622. But an owner carrying stock on margin may, if the broker becomes bankrupt, get back his stock, on paying for it, or the proceeds, if sold; In re Bolling, 147 Fed. 786, affirmed Kean v. Dickinson, 152 Fed. 1022, 82 C. C. A. 667.

A change of the location of bulky articles is not in all cases necessary, but it is sufficient if the best means available to give notice of the change of possession are made use of; Ayers v. McCandless, 147 Pa. 49; such as posting signs on, or marking, the goods; Wilson v. Hill, 17 Nev. 401, 30 Pac. 1076; or appointing an agent to take charge, which agent may be an employé of the pledgor; Sumner v. Hamlet, 12 Pick. (Mass.) 76; Combs v. Tuchelt, 24 Minn. 423. Delivery of a larger quantity than the amount pledged with the right in pledgee to select the pledge, is good; Weld v. Cutler, 2 Gray (Mass.) 195; Crofoot v. Bennett, 2 N. Y. 258; and so where the pledgee is put and kept in possession of a quantity in excess of the pledged amount, allowing the pledgor to add to, or subtract from, the mass, but maintaining the quantity of the pledge, the pledge is good; Fidelity I., T. & S.-D. Co. v. Iron Co., 81 Fed. 439. But there cannot be a valid pledge of a portion of a mass, there being no segregation, and the pledgor retaining the whole; Collins v. Buck, 63 Me. 459. When goods are in the hands of an agent of the pledgor an order on him to hold for the use of the pledgee, accepted by him, constitutes a delivery; First Nat. Bank v. Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

In the case of commercial paper, stocks, bonds, and securities, which together constitute by far the most important division of pledges, or collateral securities, and of choses in action, delivery of possession is essential, but to make the delivery effective assignment is necessary, and assignment is transfer of title. As both title and possession are transferred, the distinction between mortgage and pledge ceases to be of much practical importance—the title to the collateral depends not on the principal obligation, but on the mode of transfer; Thomson-Houston Electric Co. v. Electric Co., 65 Fed. 341, 12 C. C. A. 643. But there is a distinction between the position of the pledgee in relation to the pledgor and in relation to third persons. His position cannot be described as simply that of a trustee, because he holds the collateral primarily for his own benefit, which affects his relation to the pledge; Plucker v. Teller, 174 Pa. 529, 34 Atl. 208, 52 Am. St. Rep. 825. So far as the pledgor is concerned the question of the title of the pledgee is determined by the intention of the parties; as to third parties he is practically owner. Thus a pledgee of stock may transfer it to his own name; Smith v. Bank, 82 Tex. 368, 17 S. W. 779; though this is not necessary; Tombler v. Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896; otherwise in Vermont; French v. White, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479; Jones, Pledges § 151; and so far as the corporation is concerned he is the owner of it; Boyd v. Mills, 149 Pa. 363, 24 Atl. 287. The legal title to a pledged note or chose in action is in him; Withers v. Sandlin, 36 Fla. 619, 18 South. 856; Luter v. Roberts (Tex.) 39 S. W. 1002. He occupies the position of a *bona fide* holder for value, except when the pledge is for an existing debt; Moore v. Ensley, 112 Ala. 228, 20 South. 744; and though an assignee of a pledgee have notice of equities, he is not bound by them if his assignor, the pledgee, had not; Louisville Trust Co. v. R. Co., 75 Fed. 433, 22 C. C. A. 378. His title to an accommodation note is good, notwithstanding equities between maker and payee; McCrady v. Jones, 36 S. C. 136, 15 S. E. 430; and he has the rights of a *bona fide* holder against the corporation, when the collateral is a certificate of stock which proves to have been fraudulently issued; Fifth Avenue Bk. v. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712. See STOCK. A pledgee's lien on stock held for a debt is prior to the statutory lien of the corporation thereon if the debt was incurred prior to the debt to the corporation and if the latter had notice of the pledgee's lien; Curtice v. Bank, 110 Fed. 830.

Where a bankrupt trustee finds in the estate certificates for shares of a particular stock, subject to the demand of the customer for whom shares of that stock were bought by the bankrupt, the customer is entitled to the same, though the certificates may not be the identical ones purchased for him; if there are enough shares of such stock to satisfy the legal demand of such customer, those certificates will be presumed to be the certificates held by the bankrupt for such customer. It is the bankrupt's duty to use his own funds to replace such securities with others of the same kind, and in doing so he does not deplete the estate against his other creditors; the presumption is that such certificates were paid for out of his own funds to replace those of his customer and not that he embezzled the latter; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047.

He is bound by anything which should amount to notice that the pledgor is without authority to pledge; Gottberg v. Bank, 131 N. Y. 595, 30 N. E. 41; Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80; Commercial

Bank v. Hurt, 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; Thurber v. Bank, 52 Fed. 513; 20 Can. S. C. R. 481. But in dealing with one in possession of the securities and having the apparent right to dispose of them he will be protected, though the pledge be a fraud on the real owner; Nelson v. Owen, 113 Ala. 372, 21 South. 75. Of course if the true owner has been deprived of possession by what amounts to embezzlement he can recover from the pledgee; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411. And a pledgee from one who has no authority either to sell or pledge acquires no lien on the property as against the true owner; Patton v. Joliff, 44 W. Va. 88, 28 S. E. 740. As holder of a note to which there is a valid defence against the payee he is protected, but only to the extent of his interest, *i. e.* to the amount which he has advanced; Wright v. Hardie, 88 Tex. 653, 32 S. W. 885. See Haas v. Bank, 41 Neb. 754, 60 N. W. '85.

Factors and Agents. A factor cannot, at common law, pledge his principal's goods; and the principal may recover them from the pledgee's hands; 6 Maule & S. 1; [1893] 1 Q. B. 62; Hoffman v. Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; Buckley v. Packard, 20 Johns. (N. Y.) 421; Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 298; Warner v. Martin, 11 How. (U. S.) 209, 226, 13 L. Ed. 667; Thurber v. Bank, 52 Fed. 513; and this is so whether entrusted with the goods themselves or with the symbol of them, as a bill of lading; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573. But the Factors' Acts in England, to remedy the intolerable condition which would exist if an unknown owner were permitted to repudiate transactions of a factor, have provided that a pledge by a factor having a power of sale shall be valid. Similar acts have been passed in many of the states. See AGENTS; FACTOR; FACTORS' ACTS.

Co-Pledgees. A pledgee may hold a pledge for another pledgee also, and it will be a good pledge to both; Levy v. Winter, 43 La. Ann. 1049, 10 South. 198. If the pledge be not large enough for both debts after sale, and no other arrangement be made, the prior pledgee will have the whole of his debt paid before any part of the proceeds is applied to the subsequent pledge. If there is no priority of time, they will divide ratably. But an agreement between the parties will always determine the right of two or more pledgees; Marshall v. Bryant, 12 Mass. 321. Where possession is given to one of three pledgees, to hold for all three, the other two have a constructive possession, which is equally good, for the purpose of sharing, with an actual possession. Hence the mere manual possession of one pledgee will not give a right to discharge the whole debt of the holder and a part only of that of his co-pledgee's. So, by the rule of constructive possession, if the holder should lose the pledge by his own negligence, he would be liable to his co-pledgees out of actual possession, as well as to his pledgor.

Substituted collateral is held on the same terms as that originally pledged, the surrender of that given up being sufficient consideration for the new deposit; Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. 823; Midland Nat. Bank v. Ry. Co., 132 Mo. 492, 38 S. W. 521, 53 Am. St. Rep. 505; Blydenstein v. Security & T. Co., 67 Fed. 469, 15 C. C. A. 14. Collateral deposited on a demand by the pledgee for additional "margin" would probably be held to be security given for an existing debt. The point does not appear to have been decided. When the pledgee changes the form of the collateral he continues to hold under the terms of the pledge, *e. g.* where he forecloses a mortgage and buys in the land; Lathrop v. Adkisson, 87 Ga. 339, 13 S. E. 517. See McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068; Montague v. R. Co., 124 Mass. 242; Dalton v. Smith, 86 N. Y. 176; Hopkins v. Hemm, 159 Ill. 416, 42 N. E. 848.

But see *infra* under sub-title *Remedies of Pledgee.*

Other debts. A pledge cannot, in general, be held for any other debt than that which it was given to secure, except on the special agreement and consent of the parties; 6 Ves. 226; Armstrong v. McLean, 153 N. Y. 490, 47 N. E. 912; Hallowell v. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Cross v. Brown (R. I.) 33 Atl. 370. (The civil and Scotch law are otherwise; 2 Bell, Com. 22.) Unless the intention is clear to the contrary it will be held that this special agreement applies only to subsequent debts; Clymer v. Patterson, 52 N. J. Eq. 188, 27 Atl. 645; and the court was equally divided where a custom of brokers was set up to justify the application to existing debts; Bacon's Adm'r v. Bacon's Trustees, 94 Va. 686, 27 S. E. 576. Where a judgment has been paid the parties may lawfully agree that it shall remain as collateral for a new loan made, or to be made; Merchants N. Bk. v. Mosser, 161 Pa. 469, 29 Atl. 1.

The *renewal* of the note or obligation of pledge does not affect the pledgee's rights in regard to the collaterals, it is a mere extension of the original contract; Case v. Fant, 53 Fed. 41, 3 C. C. A. 418, 10 U. S. App. 415; Colebr. Collat. Secur. § 14.

Assignment by the pledgee is valid, in the absence of an agreement to the contrary, and carries with it all the collaterals pledged as security. The pledgor is not injured thereby, his right to redeem remaining unimpaired; Drake v. Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 586; Waddle v. Owen, 43 Neb. 489, 61 N. W. 731; Hallack L. & Mfg. Co. v. Gray, 19 Colo. 149, 34 Pac. 1000. The pledgor may transfer his right to

a third party, who may bring trover against the pledgee if the latter, after tender of the amount of the debt, refuse to deliver the pledge; Bush v. Lyon, 9 Cow. (N. Y.) 52; L. R. 1 Q. B. 585; In re Ashton's Appeal, 73 Pa. 153; Belden v. Perkins, 78 Ill. 449.

Conversion. If the pledgee assign the debt without the collateral he loses his lien on the latter, and the pledgor can recover it. If he assign the collateral, except by exercising whatever right of sale he has under the pledge, he is liable to the pledgor, who has an immediate right of action, without tendering the amount due, for the conversion, though the defendant can offset the debt due him; Smith v. Savin, 69 Hun 311, 23 N. Y. Supp. 568. If he hold negotiable paper he has no right to sell it, but should wait until its maturity and then collect it; Goldsmidt v. First Methodist Church, 25 Minn. 202; Joliet I. & S. Co. v. Brick Co., 82 Ill. 548, 25 Am. Rep. 341; Alex. L. & H. R. Co. v. Burke, 22 Gratt. (Va.) 262; Wheeler v. Newbould, 16 N. Y. 392; but a court may under certain circumstances order a judicial sale of it; Cleghorn v. Trust Co., 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615. See Blood v. Loan Co., 164 Pa. 95, 30 Atl. 362; Boldewahn v. Schmidt, 89 Wis. 444, 62 N. W. 177; Dimock v. Bank, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643; Manning v. Shriver, 79 Md. 41, 28 Atl. 899. Treating the pledge as his own property in disregard of his obligation to the pledgor is a conversion; Sheridan v. Presas, 18 Misc. 180, 41 N. Y. Supp. 451.

Shares of stock have no individuality, no earmarks. The certificates are merely evidence of ownership, muniments of title, like title deeds. Therefore a pledgee of stocks need not preserve a careful separation of certificates connected with each transaction, but complies with his obligation by holding at all times a sufficient number of shares to answer the pledge when called on; Hubbell v. Drexel, 11 Fed. 115; Smith v. Bank, 82 Tex. 368, 17 S. W. 779. The right to repledge for his own debt was not enjoyed by a common-law pledgee, but where a custom of brokers justifies re-pledging securities of customers, it is not unlawful; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; [1893] 2 Ch. Div. 120. No usage will justify such re-pledging of the collateral as to put it out of the power of the pledgee to return it on payment of his debt; that would be to destroy the contract; German Sav. Bk. v. Renshaw, 78 Md. 475, 28 Atl. 281. If a broker re-hypothecate for a larger amount than the pledgor's debt to him, for his own benefit, he is guilty of conversion; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219. See, as to pledgees of shares, In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. Rep. 639.

Re-delivery to pledgee. Possession is of the very essence of the pledge, and if possession be re-delivered by the pledgee, or with his consent, without more, the pledge is extinguished. The exceptions to the rule are where the pledgor holds as the pledgee's agent, or where the pledge is re-delivered for a temporary purpose only, *e. g.* for sale, or for collection or suit by the pledgor; Easton v. Bank, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. Ed. 210; [1895] App. Cas. 56; Winslow v. Iron Co. (Tenn.) 42 S. W. 698; Leahy v. Simpson's Adm'r, 60 Mo. App. 83; Cooley v. Ry. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609. Such possession by the pledgor will not defeat the pledge.

Property. The pledgee has at common law a special property in the pledge, and is entitled to the exclusive possession of it during the time and for the objects for which it is pledged. If a wrong-doer take the pledge from him, he is not thereby ousted from his right. His special property is enough for him to support replevin or trover against the wrong-doer. He has, moreover, a right of action, because he is responsible to his pledgor for proper custody of the bailment. The pledgor, also, may have his action against the wrong-doer resting it on the ground of his general property. A judgment for either pledgor or pledgee is a bar against a similar action by the other; 2 Bla. Com. 395; 1 B. & Ald. 59; Lyle v. Barker, 5 Binn. (Pa.) 457. See White v. Webb, 15 Conn. 302; Thayer v. Hutchinson, 13 Vt. 504, 37 Am. Dec. 607.

The pledgee may bring replevin or trover against the pledgor if the latter remove the pledge before paying the debt and thus injure the pledgee's rights, on the ground that the owner has parted with his absolute right of disposing of the chattel until he has redeemed it from its state of pledge; 2 Taunt. 268; Walcott v. Keith, 22 N. H. 196; Minott v. Elliott, 2 McCord (S. C.) 126. He recovers only the value of his special property as against the pledgor, or one who derives title from him; Brownell v. Hawkins, 4 Barb. (N. Y.) 491; but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the owner; White v. Webb, 15 Conn. 302.

If the owner brings the action and recovers the whole damages, including those for deprivation of possession, it must be with the consent of the pledgee.

A creditor of the pledgor can only take his interest, and must pay the debt before securing the pledge. It is now settled that the pledgor's general property in the pledge may be sold on execution, and the purchaser or assignee of the pledgor succeeds to the pledgor's rights and may himself redeem. At common law, a pledge could not be taken in execution; 1 Ves. 278; Srodes v. Caven, 3 Watts (Pa.) 258; Pomeroy v. Smith, 17

Pick. (Mass.) 85; Averill v. Irish, 1 Gray (Mass.) 254; Dowler v. Cushwa, 27 Md. 354; Briggs v. Walker, 21 N. H. 72. On an extent, the king takes a pawn on paying the pawnee's debt; 2 Chit. Prerog. 285.

Where securities have been pledged by assignment and delivery, it would seem that the property vests in the pledgee, who in suit upon them can recover their full value; Morgan v. Lake View Co., 97 Wis. 275, 72 N. W. 872. It has been held, however, that the pledgor does not entirely lose his right to protect his interests and can proceed against the maker of notes transferred by him as collateral; O'Kelly v. Ferguson, 49 La. Ann. 1230, 22 South. 783; and that when the pledgee refuses to proceed for collection he can proceed in equity against the pledgee and the maker; Baker v. Burkett, 75 Miss. 89, 21 So. 970. A bill which discloses that complainant has pledged the stock for which he sues is not demurrable on the ground that it fails to show payment in full of the debt for which the stock was pledged, because a pledgor always has an interest sufficient to enable him to maintain a suit; Smith v. Lee, 77 Fed. 779. Where a pledgee of securities has wrongfully re-hypothecated them, and the owner secures them by paying the debt for which they were re-hypothecated, a judgment recovered by the pledgor against the original pledgee for the conversion does not vest the title to the securities in the pledgee; Union Pac. Ry. Co. v. Schiff, 78 Fed. 216.

Ordinary care. The pledgee is bound to take ordinary care of the pledge, and is liable only for neglect of such care, the bailment being for the mutual benefit of the parties; Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. Rep. 667; Damon v. Waldteufel, 99 Cal. 234, 33 Pac. 903. Where he is to do work upon the pledge and incur expenditure he must use reasonable diligence to secure the best net results, and account, showing that expenses for which allowance is claimed were reasonable and necessary; Second N. Bk. v. Sproat, 55 Minn. 14, 56 N. W. 254; where he is to sell, paying himself out of the proceeds, he will be liable for carelessness in properly keeping the pledge, and for failing to sell until the market has fallen; Anderson v. Carothers, 18 Wash. 520, 52 Pac. 229. If the pledge is lost, and the pledgee has not failed to exercise ordinary care, he may still recover his debt. Such losses often result from casualty, superior force, or intrinsic defect against which a man of ordinary prudence would not have effectually guarded himself. If a pledgor find it necessary to employ an agent, and exercise ordinary care in the selection, he will not be liable for the latter's neglect or misconduct; Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87; Exeter Bank v. Gordon, 8 N. H. 66; St. Losky v. Davidson, 6 Cal. 643; Plymouth Co. Bk. v. Gilman, 9 S. D. 278, 68 N. W. 735, 62 Am. St. Rep. 868. Loss or depreciation in value of the thing pledged, through negligence of the pledgee, does not operate to extinguish *pro tanto* the debt secured; Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. Rep. 667; but the pledgee is liable to the pledgor for the depreciation in value of the property pledged after a tender of the amount due and a refusal of the pledgee to deliver; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

Loss by theft is *prima facie* evidence of a want of ordinary care, and the bailee must rebut the presumption. The facts in each case regulate the liability. Theft is only evidence, in short, and not absolute presumption, of negligence. Perhaps the only safe rule is that, where the pledgee pleads loss by theft as ground for not performing his duty, to excuse himself he must show that the theft could not have been prevented by ordinary care on his part. If the bailor should assert in his declaration that the pledge was lost by the bailee's fault, he would be compelled to prove the charge as laid.

The holder of collateral security, by accepting it, binds himself to use reasonable diligence in protecting it; Northwestern N. Bk. v. Mfg. Co., 71 Fed. 113, 17 C. C. A. 638. Thus, by negligently releasing the indorser he becomes chargeable with the amount of a note; Chemical N. Bk. v. Armstrong, 50 Fed. 798; if he refuse to sue on a note the pledgor may file a bill to have the note collected and credited on the debt; Baker v. Burkett, 75 Miss. 89, 21 South. 970; by failure to use due diligence to collect accounts assigned he becomes responsible for the resulting losses; Montague v. Stelts, 37 S. C. 200, 15 S. E. 968, 34 Am. St. Rep. 736; he must account for the real value of an insurance policy surrendered to the company for its cash value without notice to the pledgor; Manton v. Robinson (R. I.) 37 Atl. 8. But as assignee of a policy of life insurance he is not obliged to pay premiums unless he has engaged to do so; Killoran v. Sweet, 72 Hun 194, 25 N. Y. Supp. 295; though authorized to sell collateral in the event of its depreciation he is not bound to do so, nor liable if he fails; Howell v. Dimock, 15 App. Div. 102, 44 N. Y. Supp. 271; by taking notes secured on property he incurs no obligation to sue for the property, and if he does so, at the request of the pledgor, he incurs no obligation to take charge of it, and advance expenses upon it; Bank v. Pulley Co., 97 Tenn. 308, 37 S. W. 8; when only required to collect a sufficient sum on a note to pay the debt, and then to turn it over to the pledgor, after collecting such sum, he is not liable for failure to take prompt steps to collect the residue at maturity; Clark v. Cullen

(Tenn.) 44 S. W. 204. But he is responsible as bailee after, as well as before, the maturity of the debt; Butler v. Greene, 49 Neb. 280, 68 N. W. 496.

Pledgee's expenses. Whatever reasonable expense is necessarily incurred by the pledgee in keeping and caring for the property pledged, and protecting it against liens and taxes and assessments, and asserting title to it, or rendering it available, is a fair charge against the property pledged; Furness v. Bank, 147 Ill. 570, 35 N. E. 624; Bank v. Frese, 116 Cal. 9, 47 Pac. 783; Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33. For any unusual care he may get compensation from the pledgor, if it were not contemplated by the parties or is implied in the nature of the bailment; 2 Salk. 522; 1 Pars. Contr. 593. He may collect his expenses and costs out of a note held as collateral; Hickson Lumber Co. v. Pollock, 139 N. C. 174, 51 S. E. 855.

Use. The reasonable use of a pledge is allowed to a pledgee, according to Lord Holt, Sir Wm. Jones, and Story, provided it be of no injury or peril to the bailment. The reason given by Story is precise, namely, that where use of the pledge is beneficial to it, or cannot depreciate it, the consent of the pledgor to such use may be fairly presumed; but not otherwise. Still, the word peril is somewhat broad. If the pawn be in its nature a charge upon the pawnee,—as a horse or a cow,—he may use it, moderately, by way of recompense. The pawnee is answerable in damages for an injury happening while he is using the pawn. Still, though he use it tortiously, he is only answerable by action. His pledgee's lien is not thereby forfeited; Thompson v. Patrick, 4 Watts (Pa.) 414. A pledgee can exercise a horse, but not loan it for hire. The rule is, that if he derive any profits from the pledge they must be applied to the debt; Houton v. Holliday, 6 N. C. 111, 5 Am. Dec. 522. A sewing machine that is pledged cannot be used; McArthur v. Howett, 72 Ill. 358.

Redemption. The pledgor may redeem at any time until his right to do so has been foreclosed by judicial decree, or by sale. He has his whole lifetime in which to redeem, and the right survives to his representatives; Perry v. Craig, 3 Mo. 516. Failure to pay the debt at maturity works no forfeiture; Hyams v. Bamberger, 10 Utah 3, 36 Pac. 202. If the pledgee fail to deliver on tender, the pledgor may maintain trover, or if special ground be shown, may proceed in equity; Nelson v. Owen, 113 Ala. 372, 21 South. 75.

Remedies of pledgee. The contract of pledge is *security* for a debt or engagement, that is to say it is a secondary or subordinate contract, and the pledgee may enforce the primary contract, or may proceed upon any one of several collateral securities, or may proceed upon all together, unless restricted by his engagement with the pledgor, though he can have but one satisfaction of the debt. It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor; Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513; Jennings v. Loeffler, 184 Pa. 318, 39 Atl. 214; Burnham v. Windram, 164 Mass. 313, 41 N. E. 305; Barnes v. Bradley, 56 Ark. 105, 19 S. W. 319; Childs v. Carlstein Co., 76 Fed. 86. Even where the pledgee wrongfully claims that he is the owner of the goods, the pledgor cannot recover them without a tender of the debt; 67 L. T. 642; and the levy of an attachment by the pledgee on the pledge in the hands of the pledge-holder is not a waiver of the pledge; Marshall v. Otto, 59 Fed. 249; Guenther v. Cary (Ky.) 34 S. W. 232. But one personal obligation cannot constitute collateral security for another obligation of the same debtor, hence if he hold bonds of a corporation as collateral for its note he cannot, if the pledgor become insolvent, claim both on the notes and the bonds; International Trust Co. v. Cattle Co., 3 Wyo. 803, 31 Pac. 408, 19 L. R. A. 640; In re Waddell-Entz Co., 67 Conn. 324, 35 Atl. 257.

Formerly on default the pledgee had no power to realize upon his pledge, in the absence of agreement, except by securing a judicial decree; Glanv. lib. x. c. 6; 5 Bligh N. S. 136; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 100; Wadsworth v. Thompson, 3 Gilman (Ill.) 423; Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723. While this might in some cases still be necessary (see Cleghorn v. Trust Co., 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615), it is now generally conceded that on default the pledgee may sell after demand for payment and reasonable notice to pledgor. The pledge must be sold at public auction, and if it be divisible, only enough must be sold to pay the debt.

Generally an agreement is entered into when the pledge is made which provides what remedies the pledgee shall have in case of default, and the agreement of the parties will be sustained if not fraudulent or contrary to public policy; Hyatt v. Argenti, 3 Cal. 151; Hunter v. Hamilton, 52 Kan. 195, 34 Pac. 782. Thus the pledgor may waive notice; Williams v. Trust Co., 133 N. Y. 660, 31 N. E. 29; or authorize the pledgee to sell at public or private sale without advertisement or notice, at his discretion; Smith v. Lee, 84 Fed. 557; but the sale must be in good faith; Leahy v. Lobdell & Co., 80 Fed. 665, 26 C. C. A. 75. The fact that the price realized was small will not affect the purchaser's title; Wheelwright v. Transp. Co., 56 Fed. 164. But a merely colorable and pretended sale of the pledged property by the pledgee does not affect the rights of the pledgor as against one not standing in the position of a *bona fide* purchaser; Norton v. Baxter, 41

Minn. 146, 42 N. W. 865, 4 L. R. A. 305, 16 Am. St. Rep. 679. The pledgee may in anticipation of default make a valid contract to sell the collateral when the default occurs; Taft v. Church, 162 Mass. 527, 39 N. E. 283. But a stipulation for a forfeiture to pledgee in case of default is void; Vickers v. Battershall, 84 Hun 496, 32 N. Y. Supp. 314; and a court of equity will scrutinize carefully an agreement for transfer of ownership, and set it aside if it appear to have been obtained under a harsh contract, brought about by the position of vantage occupied by the pledgee; Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50.

The pledgee of a note may collect it when due, and of a mortgage, may foreclose it; Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 N. E. 777, 16 Ann. Cas. 123; he may collect dividends on pledged stocks; *id.;* but a pledged note cannot be sold until maturity; see 14 Harv. L. Rev. 462.

Though a pledge authorizes a sale, in case of default, at public or private sale without notice, a public sale without public notice is invalid, though in such case notice to the pledgor is not essential; Tennent v. Ins. Co., 133 Mo. App. 345, 112 S. W. 754; where a broker advanced the entire price of shares bought for a customer, a notice to him to take up the stock or furnish a margin, or the stock would be sold, is defective if it contain no notice of the time and place of the sale (there being no agreement dispensing with notice) and a sale thereupon made on the "curb" constitutes a conversion; Content v. Banner, 184 N. Y. 121, 76 N. E. 913, 6 Ann. Cas. 106.

Mere delay by the pledgee in enforcing his rights against the collateral security does not make him liable for the loss of the security; Loeb v. Bank, 88 Ark. 108, 113 S. W. 1017; but where the holder of a note pledges it, the pledgee is liable if guilty of laches, if by seasonable legal proceedings he might have collected it; Meyer Bros. v. Colvin, 122 La. 153, 47 South. 447.

Where an agreement pledging securities to a trustee for the payment of interest on certificates provided that in case of default the trustee might institute such proceedings as counsel might advise, the trustee was entitled on default to resort to a court of equity, although the agreement provided a mode of enforcement without the intervention of a court; Land Title & Trust Co. v. Asphalt Co., 121 Fed. 192.

A pledgee as such has such an equitable interest therein as will entitle him to be heard in equity concerning the protection of his interests therein; Gorman-Wright Co. v. Wright, 134 Fed. 363, 67 C. C. A. 345.

In the absence of an agreement permitting it, the pledgee cannot buy the pledge; Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592; Easton v. Bank, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. Ed. 210; though his purchase is voidable merely, at the election of the pledgor, and not void; Farmers' Loan & Trust Co. v. R. Co., 54 Fed. 759, 4 C. C. A. 561; First N. Bk. v. Rush, 85 Fed. 539, 29 C. C. A. 333. But on procuring a decree of foreclosure in a proceeding in equity to which he has made the pledgor a party, he can sell, and buy in, taking an indefeasible title; Anderson v. Olin, 145 Ill. 168, 34 N. E. 55.

It is almost an universal rule that a pledgee is precluded from buying at a sale of the property pledged; Lord v. Hartford, 175 Mass. 320, 56 N. E. 609. When the thing pledged is a mortgage, he may foreclose the mortgage for breach of condition, and such foreclosure is valid against the mortgagee; Smith v. Bunting, 86 Pa. 116. And if the mortgagee, who is also the pledgor, is joined in the foreclosure sale, his right to redeem from the pledgee will likewise be extinguished; Bloomer v. Sturges, 58 N. Y. 168. On the same principle, the pledgee may, with the pledgor's express authority, buy the property at the mortgage sale, with the result that the mortgagee's claim is transferred to the proceeds; Jennings v. Wyzanski, 188 Mass. 285, 74 N. E. 347. But with these qualifications the weight of authority supports the principle that the only effect of the sale is the substitution of the land for the mortgage in the hands of the assignee, who takes the legal title subject to a trust in favor of the pledgor; In re Estate of Gilbert, 104 N. Y. 200, 10 N. E. 148; Montague v. R. Co., 124 Mass. 242; *contra*, Anderson v. Messinger, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094.

When corporate bonds, pledged to secure claims against the company, are sold at public auction and bought in by the pledgee the latter is entitled to be paid the full value of the bonds, and not merely the amount for which they were pledged; Atlantic Trust Co. v. Irr. Co., 86 Fed. 975.

Consult Wigmore, The Pledge Idea, 10 Harv. L. Rev. 1, 389; Denis; Jones, Pledges; Colebrooke, Collateral Securities; Story, Bailments; Schouler, Bailments. See MORTGAGE; SALE; HYPOTHECATION; LIEN.

PLEDGEE. One to whom a thing is pledged.

PLEDGES. **In Pleading.** Those persons who became sureties for the plaintiff's prosecution of the suit. Their names were anciently appended at the foot of the declaration. In time it became purely a formal matter, because the plaintiff was no longer liable to be amerced for a false claim, and the fictitious persons John Doe and Richard Roe became the universal pledges, or they might be omitted altogether; 1 Tidd, Pr. 455; Archb. Civ. Pl. 171; or inserted at any time before judgment; they are now omitted.

PLEDGOR. The party who makes a pledge.

PLEGII DE RETORNO HABENDO. Pledges to return the subject of distress, should the right be determined against the party bringing the action of replevin. 3 Steph. Com. 422, n.

PLEGIIS ACQUIETANDIS, WRIT DE. The name of an ancient writ in the English law, which lies where a man becomes pledge or surety for another to pay a certain sum of money at a certain day; after the day, if the debtor does not pay the debt, and the surety be compelled to pay, he shall have this writ to compel the debtor to pay the same. Fitzh. N. B. 321.

PLENA FORISFACTURA. See FORISFACTURA.

PLENA PROBATIO. **In Civil Law.** A term used to signify full proof, in contradistinction to *semi-plena probatio*, which is not merely a suspicion, but such evidence as produces a reasonable belief though not complete evidence. Tait, Ev. 273; Code 4. 19. 5. etc.; 1 Greenl. Ev. § 119.

PLENARTY. **In Ecclesiastical Law.** Signifies that a benefice is full. See AVOIDANCE.

PLENARY. Full; complete.

In the courts of admiralty, and in the English ecclesiastical courts, causes or suits in respect of the different course of proceedings in each are termed plenary or summary. Plenary, or full and formal, suits are those in which the proceedings must be full and formal; the term summary is applied to those causes where the proceedings are more succinct and less formal. 2 Chitty, Pr. 481.

PLENE ADMINISTRAVIT (Lat. he has fully administered). A plea in bar entered by an executor or administrator, by which he affirms that he had not in his possession at the time of the commencement of the suit, nor has had any time since, any goods of the deceased to be administered; when the plaintiff replies that the defendant had goods, etc., in his possession at that time, and the parties join issue, the burden of the proof will be on the plaintiff. See Fowler v. Sharp, 15 Johns. (N. Y.) 323; 1 B. & Ald. 254; 11 Viner, Abr. 349; 12 *id.* 185; 3 Saund. (a) 315, n.

PLENE ADMINISTRAVIT PRÆTER (Lat. he has fully administered except). A plea by which a defendant executor or administrator admits that there is a residue remaining in his hands unadministered.

PLENE COMPUTAVIT (Lat. he has fully accounted). A plea in an action of account render, by which the defendant avers that he has fully accounted. Bac. Abr. *Accompt* (E). This plea does not admit the liability of the defendant to account. Whelen v. Watmough, 15 S. & R. (Pa.) 153.

PLENIPOTENTIARY. Possessing full powers; as, a minister plenipotentiary is one authorized fully to settle the matters connected with his mission, subject, however, to the ratification of the government by which he is authorized. See MINISTER.

PLENUM DOMINIUM (Lat.). The unlimited right which the owner has to use his property as he deems proper, without accountability to any one.

PLEVIN. A warrant, or assurance.

PLIGHT. An old English word, used sometimes for the estate with the habit and quality of the land. Co. Litt. 221. It extends to a rent-charge and to a possibility of dower. *Id.*

PLIMSOLL'S MARK. See LOAD LINE.

PLOUGH ALMS. The ancient payment of a penny to the church from every ploughland. 1 Mon. Aug. 256.

PLOUGH-BOTE. An allowance made to a rural tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND. **In Old English Law.** An uncertain quantity of land. According to some opinions, it contains one hundred and twenty acres. Co. Litt. 69 *a*.

PLOUGH SILVER. Money formerly paid by some tenants in lieu of service to plough the lord's land.

PLUNDER. The capture of personal property on land by a public enemy, with a view of making it his own. The property so captured is called plunder. See, for a full discussion of the subject, U. S. v. Stone, 8 Fed. 246; Carter v. Andrews, 16 Pick. (Mass.) 9; CAPTURE; BOOTY; PRIZE.

PLUNDERAGE. The embezzlement of goods on board of a ship.

The rule of the maritime law in such cases is that the whole crew shall be responsible for the property thus embezzled, because there must be some negligence in finding out the depredator; Lewis v. Davis, 3 Johns. (N. Y.) 17; Knap v. The Eliza and Sarah, 1 Pet. Adm. 200, Fed. Cas. No. 7,873; Mariners v. Kensington, 1 Pet. Adm. 239, Fed. Cas. No. 9,085; 4 B. & P. 347.

PLURIES (Lat. many times). A writ issued subsequently to a first and second (alias) of the same kind, which have proved ineffectual. The name is given to it from the word *pluries* in the Latin form of the writ: "We command you, as we have often (*pluries*) commanded you before," which distinguishes it from those which have gone before. *Pluries* is variously translated, in the modern forms of writs, by "formerly," "more than once," "often." The next writ to the pluries is called the second pluries; and so on. 3 Sharsw. Bla. Com. 283; App. 15; Nat. Brev. 33.

PLY. A hackney carriage plies for hire if it solicits passengers in a railway station. L. R. 6 Q. B. 351.

POACHING. Unlawfully entering land in night-time, armed, with intent to destroy game. 1 Russ. Crimes 469; 2 Steph. Comm. 20.

There is an interesting title on the early English *game laws* in Jacob, Law Dict.

POCKET JUDGMENT. A statute-merchant which was enforceable at any time after non-payment on the day assigned, without further proceedings.

POCKET SHERIFF. **In English Law.** A sheriff appointed by sole authority of the crown, not being one of the three nominated by the judges in the exchequer. 1 Sharsw. Bla. Com. 342.

PŒNA. "Originally signified the price or composition by which crime was expiated." James C. Carter, The Law, &c. 42.

PŒNA CORPORALIS. Corporal punishment.

PŒNA PILLORALIS. Punishment of the pillory Fleta, lib. 1, ch. 38, § 11.

POINT. **In Practice.** A proposition or question arising in a case.

It is the duty of a judge to charge the jury on every point of law properly arising out of the issue which is propounded to him by counsel. But where the conclusion of a point does not necessarily flow from the premise contained in the first part of it, it is not error for the court to refuse to affirm it; Bascom v. Mfg. Co., 182 Pa. 427, 38 Atl. 510.

POINT RESERVED. A point or question of law, which the court, not being fully satisfied how to decide, in the trial of a cause, rules in favor of the plaintiff, but subject to revision on a motion for a new trial. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside. Tr. & H. Pr. § 708. It must be a pure question of law; the facts on which it is based must appear on the record, distinctly stated; and it must be a point which is decisive of the case. The verdict must be in favor of the plaintiff, and the defendant then moves for a new trial and judgment *non obstante veredicto*. See NON OBSTANTE VEREDICTO.

Statements of fact and of the law applicable thereto submitted to a trial judge with a request that he so charge the jury. See BRIEF; PAPER BOOK; CHARGE; INSTRUCTION.

POISON. **In Medical Jurisprudence.** Any substance which, when taken into the living organism, is capable of causing impairment or cessation of function. Blyth, Poisons.

The history of poisoning, and many remarkable early instances of a wide-spread use of poisons, are recorded in works on medical jurisprudence. See these, and also, especially, Taylor, Poisons; Archb. Cr. Pract. Waterman's ed. 940; Whart. & Stillé, Med. Jur.; 1 Beekman, Hist. Jur. 74. The classification proposed by Mr. Taylor (Med. Jur. §§ 71, 74, 78) is as follows:—

- IRRITANTS.
  - MINERAL
    - NON-METALLIC — Acids, Alkalies and their Salts. Metalloids.
    - METALLIC *(Arsenic)*.
  - VEGETABLE—*(Croton Oil)*.
  - ANIMAL—*(Cantharides)*.
- NARCOTICS.
  - CEREBRAL *(Morphia)*.
  - SPINAL *(Strychnia)*
  - CEREBRO-SPINAL *(Conia, Aconitina)*.
- GASEOUS. *(Carbon Monoxide, Chlorine)*.

Irritant poisons, when taken in ordinary doses, occasion speedily violent vomiting and purging, preceded, accompanied, or followed by intense pain in the abdomen, commencing in the region of the stomach. The irritant effect of many poisons is a like feature, exerted upon various organs of excretion or secretion. The corrosive poisons, as distinguished from those in a more limited sense termed irritant, generally produce their results more speedily, and give chemical indications; but every corrosive poison acts as an irritant in the sense here adopted.

Narcotic poisons act chiefly on the brain or spinal marrow. Either immediately or some time after the poison has been swallowed, the patient suffers from headache, giddiness, paralysis, stupor, delirium, insensibility, and, in some instances, convulsions. Many narcotic poisons, of course, give rise to symptoms peculiar to themselves.

The effects of one class are, however, sometimes produced by the other,—more commonly as secondary, but sometimes even as primary symptoms.

The evidence of poisoning as derived from *symptoms* is to be looked for chiefly in *the suddenness of their occurrence;* this is perhaps the most reliable of all evidence derived from symptoms in cases of criminal poisoning; see Taylor, Pois. 107; Christison, Pois. 42; though none of this class of evidence can be considered as furnishing anything better than a high degree of probability: *the regularity of their increase;* this feature is not universal, and exists in many diseases; *uniformity in their nature;* this is true in the case of comparatively few poisons; *the symptoms begin soon after a meal;* but sleep, the manner of administration, or certain diseases, may affect this rule in the case of some poisons; *when several partake at the same time of the same poisoned food, all suffer from similar symptoms;* 2 Park. C. C. 235; Taylor, Pois. 118; *the symptoms first appearing while the body is in a state of perfect health;* Archb. Cr. Pl. Waterman ed. 948.

Appearances which present themselves on post-mortem examinations are of importance in regard to some classes of irritant poisons;

see The Hersey Case, Mass. 1861; Palmer's Case, Taylor, Poisons 697; 17 Am. L. Reg. N. S. 145; but many poisons leave no traces which can be so discovered.

Chemical analysis often results in important evidence, by discovering the presence of poison, which must then be accounted for; but a failure to detect it by no means proves that it has not been given. Christison, Poisons 61, 62.

The evidence derived from *circumstances* differs in nothing in principle from that in case of commission of other crimes.

Homicide by poisoning is generally either accidental, so as not to amount to murder, or deliberate: yet it has been held that there may be a verdict of murder in the second degree under an indictment for poisoning; State v. Dowd, 19 Conn. 388. The doctrine of principal and accessory is also modified to some extent in its application to cases of poisoning; 2 Mood. Cr. Cas. 120; 9 C. & P. 356; 9 Co. 81. To constitute an administering of poison, it is not necessary that there should be a delivery by hand; 4 C. & P. 356; 1 Bish. Cr. L. § 651.

Intent to kill need not be specifically alleged in an indictment for murder by poison; 1 East, Pl. Cr. 346; 3 Cox, C. C. 300; 8 C. & P. 418; Com. v. Hersey, 2 Allen (Mass.) 173. Where a wholesale dealer supplied a poisonous drug in place of a harmless drug ordered, he was held liable in damages to the customer who bought it from the retailer and suffered injury from taking it; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

Many of the states have statutes inflicting severe penalties upon the administering of poisons with a malicious intent. See Archb. Cr. Pr. Waterman's ed. 942; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891.

Practicing physicians, who are graduates of a medical college, are competent to testify as experts on the subject of arsenical poisoning, although it is not shown that they have had actual experience in poison cases; Siebert v. People, 143 Ill. 571, 32 N. E. 431.

As to gas poison, see 15 Med. Leg. J. 276.

POLE. A measure of length, equal to five yards and a half. See MEASURE.

POLES. The erection of poles in a street or on the sidewalk is an obstruction of the highway, and, like all other obstructions, is only justified when done under authority of law; People v. Tel. Co., 31 Hun (N. Y.) 596; Keasbey, Electric Wires. Where authorized, they must be erected in such manner as to cause the least interference with public travel and this condition is implied even if it were not expressed in the authority given; *id.;* in a proper case it is left to the jury to determine the question of damage; 15 N. J. L. J. 50; Wolfe v. Tel. Co., 33 Fed. 320; see Roberts v. Tel. Co., 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; but the rule of reasonable care does not require the company to provide against all contingencies of accident or inconvenience; Sheffield v. Tel. Co., 36 Fed. 164. It has been justly said that the question of damage arising from the obstruction of a highway by poles, depends largely on the extent of the right of the public which is under the control of the legislature, and subject to the exercise of its discretion in legalizing new uses of the highway; Keasbey, Electric Wires 157.

The question most discussed with respect to poles, has been whether their erection is a legitimate use of the street, and whether it imposes a new servitude on the land of the abutting owner. The substitution of electricity for horse power is said not to be a change of use; Keasbey, Electric Wires 106; but a different view was taken by the New Jersey supreme court; 15 N. J. L. J. 39, 45.

That they *are* an additional burden: Postal Telegraph-Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390 (telegraph on highway); Goddard v. R. Co., 202 Ill. 362, 66 N. E. 1066 (electric on highway); Bronson v. Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639 (poles on street or highway); Andreas v. Electric Co., 61 N. J. Eq. 69, 47 Atl. 555 (electric on highway); Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554 (electric on railway); Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720 (telephone in city); Cosgriff v. Tel. Co., 15 N. D. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142 (rural telegraph and telephone); Callen v. Electric L. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782 (electric in city); Krueger v. Tel. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298 (telephone in city); Gray v. Tel. Co., 92 App. Div. 89, 86 N. Y. Supp. 771 (rural telephone); Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908 (county roads).

That they are not an additional burden: Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358 (telephone in city); McCann v. Tel. Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156 (rural telephone); Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955 (same); People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721 (rural telegraph); Gulf Coast I. & M. Co. v. Bowers, 80 Miss. 570, 32 South. 113 (city's electric plant); Frazier v. Tel. Co., 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. Rep. 856, 5 Ann. Cas. 838 (telephone in city); Lowther v. Bridgeman, 57 W. Va. 306, 50 S. E. 410 (rural telephone); Kirby v. Tel. Co., 17 S. D. 362, 96 N. W. 3, 2 Ann. Cas. 152 (telephone in city).

Where the right to erect poles is recog-

nized, the courts will regulate strictly the manner in which the privilege is used. An injunction has been granted against the erection of broken or unsightly poles; Forsythe v. Tel. Co., 12 Mo. App. 494; so the poles must be set with as little damage as possible and the cutting off trees to clear the way for them will be a ground for recovering damages; Dailey v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; Memphis Bell Tel. Co. v. Hunt, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; Tissot v. Tel. Co., 39 La. Ann. 996, 3 South. 261, 4 Am. St. Rep. 248.

The poles and fixtures of a telephone company erected along the highway by permission of the locality are chattels and may be seized and sold on execution, as they do not become part of the realty; Readfield Tel. & Tel. Co. v. Cyr, 95 Me. 287, 49 Atl. 1047; but the poles and wires of an electric light plant have been held appurtenances to the realty on which the operating plants were built; Capital City Gas Light Co. v. Ins. Co., 51 Ia. 31, 50 N. W. 579; Fechet v. Drake, 2 Ariz. 239, 12 Pac. 694; Badger Lumber Co. v. Power Co., 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301. In another case they were held not fixtures to the land on which the electric light is generated or appurtenant thereto for the purpose of taxation as real estate, though they could not be assessed as personal property because not within the enumeration of the statute; Newport Illuminating Co. v. Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266.

See HIGHWAYS; ELECTRIC LIGHT; WIRES; RAILROADS; LICENSE; TELEGRAPH.

POLICE. That species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called the police.

The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form.

Police has also been divided into *administrative police*, which has for its object to maintain constantly public order in every part of the general administration; and *judiciary police*, which is intended principally to prevent crimes by punishing the criminals. Its object is to punish crimes which the administrative police has not been able to prevent.

Policemen have only statutory powers; Martin v. Houck, 141 N. C. 317, 54 S. E. 291, 7 L. R. A. (N. S. 576. See Bargar, Riot Law.

See PENSION.

POLICE JURY. In Louisiana. A name given to certain officers who collectively exercise jurisdiction in certain cases of police: as, levying taxes, regulating roads, etc.

POLICE POWER. The powers of government inherent in every sovereignty. License Cases, 5 How. (U. S.) 583, 12 L. Ed. 256; In re Allyn's Appeal, 81 Conn. 534, 71 Atl. 794, 23 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225. First used by Marshall, C. J., in Brown v. Maryland, 12 Wheat. 443, 6 L. Ed. 678.

The power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects. Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499. It is much easier to realize the instances and sources of this power than to mark its boundaries or prescribe limits to its exercise; *id.* The general police power in reserved to the states, subject to the limitation that it may not trespass on the rights and powers vested in the national government; In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848.

The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. Thorpe v. R. Co., 27 Vt. 149, 62 Am. Dec. 625. Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

The authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest. People v. Budd, 117 N. Y. 14, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460. Police power extends to what is for the greatest welfare of the state, and is not confined merely to the suppression of what is offensive, disorderly or unsanitary. Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499.

It embraces the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offences against itself, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent the conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with the right enjoyment of rights by others; Cooley, Const. Lim. 572.

Most of the law on this subject has been the growth of the nineteenth century and the latter half of it. The earliest instances of the exercise of this power were found when houses were destroyed to prevent the spread of fire. The right to take a man's property in such cases was called the law

of overruling necessity. There are also some very early instances of sanitary legislation. An act of parliament in 1388 imposed a penalty for throwing animal filth or refuse into rivers, and one of 1489 prohibited the slaughtering of cattle in the cities. Laws regulating wharfingers, millers, common carriers, innkeepers, chimney sweeps, auctioneers, ferry-keepers and drovers have been common for many centuries before the term was used.

Among former exercises of the police power which have become obsolete, may be mentioned laws restraining extravagance in dress, punishing heresy, interfering with the worship of particular churches or sects, and restraining speculation, or combinations to control a product and by withholding it, increase the price thereof; Tiedm. Pol. Pow. § 96 *a*; although in some of the states there are statutory provisions forbidding the cornering of grain, they are repetitions of old laws as to forestalling and engrossing; *id.*; Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623.

This right must be clearly distinguished from the administration of criminal law and from police regulations and police authority, nor should it be confused with eminent domain, as has sometimes been done, or with the power of taxation. It is distinct from both of these. It is more despotic and broader in its action than the right of eminent domain, caring for the public health and morals of the community, restraining individuals from interfering with them, and when it is found necessary to take private property under the police power, no compensation need be given the owner unless expressly provided by statute; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; New Orleans G. L. Co. v. Drainage Commission, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490. It is the application of the personal right or principle of self-preservation of the body politic; Wynehamer v. People, 13 N. Y. 378; to its exercises there are no limits except the restrictions contained in the written constitution; 1 Thayer, Const. L. 720; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315.

The confusion of police power with the power of taxation usually arises in cases where the police power has affixed a penalty to a certain act, or required licenses for certain occupations to be taken out and a sum paid therefor. But this is in no sense taxation, but an attempt to levy a tax which might be open to the constitutional objection of lack of equality. The admitted right to regulate includes the implied power to license or tax; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. See LICENSE; Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; Phillips v. Mobile, 208 U. S. 472, 28 Sup. Ct. 370, 52 L. Ed. 578.

Each law relating to the police power involves the questions: First, is there a threatened danger? Second, does the regulation involve a constitutional right? Third, is the regulation reasonable? People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715. See Health Department v. Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579.

It extends to all the great public needs; Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260; includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them, by compelling co-operation among banks in order to protect depositors of failed banks; Noble State Bk. v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; Assaria State Bk. v. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123.

An ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; Noble State Bk. v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

The distinction between an incidental injury to rights of private property resulting from the exercise of this power, and the *taking* within the meaning of the constitution of private property for public use, is recognized in Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336 (involving a claim for damages directly resulting from the construction by the city of Chicago of a tunnel under the Chicago river, whereby, for a very long time, the plaintiff was prevented from using its docks, and other property for purposes of business); Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205 (relating in part to the lawful prohibition by the state of the use of private property in a particular way, whereby its value was materially diminished, if not destroyed); New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269 (involving the question whether a railroad company could be required to remove a grade crossing and to establish another at a different place); Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979 (whether it was a condition of the exercise by the state of its authority to regulate the use of private property, that the owner should be indemnified for the injury resulting from

the exercise of such authority); Gibson v. U. S., 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996 (in which the owner of a farm on an island in the Ohio river, at which there was a landing, sought to recover compensation for injury done to it by the construction by the United States of a dyke for the purpose of concentrating the flow in the main channel of the river); Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126 (involving the question whether the United States was required to compensate an owner of land fronting on a navigable river when his access to the shore was permanently obstructed by a pier erected for the purpose of improving navigation); Mills v. U. S., 46 Fed. 738, 12 L. R. A. 673 (where an improvement by the United States of the Savannah river resulted in so raising the water in that river as to flood the adjacent rice fields, that were ordinarily and naturally drained in the river, and rendering it necessary that expense be incurred to provide new drainage from those fields into a back river). These cases are all cited in the opinion in New York, N. H. & H. R. Co. v. Interstate Com. Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515.

The rights insured to private corporations by their charters and the manner of their exercises are subject to such new regulations as from time to time may be made by the state; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; but these regulations must not conflict with the charter, nor take from the corporation any of its essential rights and privileges; Cooley, Const. Lim. 718; Sloan v. R. R., 61 Mo. 24, 21 Am. Rep. 397; Attorney General v. R. Co., 35 Wis. 425; Louisville & N. R. Co. v. Kentucky, 161 U. S. 695, 16 Sup. Ct. 714, 40 L. Ed. 849.

A municipal corporation may regulate the speed of railroad trains within its limits; Chicago, B. & Q. R. Co. v. Haggerty, 67 Ill. 113; (but only in the streets and public grounds of the municipality; State v. Jersey City, 29 N. J. L. 170); require the railroad to fence its tracks; Thorpe v. R. Co., 27 Vt. 156, 62 Am. Dec. 625; regulate the grade of the railroad and prescribe how the railroads may cross each other and apportion expenses of making necessary crossings between the corporations owning the roads; Pittsburg & C. R. Co. v. R. Co., 77 Pa. 173; it may require the railroad company to repair and maintain a safe viaduct over a street; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; regulate crossings in a populous city; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 58, 18 Sup. Ct. 513, 42 L. Ed. 948; limit the charges by the railroad company; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; prevent extortion on their part by unreasonable charges, favoritism, or discrimination; Georgia R. & Bank. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; forbid consolidation of competing lines; Louisville & N. R. Co. v. Kentucky, 161 U. S. 697, 16 Sup. Ct. 714, 40 L. Ed. 849; make the company liable for fires; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; require salaries and expenses of a state commission to be borne by the railroad corporations within the state; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; require locomotive engineers to be licensed after examination as to competency; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; require the examination of railroad employés for color blindness; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; regulate the speed of trains at highway and other crossings; Rockford, R. I. & St. L. R. Co. v. Hillmer, 72 Ill. 235; require a bell to be rung or a whistle blown before crossing highways at grade, and flagmen to be stationed at dangerous crossings; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; impose a penalty on conductors for failing to cause their trains to stop five minutes at every station; Davidson v. State, 4 Tex. App. 545, 30 Am. Rep. 166; require them to stop at county seats; Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064; direct the printing upon railroad tickets of any condition limiting the liability of a railroad company in type of a specified size, and provide for the redemption by the company of tickets sold but not used; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238.

A state may regulate insurance business and forbid unjust and oppressive conditions; Com. v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 608; require returns from insurance companies; Eagle Ins. Co. v. Ohio, 153 U. S. 446, 14 Sup. Ct. 868, 38 L. Ed. 778; direct companies operating electric conductors to file maps and plans; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; forbid the running of freight trains on Sunday; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; require prompt delivery of telegraph messages; Western U. Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. It may regulate the use of public highways and their alteration; Cooley, Const. Lim. 725; require the owners of urban property to construct and keep in repair sidewalks in front of it; Woodbridge v. Detroit, 8 Mich. 309; Hart v. Brooklyn, 36 Barb. (N. Y.) 226; regulate bicycle riding on highways; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; control and regulate the use of navigable waters (subject to the commerce powers of congress);

Cooley, Const. Lim. 729; prescribe the maximum charges of a business affected by the public interest; Munn v. People, 69 Ill. 80; *id.*, 94 U. S. 113, 24 L. Ed. 77; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (where a telephone company was held to be a business affected with a public interest); Covington & L. Turnpike Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560. It may regulate plumbing; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785.

In the exercise of its police power, a state may not invade the domain of the national government; Passenger Cases, 7 How. (U. S.) 572, 12 L. Ed. 702; and the states may pass no laws conflicting with existing regulations by the federal government on the subjects intrusted to it; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862. The power of congress to regulate commerce was never intended to prevent the states from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country; Louisville & N. R. Co. v. Kentucky, 161 U. S. 701, 16 Sup. Ct. 714, 40 L. Ed. 849; but since the range of a state's power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard against any needless intrusion; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527.

While sustaining the power of congress to regulate commerce among the states, the supreme court has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, morals and safety by any legislation appropriate to that end which does not encroach upon the rights guaranteed by the national constitution nor come in conflict with acts of Congress; Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 628, 18 Sup. Ct. 488, 42 L. Ed. 878. The line of distinction may well be illustrated by the case of laws for the inspection of articles of food brought into a state; the legislature may prescribe how animals may be killed to be used for food and may fix the time and places and manner of such killing; State v. Davis, 72 N. J. L. 345, 61 Atl. 2; and provide for the inspection of hides and animals; Limburger v. Barker, 17 Tex. Civ. App. 602, 43 S. W. 616. But a state inspection law must not substantially hamper or burden the constitutional right to make and to receive an interstate shipment; Vance v. W. A. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; and a statute requiring, as a condition of sales of meats in a state, that all animals from which such meats are taken shall have been inspected in that state before being slaughtered, is in violation of the commercial clause of the constitution of the United States and void; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. See Schmidt v. People, 18 Colo. 78, 31 Pac. 498.

An act regulating the domestic sale of food for animals is within the police power, even though it may affect incidentally interstate commerce; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197.

State quarantine laws, prohibiting the entry of persons or cargoes which might bring contagious diseases, are constitutional; and the national government also has jurisdiction in quarantine to prohibit improper immigrants and injurious traffic between the states; Morgan's Louisiana S. S. Co. v. Board of Health, 118 U. S. 464, 6 Sup. Ct. 1114, 30 L. Ed. 237; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649. Cattle infected with pleuro-pneumonia, dangerous persons, Chinese, coolies, contract laborers, and rags may be kept out of the country; Morgan's Louisiana S. S. Co. v. Louisiana Board of Health, 118 U. S. 465, 6 Sup. Ct. 1114, 30 L. Ed. 237; Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; peach trees may be destroyed, when affected with peach yellows; State v. Wordin, 56 Conn. 216, 14 Atl. 801; adulteration of food prohibited; State v. Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; and the manufacture of oleomargarine; Powell v. Com., 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350; where it was held that the legislature might prohibit, if it saw fit, the manufacture of a wholesome article of food; but see People v. Marx, 99 N. Y. 377, where the decision is criticised, and in Dorsey v. State, 38 Tex. Cr. R. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. Rep. 762, it is held that the state cannot constitute it a crime to mix wholesome and nutritious articles of food. See OLEOMARGARINE; FOOD AND DRUG ACTS.

The legislature may require all oleomargarine to be stamped as such; Pierce v. State, 63 Md. 592; or to be colored pink; Armour Packing Co. v. Snyder, 84 Fed. 136; or prohibit artificially coloring it; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; prescribe the price at which bread should be sold; Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441; suppress gambling and opium dens, and lotteries; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; and carrying on offensive manufactures; Coe v. Schultz, 47 Barb. (N. Y.) 64; regulate

laundries; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; and pawn-brokers, hawkers, and peddlers; Com. v. Brinton, 132 Pa. 69, 18 Atl. 1092; and require a license fee, where no discrimination is made between residents or products of the state and those of another state; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; enact laws for the preservation of game and fish; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; see GAME LAWS; to prevent the waste of natural gas; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477; the sale or manufacture of intoxicating liquors; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Vandercook Co. v. Vance, 80 Fed. 786; close cemeteries within the built-up parts of a city; Craig v. Presbyterian Church, 88 Pa. 42, 32 Am. Rep. 417; and forbid the pollution of streams; State v. Wheeler, 44 N. J. L. 88; the keeping of gunpowder in cities or villages; Fisher v. McGirr, 1 Gray (Mass.) 27, 61 Am. Dec. 381; the erection of wooden buildings in populous cities; Brady v. Ins. Co., 11 Mich. 425; or the keeping of swine therein; Com. v. Patch, 97 Mass. 221; or of a slaughter house; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Villavaso v. Barthet, 39 La. Ann. 247, 1 South. 599; or a bone boiling factory; People v. Rosenberg, 67 Hun 52, 22 N. Y. Supp. 56; or any other business injurious to the public; Taylor v. State, 35 Wis. 298; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; restrain the employment of children at theatrical exhibitions; In re Stevens, 70 Hun 243, 24 N. Y. Supp. 780; or prohibit their employment altogether when below a specified age. Similarly there seems to be no doubt that the hours of labor of women and children and the wages to be paid them may be controlled through the police power; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Chesapeake & P. Tel. Co. v. Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Morrill v. State, 38 Wis. 428, 20 Am. Rep. 12; Attorney General v. R. Co., 160 Mass. 86, 35 N. E. 252, 22 L. R. A. 112. Laborers' wages may be controlled; Gottschalk Co. v. Cattle Feeding Co., 50 Fed. 681; and the issuance to them, in payment, of scrip or store orders prohibited; In re Scrip Bill, 23 Colo. 504, 48 Pac. 512.

The confinement of the insane and their control in asylums is an exercise of the police power; Van Deusen v. Newcomer, 40 Mich. 90; and skilled trades and learned professions often come under its control, as where examinations are provided for those who wish to practise law, medicine, or pharmacy. Physicians, dentists, and midwives may be compelled to take out licenses and report births and deaths; Wilkins v. State, 113 Ind. 514, 16 N. E. 192; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623.

A state may:

Prohibit the sale of cigarettes without a license; Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; of intoxicating liquors; Appeal of Allyn, 81 Conn. 534, 71 Atl. 794, 23 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225; forbid healthy persons to enter an infected locality; Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209; the erection of dairy and cow stables within city limits; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; the burial of the dead within city limits; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; the adulteration of mixed paints; Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; the sale of milk from cows fed on "still-slop"; Sanders v. Com., 117 Ky. 1, 77 S. W. 358, 1 L. R. A. (N. S.) 932, 111 Am. St. Rep. 219; require inspection of dairy cows and their destruction if found infected with tuberculosis; New Orleans v. Charouleau, 121 La. 890, 46 South. 911, 18 L. R. A. (N. S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46; inspection of cattle coming into a state; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; compulsory vaccination; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; a railroad to remove or rebuild a bridge which interferes with the proper drainage system; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; the registration of physicians; Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439; Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987; Meffert v. Board of Medical Registration, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811; the licensing of plumbers; Douglas v. People, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162; the destruction of unwholesome food in storage; North American C. S. Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; regulate the milk business; New York v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; Adams v. Milwaukee, 144 Wis. 371, 129 N. W. 518, 43 L. R. A. (N. S.) 1066; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928; the removal of sewage, even to granting the exclusive privilege to one person and

fixing a reasonable price for service; Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718; regulate the discharge of sewage into streams; Com. v. Emmers, 221 Pa. 298, 70 Atl. 762; impose a tax on real estate by the front foot rule to provide for building a sanitary sewer; Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 118 N. W. 182, 28 L. R. A. (N. S.) 1124; change the location of gas pipes at the expense of a gas company, to accommodate a system of drainage; New Orleans G. L. Co. v. Drainage Commission, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; prohibit the killing of wild birds or animals, or the possession of fire arms, by unnaturalized foreign-born residents; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928; affirmed in Patsone v. Com., 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. ——; forbid street railroads to carry more than 75 persons in each car; Minneapolis St. Ry. Co. v. Minneapolis, 189 Fed. 445; require a street railway to erect, without compensation a new structure for its right of way over a street newly opened; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206; a railroad to repair a viaduct built by city carrying its tracks over a street; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; require the inspection of kerosene and charge therefor; Red C. O. Mfg. Co. v. Board, 172 Fed. 695; "full crews" on railroads over 50 miles long; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290; the safeguarding of railroad tracks; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 255, 17 Sup. Ct. 581, 41 L. Ed. 979; provide that notes given for a patent right are void unless that fact be shown on their face; Woods v. Carl, 203 U. S. 358, 27 Sup. Ct. 99, 51 L. Ed. 219; regulate mining operations; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; and the height of buildings; Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923; pass an employers' liability act; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; a statute which abrogates the fellow servant rule as applied to all railroad employees; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; prohibit picketing; In re Williams, 158 Cal. 550, 111 Pac. 1035; prohibit hack-drivers from soliciting business at railroad stations, even though an exclusive right has been given by the railroad to one concern; Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; require the separation of white and colored passengers on street cars; Morrison v. State, 116 Tenn. 534, 95 S. W. 494; impose on cities the obligation to pay damages to property caused by mob violence; Chicago v. Sturges, 222 U. S. 313, 32 Sup. Ct. 92, 56 L. Ed. 315, Ann. Cas. 1913B, 1349; regulate the admission of persons to places of amusement; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; require the marking of milk bottles with the correct capacity thereof; Chicago v. Dairy Co., 234 Ill. 294, 84 N. E. 913, 17 L. R. A. (N. S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; provide for licensing employment agencies; People v. City Prison, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325; and the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; invalidate all assignments of wages under $200 unless assented to in writing by employer; Mut. L. Co. v. Martell, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529; prohibit lewd women from dwelling outside the limits of a prescribed district; L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899; and females under age from remaining in or about saloons; State v. Baker, 50 Or. 381, 92 Pac. 1076, 13 L. R. A. (N. S.) 1040.

A state may in the exercise of the police power:

Prohibit the grazing of sheep on the public domain within two miles of land held by persons other than the sheep owner; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; the possession of game during a closed season; New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; *contra*, of fish; People v. A. Booth & Co., 42 Misc. 321, 86 N. Y. Supp. 272; prohibit telegraph companies from limiting their liability for damages for failure to deliver messages; Western Union Tel. Co. v. Mill Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; forbid dealing in futures; Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623; or the arbitrary deductions from actual weight in sale of grain; House v. Mayes, 219 U. S. 270, 31 Sup. Ct. 234, 55 L. Ed. 213; or keeping a bucketshop; Broadnax v. Missouri, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219; or the employment of laborers in mines more than eight hours a day; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; State v. Cantwell, 179 Mo. 245, 78 S. W. 569, affirmed in 199 U. S. 602, 26 Sup. Ct. 749, 50 L. Ed. 329; or of women in laundries more than ten hours a day; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; *contra*, People v. Williams, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798 (see Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, overruling 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, in regard to hours of bakers and con-

fectioners); the hitching of horses on streets; Wells v. Mt. Olivet, 126 Ky. 131, 102 S. W. 1182, 11 L. R. A. (N. S.) 1080; advertising on public motor vehicles; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; forbid contracts limiting liability for injuries when made before injury is received; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; forbid cutting young timber on private waste land; Questions and Answers, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745; require persons selling beer by the barrel to pay for a license; Phillips v. Mobile, 208 U. S. 472, 28 Sup. Ct. 370, 52 L. Ed. 578; and coal to be measured before screening as a basis for payment of miners' wages; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315; peddlers to take out licenses; Selma v. Till (Ala.) 42 South. 405; State v. Webber, 214 Mo. 277, 113 S. W. 1054, 15 Ann. Cas. 983; banks to be incorporated; Weed v. Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217; street-railways to water their tracks; State v. R. Co., 50 La. Ann. 1189, 24 South. 265, 56 L. R. A. 287; women to remove their hats in theatres; Oldknow v. Atlanta, 9 Ga. App. 594, 71 S. E. 1015; the examination and registration of plumbers in cities of a certain class; Beltz v. Pittsburg, 211 Pa. 561, 61 Atl. 78; colleges to separate white and colored students; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; declare combinations in restraint of trade to be crimes; State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L. R. A. (N. S.) 1287, 130 Am. St. Rep. 671; Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; regulate bulk sales of merchandise; Lemieux v. Young, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295; and the rates of fire insurance companies; German Alliance Ins. Co. v. Barnes, 189 Fed. 769; fix maximum interest rates, excepting bank and mortgage loans; Griffith v. Connecticut, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151; a minimum rate of wages for work on city streets; Gies v. Broad, 41 Wash. 448, 83 Pac. 1025; and hours of labor for those employed by state or municipalities; Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; and regulate assignments of future wages; Mutual Loan Co. v. Martell, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529; pass special legislation for banks dealing in small amounts with immigrants; Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128; provide for settlement of titles to real estate after the San Francisco earthquake; American Land Co. v. Zeiss, 219 U. S. 48, 31 Sup. Ct. 200, 55 L. Ed. 82.

Industrial insurance laws were held good in State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; and the ballot-law in Solon v. State, 54 Tex. Cr. R. 261, 114 S. W. 349.

The following are not within police power: Laws levying taxes upon alien passengers from foreign ports, for the use of hospitals; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702. Requiring a bond to be given for alien passengers from foreign ports to indemnify the state against expense for the support of the person named therein; Henderson v. Wickham, 92 U. S. 259, 23 L. Ed. 543. Prohibiting the driving of foreign cattle into a state within certain dates; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527. Requiring an inspection before slaughtering cattle, etc., so far as they apply to animals slaughtered in another state; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. (This offends against inter-state commerce.)

A state may *not* prohibit the sale of meat, fish, or butter in the same place as clothing, drugs, etc.; Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93; grant exclusive privilege to one person of shipping manure out of a city; Landberg v. Chicago, 237 Ill. 112, 86 N. E. 638, 127 Am. St. Rep. 319, 21 L. R. A. (N. S.) 830.

A state may *not* forbid persons to have intoxicating liquors in their possession for their own use; Com. v. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159; or foreign gas companies to transport gas by pipe lines outside the state; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; or the sale of theatre tickets by ticket brokers at advanced prices; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321; or require all convict-made goods to be labelled as such; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736; or fruit to be labelled with the name of the locality where it was grown; Ex parte v. Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184 109 Am. St. Rep. 183; or the registration of plumber partnerships; Schnaier v. Importation Co., 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. Rep. 790; or of persons who sell drugs; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; or undertakers to take out a license and to have knowledge of embalming; People v. Ringe, 125 App. Div. 592, 110 N. Y. Supp. 74; Wyeth v. Board, 200 Mass. 474, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439; or railroads to make switch connections at their own expense for the convenience of elevators; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; or physicians and midwives to furnish, without compensation, non-professional information in confinement cases for the bureau of vital statistics; State v. Boone, 84

Ohio St. 346, 95 N. E. 924, 39 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 683; regulate the height of bill-boards on one's own property; People v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735; State v. Whitlock, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765; Passaic v. Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892; Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88; Bryan v. Chester, 212 Pa. 259, 61 Atl. 894, 108 Am. St. Rep. 870; *contra*, St. Louis Gunning Adv. Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929; fix the weight of bread; Buffalo v. Baking Co., 39 App. Div. 432, 57 N. Y. Supp. 347; Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364.

An employers' liability act was held *bad* in Ives v. Ry. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; a curfew ordinance in Ex parte McCarver, 39 Tex. Cr. R. 448, 46 S. W. 936, 42 L. R. A. 587, 73 Am. St. Rep. 946; an act requiring sleeping car porters to leave an unsold upper berth up at the option of the occupant of the lower berth in State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; an ordinance requiring all property owners to remove snow from sidewalks in State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438. So of an act requiring the labelling of packages of butter with the weight thereof; Ex parte Dietrich, 149 Cal. 104; regulating employment agencies; Spokane v. Macho, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263, 130 Am. St. Rep. 1100; Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; prohibiting the killing of game by a particular kind of weapon; In re Marshall, 102 Fed. 323; the operation of stone quarries within a city; In re Kelso, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178; providing for the asexualization of the feeble minded, epileptics, certain criminals who are confined in state reformatories and charitable institutions, because not applying to all epileptics within the state; Smith v. Board of Examiners of Feeble Minded (N. J.) 88 Atl. 963.

A state may require an owner of a ferry boat, living in another state, to take out a license for the bar on such boat when plying between the two states; Harrell v. Speed, 113 Tenn. 224, 81 S. W. 840, 1 L. R. A. (N. S.) 639, 106 Am. St. Rep. 814, 3 Ann. Cas. 260; and a United States statute which prohibits introducing liquors into the "Indian country" will not apply to lands held by Indians within a state, who are citizens of the United States; U. S. v. Sutton, 165 Fed. 253. Fish-nets used in violation of a constitutional statute cannot be recovered by the owner from the officer who lawfully seized them; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997.

The Wisconsin eugenic marriage law (1913), prohibiting the issuing of a marriage license to any male applicant who does not produce a physician's certificate stating that he is free from venereal diseases, was held unconstitutional in Peterson v. Widule (Dist. Ct. of Milwaukee, Wis.), on the ground that it violated the constitutional provision recognizing the inherent right of all persons to life and liberty, and forbidding control of, or interference with, rights of conscience.

"Whether the prohibited act or omission shall be made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or, on the other hand, the party be deprived of all remedy for any right which, but for the regulation, he might have had against other persons, are questions which the legislature must decide." Cooley, Const. Lim. 745.

The determination by the legislature as to what is a proper exercise of its police power is subject to the supervision of the courts; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Lawton v. Steele, 152 U. S. 137, 14 Sup. Ct. 499, 38 L. Ed. 385; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

A police regulation may be good even though it incidentally affects interstate commerce; Louisville & N. R. Co. v. Kentucky, 161 U. S. 701, 16 Sup. Ct. 714, 40 L. Ed. 849; New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; Western Union Tel. Co. v. Mill Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; but it may not interfere directly with interstate commerce; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; Vance v. W. A. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193. Congress may authorize an exercise of the police power by a state, which without such authority would be unconstitutional as an interference with interstate commerce; In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; and restrictive sales of goods may be prohibited, even though it should affect the sale or rental of patented articles; In re Opinion of the Justices, 193 Mass. 605, 81 N. E. 142.

Expert testimony is not admissible to show the desirability of legislation providing an eight hour day in mines; Cantwell v. Missouri, 199 U. S. 602, 26 Sup. Ct. 749, 50 L. Ed. 329, affirming 179 Mo. 245, 78 S. W. 569.

As to classification of the objects of legislation, under the constitutional provision for

the equal protection of the laws, see EQUAL PROTECTION OF THE LAW; STATUTE.

See Tiedeman, Prentice; Police Powers; Cooley, Const. Lim.; Thayer, Const. L.; and see also the various titles to which the power has been applied. See LIBERTY OF CONTRACT; PRIVILEGES AND IMMUNITIES; COMMERCE.

POLICY. The instrument whereby insurance is made by an underwriter in favor of an assured, expressed, implied, or intended, against some risk, peril, or contingency, in reference to some subject.

The written or printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties. It may be either a specialty or simple contract. 1 Joyce, Ins. § 145.

It must show expressly, or by implication, in whose favor it is made. It may be upon a valuable property, interest, or contingency, or be a gaming or wagering policy on a subject in which the assured has no interest, or against risks in respect to which the assured has no interest except what arises from the contract itself.

An *interest* policy is one where the insured has a real, substantial, assignable interest in the thing insured. Sawyer v. Ins. Co., 37 Wis. 539.

An *open* policy is one on which the value is not fixed, but is left to be definitely determined in case of loss. 1 Phill. Ins. §§ 4, 6, 7; Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Snell v. Ins. Co., 4 Dall. (U. S.) 430, 1 L. Ed. 896. By an "open policy" is also sometimes meant one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time; Douville v. Ins. Co., 12 La. Ann. 259; Trustees First B. Church v. Ins. Co., 19 N. Y. 305; E. Carver Co. v. Ins. Co., 6 Gray (Mass.) 214; it may also mean one kept open for new subscriptions, or one on a cargo kept open for new subjects of insurance; 1 Joyce, Ins. § 156.

A *valued* policy is one where a value has been set on the ships or goods insured, and this value inserted in the policy in the nature of liquidated damages. In such a policy the value of the subject is expressly agreed; Schaefer v. Ins. Co., 33 Md. 109; Cox, M. & Co. v. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771; or is, as between the parties, the amount insured. Under an open policy in case of loss, the insured must prove the true value of the property, while under a valued policy, the sum agreed upon is conclusive, except in case of fraud; 3 Camp. 319; Coolidge v. Ins. Co., 15 Mass. 341; Lycoming Ins. Co. v. Mitchell, 48 Pa. 372; May, Ins. § 30; 12 T. L. R. 97.

A *mixed* policy is one which is open as to certain property and valued as to other property. Riley v. Ins. Co. 2 Conn. 368.

A *wager* policy is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are strongly reprobated; 3 Kent 225.

A *floating* policy is one which applies to goods of a class or kind, which, from its fluctuating, changing nature, differs as to specific articles. Hoffman & P. v. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337.

In the absence of any insurable interest of the beneficiary, the law will presume that a policy was taken out for the purpose of a wager, or speculation; U. B. Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111.

The insured must be held to a knowledge of the conditions of his policy, and the fact that he had never seen it does not help him any more than the fact that he had not read it, where there is no adequate reason shown why he could not have seen it had he so desired, and the company had not kept it from him through any fault or fraud; Cleaver v. Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Morrison v. Ins. Co., 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

Records and documents expressly referred to in the policy are, in effect, for the purpose of the reference, a part of the contract; Howard F. Ins. Co. v. Bruner, 23 Pa. 50; 23 E. L. & E. 514; Cushman v. Ins. Co., 70 N. Y. 72; Southern M. L. Ins. Co. v. Montague, 84 Ky. 653, 2 S. W. 443, 4 Am. St. Rep. 218; Standard L. & A. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105.

All prior negotiations are presumed to be merged in the written contract, and the policy itself, in the absence of fraud, duress, or mistake, must be looked to to ascertain the intent of the parties; Higginson v. Dall, 13 Mass. 96. Where the form of the policy is not prescribed by statute, it should contain, either by itself, or by reference to other papers, the exact agreement between the parties, set forth therein in clear, precise, and unambiguous terms, and should embody all the requirements of a valid insurance contract. Where the terms are plain and unambiguous, parol evidence is inadmissible to vary or control them; Keim v. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Walton v. Ins. Co., 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677; but if it is ambiguous, extrinsic evidence is admissible, not to contradict or change the contract, but to develop and explain its true meaning; Tesson v. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293. Conversations had between the parties at the time have been held admissible; Gray v. Harper, 1 Sto. 574, Fed. Cas. No. 5,716; when parties have, by certain acts of their own, placed a construction on doubtful terms of the contract,

this construction will be adopted by the court against them.

The language of the policy must be construed with reference to the subject-matter and the nature of the property to which it is applied, and with a view to the objects and intentions of the parties, as the same may be gathered from the whole instruments; Allegre's Adm'rs v. Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Ripley v. Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; De Graff v. Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; and the whole policy with all its parts should be construed together as one entire contract; Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466. A special clause in a policy which creates an exception to a general clause governs the latter; Bowman v. Ins. Co., 27 Mo. 152. When susceptible of more than one interpretation, the contract should be construed in favor of the assured; Kratzenstein v. Assur. Co., 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799; Northwestern M. L. Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Healey v. Acc. Ass'n, 133 Ill. 556, 25 N. E. 52; 9 L. R. A. 371, 23 Am. St. Rep. 637; De Graff v. Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; Watertown F. Ins. Co. v. Cherry, 84 Va. 72, 3 S. E. 876; Western & A. P. L. v. Ins. Co., 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231.

The written part of the policy controls that part which is printed; 4 East 136; Plinsky v. Ins. Co., 32 Fed. 47; Benedict v. Ins. Co., 31 N. Y. 389. A special indorsement exempting from liability for partial loss will control; Chadsey v. Guion, 97 N. Y. 333.

In respect to forfeiture, that construction of a policy which will sustain rather than forfeit the contract is applicable; McMaster v. Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

A stipulation that, if any representations made by the applicant are untrue, the policy shall be void is reasonable; Deming I. Co. v. Ins. Co., 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607. Incontestable clauses are good although the insured was not in good health when the policy was delivered, against an express condition in the policy; Mutual R. F. L. Ass'n v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; but they do not prevent the defence of lack of insurable interest; Bromley's Adm'r v. Ins. Co., 122 Ky. 402, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; or of fraud in procuring the policy; Reagan v. Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362.

Although a fire is raging in an adjacent building and at the time of expiration of the policy a loss is inevitable, if in fact no fire breaks out at such expiration, there can be no recovery; Rochester G. Ins. Co. v. Peaslee-G. Co., 120 Ky. 752, 87 S. W. 1115, 27 Ky. L. R. 1155, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324. But if the fire has already begun in the building, insurance for the loss of merchandise may be recovered, although the fire did not actually reach the merchandise within the life of the policy; Rochester G. Ins. Co. v. Peaslee-G. Co., 120 Ky. 752, 89 S. W. 3, 28 Ky. L. Rep. 130, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324.

A policy may take effect on actual or constructive delivery; New England F. & M. Ins. Co. v. Robinson, 25 Ind. 537; Bragdon v. Ins. Co., 42 Me. 259; Sheldon v. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Jackson v. Ins. Co., 5 Gray (Mass.) 52; and may be retrospective, provided there is no concealment or misrepresentation by either party; Hallock v. Ins. Co., 26 N. J. L. 268.

Where eighteen policies are ready for delivery, but one of the buildings is destroyed by fire just before delivery, but after the agreement with the agent, there is no existing contract; German Ins. Co. v. Downman, 115 Fed. 481.

A policy returned by the applicant to the company because it does not correspond with his application is not cancelled, especially where the company has insisted that it is all right; Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805. A company is not bound to return unearned premiums in order to bring about a cancellation of the policy; Davidson v. Ins. Co., 74 N. J. L. 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065; *contra*, Glen F. Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; and where a standard policy provides for the return of the unearned premiums, the insured may waive such condition by his voluntary and unconditional surrender of the policy upon receiving notice of cancellation by the company; Buckley v. Ins. Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889.

A renewal reinstates the original contract with all its terms and also incorporates into it the new terms expressed in the renewal application and representations contained therein become part of the contract; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

Every policy, whether marine, against fire, or on life, specifies or imports parties, and specifies the subject or interest intended to be insured, the premium or other consideration, the amount insured, the risks and perils for which indemnity is stipulated, and the period of the risk, or the terminus *a quo* and *ad quem*. The subject-matter is usually more minutely described in a separate paper—called *an application;* Beach, Ins. § 352. See APPLICATION. May, Ins. § 29.

The duration of the risk, under a marine insurance, or one on inland navigation, is either from one geographical terminus to another, called a *"Voyage Policy,"* or from a specified time, called a *"Time Policy;"* that of a fire policy is for a specified time; one on life is either for life or a term of years, months, etc. It is a leading principle, as to the construction of a policy of insurance, that its distinguishing character as a contract of indemnity is to be favored; which is in conformity with the common maxim, *ut res valeat magis quam pereat;* Brown v. Ins. Co., 18 N. Y. 385; Kingsley v. Ins. Co., 8 Cush. (Mass.) 393; Smith v. Ins. Co., 17 Pa. 253, 55 Am. Dec. 546; 29 E. L. & E. 111, 215; Moore v. Ins. Co., 16 Mo. 98; Sheldon & Co. v. Ins. Co., 22 Conn. 235, 58 Am. Dec. 420; Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; Indianapolis Ins. Co. v. Mason, 11 Ind. 171; Atwood v. Ins. Co., 28 N. H. 234; Gloucester Ins. Co. v. Younger, 2 Curt. C. C. 322, Fed. Cas. No. 5,487; Sayles v. Ins. Co., 2 Curt. C. C. 610, Fed. Cas. No. 12,422; Philbrook v. Ins. Co., 37 Me. 137; Schenck v. Ins. Co., 24 N. J. L. 447; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553; Wilson v. Ins. Co., 4 R. I. 159. See Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

In marine insurance the contract has necessarily more implied reference to customs and usages than most other contracts; or, in other words, a larger proportion of the stipulations are not specifically expressed in the instrument; 1 Phill. Ins. § 119; whence it has been thought to be an imperfect, obscure, confused instrument; Yeaton v. Fry, 5 Cra. (U. S.) 342, 3 L. Ed. 117; 1 Burr. 347. But the difficulty in giving it a practical construction seems to arise more from the complication of the circumstances necessarily involved than from any remediable defects in its provisions and phraseology. New provisions are, however, needed, from time to time, to adapt the contract to new circumstances.

A mistake in filling up a policy may be corrected by order of a court of equity; 5 B. & P. 322; 1 Wash. C. C. 415; Oliver v. Ins. Co., 2 Curt. C. C. 277, Fed. Cas. No. 10,498. If by accident, inadvertence, or mistake, the terms of the contract are not fully set forth in a policy, it may be reformed so as to express the real agreement; Thompson v. Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

A marine policy is assignable without the consent of the insurers; May, Ins. § 377; while a fire policy is not; Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Simeral v. Ins. Co., 18 Ia. 319; 4 Bro. P. C. 431; 9 L. T. N. S. 688. An outstanding and valid life policy is held to be assignable without the insurer's consent, provided the sale is *bona fide* and not a device to evade the law; St. John v. Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Provident L. I. & I. Co. v. Baum, 29 Ind. 236; Campbell v. Ins. Co., 98 Mass. 381; American L. & H. Ins. Co. v. Robertshaw, 26 Pa. 189; Robinson v. Cator, 78 Md. 72, 26 Atl. 959. But see, *contra*, Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313. See, generally, Johnson v. Alexander, 9 L. R. A. 660; Joyce, Insurance. A pre-existing debt is a sufficient consideration for an assignment of insurance policies after loss of the property insured; Glover v. Lee, 140 Ill. 102, 29 N. E. 680. When a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect; Moise v. Life Ass'n, 45 La. Ann. 736, 13 South. 170; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441; and it is avoided by an assignment for the benefit of creditors; Dube v. Ins. Co., 64 N. H. 527, 15 Atl. 141, 1 L. R. A. 57; but if made subsequently to the loss, it is valid, regardless of the conditions; Nease v. Ins. Co., 32 W. Va. 283, 9 S. E. 233; Star U. L. Co. v. Finney, 35 Neb. 214, 52 N. W. 1113. Where the insured and beneficiary assign one-half their interest upon consideration that the assignee shall pay the premiums, neither the assignee nor the beneficiary can recover on the policy; Metropolitan L. Ins. Co. v. Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909.

See AGREEMENT FOR INSURANCE.

A Pennsylvania act providing that fire or life policies which contain a reference to an application therefor, or a reference to the constitution, by-laws or other rules of the company, shall contain or have attached thereto a copy of such application or rules, otherwise the application, rules, &c., shall not be received in evidence nor considered a part of the policy, is constitutional; New Era L. Ins. Co. v. Musser, 120 Pa. 384, 14 Atl. 155; but the company cannot prevent the admission of the application in evidence; Norristown T. Co. v. Ins. Co., 132 Pa. 385, 19 Atl. 270.

See ABANDONMENT; AVERAGE; INSURABLE INTEREST; INSURANCE; SALVAGE; LOSS; TOTAL LOSS; VOLUNTARY EXPOSURE; RESERVE; PREMIUM.

A standard form of policy is provided by statute in many states. A statute providing for a standard policy without fixing its terms or conditions and leaving them to be fixed by the insurance commissioner is unconstitutional as a delegation of legislative power; it *seems* that the legislature could prescribe a form; O'Neil v. Ins. Co., 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650; Dowling v. Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112.

A method of gambling by betting as to what numbers will be drawn in a lottery. State v. Carpenter, 60 Conn. 97, 22 Atl. 497.

POLICY, PUBLIC. See PUBLIC POLICY; RESTRAINT OF TRADE.

POLITICAL. Pertaining to policy, or the administration of the government. Political rights are those which may be exercised in the formation and administration of the government: they are distinguished from civil rights, which are the rights which a man enjoys as regards other individuals, and not in relation to the government. A political corporation is one which has principally for its object the administration of the government, or to which the powers of government, or a part of such powers, have been delegated. See Winspear v. Dist. Tp., 37 Ia. 544; People v. Morgan, 90 Ill. 563.

POLITICAL OFFENDER. A political offender if accused of what is *prima facie* an extraditable crime cannot be legally surrendered, if the offence is of a political character, that is if it is incidental to, and forms part of, a political disturbance; [1891] 1 Q. B. 149; [1896] 1 Q. B. 108. See EXTRADITION.

POLITICAL PARTIES. See ELECTION; NOMINATION.

POLITICAL QUESTION. One over which the courts decline to take cognizance in view of the line of demarkation between the judicial branch of the government, on one hand, and the executive and legislative branches, on the other. Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Questions expressly reserved by the constitution to either the executive or the legislature, and questions which, by necessary implication of the constitution, are so reserved—that is, questions the decision of which by the judiciary would obviously embarrass the action of the legislative and executive within their respective spheres, or which, owing to the superior sources of knowledge of the other two branches, the courts are ill qualified to decide. 22 Harv. L. R. 132.

The following have been held political questions:

As to who is the sovereign of a certain country; Pearcy v. Stranahan, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. Ed. 793; the jurisdiction of different sovereignties; State v. Wagner, 61 Me. 178; Pearcy v. Stranahan, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. Ed. 793; whether a state is republican in its form of government; State v. Summers (S. D.) 144 N. W. 730; as to the status of Indian tribes; Farrell v. U. S., 110 Fed. 942, 49 C. C. A. 183; whether a state constitution was duly ordained by the people; and where it has been promulgated and recognized as in force by the executive and legislative departments and accepted by the people, the legality of its adoption cannot be brought in question in a federal court; Brickhouse v. Brooks, 165 Fed. 534; whether the initiative and referendum provisions in the Oregon constitution so alter its form of government as to make it no longer republican; Pacific S. Tel. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377; whether a law is *necessary* within the initiative and referendum provision of the constitution, excepting from its provision for referendum laws which are necessary for the immediate preservation of the public peace, health or safety; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; whether or not property held as public property is necessary for the public use; Monroe v. Johnson, 106 La. 350, 30 South. 840; as to how long Cuba may rightfully be occupied by the United States; Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448.

The courts will not declare an act to be a tort in violation of the law of nations or of a treaty, when the executive, congress and the treaty-making power have all adopted it; O'Reilly De Camara v. Brooke, 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676.

Courts will treat as subject to their jurisdiction any territory claimed by the political department; Harrold v. Arrington, 64 Tex. 233.

A mere assertion of property rights will not give jurisdiction over a political question, where the assertion is merely added for the purpose of conferring jurisdiction; Georgia v. Stanton, 6 Wall. (U. S.) 50, 18 L. Ed. 721; and the court refused to take jurisdiction of a suit, the real object of which was to settle the right of succession between Indian princes, although nominally brought to test the title to property; 12 Calcutta W. N. 777 (Calcutta High Court, 1908). But it is held that municipal courts may determine the title to property within their jurisdiction, even though a political question is involved; 12 Moore, Ind. App. 523.

It is within the province of the political department to provide the mode in which imperfect rights of property under treaties (such as that by which territory was ceded by Mexico to the United States) may be secured, and the courts have no jurisdiction to enforce such rights except as delegated to them by congress; U. S. v. Sandoval, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168.

Such questions frequently arise when there is an attempt to enjoin an incumbent of either the legislative or executive departments from performing some act which he claims the right to perform by virtue of his office, or to compel him to perform some act which he declines or refuses to perform; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

POLITICS. Everything that concerns the government of the country. 2 Ves. Sr. 156.

POLL. A head. Hence poll-tax is the name of a tax imposed upon the people at so much a head.

To *poll* a jury is to require that each juror shall himself declare what is his verdict.

This may be done, at the instance of either party, at any time before the verdict is recorded, according to the practice in some states. See People v. Goodwin, 18 Johns. (N. Y.) 188, 9 Am. Dec. 203. In some states it lies in the discretion of the judge; Martin v. Maverick, 1 McCord (S. C.) 24; State v. Allen, 1 McCord (S. C.) 525, 10 Am. Dec. 687; Beale v. Hall, 22 Ga. 431. A defendant has a right to a poll of the jury to ascertain whether each member concurs in the verdict but the exact words used by the juror in answering are immaterial, if they indicate clearly the assent of the individual mind to the verdict; Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228. Where a court directs a verdict, a party is not entitled to have the jury polled; Donoghue v. R. Co., 87 Mich. 13, 49 N. W. 512.

In Massachusetts it is not the right of the party, even in a capital case, to poll the jury; Com. v. Costley, 118 Mass. 1.

In Conveyancing. See DEED POLL.

POLL-TAX. A capitation tax; a tax assessed on every head, *i. e.* on every male of a certain age, etc., according to statute. Webst. Dict. See TAXATION.

POLLICITATION. In Civil Law. An offer not yet accepted by the person to whom it is made. Langd. Contr. § 1.

It differs from a contract, inasmuch as the latter includes a concurrence of intention in two parties, one of whom promises something to the other, who accepts, on his part, such promise. Grotius l. 2, c. 2; Pothier, Obl. pt. 1, c. 1, s. 1, art. 1, § 2.

POLLS. The place where electors cast in their votes.

POLLUTION OF WATERS. A riparian proprietor is required to refrain from erecting upon the banks of a water course any works which will pollute the water and thereby create a nuisance; 9 Co. 59; 5 B. & Ald. 1; Attorney-General v. Steward, 20 N. J. Eq. 416; Call v. Buttrick, 4 Cush. (Mass.) 345; [1897] Ch. D. 96.

It is the right of the owner of land through which a stream flows, to have the natural flow free from pollution, as also from diversion or obstruction; and for an interference with this right an action will lie; Richmond Mfg. Co. v. De Laine Co., 10 R. I. 106, 14 Am. Rep. 658; Holsman v. Bleaching Co., 14 N. J. Eq. 335; [1893] App. Cas. 691. An injury to the purity of the water which affects the riparian owner is considered an injury of the same character as an obstruction or diversion of the water; Dwight Printing Co. v. Boston, 122 Mass. 583. So one who pollutes his neighbor's spring is liable therefor; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Kinnaird v. Oil Co., 89 Ky. 468, 12 S. W. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545; 29 Ch. D. 115; and so is one who deposits filth or noxious matter on his own premises from which it percolates through the soil; Good v. Altoona City, 162 Pa. 493, 29 Atl. 741, 42 Am. St. Rep. 840; Robinson v. Coal Co., 57 Cal. 412, 40 Am. Rep. 118; 29 Ch. D. 115; Decatur G. L. & C. Co. v. Howell, 92 Ill. 19; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Perrine v. Taylor, 43 N. J. Eq. 128, 12 Atl. 769.

Sources of the pollution of water for which it has been held that an action would lie, are: fouling by the discharge into it of muriatic acid; 7 H. & P. 160; sulphuric acid; 5 Ch. D. 769; vitriol, having a corrosive effect on boilers; Merrifield v. Lombard, 13 Allen (Mass.) 16, 90 Am. Dec. 172; dye wares or dye liquors, madder, indigo, potash, etc.; 16 Jur. N. S. 75; MacNamara v. Taft, 196 Mass. 597, 83 N. E. 310, 13 L. R. A. (N. S.) 1044; heated water, which affects a stream injuriously; 3 B. & Ad. 304; 2 K. & J. 264; blood from a slaughter-house; Attorney-General v. Steward, 20 N. J. Eq. 415; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; setting up hog-pens, or lime-pits; Hazeltine v. Case, 46 Wis. 391, 1 N. W. 66, 32 Am. Rep. 715; Y. B. Hen. II. b. 6; Smiths v. McConathy, 11 Mo. 517; the erection of a cesspool, placing near the water oil or manure; Kinnaird v. Oil Co., 89 Ky. 478, 12 S. W. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545; placing the carcass of a dead animal in the water; State v. Wahl, 35 Kan. 608, 11 Pac. 911.

It is not always actionable to discharge into a stream waste or impure matter, but it is a question for the jury whether such use of it is, under the circumstances, reasonable, and as a general rule the same consideration would control as in case of obstructions of the water generally. It is necessary to take into consideration the character of the stream, its natural uses and the importance of the use proposed to be made of it by the party complained of and the extent and character of the injury to the other party. See Ang. Waterc. § 140 *d.*

One of the rights of a riparian owner by reason of his location upon the banks of a stream is to make use of the water to such extent as he can without creating a nuisance to his neighbors or to the public. This right includes the casting of a certain amount of pollution into the stream; 1 Farnham, Waters 288; Missouri v. Illinois, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572, which held that a nuisance must be shown before such act will be forbidden. It is held that the legislature may forbid such pollution without infringing the constitutional rights of the riparian owners, although no injury to the public health or comfort is shown; Durham v. Mills, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. (N. S.) 321; State v. Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019.

A riparian proprietor cannot use the water in such manner as to pollute the atmos-

phere, and it is no defence to an action for so doing that the injury was public in its character as affecting an entire community and that it was a subject of criminal indictment; Story v. Hammond, 4 Ohio 376; and if such a condition of things cannot be remedied by action, equity will interfere to abate the nuisance; Carlisle v. Cooper, 21 N. J. Eq. 576; in all these cases where the injury is continuous and irreparable so that an action for damages is not an adequate remedy, an injunction will be granted. See INJUNCTION. For a collection of cases in which injunctions have been granted, see Amer. & Eng. Dec. in Eq. 648, 653.

That one in possession of real estate may recover damages for wrongful pollution of a spring without showing title to the property is held in Long v. R. Co., 128 Ky. 26, 107 S. W. 203, 13 L. R. A. (N. S.) 1063, 16 Ann. Cas. 673.

The weight of authority is in favor of the doctrine that an action by the lower riparian owner will lie for the pollution of the stream by a discharge into it of refuse water from a mine, and that such action may be enjoined; Beach v. Zinc Co., 54 N. J. Eq. 65, 33 Atl. 286, where it was expressly held that it was no defence, that the pollution was a natural and necessary result of mining operations prosecuted in the ordinary way. In this case the defendant was not a riparian owner. The decree was affirmed by the court of appeals where Garrison, J., thus stated the conclusion: "A non-riparian mine-owner may not artificially cause the injurious discoloration of a natural water course, if, by the use of practicable means within his knowledge and under his control, he may carry on his mining operations without injury to the right of others,—a paraphrase of the maxim, "*Sic utere tuo ut alienum non lædas.*"

The contrary doctrine was held in Pennsylvania in the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, a decision which was criticised and expressly disapproved in the above case; and there were two Pennsylvania cases *contra*, Sanderson v. Coal Co., 86 Pa. 401, 27 Am. Rep. 711, and Pennsylvania Coal Co. v. Sanderson, 94 Pa. 302, 39 Am. Rep. 785, which were overruled in the third case by a bare majority of the court. Referring to Pennsylvania Coal Co. v. Sanderson, Lord Shand, in [1893] App. Cas. 691, says: "This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight." One other case seems in a measure to follow the Pennsylvania case; Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454; where it was held that one who sinks an artesian well on his own land, and uses the water to bathe the patients in a sanitarium erected by him on said premises, is not liable to injunction and damages for allowing the water, after such use, to flow into a stream which crosses the land of an adjoining owner, and is the only natural and available outlet." Of this case it is remarked: "There were, however, many features to distinguish this from the Sanderson case, so that the adoption of the language of the latter was unnecessary. In the first place, the pollution was slight; in the second, before the water reached the plaintiff's premises, it was further defiled by passing through a city; either of which would tend to defeat the claim, apart from all other considerations;" 3 Eng. & Am. Dec. in Eq. 652, by Henry Budd.

The same writer draws attention to the fact that "even in Pennsylvania, the doctrine of the Sanderson case is carefully limited to the natural drainage of the mine water; and any other means of getting rid of it will be enjoined;" *id.*, citing Getting v. Imp. Co., 7 Kulp (Pa.) 493. See, also, Long v. Trexler, 8 Atl. 620. It has been intimated that even the Pennsylvania doctrine upholding the right to pollute a water course with mine water does not apply to streams from which a municipal water supply is taken; Com. v. Russell, 172 Pa. 506, 33 Atl. 709; and a contrary decision was rendered by a lower court in Union Water Co. v. Oil Co., 21 Pittsb. L. J. (N. S.) 159.

In an action to recover damages for fouling a stream so as to constitute a nuisance, it is no defence that plaintiff's own acts contributed to the injury; Bowman v. Humphrey, 132 Ia. 234, 109 N. W. 714, 6 L. R. A. (N. S.) 1111, 11 Ann. Cas. 131; Philadelphia & R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131.

The right of the lower riparian proprietor to have the use of the stream unimpaired, must be adjusted with due regard to the rights possessed by the upper riparian owner to use the stream for the proper purposes, such as casting sewage or waste therein; Prentice v. Geiger, 74 N. Y. 341; Haskell v. New Bedford, 108 Mass. 208; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; and the necessary result of the legitimate use of a stream for irrigation, manufacturing, and domestic purposes, will have a tendency, with the natural increase of population, to render the stream more impure; see Merrifield v. Worcester, 110 Mass. 221, 14 Am. Rep. 592; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; and the courts will not interfere by injunction with extensive manufacturing enterprises until satisfied from all the circumstances that there is no adequate remedy at law, and that the failure to interfere will result in irreparable injury; New Boston C. & M. Co. v. Water Co., 54 Pa. 164. That a creamery or tannery or other industrial plant is a perfectly legitimate enter-

prise, or one of great convenience and benefit, is not a defence to an action for polluting a stream, but it may still be a nuisance for which an action will lie, though the utmost care has been taken to avoid all just cause of complaint; Hauck v. Pipe Line Co., 153 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 34 Am. St. Rep. 710.

The pollution, by a properly constructed city sewer, of a stream which is the natural drainage of the land on which the city is built, gives no right of action to a lower riparian owner whose mill property, constructed and operated before the building of the city, is injured thereby; Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610. A plaintiff was held entitled to recover damages where sewers constructed by a city, polluted a stream and the foul water found its way to the two springs of the plaintiff, and he was unable to obtain pure water by digging wells, the whole underground supply being polluted; Good v. Altoona City, 162 Pa. 493, 29 Atl. 741, 42 Am. St. Rep. 840. As a general thing the circumstances of each case must be considered by the court and the conflicting interests, carefully and judiciously weighed, and no general rule can be framed which will afford a rule to be applied by the courts in all cases as matter of law. The right to deposit in the stream must be settled as a question of reasonable use in the same way that courts deal with questions of diversion or obstruction; Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194; as to many uses of the water, either by common consent or other obvious considerations, settled rules have been established; Redfield, C. J., in Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; many of these cases may be found collected in Gould, Waters § 220.

The legislature may authorize the commissioner of public works of a city to take such measures as may be necessary to protect the city's water supply from pollution; Kelley v. New York, 89 Hun 246, 35 N. Y. Supp. 1109. It may empower a local board to prevent boating on a great pond in which there are no private rights of property; Sprague v. Minon, 195 Mass. 581, 81 N. E. 284. The right to protect the water supply includes the right to prevent the casting of sewage into the stream; Missouri v. Illinois, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

Where a municipal corporation was authorized by statute to construct sewers and discharge sewerage into the tide water it was held liable for damages, caused by the sewerage destroying the plaintiff's oysters, although the damage involved no physical taking of property; Huffmire v. Brooklyn, 22 App. Div. 406, 48 N. Y. Supp. 132.

One who had permission to use the water of a canal was held entitled to recover damages from a third person, who fouled the water so that the plaintiff's boilers were injured, the action of the defendant having been without any authority; 2 H. & N. 476; in a case in the Exchequer Chamber, although the judgment was reversed on other grounds, there was no dissent from the doctrine of the court below, "that he had no right to cause dirty water to flow on his neighbors' land without some special right to do so," but it was left doubtful whether the mere permission of the riparian owner to take the water out of the stream was sufficient to authorize the action against the wrong-doer either for diverting or fouling; 3 H. & N. 675.

Neither a municipality nor an individual can acquire a prescriptive right to pollute a stream when the pollution constitutes a public nuisance; Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589; Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Birmingham v. Land, 137 Ala. 538, 34 South. 613; more particularly when the stream has been appropriated by statute for a municipal water supply; Martin v. Gleason, 139 Mass. 183, 29 N. E. 664. But where it is not a public nuisance, a prescriptive right may be obtained by an upper riparian as against a lower riparian owner; Alabama Consol. C. & I. Co. v. Turner, 145 Ala. 639, 39 South. 603, 117 Am. St. Rep. 61; Morris C. & B. Co. v. Paper Co., 71 N. J. Eq. 481, 64 Atl. 746; 16 Can. S. C. 575; so of a city as against a lower riparian owner; Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711, where the deposit of city sewage was held not to be a public nuisance. The prescription period begins only from the time when an injury had been sustained by the complaining party; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am. Rep. 763; and the right of pollution is limited by the user during the period of acquiring the prescriptive right; L. R. 2 Ch. App. 478; Bloomington v. Costello, 65 Ill. App. 407.

Notwithstanding the length of time a city has discharged sewage into a stream, the state may regulate or forbid it; Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589.

See, as to pollution by municipalities, Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; State v. Concordia, 78 Kan. 250, 96 Pac. 487, 20 L. R. A. (N. S.) 1050, and notes.

Where a drain laid by property owners of a public street under permission from the city opens into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream, to the injury of a lower riparian owner, the drain is a nuisance and the city is liable for not abating it; Mansfield v. Bristor, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 767.

The pollution of streams has been the

subject of extended legislation in England, which is embodied in the Rivers Pollution Prevention Act, 1876; see Haworth on Rivers Pollution.

A state board of health may forbid citizens drinking polluted water; State Board v. St. Johnsbury, 82 Vt. 276, 73 Atl. 581, 32 L. R. A. (N. S.) 766, 18 Ann. Cas. 496.

POLYANDRY. The state of a woman who has several husbands.

Polyandry is legalized only in Thibet. It is inconsistent with the law of nature. See LAW OF NATURE.

POLYGAMY. The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another.

It differs from bigamy. Com. Dig. *Justices* (S 5); Co. 3d Inst. 88.

But bigamy is now commonly used even where polygamy would be strictly correct; 1 Russ. Cr. 186, n. On the other hand, polygamy is used where bigamy would be strictly correct; Mass. Gen. Stat. 1860, p. 817.

Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; R. S. § 5352 (Crim. Code, § 313); Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481.

An act of congress of March 3, 1887, was passed for the express purpose of the suppression of polygamy in Utah Territory. It expressly annuls the act of territorial legislation which contravenes its purposes and provided for winding up the corporation in the territory, known as the Church of Jesus Christ of the Latter Day Saints, and required the attorney-general to take proceedings for that purpose. The act contains elaborate provisions for adjusting property interests involved in this change, and providing severe penalties for violation of its provisions; U. S. R. S. 1 Supp. 568. This act was held constitutional; Church of Jesus Christ of L. D. S. v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; where it was also held that the pretence of religious belief cannot deprive congress of the power to prohibit polygamy and all other open offences against the enlightened sentiment of mankind.

See BIGAMY; RELIGION; LASCIVIOUS COHABITATION.

POLYGARCHY. A term used to express a government which is shared by several persons.

POND. A body of stagnant water; a pool. See Call. Sew. 103.

Any one has a right to erect a fish-pond; the fish in it are considered as real estate, and pass to the heir, and not to the executor; Ow. 20. Where land bounding on a lake or pond is conveyed, the grant extends only to the water's edge if it is a natural pond (some cases hold to low-water mark; Waterman v. Johnson, 13 Pick. [Mass.] 261); but to the middle of the stream if it is artificial; Ang. Wat. Cours. § 41. See 3 Washb. R. P. 5th ed. *633.

By the common law, fresh water lakes and ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad filum aquæ;* Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See Attorney General v. Pond Aqueduct, 133 Mass. 364. See LAKE.

That the public authorities have no statutory right to lease ponds which are in private ownership will not prevent a lease by them from forming the basis of a prescriptive title in the public; Attorney General v. Ellis, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120.

PONE. (Lat. *ponere*, to put). **In English Practice.** An original writ issuing out of chancery, for the purpose of removing a plaint from an inferior court into the superior courts at Westminster. The word signifies "put": put by gages, etc. The writ is called from the words it contained when in Latin, *Pone per vadium et salvos plegios*, etc.; put by gage and safe pledges, etc. See Fitzh. N. B. 69, 70 *a;* Digby, Hist. R. P. 71.

The writ of *certiorari* is now used in its place.

PONENDIS IN ASSISIS. An old writ directing a sheriff to empanel a jury for an assize or real action. Whart. Law Lex.

PONENDUM IN BALLIUM. A writ commanding that a prisoner be bailed in cases bailable. Whart. Law Lex.

PONENDUM SIGILLUM. A writ requiring justices to put their seals to a bill of exceptions, according to Stat. West. 2, 13 Ed. I. c. 31. Whart. Law Lex.

PONERE (Lat.). To put. The word is used in the old law in various connections, in all of which it can be translated by the English verb "put." See Glanv. lib. 2, c. 3.

PONIT SE (Lat. puts himself). **In English Criminal Practice.** When the defendant pleads "not guilty," his plea is recorded by the officer of the court, either by writing the words "*po se*," an abbreviation of the words *ponit se super patriam* (puts himself upon his country), or, as at the central criminal court, *non cul.* 2 Den. C. C. 392. See ARRAIGNMENT.

PONTAGE. A contribution towards the maintenance, rebuilding, or repairs of a bridge. The toll taken for this purpose also bears this name. Obsolete. Fleta, lib. 4, c. 1, § 16.

PONTIBUS REPARANDIS. An old writ directed to the sheriff commanding him to charge one or more to repair a bridge. Cowell; Reg. Orig. fol. 153.

POOL. A small lake of standing water.

By the grant of a pool, it is said both the land and water will pass; Co. Litt. 5. Undoubtedly the right to fish, and probably the right to use hydraulic works, will be acquired by such grant; Bullen v. Runnels, 2 N. H. 259, 9 Am. Dec. 55; Co. Litt. 5; Bac. Abr. *Grants* (H 3); Com. Dig. *Grant* (E 5); Jackson v. Halstead, 5 Cow. (N. Y.) 216; Cro. Jac. 150. See LAKE.

A combination of stakes, the money derived from which goes to the winner. Com. v. Ferry, 146 Mass. 203, 15 N. E. 484. See GAMING; HORSE RACE.

A commercial term used to indicate a contract between two competing railroad companies, whereby they agree to divide all their earnings over and above the amounts required for the payment of operating expenses. See RESTRAINT OF TRADE.

As a business term the word "pool," as used in the phrase "real estate pool," means no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic. Kilbourn v. Thompson, 103 U. S. 195, 26 L. Ed. 377.

POOLING AGREEMENT. See RESTRAINT OF TRADE; RATES.

POOL SELLING. See GAMING.

POOR. Destitute; helpless and in extreme want; Rhine v. Sheboygan, 82 Wis. 352, 52 N. W. 444; so completely destitute of property as to require assistance from the public; State v. Osawkee Tp., 14 Kan. 421, 19 Am. Rep. 99. In charities the poor need not be (though they generally are) the sole or especial object; 1 Jarm. Wills 217; but a trust for the benefit of poor boys was held not confined to those who required parish relief; 31 L. J. Ch. 810. See CHARITABLE USES; LEGACY; PAUPER.

POOR DEBTORS. By the constitution of the several states and territories, or by the laws which exist for the relief of poor debtors, it is provided in general terms that there shall be no imprisonment for debt. But this is usually qualified by provisions for the arrest of debtors in certain enumerated cases of fraud. The statutes in the different states are very similar, and as a rule, require the creditor to make affidavit that the debtor is about to remove some of his property out of the jurisdiction of the court with intent to defraud his creditors, or that, for the same reason, he is about to dispose or has disposed of his property, or that he is fraudulently concealing it; or that the debt, concerning which suit is brought, was fraudulently contracted. Such in general is the law in most of the states and territories.

Imprisonment for debt has been generally prohibited by constitutional provision. In some states it is conditioned upon the debtor delivering up his property for the benefit of his creditors. It was substantially abolished in England in 1869.

It may be stated generally that the object of such statutes is to induce the defendant to pay the debt, give security, or take advantage of the insolvent laws or of some enactments made especially for the relief of poor debtors. It follows therefore that in most of the states a person under arrest for debt may obtain his release in any of these ways. A poor debtor is usually compelled to resort to one of the two last mentioned, and, although the proceedings differ in the different states, yet as a rule he is released upon delivering his property to a trustee, or taking oath that he has not more than ten or twenty dollars above the amount exempted by statute in the particular state in which he is confined.

Statutes authorizing imprisonment of one who obtains food and lodging without paying therefor, with intent to defraud, are constitutional; Ex parte Milecke, 52 Wash. 312, 100 Pac. 743, 21 L. R. A. (N. S.) 259, 132 Am. St. Rep. 968; Ex parte King, 102 Ala. 182, 15 South. 524; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656. They are usually held to impose the penalty, not because of or for the purpose of collecting the debt, but because of the fraud; State v. Benson, 28 Minn. 424, 10 N. W. 471; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; State v. Engle, 156 Ind. 339, 58 N. E. 698.

POOR LAW BOARD. A government board appointed by statute 10 & 11 Vict. c. 109, to take the place of poor law commissioners, who had general management of the poor and the funds for their relief. The poor law board is now superseded by the local government board, established under 34 & 35 Vict. c. 70; 3 Steph. Com. 49.

POOR RATE. A rate levied by church authorities for the relief of the poor.

POPE. The bishop of Rome and head of the Roman Catholic church. He is elected by certain officers called cardinals, and remains in power during life. In the 9th Collation of the Authentics it is declared the bishop of Rome hath the first place of sitting in all assemblies, and the bishop of Constantinople the second. Ridley, Civ. & Eccl. L. pt. 1, c. 3, § 10.

"It does not appear necessary that a Pope be selected either from the ranks of the Cardinals or that he be in Orders." 1 Halleck, Int. L., Baker's ed. 104.

The Catholic powers concede the precedency to the Pope as the visible head of the church; but Russia and Turkey and the Protestant states of Europe consider him

only as the bishop of Rome, and a sovereign prince, although since September 20, 1870, he has been dispossessed of substantially all his territory. By the Italian decree of May 13, 1871, he is guaranteed his sovereign rights and other immunities by Italy, but he has refused to accept this decree. He maintains diplomatic relations with France and some other Catholic states; *id.* 118.

Though deprived of the territorial dominion which he once enjoyed, he holds, as sovereign pontiff and head of the Roman Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged. Nevertheless he does not make war, and the conventions which he concludes with states are not called treaties but concordats. 1 Moore, Dig. Int. L. 39, cited in Ponce v. Church, 210 U. S. 318, 28 Sup. Ct. 737, 52 L. Ed. 1068.

See ROMAN CATHOLIC CHURCH.

POPULAR ACTION. An action given by statute, to any one who will sue for the penalty. A *qui tam* action. Dig. 47. 23. 1.

POPULAR SENSE. The sense in which a subject is understood by those conversant therewith. 1 Ex. D. 248, adopted in Westerlund v. Min. Co., 203 Fed. 599, 121 C. C. A. 627.

POPULAR USE. The occasional and precarious enjoyment of property by the members of society in their individual capacity, without the power to enforce such enjoyment according to law. Gilmer v. Lime Point, 18 Cal. 238.

POPULISCITUM (Lat.). An act of the commons; same as *plebiscitum.* Ainsworth, Dict.

A law passed by the whole people assembled in *comitia centuriata*, and at the proposal of one of the senate, instead of a tribune, as was the case with a *plebiscitum.* Tayl. Civ. Law 178; Mackeldey, Civ. Law § 26.

PORCH. A portico; a shelter in front of a door. Attorney General v. Ayer, 148 Mass. 584, 20 N. E. 451.

PORT. A place to which the officers of the customs are appropriated, and which includes the privileges and guidance of all members and creeks which are allotted to them. 1 Chitty, Com. Law 726; Postlewaith, Com. Dict. According to Dalloz, a port is a place within land, protected against the waves and winds and affording to vessels a place of safety. By the Roman law a port is defined to be *locus conclusus quo importantur merces et unde exportantur.* Dig. 50. 16. 59. See Packwood v. Walden, 7 Mart. N. S. (La.) 81. In the revenue laws it is synonymous with district, when the limits of the port and district are the same; Ayer v. Thacher, 3 Mas. 153, Fed. Cas. No. 684. As used in the R. S. § 4347 it means any place from which merchandise may be shipped.

A port differs from a haven, and includes something more. *First*, it is a place at which vessels may arrive and discharge or take in their cargoes. *Second*, it comprehends a ville, city, or borough, called in Latin *caput corpus*, for the reception of mariners and merchants, for securing the goods and bringing them to market, and for victualling the ships. *Third*, it is impressed with its legal character by the civil authority. Hale, *de Portibus Mar.* c. 2; 1 Hargr. Tracts 46, 73; Bac. Abr. *Prerogative* (D 5); Com. Dig. *Navigation* (E); Co. 4th inst. 148; 2 Chitty, Com. L. 2; Dig. 50. 16. 59; 43. 12. 1. 13; 47. 10. 15. 7; 39. 4. 15.

The exact meaning of the term was considered by Lord Esher, M. R., in 15 Q. B. D. 580. He held that it was not usually the legal port as defined by acts of Parliament, but, "a place of safety for the ship and goods, whilst the goods are being loaded and unloaded"; that there never would be a port in the ordinary business sense of the word, unless there was some element of safety in it for the ship and goods, and that nothing was more certain to be such a port than a natural port; that a natural port was "a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a place of safety for loading and unloading"; that any place at which the loading and unloading took place might safely be inferred to be within "the port," as understood by the parties; that beyond the place of loading and unloading, the port would extend to any further space over which the court authorities were in the habit of exercising "port discipline."

In L. R. 4 Ex. 238, 245, Byles, J., said: "The passage from Lord Hale, *de Portibus Maris* (ch. 2, p. 46), shows that the limits of a port may depend on the existence of wharves, quays, buildings, and other conveniences. It may accordingly, from time to time, vary and increase with the increase of population and of buildings. Lord Hale further says: 'The port of London anciently extended to Greenwich in the time of Edward I. and Gravesend is a member of it. The extent of a port therefore after a lapse of years may become a question of fact.'"

In the same case below the meaning of "port" generally was considered by Martin, B.; L. R. 3 Ex. 330, 345. See HOME PORT; DOMESTIC PORT.

PORT OF DELIVERY. This is sometimes used to distinguish the port of unlading or destination, from any port at which the vessel touches for other purposes. The Two Catherines, 2 Mas. 319, Fed. Cas. No. 14,288.

PORT OF DEPARTURE. As used in the United States statutes requiring a ship to procure a bill of health from the consular officer at the place of departure, it is not the last port at which the ship stops while bound for the United States, but the port from which she cleared. The Dago, 61 Fed. 986, 10 C. C. A. 224.

PORT OF DESTINATION. As used in a time policy, the phrase has been held to mean any foreign port to which the vessel may be destined during the voyage, as well as her home port, and to include any usual stopping place for lading or unlading cargoes. Cole v. Ins. Co., 12 Gray (Mass.) 501, 74 Am. Dec. 609.

PORT OF DISCHARGE. The place where the substantial part of the cargo is discharged has been held to be such, although done with the intent to complete the discharge at another basin. Bramhall v. Ins. Co., 104 Mass. 510, 6 Am. Rep. 261. Some cargo must be discharged to make the port of destination the port of discharge; U. S. v. Barker, 5 Mas. 404, Fed. Cas. No. 14,516. See, further, Kimball v. The Anna Kimball, 2 Cliff. 4, Fed. Cas. No. 7,772.

PORT RISK. A risk upon a vessel whilst she is lying in port and before she has taken her departure on another voyage. Nelson v. Ins. Co., 71 N. Y. 459.

PORT TOLL. The toll paid for bringing goods into a port.

PORTATICA (L. Lat.). **In English Law.** The generic name for port duties charged to ships. Hargr. Law Tracts 64.

PORTER. The name of an ancient English officer who bore or carried a rod before the justices. The door-keeper of the English parliament also bears this name.

One who is employed as a common carrier to carry goods from one place to another in the same town is also called a porter. Such person is, in general, answerable as a common carrier. Story, Bailm. § 496.

PORTGREVE (from Sax. *gerefa*, reeve or bailiff, and port). A chief magistrate in certain maritime towns. The chief magistrate of London was anciently so called, as appears from a charter of king William I. Instead of this portgreve of London, the succeeding king appointed two bailiffs, and afterwards a mayor. Camden, Hist. 325.

PORTION. That part of a parent's estate, or the estate of one standing *in loco parentis*, which is given to a child. 1 Vern. 204. See 8 Com. Dig. 539; 16 Viner, Abr. 432; 1 Belt, Suppl. Ves. 34, 58, 303; 2 *id.* 46; Appeal of Lewis, 108 Pa. 137; Holly v. State, 54 Ala. 240.

The part, share, or division, made for a child by the parent. Dickison v. Dickison, 138 Ill. 541, 28 N. E. 792, 32 Am. St. Rep. 163.

PORTION DISPONIBLE. **In French Law.** The part of a person's estate which he may bequeath to others than his natural heirs. A parent having one legitimate child may dispose of one-half only of his property; leaving two, one-third only; and leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos*, or by will. See LEGITIME.

PORTIONIBUS. Is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish. 4 Cl. & F. 1.

PORTORIA (Lat.). **In Civil Law.** Duties paid in ports on merchandise. Code 4. 61. 3. Taxes levied in old times at city gates. Tolls for passing over bridges. Vicat, Voc. Jur.; Spelman, Gloss.

PORTO RICO. By the ratification of the treaty of peace with Spain, Porto Rico became subject to the legislative power of Congress, but, pending the action of Congress, and the necessary delay in establishing civil government, there was no *inter regnum*, and the authority to govern the territory ceded by the treaty was, by the law applicable to conquest and cession, under the military control of the president as commander-in-chief; Santiago v. Nogueras, 214 U. S. 260, 29 Sup. Ct. 608, 53 L. Ed. 989. The purpose of the organic act of April 12, 1900, was to give local self-government, conferring an autonomy similar to that of the states: Gromer v. Dredging Co., 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801; Porto Rico v. Rosaly Y Castillo, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507.

Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory. Its history and its legal and political institutions up to its annexation are matters which must be recognized, as are the ancient laws and institutions of many of our states, when matters come before it from their several jurisdictions. The court will take judicial notice of the Spanish law as far as it effects our insular possessions. It is *pro tanto* no longer foreign law; Ponce v. Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068.

While it has not for all purposes been incorporated into the United States, it is not foreign territory; De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; nor are its citizens aliens; American R. Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, following Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317. Its organization is in most essentials that of a territory; American R. Co. v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, following New York v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286.

When Spain's sovereignty was withdrawn, the Spanish Governor-General and all other officers of the crown of Spain whose authority consisted in the exercise of the royal

prerogatives delegated to them, ceased to exercise such authority, and the powers possessed by them under the royal decree of 1878 in regard to the formation of corporations did not pass to the authority of the United States; Moore, Int. Law § 93.

By the act of April 12, 1900, in relation to the government of Porto Rico, the commissioner of navigation was empowered to make such regulations, subject to the approval of the secretary of the treasury, as he might deem expedient for the nationalization of all vessels owned by the inhabitants on the date of the exchange of the ratifications of the treatry of cession, and which continued to be so owned up to the time of such nationalization, and for their admission to all the benefits of the coasting trade of the United States.

The power to dispose permanently of the public lands and property rests in congress and, in the absence of a statute conferring such power, cannot be exercised by the executive; 1 Moore, Int. L. § 93.

The title of the Roman Catholic church in Porto Rico to churches erected and dedicated to religious uses, is not affected by the fact that some of the funds for building or repairing them were public funds appropriated by the municipality of Ponce, where such appropriations were made without reservation or restriction; Ponce v. Roman Catholic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068.

See PHILIPPINES; MILITARY OCCUPATION.

PORTRAIT. A picture of a person painted from life or from reasonable materials, if there are such, from which a likeness can be framed; or a picture painted after a man's death and meant to represent him. If there is nothing affording the materials for the portrait, it is completely an ideal one and cannot properly be called a portrait; Lord Lyndhurst, in 14 L. J. Ch. 73.

PORTSALES. Auctions were anciently so called, because they took place in ports.

PORTSOKA, or PORTSOKEN. Any place within the jurisdiction of a city. Cowell.

PORTUGAL. A republic of Europe. The revolution occurred October 5, 1910, and the new government was formed immediately afterwards. The executive is vested in a president and a responsible cabinet of seven members. The legislature consists of two chambers.

The Codigo Civil Portuguëz was established in 1868. The law is administered in about one hundred and twenty public law courts and a high court of appeal at Lisbon. There are three high courts at Lisbon and there are also three other high courts in other districts. Some cases are tried before a jury.

POSITIONS. In pleading in ecclesiastical courts, the numbered paragraphs of a detailed statement, prepared by each of the parties, of the facts in support of his pleadings. Langdell, Eq. Pl.

POSITIVE. Express; absolute; not doubtful. This word is frequently used in composition.

POSITIVE CONDITION. One in which the thing which is the subject of it *must* happen: as, if I marry. It is opposed to a negative condition, which is where the thing which is the subject of it *must not* happen: as, if I do not marry.

POSITIVE EVIDENCE. That which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from circumstantial evidence. 3 Bouvier, Inst. n. 3057.

POSITIVE FRAUD. See FRAUD.

POSITIVE LAW. Law actually ordained or established, under human sanctions, as distinguished from the law of nature or natural law, which comprises those considerations of justice, right, and universal expediency that are announced by the voice of reason or of revelation. Municipal law is chiefly, if not essentially, positive; while the law of nations has been deemed by many of the earlier writers as merely an application of the law of nature. That part of the law of nations which rests on positive law may be considered in a threefold point of view:—1. The *universal voluntary law*, or those rules which become law by the uniform practice of nations in general, and by the manifest utility of the rules themselves; 2. The *customary* law, or that which, from motives of convenience, has, by tacit but implied agreement, prevailed, not necessarily among all nations, nor with so permanent a utility as to become a portion of the *universal* voluntary law, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it. 1 Taunt. 241; 3. The *conventional* law, or that which is agreed between particular states by *express treaty*, a law binding on the parties among whom such treaties are in force. 1 Chitty, Com. Law 28. See LAW.

POSSE (Lat.). To be able. This word is used substantively to signify a possibility. For example, such a thing is *in posse*, that is, such a thing may possibly be. When the thing is in being, the phrase to express it is, *in esse*.

POSSE COMITATUS (Lat.). The power of the county.

The sheriff, or other peace officer, has authority by the common law, while acting under the authority of the writ of the United States, commonwealth, or people, as the case may be, and for the purpose of

preserving the public peace, to call to his aid the *posse comitatus;* 1 Bla. Com. 343.

But with respect to writs which issue in the first instance to arrest in civil suits, or on mesne process, the sheriff is not bound to take the *posse comitatus* to assist him in the execution of them; though he may, if he pleases, on anticipated, or actual resistance to the execution of the process; Co. 2d Inst. 193; Co. 3d Inst. 161; Coyles v. Hurtin, 10 Johns. (N. Y.) 85; State v. Allison, 47 N. C. 339.

Although the sheriff is not bound upon a *capias ad respondendum* to take the *posse comitatus,* it has been held to be his duty to do so if he has any reason to anticipate resistance; nor can it be said to be a hardship on the sheriff that he should be bound to provide against resistance; 12 Jurist 1052; Winst. 144. And likewise with reference to a *capias ad satisfaciendum;* Abbott v. Holland, 20 Ga. 598; and he cannot, in an action for escape, plead that the prisoner was rescued; *id.*

Having the authority to call in the assistance of all citizens, he may equally require that of any individual; but to this general rule there are some exceptions; persons of infirm health, or who lack understanding, minors under the age of fifteen years, women, and perhaps some others, it seems, cannot be required to assist the sheriff, and are, therefore, not considered as a part of the power of the county; Viner, Abr. *Sheriff* (B).

A refusal on the part of an individual lawfully called upon to assist the officer in putting down a riot is indictable; 1 Carr. & M. 314. In this case will be found the form of an indictment for this offence.

Although the sheriff is acting without authority, yet it would seem that any person who obeys his command, unless aware of that fact, will be protected; McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665.

An individual not called upon by the sheriff to lend his aid does so at his peril; Kirbie v. State, 5 Tex. App. 60. In a case where the defendant assisted a sheriff's officers in executing a writ of replevin without their solicitation, the court held him justified in so doing; 2 Mod. 244; see Williams v. Bunker, 78 Me. 373, 5 Atl. 882; Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Bac. Abr. *Sheriff* (N); Comfort v. Com., 5 Whart. (Pa.) 437.

The employment of the army in this way is forbidden; Act of June 18, 1878.

See SHERIFF; PEACE; MARTIAL LAW.

POSSESSED. This word is applied to the right and enjoyment of a termor, or a person having a term, who is said to be possessed, and not seised. Bac. Tr. 335; Dy. 369. It is sometimes synonymous with "seised"; Flowers v. Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75.

"Possessed" is a variable term in the law, and has different meanings as it is used in different circumstances. It sometimes implies a temporary interest in lands; as we say a man is possessed, in contradistinction to being seised. It sometimes implies the corporal having; as we say a man is seised and possessed. But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his; Thompson v. Moran, 44 Mich. 603, 7 N. W. 180.

POSSESSIO (Lat.). **In Civil Law.** The detention of a thing: divided into—*first,* natural, or the naked detention of a thing, without intention to acquire ownership; *second,* civil, or the detention of a thing to which one has a right, or with intention of acquiring ownership. Hein. *Elem. Jur. Civ.* § 1288; Mackeldey, Civ. Law § 210.

In Old English Law. Possession; seisin. Law Fr. & Lat. Dict.; 2 Bla. Com. 227; Bracton, lib. 2, c. 17; Cowell, *Possession.* But *seisina* cannot be of an estate less than freehold; *possessio* can. Slater v. Rawson, 1 Metc. (Mass.) 450.

POSSESSIO FRATRIS (Lat. the brother's possession). A technical phrase applied in the English law relating to descents, to denote the possession by one in such privity with a person as to be considered the person's own possession.

By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seisin of the lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratris.* The possession of a tenant for years, guardian, or brother is equivalent to that of the party himself, and is termed *possessio fratris;* Littl. sect. 8; Co. Litt. 15 *a;* 3 Wills. 516; 7 Term 386.

In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, and Virginia, the real and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seisin of the ancestor; Reeve, Desc. 377; Hillhouse v. Chester, 3 Day (Conn.) 166, 3 Am. Dec. 265; Gardner v. Collins, 2 Pet. (U. S.) 59, 7 L. Ed. 347; In Maryland, New Hampshire, North Carolina, and Vermont, the doctrine of *possessio fratris,* it seems, is recognized; Chirac v. Reinecker, 2 Pet. (U. S.) 625, 7 L. Ed. 538. Reeve, Desc. 377; 4 Kent 384.

POSSESSION. The detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name.

By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. Thus, the seaman possesses his ship, but not the water in which it moves, although he makes each subserve his purpose.

It expresses the closest relation that can exist between a corporeal thing and the person who possesses it, implying an actual, physical contact, as by sitting or standing upon a thing; Bryan v. Spivey, 109 N. C. 57, 13 S. E. 766.

Actual possession exists where the thing is in the immediate occupancy of the party. Simpson v. Blount, 14 N. C. 34.

Constructive possession is that which exists in contemplation of law, without actual personal occupation. Hubbard v. Austin, 11 Vt. 129. And see 2 Bla. Com. 116.

There is no word more ambiguous in its meaning than possession. It is invariably used to describe actual possession and constructive possession, which are often so shaded into one another that it is difficult to see where one ends and the other begins; National Safe Deposit Co. v. Stead, 232 U. S. 58, 34 Sup. Ct. 209, 58 L. Ed. ——.

"Possession is the occupation of anything with the intention of exercising the rights of ownership in respect to it." Hunter, Rom. Law 209. *Natural* possession (*naturalis possessio*) implies mere physical contact with a thing, apart from all attempted exercise of rights with respect to it. Taylor, Jurispr. 545. The lower degree of control was known to the later civilians as *detentio*. *Id.* 544.

In order to complete a possession, two things are required: that there be an occupancy, *apprehension*, or taking; that the taking be with an intent to possess (*animus possidendi*): hence persons who have no legal wills, as children and idiots, cannot possess or acquire possession; Pothier; Etienne. See 1 Mer. 358. But an infant of sufficient understanding may lawfully acquire the possession of a thing; Mitch. R. E. 259.

Proof of the possession of property is commonly said to be *prima facie* evidence of title to it; and this is so with respect to land, in which case it has been held that proof of possession is sufficient evidence of title to maintain an action against a powder company for damages caused by an explosion; Hazard Powder Co. v. Volger, 58 Fed. 152, 7 C. C. A. 130. This particular phrase that possession is *prima facie* evidence of title has been very much criticised by Sir F. Pollock, who says that "it would be less intelligible at first sight, but not less correct to say that in the developed system of common-law pleading and procedure as it existed down to the middle of this century, proof of title was evidence only of a right to possess." Poll. Torts 317. Under the common-law forms of action, possession was of the utmost importance and was rather to be considered than ownership. "An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the true owner of goods is the person, and the only person, entitled to immediate possession." Poll. Torts 316.

Commenting on the suggestion sometimes made that there is no doctrine of possession in our law, the same author says: "The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership; and the rights of a possessor, the one entitled to possess, have all but monopolized the very name of property." *Id.* 317.

"Legal possession does not necessarily coincide either with actual physical control . . . or with the right to possess (constantly called property in our books), and it need not have a rightful origin." *Id.* 318. "The common law, when it must choose between denying legal possession to the persons apparently in possession and attributing it to a wrongdoer, generally prefers the latter course. In Roman law there is no such general tendency, though the results are often similar." *Id.* 319.

Judge Holmes considers possession a conception only less important than contract, and he contends that the English system is far more civilized than the Roman. He seeks to answer the question which presents so much difficulty to German philosophers: "Why is possession protected by the law when the possessor is not also an owner?" His reply is that "possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will; he has extended his personality into or over that object." Holmes, Com. Law 207. "Rights of ownership are substantially the same as those incident to possession. . . . The owner is allowed to exclude all and is accountable to no one; the possessor is allowed to exclude all but one and is accountable to no one but him." *Id.* 246. See Holmes, Common Law, Lect. 6; Pollock, Torts, 5th ed. ch. 9; F. W. Maitland in 1 Law Quart. Rev. 324; 2 *id.* 481.

A very high degree of legal protection is accorded to one lawfully in possession and, whether its origin is rightful or not, a stranger cannot be heard in opposition to it. The true owner may be heard, but an intruder never. It is said, however, that the bald proposition that possession is a good title against a wrongdoer is inaccurate, if stated entirely without a qualification, and that the true limits of the bare possessor's right to recover damages for interference with his possession are: 1. If the

defendant cannot show who the true owner is, the bare possessor may recover the same measure of damages as if he were the true owner, whether he is liable over to the owner or not. 2. Where the true owner is shown, the bare possessor cannot recover the value of the goods taken or the diminution in their value, or for injury, unless he is liable over to the owner. 3. Whether the true owner be shown or not, the possessor may recover damages for the taking or trespass, nominal or substantial, as the taking is or is not attended with aggravation. 7 Law Quart. Rev. 242.

Possession in the Roman law is the subject of an extended discussion by J. M. Lightwood in 3 Law Quart. Rev. 32, who takes issue with Judge Holmes' treatment of that subject, as to which he says, that although the differences between the two systems are very striking, Judge Holmes treats the civilians with scant respect, although "the knowledge he shows of their rights proves that he has himself by no means neglected them and we shall not be far wrong in following his practice rather than his precept."

Sir F. Pollock (Genius of Com. Law 120) states a few "comprehensive principles as to possession in the common law in their simplest form: 1. Possession in fact is such actual exclusive control as the nature of the thing admits. 2. Possession in law, the right which is protected by possessory remedies, generally follows possession in fact, but does not necessarily cease when possession in fact ceases. The chief exception to this rule is that a servant in charge of his master's goods has not possession in law. 3. Possession in law continues until determined in some way which the law definitely recognizes, beyond the mere absence or failure of a continuing intent to possess. 4. Possession in law is a commencement of title; in other words the possessor can deal with the thing as an owner against all persons not having a better title and this protection extends to persons deriving title from him in good faith. 5. When possession in fact is so contested that no one can be said to have actual effective control, possession in law follows the better title. It is true that every one of these principles, in its application to the complex facts of life, may call for careful and even subtle elaboration. But I am free to maintain that in themselves they are adequate and rational. We take the line of making legal possession coincide with apparent control so far as possible; the Roman law takes the opposite line of unwillingness to separate legal possession from ownership or what we call 'general property'; and I venture to think our way both the simpler and the better."

Failure to take possession is sometimes considered a badge of fraud, in the transfer of personal property. See SALE; MORTGAGE.

Possession of real property will be presumed to accompany ownership until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers; Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705, 30 L. Ed. 801. Long continued possession and use of real property creates a presumption of lawful origin; Bradshaw v. Ashley, 180 U. S. 59, 21 Sup. Ct. 297, 45 L. Ed. 423; and this presumption need not rest upon belief that a conveyance was in point of fact executed; Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759.

When it is not based on legal right, but secured by violence and maintained with force and arms, possession cannot furnish the basis of a right; Lyle v. Patterson, 228 U. S. 211, 33 Sup. Ct. 480, 57 L. Ed. 804.

Securities of a decedent, which he had kept in a safe-deposit box, to which he alone had access, are not "in the possession or under the control" of the safe-deposit company; People v. Mercantile Safe-Deposit Co., 159 App. Div. 98, 143 N. Y. Supp. 849, *contra*, National S.-D. Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430.

See Pollock & Wright, Possession; Holland, Jurisprudence; Savigny, Rechts des Besitzes; Austin, Jurisprudence; Salmond, Jurisprudence.

See ADVERSE POSSESSION; LIMITATIONS.

In Louisiana. *Civil* possession exists when a person ceases to reside in a house or on the land which he occupied, or to detain the movable which he possessed, but without intending to abandon the possession. It is the detention of a thing by virtue of a just title and under the conviction of possessing as owner. La. Civ. Code, art. 3392, 3394.

Natural possession is that by which a man detains a thing corporeal; as, by occupying a house, cultivating ground, or retaining a movable in his possession. Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void. La. Civ. Code, art. 3391, 3393.

Possession applies properly only to corporeal things, movables and immovables. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a *quasi*-possession, and is exercised by a species of possession of which these rights are susceptible. *Id.* art. 3395.

Possession may be enjoyed by the proprietor of the thing or by another for him: thus, the proprietor of a house possesses it by his tenant or farmer.

To acquire possession of a property, two things are requisite: the intention of possessing as owner; the corporeal possession of the thing. *Id.* art. 3399.

Possession is lost with or without the consent of the possessor. It is lost *with* his

consent—when he transfers this possession to another with the intention to divest himself of it; when he does some act which manifests his intention of abandoning possession: as, when a man throws into the street furniture or clothes of which he no longer chooses to make use. *Id.* art. 3411. A possessor of an estate loses the possession *against* his consent—when another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering; when the possessor of an estate allows it to be usurped and held for a year, without during that time having done any act of possession or interfered with the usurper's possession. *Id.* art. 3412.

In Criminal Law. In some states it is made a criminal offence to have possession of burglars' tools with intent to use them for the purpose for which they were intended. Under such a statute it was held that it is sufficient to allege in the information possession with the intent to break open places of deposit in general and take property, without specifying any particular place or property. Scott v. State, 91 Wis. 552, 65 N. W. 61.

See RECENT POSSESSION OF STOLEN PROPERTY.

In International Law. As indicating political control, a possession means the same as a colony. It was so used in the treaty of 1897, between the United States and Great Britain, which failed to receive the approval of the senate.

The Roman law doctrine of possession, or occupation, has been of immense importance in international law; by it anything without an owner might be taken possession of (occupation) by any one who desired to keep it. Grotius, to some extent at least, applied the doctrine to the partition of the New World by European nations. Taylor, Jurispr. § 48.

POSSESSION MONEY. An allowance to one put in possession of goods taken under writ of *fieri facias*. Holthouse, Dict.

POSSESSION, WRIT OF. See HABERE FACIAS POSSESSIONEM.

POSSESSOR. He who holds, detains, or enjoys a thing, either by himself or his agent, which he claims as his own.

In general, the possessor of personal chattels is presumed to be the owner; and in case of real estate he has a right to receive the profits until a title adverse to his possession has been established, leaving him subject to an action for the mesne profits.

POSSESSORY ACTION. In Old English Law. A real action, in which the plaintiff, called the demandant, sought to recover the *possession* of land, tenements, and hereditaments. On account of the great nicety required in its management, and the introduction of more expeditious methods of trying titles by other actions, it has been laid aside. Finch, Laws 257.

In admiralty law the term is still in use. See PETITIONS.

In Louisiana. An action by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted. Preston v. Zabrisky, 2 La. 227.

POSSIBILITY. An uncertain thing which may happen. Lilly, Reg. A contingent interest in real or personal estate. 1 Madd. 549.

Possibilities are near, as when an estate is limited to one after the death of another; or remote, as that one man shall be married to a woman, and then that she shall die and he be married to another. 1 Fonbl. Eq. n. *e;* Viner, Abr.; 2 Co. 51 *a.*

Possibilities are also divided into—a possibility coupled with an interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises, and in contingent, springing, or executory uses. See Bodenhamer v. Welch, 89 N. C. 81.

A *bare* possibility, or hope of succession. This is the case of an heir apparent during the life of his ancestor. It is evident that he has no right which he can assign, devise, or even release. See Chal. R. P. 66.

A possibility or mere contingent interest, as, a devise to Paul if he survive Peter. Dane, Abr. c. 1, a. 5, § 2, and the cases there cited. See PERPETUITY.

POSSIBLE. Liable to happen or come to pass, capable of existing or of being conceived or thought of; capable of being done; not contrary to the nature of things. Topeka City Ry. Co. v. Higgs, 38 Kan. 383, 16 Pac. 667, 5 Am. St. Rep. 754. It is sometimes equivalent to practicable or reasonable; Palmer v. Ins. Co., 44 Wis. 208. An undertaking to supply an article as soon as possible is construed to mean with all reasonable promptitude, regard being had to the manufacturer's means of business, and his orders already in hand; 26 L. J. C. P. 73; 4 Q. B. D. 670.

POST (Lat.). After. When two or more alienations or descents have taken place between an original intruder and the tenant or defendant in a writ of entry, the writ is said to be in the *post*, because it states that the tenant had not entry unless *after* the ouster of the original intruder. 3 Bla. Com. 182. Persons claiming under the *propositus* by feofment or inheritance were said to be "in the *per*," while those claiming in any other manner, *e. g.* the limitation of a use, as tenant in dower, etc., were said to be "in the *post*." Except in case of the heir, the distinction is that persons in the *per* take

by the act of the party at common law unassisted by statute, while persons in the *post* take by operation of law without any act of the party or by his act aided by statute; 4 L. Quart. Rev. 362. See ENTRY, WRIT OF.

A military establishment where a body of troops is permanently fixed. Caldwell's Case, 19 Wall. (U. S.) 268, 22 L. Ed. 114; a military post is synonymous with military station. U. S. v. Phisterer, 94 U. S. 219, 24 L. Ed. 116.

POST CONQUESTUM. After the Conquest. Words inserted in the king's title by King Edward I., and constantly used in the time of Edward III. Toml.

POST-DATE. To date an instrument a time after that on which it is made. See DATE.

POST DIEM (Lat.). After the day; as, a plea of payment *post diem*, after the day when the money became due. Com. Dig. *Pleader* (2 W. 29).

POST DISSEISIN. In English Law. The name of a writ which lies for him who, having recovered lands and tenements by force of a novel disseisin, is again disseised by a former disseisor. Jacob, Law Dict.

POST ENTRY. In Maritime Law. An entry made by a merchant upon the importation of goods, after the goods have been weighed, measured, or gauged, to make up the deficiency of the original or prime entry. The custom of making such entries has arisen from the fact that a merchant in making the entry at the time of importation is not or may not be able to calculate exactly the duties which he is liable to pay: he therefore makes an approximately correct entry, which he subsequently corrects by the *post entry*. See Chitty, Com. L. 746.

POST FINE. A duty formerly paid to the king for a fine acknowledged in his court.

POST LITEM MOTAM (Lat.). After the commencement of the suit.

Declarations or acts of the parties made *post litem motam* are presumed to be made with reference to the suit then pending, and, for this reason, are not evidence in favor of the persons making them; while those made before an action has been commenced, in some cases, as when a pedigree is to be proved, may be considered as evidence; 4 Camp. 401.

POST-MARK. A stamp or mark put on letters in the postoffice.

Post-marks are evidence of a letter's having passed through the postoffice; 2 Camp. 620; 2 B. & P. 316; New Haven Co. Bk. v. Mitchell, 15 Conn. 206. But they are not evidence *per se* without proof; 1 Campb. 215; 16 M. & W. 124.

See LETTER; POSTAL SERVICE.

POST MORTEM (Lat.). After death: as, an examination *post mortem* is an examination made of a dead body to ascertain the cause of death; an inquisition *post mortem* is one made by the coroner.

It is the duty of the coroner, after death by violence, to cause a *post mortem* examination to be made by a competent medical authority. A physician thus employed may, at common law, maintain an action against the county for trouble and labor expended in such examination; Gibson, C. J., in Com. v. Harman, 4 Pa. 269.

A father may maintain an action against one to whom he has intrusted his child for treatment, for an autopsy performed upon it after death; Burney v. Children's Hospital, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273. A widow may recover damages in a similar case for the unlawful dissection of the body of her dead husband; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative;" Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471; other authorities to the same general effect are Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249; Young v. College of Physicians, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540. See DEAD BODY.

POST-NATUS (Lat.). Literally, after born; it is used by the old law writers to designate the second son. See PUISNE; POSTNATI.

POST NOTES. A species of bank-notes payable at a distant period, and not on demand. In re Dyott's Estate, 2 W. & S. (Pa.) 463. A kind of bank-notes intended to be transmitted at a distance by post. See Medomak Bank v. Curtis, 24 Me. 36.

POST-NUPTIAL. Something which takes place after marriage: as, a post-nuptial settlement, which is a conveyance made generally by the husband for the benefit of the wife.

A post-nuptial settlement may be either with or without consideration. The former is valid even against creditors, when in other respects it is untainted with fraud; Picquet v. Swan, 4 Mas. 443, Fed. Cas. No. 11,133; Gore v. Waters, 2 Bail. (S. C.) 477. The latter, when made without consideration, if *bona fide*, and the husband be not involved at the time, and it be not disproportionate to his means, taking his debts and situation into consideration, is valid; Picquet v. Swan, 4 Mas. 443, Fed. Cas. No. 11,-

133. See ANTE-NUPTIAL CONTRACT; SETTLEMENT; VOLUNTARY CONVEYANCE.

POST-OBIT (Lat.). An agreement by which the obligor borrows a certain sum of money and promises to pay a larger sum, exceeding the lawful rate of interest, upon the death of a person from whom he has some expectation, if the obligor be then living. Boynton v. Hubbard, 7 Mass. 119; 6 Madd. 111; 5 Ves. 57; 19 *id.* 628. See CATCHING BARGAIN; EXPECTANCY; MACEDONIAN DECREE.

POSTOFFICE. A government office for the receipt and delivery of the mail.

The power to establish postoffices does not enable the postmaster-general to bind the government by leasing a postoffice for twenty years when there is no appropriation therefor; Chase v. U. S., 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 234.

The top of a letter-box is not an authorized depository for mail matter; 17 Op. A. G. 524.

A repair shop though designated as a station is not a branch postoffice or station; Knox v. U. S., 30 Ct. Cl. 59.

Where goods are sent by mail the postoffice is the agent of the buyer and not the seller; [1898] A. C. 200; and when they are delivered by the seller to the postoffice the title vests in the buyer; *id.* 204.

No person shall furnish any private conveyance for letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route or between places between which the mail is carried. See Blackham v. Gresham, 16 Fed. 609.

All waters, canals, and plank roads are post routes during the time the mail is carried thereon, and all railroads in operation are post roads; R. S. § 3964; all public roads and highways are post roads; Act of March 1, 1884. See U. S. v. R. Co., 160 U. S. 1, 40, 16 Sup. Ct. 190, 40 L. Ed. 319.

See POSTAL SERVICE.

POST ROADS. See POSTOFFICE.

POSTAGE. The money charged by law for carrying and delivering mail matter.

The rates of postage between places in the United States are fixed by law; the rates of postage upon foreign letters are fixed by arrangements entered into by the postmaster-general, in pursuance of authority vested in him by congress for that purpose.

The vice president and members and members-elect of, and delegates and delegates-elect to, congress may send "any mail matter" free, not exceeding four ounces, "upon official or departmental business." Act of April 28, 1904.

Reading matter in raised characters for the blind, up to 10 pounds in a single volume or in packages not exceeding four pounds and containing no advertisements or other matter, unsealed, and when sent by blind institutions or public libraries as a loan and on return, are free. Act of March 27, 1904.

POSTAGE-STAMPS. The act of congress approved March 3, 1847, section 11, and the act of congress of March 3, 1841, sections 3, 4, provide that, to facilitate the transportation of letters in the mail, the postmaster-general be authorized to prepare postage-stamps, which when attached to any letter or packet shall be evidence of the payment of the postage chargeable on such letter. The same sections declare that any person who shall falsely or fraudulently make, utter, or forge any post-stamp, with the intent to defraud the postoffice department, shall be deemed guilty of felony, and be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment. And if any person shall use or attempt to use, in prepayment of postage, any postage-stamp which shall have been used before for like purposes, such person shall be subject to a penalty of fifty dollars for every such offence; to be recovered in the name of the United States, in any court of competent jurisdiction. See, also, Act of Mar. 3, 1851, 9 Stat. at L. 589; Act of Aug. 31, 1852, 10 Stat. at L. 141; 1 Supp. R. S. p. 249, § 28. Postmasters and other postal employés are forbidden to dispose of postage-stamps, stamped envelopes, or postal cards except for cash, or sell or dispose of them for any larger or less sum than the values indicated on their faces; 1 Supp. R. S. p. 187.

Postage stamps belonging to the United States are personal property and may be the subject of larceny; Jolly v. U. S., 170 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085.

POSTAL SAVINGS DEPOSITARIES. The act of congress of June 25, 1910, created a board of trustees (the post-master general, the secretary of the treasury, and the attorney-general) to establish such depositaries. Deposits may be made by any person of ten years or over, in his or her name, or by a married woman in her own name and free from her husband's control. Deposits may be made of $1 or multiples thereof; but not to exceed $100 in any calendar month. Any person may purchase for 10 cents a card to which may be attached "postal savings stamps"; when these with the stamps amount to $1 or multiple thereof, including the card, the card and stamp may be added to the deposit. Interest at the rate of 2 per cent. a year is paid, but not on fractions of a dollar. No balance shall exceed $500.

Deposits may be withdrawn, in whole or in part, on demand. A depositor surrenders his deposit in sums of $20, $40, $60, $80, and $100, and multiples of $100 and of $500, and receives United States bonds of corresponding denominations, bearing interest at 2½ per cent. per annum, payable half-yearly and redeemable at the pleasure of the United States after one year, and payable in gold at the end of twenty years.

By § 16 "the faith of the United States is solemnly pledged to the payment" of the deposits.

See Wanamaker, Postal Savings Banks.

POSTAL SERVICE. That relating to the mails, their transmission and delivery.

The act of July 26, 1892, provides that after a general advertisement for the transportation of the mails, the postmaster-general may secure any mail service that may become necessary, and the contract shall be made with the lowest bidder. Where a contract is awarded to the lowest bidder, it can be changed only in the manner provided in §§ 3957–3959; Cosgrove v. U. S., 31 Ct. Cl. 332.

The compensation of mail contractors is fixed by contract and by law of congress. The postmaster-general may make deduction for failure to perform services, and may also deduct the price of the trip in all cases where the trip is not performed; Otis v. U. S., 24 Ct. Cl. 61. Compensation for additional services in carrying the mail is not to be in excess of the exact proportion which the original compensation bears to the original services; Allman v. U. S., 131 U. S. 31, 35, 9 Sup. Ct. 632, 33 L. Ed. 51. The original letting, and not any subsequent increase of service or pay, is made the standard of limitation under § 3960; 17 Op. Atty. Gen. 166. If an allowance is made under false representations or by mistake, the money paid can be recovered; U. S. v. Barlow, 132 U. S. 271, 10 Sup. Ct. 77, 33 L. Ed. 346; U. S. v. Carr, 132 U. S. 644, 10 Sup. Ct. 182, 33 L. Ed. 483; U. S. v. Voorhees, 135 U. S. 550, 10 Sup. Ct. 841, 34 L. Ed. 258; and money received under an expedited schedule as payment for additional horses and men and never used, though allowed in the order of expedition, was held bound to be subject to being refunded to the United States; U. S. v. Barlow, 132 U. S. 271, 10 Sup. Ct. 77, 33 L. Ed. 346. The clause providing that the compensation should not be in excess of the exact proportion does not prevent its being less; 19 Op. Atty. Gen. 147.

Most of the criminal legislation of congress rests upon no express grant of power, but upon the power to make all laws necessary and proper for carrying into execution the powers conferred; Ordron. Const. Leg. 559. The power to establish postoffices and post roads includes the power to punish offences committed against its administration, by whatever name it may be known; U. S. v. Jenther, 13 Blatch. 335, Fed. Cas. No. 15,476; U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278; forbid the use of the mails to carry matter which disseminates crime and immorality; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93.

The right of congress to establish postoffices and post roads authorizes all measures necessary to secure the safe and speedy transmission of the mails and a prompt delivery of their contents; congress may prescribe what shall be carried and what shall be excluded; U. S. v. Musgrave, 160 Fed. 700; Public Clearing House v. Coyne, 194 U. S. 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; and the size, weight, shape and character of the contents of every mailable package; limit the superscription, and declare a violation of its regulations to be a public offense and fix the punishment therefor. The unrestricted use of the mails is not one of the fundamental rights guaranteed by the constitution; Warren v. U. S., 183 Fed. 718, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800. In Lewis Pub. Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190, the provisions in § 2 of the post office appropriation act of 1912 regarding publications and conditions under which they can be carried in the mails were construed, and it was held that these provisions are intended simply to supplement existing legislation relative to second-class mail matter, and not as an exercise of legislative power to regulate the press, curtail its freedom or to deprive one not complying therewith of all right to use the mail service.

Opening a letter which had been in the postoffice, before delivery to the person to whom it was directed, with the intent to pry into his correspondence, is an offence against the postal laws, even though the letter was not sealed at the time; U. S. v. Pond, 2 Curt. 265. Fed. Cas. No. 16,067; and though it come from a criminal and is supposed to contain improper information; Andrews v. U. S., 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; but in order to constitute an offence against the postal laws the letter must have been in the custody of the postmaster or his agents; The Louisiana Lottery Cases, 20 Fed. 625.

Obstructing mails. The United States may enjoin obstructions to highways used in interstate commerce and in transporting the mails; Re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. This applies to obstructions upon railroads and electric railways, and includes employés who suddenly desert their work; *id.;* U. S. v. Thomas, 55 Fed. 380; U. S. v. Woodward, 44 Fed. 592. See LABOR UNION.

Arresting a letter carrier on an indictment for murder is not obstructing the mail; U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278. A state statute which necessarily interferes with speedy and uninterrupted carriage of the mails cannot be considered as a reasonable police regulation; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107. A state cannot prohibit or render penal the use of the mails between the states to effectuate the importation of liquor; R. M. Rose Co. v. State, 133 Ga. 353, 65 S. E. 770, 36 L. R. A. (N. S.) 443.

Committing an unprovoked assault upon a postmaster, the necessary result whereof was an obstruction and retarding of the passage of the mail, is an offence, unless the act was independent and disconnected from the

postoffice and matters pertaining thereto; U. S. v. Claypool, 14 Fed. 127.

A person having a lien against horses for their keeping cannot enforce the same in such a manner as to stop the mail in a stage coach drawn by such horses, if it be actually *in transitu;* U. S. v. Barney, 3 Hughes 545, Fed. Cas. No. 14,525. It is an offence under the statute to stop a mail train although one had obtained a judgment and writ of execution from a state court against the railway company; U. S. v. De Mott, 3 Fed. 478. A forcible obstruction of interstate commerce and the transportation of the mails by the creation of a boycott among the members of the American Railway Union against the Pullman Car Company will be restrained by injunction; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

It is not an offence to restrain the driver of a mail coach from driving through a crowded city at such a rate as seriously to endanger the lives of the citizens; U. S. v. Hart, Fed. Cas. No. 15,316, Pet. C. C. 390. Restricting the speed of trains to six miles an hour by city ordinance does not obstruct the mails; 5 Op. Atty. Gen. 554.

Larceny and robbery. Embezzlement or destruction of mail matter by an employé in any department of the postal service is an offence against the postal laws. This statute has been held to create two distinct offences; viz.: (1) the embezzlement of a letter carried in the United States mail, and (2) the stealing of its contents; and one may be punished separately for each offence; U. S. v. Taylor, 37 Fed. 200; U. S. v. Atkinson, 34 Fed. 316. Under the statute no one can be convicted who is not an employé of the postoffice department; U. S. v. Nott, 1 McLean, 499, Fed. Cas. No. 15,900. One who steals from the mail, whether an employé or not, commits an offence against the postal laws; U. S. v. Gruver, 35 Fed. 59; and in taking or abstracting articles or receiving them when so taken, with the object of opening, secreting, destroying, embezzling, or stealing the same constitutes the offence; U. S. v. Jolly, 37 Fed. 108.

Sending letters to the customers of a corporation, urging them not to handle its products on account of labor troubles, is an offence against the postal laws; U. S. v. Raish, 163 Fed. 911.

Under U. S. Cr. Code, § 215, a "scheme to defraud" by the use of the mails may be found in any plan to get money or property of others by deceiving them as to the substantial identity of the thing they are to receive in exchange; this deception may be by implication, as well as by expressed words. There must be an underlying intent to defraud; mere expressions of honest opinion as to quality or future performance or "puffing" is not enough, if within reasonable bounds; Harrison v. U. S., 200 Fed. 662, 119 C. C. A. 78.

Among such schemes to defraud are: Selling worthless corporate stock; Wilson v. U. S., 190 Fed. 427, 111 C. C. A. 231; running a bucket shop under the pretense of doing real trading; Foster v. U. S., 178 Fed. 165, 101 C. C. A. 485; running a fake marriage bureau; Grey v. U. S., 172 Fed. 101, 96 C. C. A. 415; getting consignments without intent to remit; McConkey v. U. S., 171 Fed. 829, 96 C. C. A. 501; carrying on financial schemes impossible of performance; Walker v. U. S., 152 Fed. 111, 81 C. C. A. 329.

As to the use of decoy letters, see that title.

As to courts interfering with post office rulings, see U. S. v. Cortelyou, 28 App. D. C. 570, 12 L. R. A. (N. S.) 166.

As to using the mails for improper or nonmailable matter, see LIBEL; LIBERTY OF THE PRESS; LOTTERY; OBSCENITY.

POSTAL UNION. A treaty made at Berne in October, 1874, for the regulation of rates of postage and other matters connected with the postoffice between England and various other countries. See 38 & 39 Vict. c. 22; 1 Hall. Int. L. 286. Several international conferences have since been held on the subject: Paris, 1878; Lisbon, 1885; Vienna, 1891; Washington, 1897; Rome, 1906.

POSTEA (Lat. afterwards). **In Practice.** The indorsement, on the *nisi prius* record, purporting to be the return of the judge before whom a cause is tried, of what has been done in respect of such record.

It states the day of trial, before what judge, by name, the cause is tried, and also who is or was an associate of such judge; it also states the appearance of the parties by their respective attorneys, or their defaults, and the summoning and choice of the jury, whether those who were originally summoned, or those who were tales, or taken from the standers-by; it then states the finding of the jury upon oath, and, according to the description of the action, and the assessment of the damages, with the occasion thereof, together with the costs.

These are the usual matters of fact contained in the *postea*; but it varies with the description of the action. See Lee, Dict. *Postea;* 2 Lilly, Abr. 337; 16 Viner, Abr. 465; Bacon, Law Tr. 127.

When the trial is decisive, and neither the law nor the facts can afterwards be controverted, the postea is delivered by the proper officer to the attorney of the successful party, to sign his judgment; but it not unfrequently happens that after a verdict has been given there is just cause to question its validity: in such case the postea remains in the custody of the court. Eunomus, Dial. 2, § 33, p. 116.

POSTERIORES (Lat.). This term was used by the Romans to denote the descendants in a direct line beyond the sixth degree. It is still used in making genealogical tables.

POSTERIORITY. Being or coming after. It is a word of comparison, the correlative of which is *priority:* as, when a man holds lands from two landlords, he holds from his ancient landlord by priority, and from the other by posteriority. Co. 2d Inst. 392.

These terms, priority and posteriority, are also used in cases of liens: the first are prior liens, and are to be paid in the first place; the last are posterior liens, and are not entitled to payment until the former have been satisfied.

POSTERITY. All the descendants of a person in a direct line to the remotest generation. Breckinridge v. Denny, 8 Bush. (Ky.) 527.

POSTHUMOUS CHILD. One born after the death of its father; or, when the Cæsarean operation is performed, after that of the mother. The doctrine is universally adopted throughout the United States, that posthumous children inherit in the same manner as if born during the father's life; and this relates back to the conception of the child, if it is born alive; 3 Washb. R. P. *412; Jenkins v. Freyer, 4 Paige (N. Y.) 52; Barker v. Pearce, 30 Pa. 173, 72 Am. Dec. 691. The court will allow a longer time than nine months for the birth of the child, when the opinion of physicians, or circumstances warrant it; 2 Greenl. Cruise, R. P. 140.

When a father makes a will without providing for a posthumous child, the will is generally considered as revoked *pro tanto;* 3 Washb. R. P. 699, 412; 4 Kent 412, 521, 525; Shotts v. Poe, 47 Md. 513, 28 Am. Rep. 486; Wilson v. Ott, 160 Pa. 433, 28 Atl. 848; where it is governed by statute.

In most of the states there are statutes providing that in case of future estates or remainders limited to heirs, issue, or children of any person, posthumous children take as if living at the death of the parent without the limitation of an estate to support contingent remainders; and most of such statutes also provide that the future estate limited to take effect on the death of a person without heirs, etc., is defeated by the birth of a posthumous child. In a few states the time within which such child must be born is limited to ten months after the death of the father. See Belton v. Summer, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; LEGACY; EN VENTRE SA MÈRE.

POSTLIMINIUM (Lat. from *post*, after, and *limen*, threshold). A fiction of the civil law, by which persons or things taken by the enemy were restored to their former status on coming again under the power of the nation to which they formerly belonged. Calvinus, Lex.; 1 Kent 108. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule, by strict law of nations, unless promptly recaptured. If recaptured after twenty-four hours they vest in the recaptor, subject, amongst most nations, to revest in the owner, upon payment of military salvage; Risley, Law of War 143.

The rule does not affect property which is brought into a neutral territory; 1 Kent 108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken.

When an enemy's military occupation comes to an end, the legal state of things previously existing is deemed to have been in continuous existence during the occupation. Postliminium applies to territory, to private immovable property, and to every kind of property that may not lawfully be seized. But property, public or private, that has been lawfully taken by an enemy, is not subject to the fiction. Acts done once and for all, within an invader's competence to perform, hold good. There is no postliminium as regards lawful prize, though it is said there may be by recapture; which, if it occur before capture is complete, may have effects like those of postliminium, though the latter fiction does not include any idea of salvage; Risley, Law of War 143.

The *jus postliminii* in international law is derived from a similar term in the Roman law by which persons and property captured by an enemy and then recaptured are restored to their original owner. The term now applies almost exclusively to property both real and personal which when recaptured does not belong to the recaptor but to the original owner. Snow, Int. Law 116.

It is important to observe the distinction between the effects of *postliminium* according to municipal law and those according to international law. Municipal law determines the conditions upon which private property shall revert to its former owners when it is brought again within the power of the state of which its former owners are citizens. International law determines the general international status of territory, persons and property which, having been under the control of the enemy, come again under the control of their original sovereign. II Opp. §§ 279–284.

POSTLIMINY. See POSTLIMINIUM.

POSTMAN. A senior barrister in the court of exchequer, who has precedence in motions; so called from place where he sits. 2 Bla. Com. 28; Wharton, Dict. A letter-carrier. Webster, Dict.

POSTMASTER. An officer who keeps a postoffice, attending to the receipt, forwarding, and delivery of letters and other matter passing through the mail.

Postmasters must reside within the delivery district for which they are appointed. For those offices where the salary or compensation is less than a thousand dollars a year, the postmaster-general appoints; where it is more, the president. Postmasters are divided into four classes, exclusive of the

postmaster at New York, according to the amount of salary; those of the first class receiving three thousand or more, those of the fourth less than one thousand; 1 Supp. R. S. 110, 417. They must give bond to the United States; see U. S. v. Le Baron, 19 How. (U. S.) 73, 15 L. Ed. 525; which remains in force, for suit upon violation, during the term; Boody v. U. S., 1 W. & M. 150, Fed. Cas. No. 1,636; for three, formerly two, years after the expiration of the term of office; R. S. § 3838; Jones v. U. S., 7 How. (U. S.) 681, 12 L. Ed. 870. See R. S. § 3836.

Where an office is designated as a money-order office, the bond of the postmaster shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business; R. S. § 3834.

The presumption that public officers do their duty applies to the duty of postmasters to report a contractor's delinquencies; U. S. v. Carr, 132 U. S. 644, 10 Sup. Ct. 182, 33 L. Ed. 483.

Every postmaster is required to keep an office in the place for which he may be appointed; and it is his duty to receive and forward by mail, without delay, all letters, papers, and packets as directed, to receive the mails, and deliver, at all reasonable hours, all letters, papers, and packets to the persons entitled thereto.

Every person who, without authority from the postmaster-general, sets up any office bearing the title of postoffice is liable to a penalty of $500 for each offence; R. S. § 3829.

A postmaster is liable for all losses occasioned by his own default in office; 5 Burr. 2709; 2 Kent 474; Story, Bailm. § 463; see Raisler v. Oliver, 97 Ala. 710, 12 South. 238, 38 Am. St. Rep. 213; but in order to make him liable for negligence, it must appear that the loss or injury sustained was in consequence of such negligence; Dunlop v. Munroe, 7 Cra. (U. S.) 242, 3 L. Ed. 329; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632. He is bound only to the exercise of due diligence in the care of matter deposited in the postoffice; U. S. v. Thomas, 15 Wall. (U. S.) 337, 21 L. Ed. 89. See 1 Ld. Raym. 646, where the question is elaborately discussed.

A postmaster is liable for the acts of his clerks or servants who were not regularly appointed and sworn as his assistants; Christy v. Smith, 23 Vt. 663; Fitzgerald v. Burrill, 106 Mass. 446. He is not responsible for their secret delinquencies; though, perhaps, he is answerable for want of attention to the official conduct of his subordinates; Schroyer v. Lynch, 8 Watts (Pa.) 453; but see Raisler v. Oliver & Co., 97 Ala. 710, 12 South. 238, 38 Am. St. Rep. 213. An attempt to induce a postmaster to sell stamps on credit is in violation of a statute providing against the attempt to influence any officer of the United States to a violation of his lawful duties; In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514. A postmaster is liable for the full value of a registered letter embezzled, regardless of the liability of the government to the sender of the letter; Gibson v. U. S., 208 Fed. 534.

POSTMASTER-GENERAL. The chief officer of the postoffice department of the executive branch of the government of the United States.

His duties, in brief, are, among other things, to establish postoffices and appoint postmasters at convenient places upon the post-roads established by law; to give instructions for conducting the business of the department; to provide for the carriage of the mails; to obtain from the postmasters balances due, with accounts and vouchers of expenses; to pay the expenses of the department; see U. S. v. Bank, 15 Pet. (U. S.) 377, 10 L. Ed. 774; to prosecute offences, and, generally, to superintend the business of the department in all the duties assigned to it. He is assisted by four assistants and a large corps of clerks,—the four assistants being appointed by the president. He must make reports annually to congress, relating chiefly to the financial management of the department, with estimates of the expenses of the department for the ensuing year. R. S. § 413. He is a member of the cabinet. See R. S. §§ 388–414; DEPARTMENT; OFFICER.

POSTNATI (Lat.). Those born after. Applied to American and British subjects born after the separation of England and the United States; also to the subjects of Scotland born after the union of England and Scotland. They were held to be natural-born subjects of the king of England; Calvin's Case, 2 St. Tr. 559. Those born after an event, as opposed to *antenati*, those born before. 2 Kent 56; Cummington v. Springfield, 2 Pick. (Mass.) 395. See ANTENATI.

POSTPONE. To put off; to delay; to continue or adjourn, as to postpone a hearing.

POSTULATIO (Lat.). **In Roman Law.** The name of the first act in a criminal proceeding.

A person who wished to accuse another of a crime appeared before the prætor and requested his authority for that purpose, designating the person intended. This act was called *postulatio*. The postulant made oath *(calumnium jurabat)* that he was not influenced by a spirit of calumny, but acted in good faith with a view to the public interest. The prætor received this declaration, at first made verbally, but afterwards in writing, and called a libel. The *postulatio* was posted up in the forum, to give public notice of the names of the accuser and the accused. A second accuser sometimes appeared and went through the same formalities.

Other persons were allowed to appear and join the postulant or principal accuser. These were said *postulare subscriptionem*, and were denominated *subscriptores*. Cic. in Cæcil. Divin. 15. But commonly such persons acted concurrently with the postulant, and inscribed their names at the time he first appeared. Only one accuser, however,

was allowed to act; and if the first inscribed did not desist in favor of the second, the right was determined, after discussion, by judges appointed for the purpose. Cic. in Verr. i. 6. The preliminary proceeding was called *divinatio*, and is well explained in the oration of Cicero entitled Divinatio. See Aulus Gellius, Att. Noct. lib. ii. cap. 4.

The accuser having been determined in this manner, he appeared before the prætor, and formally charged the accused by name, specifying the crime. This was called *nominis et criminis delatio*. The magistrate reduced it to writing, which was called *inscriptio*, and the accuser and his adjuncts, if any, signed it, *subscribebant*. This proceeding corresponds to the indictment of the common law.

If the accused appeared, the accuser formally charged him with the crime. If the accused confessed it, or stood mute, he was adjudged to pay the penalty. If he denied it, the *inscriptio* contained his answer, and he was then *in reatu* (indicted, as we should say), and was called *reus*, and a day was fixed, ordinarily after an interval of at least ten days, according to the nature of the case, for the appearance of the parties. In the case of Verres, Cicero obtained one hundred and ten days to prepare his proofs; although he accomplished it in fifty days, and renounced, as he might do, the advantage of the remainder of the time allowed him.

At the day appointed for the trial, the accuser and his adjuncts or colleagues, the accused, and the judges, were summoned by the herald of the prætor. If the accuser did not appear, the case was erased from the roll. If the accused made default, he was condemned. If both parties appeared, a jury was drawn by the prætor or *judex quæstionis*. The jury was called *jurati homines* and the drawing of them *sortitio*, and they were taken from a general list made out for the year. Either party had a right to object to a certain extent to the persons drawn; and then there was a second drawing called *subsortitio*, to complete the number.

In some tribunals *quæstiones* (the jury) were *editi* (produced) in equal number by the accuser and the accused, and sometimes by the accuser alone, and were objected to or challenged in different ways, according to the nature of the case. The number of the jury also varied according to the tribunal *(quæstio)*: they were sworn before the trial began. Hence they were called *jurati*.

The accusers, and often the *subscriptores*, were heard, and afterwards the accused, either by himself or by his advocates, of whom he commonly had several.

After the pleadings were concluded, the prætor or the *judex quæstionis* distributed tablets to the jury, upon which each wrote, secretly, either the letter A. *(absolvo)*, or the letter C. *(condemno)*, or N. L. *(non liquet)*. These tablets were deposited in an urn The president assorted and counted the tablets. If the majority were for acquitting the accused, the magistrate declared it by the words *fecisse non videtur*, and by the words *fecisse videtur* if the majority were for a conviction. If the tablets marked N. L. were so many as to prevent an absolute majority for a conviction or acquittal, the cause was put off for more ample information, *ampliatio*, which the prætor declared by the word *amplius*.

The forms observed in the *comitia centuriata* and *comitia tributa* were nearly the same, except the composition of the tribunal and the mode of declaring the vote.

POSTULATIO ACTIONIS (Lat.). **In Civil Law.** Demand of an action (*actio*) from the prætor, which some explain to be a demand of a *formula*, or form of the suit; others, a demand of leave to bring the cause before the judge. Taylor, Civ. Law 80; Calvinus, Lex. *Actio*.

POT-DE-VIN. In French Law. A sum of money frequently paid at the moment of entering into a contract, beyond the price agreed upon.

It differs from *arrha* in this that it is no part of the price of the thing sold, and that the person who has received it cannot by returning double the amount, or the other party by losing what he has paid, rescind the contract; 18 Toullier, n. 52.

POTENTATE. One who has a great power over an extended country; a sovereign.

By the naturalization laws of the United States, an alien is required, before he can be naturalized, to renounce all allegiance and fidelity to any foreign prince, potentate, state, or sovereign whatever.

POTENTIALLY. In possibility, not in act, not positively; in efficacy, not in actuality. Cole v. Kerr, 19 Neb. 556, 26 N. W. 598.

POTESTAS (Lat.). **In Civil Law.** Power; authority; domination; empire. *Imperium*, or the jurisdiction of magistrates. The power of the father over his children, *patria potestas*. The authority of masters over their slaves, which makes it nearly synonymous with *dominium*. See Inst. 1. 9. 12; Dig. 2. 1. 13. 1; 14. 1; 14. 4. 1. 4.

POUND. A place, enclosed by public authority, for the temporary detention of stray animals. Gilmore v. Holt, 4 Pick. (Mass.) 258; Brightman v. Grinnell, 9 Pick. (Mass.) 14.

Animals may not be impounded unless they are suffered by the owner to run at large, within the strict construction of the statute; Adams v. Nichols, 1 Aik. (Vt.) 316; if the impounding is illegal, they can be recovered by the owner; Morse v. Reed, 28 Me. 481; Mellen v. Moody, 23 Vt. 674. If it is legal, the owner must pay the costs imposed; Mahler v. Holden, 20 Ill. 363; and the pound-keeper need not deliver over the animals until all legal charges are paid; Folger v. Hinckley, 5 Cush. (Mass.) 263; Keith v. Bradford, 39 Vt. 34; the impounder has the right to use the some force to maintain his possession as a sheriff has to protect his possession under legal process; Barrows v. Fassett, 36 Vt. 625.

Where the proper officer finds cattle running at large in public streets, he may pursue them upon private property; Mosher v. Jewett, 63 Me. 84; but when a man finds strange cattle in his field, he is not bound to impound or retain them for the owner, but may drive them off into the highway; Stevens v. Curtis, 18 Pick. (Mass.) 227; if, however, he impounds, he must feed and water them properly, according to the usage of the country and good husbandry; Adams v. Adams, 13 Pick. (Mass.) 384; he must proceed strictly according to the statute, or he will be a trespasser; Fitzwater v. Stout, 16 Pa. 22; notice must be given before the im-

pounded animal can be sold; Newhouse v. Hatch, 126 Mass. 364; and such notice must state the legal charges; Pickard v. Howe, 12 Metc. (Mass.) 198. Laws authorizing the impounding and sale of stock without notice or judicial investigation are held to be unconstitutional as authorizing a sale of private property without due process of law: Rockwell v. Nearing, 35 N. Y. 302; Rose v. Hardie, 98 N. C. 44, 4 S. E. 41; Anderson v. Locke, 64 Miss. 283, 1 South. 251; but it has been held that such laws are valid under the police power; Wilcox v. Hemming, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625. See ANIMAL; ESTRAY; RUNNING AT LARGE.

Weights. See WEIGHTS.

Money. The sum of twenty shillings. Previous to the establishment of the federal currency, the different states made use of the pound in computing money: it was of different value in the several states.

Pound Sterling is a denomination of money of Great Britain. It is of the value of a *sovereign* (*q. v.*). In calculating the rates of duties, the pound sterling shall be taken as of the value of four dollars and eighty-six cents and six and one-half mills, and the pound sterling of *Ireland* at four dollars and ten cents; U. S. R. S. § 3565.

POUND-BREACH. The offence of breaking a pound in order to take out the cattle impounded. 3 Bla. Com. 146. The writ *de parco fracto*, or pound-breach, lies for recovering damages for this offence; also case. *Id.* It is also indictable.

POUND-KEEPER. An officer charged with the care of a pound, and of animals confined there.

POUNDAGE. The amount allowed to the sheriff, or other officer, for commissions on the money made by virtue of an execution. This allowance varies in different states and to different officers.

POURPARLER. In French Law. The conversations and negotiations which have taken place between the parties in order to make an agreement. These form no part of the agreement. Pardessus, *Dr. Com.* 142.

POURSUIVANT. A follower; a pursuer. In the ancient English law, it signified an officer who attended upon the king in his wars, at the council-table, exchequer, in his court, etc., to be sent as a messenger. A poursuivant was, therefore, a messenger of the king.

POVERTY AFFIDAVIT. An affidavit furnished by a party to a suit that he is not able to furnish security for costs. Cole v. Hoeburg, 36 Kan. 263, 13 Pac. 275. In the United States courts, an affidavit of poverty for the purpose of avoiding the giving of a cost bond, may be filed after the granting, on notice to plaintiff, of an order for such bond; McDuffee v. R. Co., 82 Fed. 865.

POWER. The right, ability, or faculty of doing something.

The distinction between "power" and "right," whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right; Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89.

Technically, an authority by which one person enables another to do some act for him. 2 Lilly, Abr. 339.

Derivative Powers are those which are received from another. This division includes all the powers technically so called. They are of the following classes:—

Coupled with an interest, being a right or authority to do some act, together with an interest in the subject on which the power is to be exercised. Marshall, C. J., Hunt v. Rousmanier, 8 Wheat. (U. S.) 203, 5 L. Ed. 589; and the interest coupled with a power in order to make it irrevocable, must be an interest in the thing itself; Missouri v. Walker, 125 U. S. 342, 8 Sup. Ct. 929, 31 L. Ed. 769.

A power of this class survives the person creating it, and, in case of an excess in execution, renders the act valid so far as the authority extends, leaving it void as to the remainder only. It includes powers of sale conferred on a mortgagee.

Naked, being a right of authority disconnected from any interest of the donee in the subject-matter. Bloomer v. Waldron, 3 Hill (N. Y.) 365. In the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of that power should precede it; Williams v. Peyton, 4 Wheat. (U. S.) 77, 4 L. Ed. 518; Deputron v. Young, 134 U. S. 256, 10 Sup. Ct. 539, 33 L. Ed. 923. A naked power given to several persons cannot be executed by the survivors; 16 Beav. 233.

Inherent Powers. Those which are enjoyed by the possessors of natural right, without having been received from another. Such are the powers of a people to establish a form of government, of a father to control his children. Some of these are regulated and restricted in their exercise by law, but are not technically considered in the law as powers.

Powers under the Statute of Uses. An authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or another person.

Methods of causing a use, with its accompanying estate, to spring up at the will of a given person. Will. R. P., 16th ed. 333; 2 Washb. R. P. 300.

The right to designate the person who is to take a use. Co. Litt. 271 *b*, Butler's note, 231, § 3, pl. 4.

A right to limit a use. 4 Kent 334.

An authority to do some act in relation to lands, or the creation of estates therein,

or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

Powers are distinguished as—

Appendant. Those which the donee is authorized to exercise out of the estate limited to him, and which depend for their validity upon the estate which is in him. 2 Washb. R. P. 304. A life-estate limited to a man, with a power to grant leases in possession, is an example. 1 Cai. Cas. 15; Sugd. Pow. 107; Burton, R. P. § 179.

Of appointment. Those which are to create new estates. Distinguished from powers of revocation.

Collateral. Those in which the donee has no estate in the land. 2 Washb. R. P. 305.

General. Those by which the donee is at liberty to appoint to whom he pleases.

In gross. Those which give a donee, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. Wilson v. Troup, 2 Cow. (N. Y.) 236, 14 Am. Dec. 458. Tudor, Lead. Cas. 293.

Of revocation. Those which are to divest or abridge an existing estate. Distinguished from those of appointment; but the distinction is of doubtful exactness, as every new appointment must divest or revoke a former use. Sanders, Uses 154.

As to the effect of the insertion of a power of revocation, either single or in connection with one of appointment, see Styles 389; 2 Washb. R. P. 307.

Special. Those in which the donee is restricted to an appointment to or among particular objects only. 2 Washb. R. P. 307.

See a classification by Jessel, M. R., in 15 Ch. 228.

The person bestowing a power is called the *donor;* the person on whom it is bestowed is called the *donee.*

The person who receives the estate by appointment is called the appointee; the donee of the power is sometimes called the appointor.

The creation of a power may be by *deed or will;* 2 Washb. R. P. 314; by *grant* to a grantee, or *reservation* to the grantor; 4 Kent 319; and the reservation need not be in the same instrument, if made at the same time; 1 Sugd. Pow. 158; by *any form of words* indicating an intention; 2 Washb. R. P. 315. The doubt whether a power is created or an estate conveyed can, in general, exist only in cases of wills; 2 Washb. R. P. 316; and in any case is determined by the intention of the grantor or devisor, as expressed in or to be gathered from the whole will or deed; Ladd v. Ladd, 8 How. (U. S.) 10, 12 L. Ed. 967; Sharpsteen v. Tillou, 3 Cow. (N. Y.) 651; Walker v. Quigg, 6 Watts (Pa.) 87, 31 Am. Dec. 452. It must be limited to be executed, and must be executed, within the period fixed by the rules against perpetuities; 5 Bro. P. C. 592; 13 Sim. 393.

The interest of the donee is not an estate; 2 Prest. Abstr. 275; but is sufficient to enable the donee to act, if the intention of the donor be clear, without words of inheritance; 1 P. Wms. 171; Wilson v. Troup, 7 Johns. Ch. (N. Y.) 34; see Co. Litt. 271 *b*, Butler's note 231; and may coexist with the absolute fee in the donee; 10 Ves. 255; 4 Greenl. Cruise, Dig. 241, n. As a general rule a power to sell does not include a power to mortgage; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Willis v. Smith, 66 Tex. 31, 17 S. W. 247; Norris v. Woods, 89 Va. 873, 17 S. E. 552; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, then it may be proper under the circumstances to raise the money by mortgage, and the court will support it as a conditional sale; 1 De G. M. & G. 645; Sugd. Powers 425; and sale generally means a cash sale; 4 Kent 331; Ives v. Davenport, 3 Hill (N. Y.) 373. See *infra.* It is held that a general power to appoint makes the property so to be disposed of assets of the estate of the donee of the power for the payment of his debts; Olney v. Balch, 154 Mass. 318, 28 N. E. 258; Clapp v. Ingraham, 126 Mass. 200, following 3 De G., M. & G. 976; but not in New York (under statute) either as to real or personal property; In re Moehring, 154 N. Y. 423, 48 N. E. 818.

As to exercising the power. If it be simply one in which no person is interested but the donee, it is a matter of election on his part whether to exercise it or not; 1 Sugd. Pow. 158; see *infra;* but if coupled with a trust in which other persons are interested, equity will compel an execution; Story, Eq. Jur. § 1062; Hunt v. Ennis, 2 Mas. 251, Fed. Cas. No. 6,889.

A power to appoint by will, conferred on a life tenant, does not empower him to devise the land for the payment of his own debts; Balls v. Dampman, 69 Md. 390, 16 Atl. 16, 1 L. R. A. 545. But a power conferred by will to invest or use includes the power to sell; Crawford v. Wearn, 115 N. C. 540, 20 S. E. 724.

The execution must be in the manner prescribed, by the proper person, see APPOINTMENT, and cannot be by an assignee; 2 Washb. R. P. 321; unless authorized by the limitation; 4 Cruise, Dig. 211; or unless an interest be coupled with the power; Wilson v. Troup, 2 Cow. (N. Y.) 236, 14 Am. Dec. 458; Hunt v. Rousmanier, 8 Wheat. (U. S.) 203, 5 L. Ed. 589; nor by a successor, as on the death of an executor; Tainter v. Clark, 13 Metc. (Mass.) 220. As to whether a sale by a donee who has also an estate in the land is held to be an execution of the power, see 2 Washb. R. P. 325; Tudor, Lead. Cas. 306; 5 B. & C. 720; 6 Co. 18; 16 Pa. 25. The exercise of a power must refer to the power

to be executed, or actually dispose of the subject of it by identifying it; In re Neill's Estate, 222 Pa. 145, 70 Atl. 942; but not if the act cannot take effect but by virtue of the power; Allison v. Kurtz, 2 Watts (Pa.) 185. In order to exercise a testamentary power, a will must, at common law, contain a sufficient reference to the power to show an intention to exercise it. The use of the verb "appoint," especially when coupled with the express inclusion, in a general gift, of "all property over which I have a power of appointment," would undoubtedly be a sufficient reference in the case of a general power; L. R. 17 Ir. 436, 443.

At common law an estate created by the execution of a power takes effect as if created by the original deed, yet for some purposes (here taxation under an express statute) the execution of the power is considered the source of title; Chanler v. Kelsey, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882 (Holmes and Moody, JJ., dissenting).

A power to sell gives authority to sell for cash only, and does not uphold a mere exchange; Woodward v. Jewell, 140 U. S. 253, 11 Sup. Ct. 784, 35 L. Ed. 478; Hampton v. Moorhead, 62 Ia. 91, 17 N. W. 202; Perry, Trusts § 769; or mortgage; Morris v. Watson, 15 Minn. 212 (Gil. 165); Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Willis v. Smith, 66 Tex. 31, 17 S. W. 247; *contra*, McCreary v. Bomberger, 151 Pa. 323, 24 Atl. 1066, 31 Am. St. Rep. 760; Campbell v. Home Ass'n, 163 Pa. 626, 30 Atl. 222, 26 L. R. A. 117, 43 Am. St. Rep. 818; and see Kent v. Morrison, 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616.

Whether a power to sell includes a power to mortgage depends on the intent of the donor. If no absolute power appears on the face of the power, the presumption may vary according to the character of the estate created, the purpose of the power and the status of the devise; 20 H. L. Rev. 568.

A power of sale in a trust deed is not revoked by the death of the grantor; Frank v. Mtg. Co., 86 Miss. 103, 38 South. 340, 70 L. R. A. 135, 4 Ann. Cas. 54.

A power of sale in a mortgage may be executed, although no payment has been made for twenty years; House v. Carr, 185 N. Y. 453, 78 N. E. 171, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185.

Where three executors, given power to sell real estate, have accepted the trust, one alone cannot execute the power; Wright v. Dunn, 73 Tex. 293, 11 S. W. 330; and in a devise to two sisters to sell if they desired, the power can only be exercised by their joint deed and is lost by the death of either of them; Glover v. Stillson, 56 Conn. 316, 15 Atl. 752. A power given by will cannot be delegated, but an appointment under it need not allude to the power; Hood v. Haden, 82 Va. 588.

Where an exact execution is impossible under authority of court, it may be executed as near as may be (*cy-près*) to carrying out the donor's intention; 4 Ves. 681; 5 Sim. 632; Warner v. Howell, 3 Wash. C. C. 12, Fed. Cas. No. 17,184.

It must be made at a proper time, and, where several powers are given over different parts of the same estate, in proper succession; 1 Co. 174; 1 W. Bla. 281.

Equity will compel the donee to execute a power where it is coupled with a trust in which other persons are interested; Story, Eq. Jur. § 1062; and to correct a formal defect in the manner of execution; 2 P. Wms. 489, 622; Hunt v. Ennis, 2 Mas. 251, Fed. Cas. No. 6,889.

Three classes of cases have been held sufficient demonstrations of an intended exercise of a power: 1. Where there has been some reference in the will, or other instrument, to the power; 2. or a reference to the property, which is the subject on which it is to be executed; 3. or when the provisions in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual or a mere nullity, in other words it would have no operation, except as an execution of the power; Lee v. Simpson, 134 U. S. 590, 10 Sup. Ct. 631, 33 L. Ed. 1038. See Warner v. Ins. Co., 109 U. S. 366, 3 Sup. Ct. 221, 27 L. Ed. 962; White v. Hicks, 33 N. Y. 392; Funk v. Eggleston, 92 Ill. 538, 34 Am. Rep. 136.

The suspension or destruction of a power may sometimes happen by a release by the donee, by an alienation of his estate, by his death, and by other circumstances.

An appendant power may be susupended by a conveyance of his interest by the donee; 4 Cruise, Dig. 221; Cro. Car. 472; 4 Bingh. N. C. 734; Wilson v. Troup, 2 Cow. (N. Y.) 237, 14 Am. Dec. 458; and may be extinguished by such conveyance; 2 B. & Ald. 93; 10 Ves. 246; or by a release; 1 Russ. & M. 431, 436, n.; 1 Co. 102 *b*; 2 Washb. R. P. 308.

As to *illusory appointments* under a power, see that title.

A power in gross may be released to one having the freehold in possession, reversion, or remainder, and not by any other act of the donee; Tud. Lead. Cas. 294; Burt. R. P. § 176; Chance, Pow. § 3172; Hardr. 416; 1 P. Wms. 777; an infant may execute a power in gross; 7 Ch. D. 728.

A collateral power cannot be suspended or destroyed by act of the donee; F. Moo. 605; 5 Mod. 457; such a power may be executed by an infant; 4 Kent 342. And see 1 Russ. & M. 431; Tainter v. Clark, 13 Metc. (Mass.) 220.

Impossibility of immediate vesting in interest or possession does not suspend or extinguish a power; 2 Bingh. 144. A power of sale in a mortgage for condition broken is not revoked by the mortgagor's death;

Way v. Mullett, 143 Mass. 49, 8 N. E. 881; Reilly v. Phillips, 4 S. D. 604, 57 N. W. 780. In general, a power of sale is exhausted by a single exercise of power; Simmons v. Baynard, 30 Fed. 532.

A power may be executed by a married woman; 4 Kent 342; but she will not be compelled to exercise a power of appointment of which she is donee for the benefit of her creditors; 17 Q. B. D. 521.

As to whether the donee of a power of appointment can covenant to exercise it in a particular way, see 18 L. Q. R. 112.

See article on "Power Coupled with an Interest" by James Lowndes, in 12 Harv. L. Rev. 262; see also 19 *id.* 287; as to whether a power to sell is a power to mortgage, see 19 Harv. L. Rev. 62, where the negative is stated as the ordinary rule; as to whether a power of sale includes power to give an option, see Trogdon v. Williams, 144 N. C. 192, 56 S. E. 865, 10 L. R. A. (N. S.) 867.

See EXECUTIVE POWERS; JUDICIAL POWERS; LEGISLATIVE POWERS; APPOINTMENT.

POWER OF ATTORNEY. An instrument authorizing a person to act as the agent or attorney of the person granting it. It is often called *letter of attorney.*

A *general* power authorizes the agent to act generally in behalf of the principal.

A *special* power is one limited to particular acts.

It may be by parol or under seal. 1 Pars. Contr. 94. It is held that, *ex vi termini*, it indicates a sealed instrument; Cutler v. Haven, 8 Pick. (Mass.) 490. The attorney cannot, in general, execute a sealed instrument so as to bind his principal, unless the power be under seal; 2 B. & P. 338; 5 B. & C. 355; Stetson v. Patten, 2 Greenl. (Me.) 358, 11 Am. Dec. 111. See Bank of Columbia v. Patterson, 7 Cra. (U. S.) 299, 3 L. Ed. 351; Darst v. Roth, 4 Wash. C. C. 471, Fed. Cas. No. 3,582; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Damon v. Granby, 2 Pick. (Mass.) 345.

Powers of attorney are strictly construed; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Mechanics' Bank v. Bank, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; 8 M. & W. 806. General terms used with reference to a particular subject-matter are presumed to be used in subordination to that matter; 7 B. & C. 278; Kelley v. Lindsey, 7 Gray (Mass.) 287. See, as to a power to collect a debt; Barlow v. Reno, 1 Blackf. (Ind.) 252; to settle a claim; 5 M. & W. 645; Miller v. Edmonston, 8 Blackf. (Ind.) 291; to make an adjustment of all claims; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Taylor v. Robinson, 14 Cal. 399; to accept bills; 7 B. & C. 278.

Where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country; [1891] 1 Q. B. 79.

Third parties dealing with an agent on the basis of a written letter of attorney are not prejudiced by any private instructions from the principal to the agent, unless such instructions are in some way referred to in the letter; 3 Term 757; Earp v. Richardson, 81 N. C. 5; Silliman v. R. Co., 27 Gratt. (Va.) 119. Where an agent is acting under such a written letter, it is the duty of third persons to examine the instrument; Story, Ag. § 72. A failure to do this precludes a recovery unless the claim is based on fraud; Schimmelpennich v. Bayard, 1 Pet. (U. S.) 264, 7 L. Ed. 138; Whart. Ag. § 227; Appeal of Weise, 72 Pa. 351; Equitable Life Assur. Soc. v. Poe, 53 Md. 28. When a power of attorney is to a partnership as such, a deed executed in the partnership name by one of the partners is good; Frost v. Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.

A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are void; McClaskey v. Barr, 50 Fed. 712; and upon the death of some of the donors of a power of attorney, it is revoked as to them if not as to all; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. 147, 30 L. Ed. 390.

If a power of attorney is part of a contract and is a security for the payment of money or the performance of an act, it is irrevocable, whether so expressed or not; Wood v. Kerkeslager, 225 Pa. 296, 74 Atl. 174.

See PRINCIPAL AND AGENT.

PRACTICABLE, PRACTICABLY. Practicable is that which may be done, practiced, or accomplished, that which is performable, feasible, possible; and the adverb practically means in a practical manner. Streeter v. Streeter, 43 Ill. 165.

Reasonably practicable, when used in directing the observance of a set of affirmative and negative rules, will usually apply to the negative; 16 Q. B. D. 340.

Where a statute provides that persons having in charge animals affected with a contagious disease shall notify the police of the fact with all practicable speed, it was held to be necessary that the person shall have knowledge of the animal's being diseased before it becomes neglect to give notice; L. R. 8 C. P. 322.

PRACTICE. The form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of

law and the rules laid down by the respective courts. In its ordinary meaning it is to be distinguished from the pleadings. The term applies to a distinct part of the proceedings of the court. 10 Jur. N. S. 457. In a popular sense, the business which an attorney or counsellor does: as, A B has a good practice.

A settled, uniform, and long-continued practice, without objection, is evidence of what the law is; and such practice is based on principles which are founded in justice and convenience; 2 Russ. 19, 570; 2 Jac. 232; 1 Y. & J. 167, 168; 2 C. & M. 55; Ram, Judgm. c. 7.

With respect to criminal practice, it has been remarked by a learned judge that even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament. Per Maule, J., Scott, N. C. 599.

PRACTICE COURT. In English Law. A court formerly attached to the court of king's bench, which heard and determined common matters of business and ordinary motions for writs of mandamus, prohibition, etc. It was usually called the bail court. It was held by one of the puisne justices.

PRACTICES. A succession of acts of a similar kind or in a like employment. Webst.

PRACTICING. A retired lawyer who tries a case for a neighbor gratuitously, is not a practicing lawyer subject to a penalty for practicing without having paid the license tax. "The term practicing implies something more than a single act or effort." McCargo v. State (Miss.) 1 South. 161; State v. Bryan, 98 N. C. 644, 4 S. E. 522.

PRACTITIONER. He who is engaged in the exercise or employment of any art or profession.

PRÆCEPTORS (Lat.). Heretofore masters in chancery were so called, as having the direction of making out remedial writs. Fleta 76; 2 Reeve, Hist. Eng. Law 251. A species of benefice, so called from being possessed by the principal templars (*præceptores templi*), whom the chief master by his authority created. 2 Mon. Ang. 543.

PRÆCIPE, PRECIPE (Lat.). A slip of paper upon which the particulars of a writ are written. It is lodged in the office out of which the required writ is to issue. Wharton, Dict. A written order to the clerk of a court to issue a writ.

It is a part of the record; the writ of service, if it fail to follow it, may be amended to conform; Wilkinson v. North East Borough, 215 Pa. 486.

PRÆCIPE IN CAPITE. A writ out of chancery for a tenant holding of the crown *in capite*, viz., in chief. Magna Char. c. 24.

PRÆCIPE QUOD REDDAT (Lat.). Command him to return. An original writ, of which *præcipe* is the first word, commanding the person to whom it is directed to do a thing or to show cause why he has not done it. 3 Bla. Com. 274; Old N. B. 13. It is as well applied to a writ of right as to other writs of entry and possession.

PRÆCIPE QUOD TENEAT CONVENTIONEM. The writ which commenced the action of covenant in fines, which are abolished by 3 & 4 Wm. IV. c. 74.

PRÆCIPITIUM. The punishment of casting headlong from some high place.

PRÆCIPUT CONVENTIONNEL. In French Law. Under the *régime en communauté*, when that is of the conventional kind, if the survivor of husband and wife is entitled to take any portion of the common property by a paramount title and before partition thereof, this right is called by the somewhat barbarous title of the conventional *prœciput*, from *prœ*, before, and *capere*, to take. Brown.

PRÆDIA (Lat.). **In Civil Law.** Lands.

Prœdia stipendiaria, provincial lands belonging to the people.

Prœdia tributaria, provincial lands belonging to the emperor.

Prœdia volantia, certain things movable which were ranked among immovable things. 2 Bla. Com. 428.

It indicates a more extensive domain than *fundus*. Calvinus, Lex.

PRÆDIA BELLI (Lat.). Booty. Property seized in war. See Booty.

PRÆDIAL. That which arises immediately from the ground: as, grain of all sorts, hay, wood, fruits, herbs, and the like.

Prœdial larceny is the larceny of things attached to the land. 4 Journ. of Soc. of Comp. Leg. N. S. 135.

PRÆDIUM DOMINANS (Lat. the ruling estate). **In Civil Law.** The name given to an estate to which a servitude is due; it is called the ruling estate.

PRÆDIUM RUSTICUM (Lat. a country estate). **In Civil Law.** By this is understood all heritages which are not destined for the use of man's habitation; such, for example, as lands, meadows, orchards, gardens, woods, even though they should be within the boundaries of a city.

PRÆDIUM SERVIENS (Lat.). **In Civil Law.** The name of an estate which suffers or yields a service to another estate.

PRÆDIUM URBANUM (Lat.). **In Civil Law.** By this term is understood buildings and edifices intended for the habitation and use of man, whether they be built in cities

or whether they be constructed in the country.

PRÆFECTI APOSTOLICI. Officers of the same character as the Vicarius Apostolicus (*q. v.*), but without the power of exercising episcopal functions. 2 Phill. Int. L. 529.

PRÆFECTUS URBIS. An officer who had the superintendence of the city and its police with jurisdiction extending one hundred miles from the city and power to decide both civil and criminal cases. Whart.

PRÆFECTUS VIGILIUM (Lat.). **In Roman Law.** The chief officer of the night-watch. His jurisdiction extended to certain offences affecting the public peace, and even to larcenies. But he could inflict only slight punishments.

PRÆMUNIRE (Lat.). A statute of 27 Edw. III. which prohibited citations to the court of Rome; by it penalties were enacted against all subjects who should "draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court" and who should fail to appear before the king and his council, or in his chancery, or before the justices to answer for the contempt committed. This was the origin of the offence afterwards known as *præmunire* from the words of the writ *præmunire facias*, requiring the sheriff to warn the accused to appear and answer. Taswell-Langmead, Engl. Constit. Hist. 323.

The penalties of *præmunire* were subsequently applied to other offences of various kinds, as the molestation of possessors of abbey lands, the assertion that the houses of parliament have a legislative authority without the sovereign or the sending subjects of the realm into parts beyond the seas. Whart. Law Dict.; Jacob.

It is said by Jacob to be a corruption of *præmoneri*, to be *forewarned*, citing Du Cange. He also points out that there had been but one prosecution for *præmunire* in the state trials (2 Hargr. St. Tr. 263).

PRÆNOMEN. In Civil Law. See COGNOMEN.

PRÆSTITA ROLLS. In these were entered the sums of money which issued out of the royal treasury, by way of imprest, advance, or accommodation, in the 12th year of King John; also roll of the 7th, and one of the 14th, 15th and 16th years of the same reign. See RECORD COMMISSION (1844).

PRÆSUMPTIO HOMINIS. A presumption based upon what is probable in human experience, whereby, from a given fact or state of facts, another fact or state of facts may be naturally inferred. Morey, Rom. L. 411.

PRÆSUMPTIO JURIS (Lat.). **In Roman Law.** A deduction from the existence of one fact as to the existence of another, which admits of proof to the contrary. A rebuttable presumption. An intendment of law which holds good until it is weakened by proof or a stronger presumption. Best, Pres. 29.

PRÆSUMPTIO JURIS ET DE JURE (Lat.). **In Roman Law.** A deduction drawn, by reason of some rule of law, from the existence of one fact as to the existence of another, so conclusively that no proof can be admitted to the contrary. A conclusive presumption.

PRÆTOR. In Roman Law. A municipal officer of Rome, so called because (*præiret populo*) he went before or took precedence of the people.

The consuls were at first called *prætors*. Liv. Hist. iii. 55. The word *prætor* means literally a general and is a title of honor accorded to the counsels in the first centuries of the republic. The *prætor* was really a third consul who was specially intrusted, not with the military command, but with the administration of justice. This is the reason why, in point of rank (and in the number of his lictors), he was inferior to the consul, though, on principle, his power was consular; Sohm, Inst. Rom. L. 48, n. 1. He was a sort of minister of justice, invested with certain legislative powers, especially in regard to the forms or formalities of legal proceedings. Ordinarily, he did not decide causes as a judge, but prepared the grounds of decision for the judge, and sent to him the questions to be decided between the parties. The judge was always chosen by the parties, either directly, or by rejecting, under certain rules and limitations, the persons proposed to them by the *prætor*. Hence the saying of Cicero (*pro Cluentio* 43) that no one could be judged except by a judge of his own choice. There were several kinds of officers called prætors. See Vicat, Voc.

Before entering on his functions, he published an edict announcing the system adopted by him for the application and interpretation of the laws during his magistracy. The edict issued by the *prætor* on his taking office was called the *edictum perpetuum*. It was said that these edicts were of great authority. They were called the *jus honorarium* because those who bear honors in the state, that is the magistrate, have given it their sanction; Inst. 1. 2. 7; Howe, Stud. Civ. L. 10; the fact that the circumstances and habits of thought, untrammelled as they were under this system, led to the exercise by the *prætor* of equitable functions and extension of the narrow limits of the old civil law, was a potent factor in the judge-made law which replaced the ancient technical and rigid system by one more flexible. The *lex Cornelia* (B. C. 67) forbade a *prætor* to depart during his term from the edict promulgated by him at its beginning. The edicts of preceding *prætors* were collected and condensed by Salvius Julianus, who had filled the office during the time of Hadrian; this was a final *edictum perpetuum*, and it was known distinctively by that title. It is doubtful whether after that annual edicts were issued: Sand. Inst. Just. 11; Sohm, Rom. L. § 14; Mack. Rom. L. § 47.

The authority of the *prætor* extended over all jurisdictions, and was summarily expressed by the words *do, dico, addico*, i. e. *do* I give the action, *dico* I declare the law, I promulgate the edict, *addico* I invest the judge with the right of judging. There were certain cases which he was bound to decide himself, assisted by a council chosen by himself,—perhaps the *decemvirs*. But the greater part of causes brought before him he sent either to a judge, an arbitrator, or to *recuperatores*, or to the centumvirs, as before stated. The *prætor* had no power to legislate, but he might grant or refuse an action; Sohm, Rom. L. 52. Under the empire, the powers of the *prætor* passed by degrees to the

prefect of the *prætorium* or the prefect of the city; so that this magistrate, who at first ranked with the consuls, at last dwindled into a director or manager of the public spectacles or games.

The *prætor urbanus* was a special officer appointed to administer justice in the city; afterwards (about 242 B. C.) the increase of business made it necessary to appoint a second *prætor*, who was called a *prætor peregrinus* to whom were assigned all cases in which either or both of the parties were foreigners. *Prætores tutelares* were special magistrates nominated in Rome and vested with the power of appointing *tutors* which right had previously been exercised by the *prætor urbanus*.

A *prætor fideicommissarius* was a magistrate specially appointed to have jurisdiction of *fideicommissa*.

The *prætor fiscalis* had special jurisdiction of cases affecting the public treasury.

PRAGMATIC SANCTION. A solemn ordinance or decree of a sovereign dealing with matters of primal importance and regarded as constituting a part of the fundamental law of the land. It originated in the Byzantine Empire; in later European history it was especially used to designate an ordinance of Charles VI, emperor of Germany, issued April, 1713, to settle the succession on his daughter, Maria Theresa. It was ratified by the Great Powers. On the death of the emperor, it was repudiated by Prussia, France and others, which led to the War of the Austrian Succession. Int. Encycl.

In Civil Law. The answer given by the emperors on questions of law, when consulted by a corporation or the citizens of a province or of a municipality, was called a pragmatic sanction. *Leçons El. du Dr. Civ. Rom.* § 53. See RESCRIPT.

PRAIRIE. An extensive tract of land destitute of trees, covered with coarse grass, and usually characterized by a deep, fertile soil; a meadow or tract of grassland; especially a so called "natural meadow." Interstate G. C. Co. v. Kline, 51 Kan. 23, 32 Pac. 628.

PRATIQUE, or PRATIC. Intercourse; the communication between a ship and the port in which she arrives; hence, a license to hold intercourse and trade with the inhabitants of a place, especially after quarantine, or certificate of non-ineffectiveness. Cent. Dict.

PRAYER. **In Equity Practice.** The request in a bill that the court will grant the aid which the petitioner desires. That part of the bill which asks for relief. The word denotes, strictly, the request, but is very commonly applied to that part of the bill which contains the request.

OF PROCESS. That part of the bill which asks that the defendant may be compelled to appear and answer the bill, and abide the determination of the court upon the subject.

It must contain the names of all the parties; 1 P. Wms. 593; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 245; Coop. Eq. Pl. 16; Bisph. Eq. § 9; although they are out of the jurisdiction; 1 Beav. 106; Mitf. Eq. Pl. 164. The ordinary process asked for is a writ of subpœna; Story, Eq. Pl. § 44; and in case a distringas against a corporation; Coop. Eq. Pl. 16; or an injunction; 2 S. & S. 219; 1 Sim. 50; is sought for, it should be included in the prayer.

Under the supreme court equity rule 25 (February, 1913) the prayer for special relief only is provided for and it may be in the alternative; 198 Fed. xxv.

FOR RELIEF, is *general*, which asks for such relief as the court may grant; or *special*, which states the particular form of relief desired. A special prayer is generally inserted, followed by a general prayer, 4 Madd. 408; Hobson v. McArthur, 16 Pet. (U. S.) 195, 10 L. Ed. 930; Danforth v. Smith, 23 Vt. 247; Spivey v. Frazee, 7 Ind. 661; Kelly's Heirs v. McGuire, 15 Ark. 555; a general prayer if omitted, may be added by amendment or amended bill; McCrum v. Lee, 38 W. Va. 583, 18 S. E. 757. Unless the general prayer is added, if the defendant fails in his special prayer he will not be entitled to any relief; 1 Ves. 426; Mt. Vernon Bank v. Stone, 2 R. I. 129, 57 Am. Dec. 709; except in case of charities and bills in behalf of infants; 18 Ves. 325; Colton v. Ross, 2 Paige, Ch. (N. Y.) 396, 22 Am. Dec. 648.

A general prayer is sufficient for most purposes; and the special relief desired may be prayed for at bar; 4 Madd. 408; Story, Eq. Pl. § 41; Busby v. Littlefield, 31 N. H. 193; Tayloe v. Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; Holmes v. Fresh, 9 Mo. 201; Shields v. Trammell, 19 Ark. 62; Kelly v. Payne, 18 Ala. 371; Danforth v. Smith, 23 Vt. 247; but where a special order and provisional process are required, founded on peculiar circumstances, a special prayer therefor is generally inserted; 6 Madd. 218; Eastman v. Ramsey, 3 Ind. 419. A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill; Walker v. Converse, 148 Ill. 622, 36 N. E. 202; but under such a prayer a party cannot recover a claim distinct from that demanded by the bill; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622.

Such relief, and such only, will be granted, either under a special prayer, whether at bar; 2 Ves. 299; Walker v. Devereau, 4 Paige, Ch. (N. Y.) 229; Scudder v. Young, 25 Me. 153; Cameron v. Abbott, 30 Ala. 416; or in the bill; Denison v. League, 16 Tex. 399; Miller v. Saunders, 18 Ga. 492; Delaware & H. C. Co. v. Coal Co., 21 Pa. 131; or under a general prayer, as the case as stated will justify; Melvin v. Robinson, 42 N. C. 80; Cook v. Brohaugh, 13 Ark. 183; Tayloe v. Ins. Co., 9 How. (U. S.) 390, 13 L. Ed. 187; and a bill framed apparently for one purpose will not be allowed to accomplish another, to the injury of the defendant; Denison v. League, 16 Tex. 399; Livingston's

Ex'rs v. Van Rensselaer's Adm'rs, 6 Wend. (N. Y.) 63.

And, generally, the decree must conform to the allegations and proof; Crocket v. Lee, 7 Wheat. (U. S.) 522, 5 L. Ed. 513; Stuart v. Bank, 19 Johns. (N. Y.) 496; Langdon v. Roane's Adm'r, 6 Ala. 518, 41 Am. Dec. 60; Beers v. Botsford, 13 Conn. 146. But a special prayer may be disregarded, if the allegations warrant relief under the general prayer; Kelly's Heirs v. McGuire, 15 Ark. 555; May v. Lewis, 22 Ala. 646; the relief granted must be consistent with the special prayer; Simmons v. Williams, 27 Ala. 507; Delaware & H. C. Co. v. Coal Co., 21 Pa. 131; Ruff v. Summers, 4 Des. Eq. (S. C.) 530; Wilkin v. Wilkin, 1 Johns. Ch. (N. Y.) 111.

PREAMBLE. An introduction prefixed to a statute, reciting the intention of the legislature in framing it, or the evils which led to its enactment. It is no part of the law; Erie & N. E. R. v. Casey, 26 Pa. 287. *Contra*, [1891] A. C. 543. It is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute. Resort cannot be had to the preamble of a statute to ascertain the intention of an act unless there is an ambiguity in the enacting part. Effect should be given to a preamble to the extent that it shows what the legislature intended, and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case that meaning should be preferred to one which shows an intention of the legislature which would not answer the purposes of the preamble or would go beyond them. To that extent only is the preamble material; 8 App. Cas. 388. The clear language of an act cannot be cut down by a reference to the preamble; 29 Ch. D. 950. It may explain what is of doubtful meaning, but will not limit what is clear; Tripp v. Goff, 15 R. I. 299, 3 Atl. 591; Wilson v. Spaulding, 19 Fed. 304.

A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute; Co. 4th Inst. 330; Green v. Neal, 6 Pet. (U. S.) 301, 8 L. Ed. 402. In modern legislative practice, preambles are much less used than formerly, and in some of the states are rarely inserted in statutes. In the interpretation of a statute, though resort may be had to the preamble, it cannot limit or control the express provisions of the statute; Dwarris, Stat. 504; Wilberf. Stat. Law 277. Nor can it by implication enlarge what is expressly fixed; 1 Story, Const. b. 3, c. 6; Bynum v. Clark, 3 McCord (S. C.) 298, 15 Am. Dec. 633; Jackson v. Gilchrist, 15 Johns. (N. Y.) 89.

A preamble reciting the existence of public outrages, provision against which is made in the body of the act, is evidence of the facts it recites. See 4 Maule & S. 532; 2 Russ. Cr. 720.

The facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act passed and a third person; Parmelee v. Thompson, 7 Hill (N. Y.) 80; but the statement of legislative reasons in the preamble will not affect the validity of an act; Lothrop v. Stedman, 42 Conn. 583, Fed. Cas. No. 8,519.

See STATUTE; INTERPRETATION.

A recital inserted in a contract for the purpose of declaring the intention of the parties.

PREBEND. In Ecclesiastical Law. The stipend granted to an ecclesiastic, in consideration of officiating in the church. It is in this distinguished from a canonicate, which is a mere title and may exist without stipend. The prebend may be a simple stipend, or a stipend with a dignity attached to it, in which case it has some jurisdiction belonging to it. 2 Burn, Eccl. Law 88; 1 Term 401; 1 Wils. 206; 7 B. & C. 113; 8 Bingh. 490; Jacob, L. Dict.

PRECARIÆ. Day works which the tenants of certain manors were bound to give their lords in harvest time. Cowell.

PRECARIOUS. The affairs of an executor are precarious only when conducted with such recklessness as in the opinion of prudent and discreet men endangers their security. Shields v. Shields, 60 Barb. (N. Y.) 56.

PRECARIOUS RIGHT. The right which the owner of a thing transfers to another, to enjoy the same until it shall please the owner to revoke it.

If there is a time fixed during which the right may be used, it is then vested for that time, and cannot be revoked until after its expiration. Wolff, Inst. § 333.

PRECARIUM (Lat.). The name of a contract among civilians, by which the owner of a thing, at the request of another person, gives him a thing to use as long as the owner shall please. Pothier, n. 87. See Cro. Jac. 235; Orser v. Storms, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; Bac. Abr. *Bailment* (C); Story, Bailm. §§ 127, 253 *b*.

A tenancy at will is a right of this kind.

PRECATORY WORDS. Expressions in a will praying or requesting that a thing shall be done. A trust created by such words, which are more like words of entreaty and permission, than of command or certainty.

Examples of such words, which the courts have held sufficient to constitute a trust, are "wish and request," "have fullest confidence," "heartily beseech," and the like; Rap. and Lawr. L. Dict.

Although recommendatory words used by a testator, of themselves, seem to leave the

devisee to act as he may deem proper, giving him a discretion, as when a testator gives an estate to a devisee, and adds that he hopes, recommends, has a confidence, wish, or desire that the devisee shall do certain things for the benefit of another person, yet courts of equity have formerly construed such precatory expressions as creating a trust; 8 Ves. Ch. 380; Bac. Abr. *Legacies* (B); Warner v. Bates, 98 Mass. 274; Van Amee v. Jackson, 35 Vt. 173; Murphy v. Carlin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699. See, *contra*, In re Pennock's Estate, 20 Pa. 268, 59 Am. Dec. 718; 2 Story, Eq. Jur. § 1069; Eberhardt v. Perolin, 49 N. J. Eq. 570, 25 Atl. 510; Bacon v. Ransom, 139 Mass. 117, 29 N. E. 473; Bisph. Eq. 73.

But this construction will not prevail when either the objects to be benefited are imperfectly described, or the amount of property to which the trust should attach is not sufficiently defined; 1 Bro. C. C. 142; 1 Sim. 556.

While the expression of confidence, if the context shows that a trust is intended, may create a trust, yet, if upon the whole will the confidence is merely that the legatee will do what is right in disposing of the property, a trust is not imposed; 4 Kent 305; [1895] 2 Ch. 370; In re Gardner, 140 N. Y. 122, 35 N. E. 439; Boyle v. Boyle, 152 Pa. 108, 25 Atl. 494, 34 Am. St. Rep. 629; Durant v. Smith, 159 Mass. 229, 34 N. E. 190. The words *in the fullest confidence* were held to create a trust; 1 Turn. & R. 143.

The current of decision in England with regard to precatory words is said to be now to restrict the practice which deduces a trust from the expression of a wish, etc., regarding property absolutely bequeathed; Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; L. R. 10 Eq. Cas. 267; Foose v. Whitmore, 82 N. Y. 406, 37 Am. Rep. 572.

A trust will not be created where the testator shows an intention to leave property absolutely; 27 Ch. Div. 394. See Appeal of Paisley, 70 Pa. 153; Gilbert v. Chapin, 19 Conn. 351. The leaning of the courts is against the implication of a trust; 1 Jarm. Wills 365. It is a question of what was the intention, not of what particular word was used; [1895] 2 Ch. 370. But it was held that a testamentary gift with added words of entreaty or recommendation, or expressing a hope or confidence will constitute a trust; Loring v. Loring, 100 Mass. 340; McRee's Adm'rs v. Means, 34 Ala. 349. See the cases in 1 Jarm. Wills 385, on this subject.

"The true rule, upon principle, and according to the weight of more recent authorities, is said to be that the whole will must be examined to determine whether the words used were to impose an obligation or to give the devisee full discretion." 4 Kent 305, note b, citing 8 Ch. D. 540; Howard v. Carusi, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; Barrett v. Marsh, 126 Mass. 213; Bohn v. Barrett's Ex'r, 79 Ky. 378.

Vagueness in the object tends to show that no trust was intended. See L. R. 8 Eq. 673. It has been held that precatory words are *prima facie* imperative, and create a trust; Nunn v. O'Brien, 83 Md. 200, 34 Atl. 244; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138.

Precatory words do not always create a trust. The question in every case is one of intention. Expressions *per se* sufficient to create a trust may be deprived of that effect by a context especially declaring or by implication showing no trust was intended. The question in all cases is, was the direction imperative? The real question to be determined when such words are used is whether the confidence, hope, or wish expressed is meant to govern the donee, or whether it was a mere indication of that which the testator thinks would be a reasonable or suitable use of the property conveyed, leaving the matter ultimately to the decision of the donee; 1 Jarm. Wills 406, n.

When property is given by will absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence; but if the objects of the supposed trust are definite and the property clearly pointed out, if the relations between the testator and the supposed beneficiary are such as to indicate a motive on the part of the one to provide for the other, and if the precatory clause warrants the inference that it is peremptory, then it may be held that a trust is created; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, where there was a gift to the wife, followed by the words: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best;" it was held that the mother and sister took a beneficial interest.

There is a simple, sure and familiar form of gift to raise a trust—to the legatee in trust for the beneficiary—and the failure to use it indicates an intention to avoid the creation of a trust. Words of desire, request, recommendation or confidence addressed by a testator to a legatee whom he has the power to command, create no trust, *unless* (1) the intent to make the desire, etc., imperative upon the legatee, leaving him no option, clearly appears; (2) the subject-matter of the wish is certain, and (3) the beneficiaries are clearly designated; Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; citing Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; Warner v. Bates, 98 Mass. 277.

"Precatory trusts" is nothing more than a misleading nickname. A clear gift to one for his own benefit shall not be cut down by subsequent words which may operate as an expression of a desire without disturbing the

previous devise; [1897] 2 Ch. 12, C. A., per Rigby, L. J.

PRECEDENCE. The right of being first placed in a certain order,—the first rank being supposed the most honorable.

In this country no precedence is given by law to men.

Nations, in their intercourse with each other, do not admit any precedence: hence, in their treaties, it is the usage for the powers to alternate, both in the preamble and in the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Sometimes signatures are made in alphabetical order of the states which are parties to the act, the French alphabet being adopted for that purpose. 2 Hall. Int. L. 122.

In some cases of officers, when one must of necessity act as the chief, the oldest in commission will have precedence: as, when the president of a court is not present, the associate who has the oldest commission will have a precedence; or if their commissions bear the same date, then the oldest man.

In the army and navy there is a regular order of precedence. See RANK.

For rules of precedence in England, see Whart. Law Dict.; Encycl. Br.

PRECEDENT CONDITION. See CONDITION PRECEDENT.

PRECEDENTS. Legal acts or instruments which are deemed worthy to serve as rules or models for subsequent cases.

The word is similarly applied in respect to judicial and legislative action. In the former use, precedent is the word to designate an adjudged case which is actually followed or sanctioned by *a court* in subsequent cases. An adjudged case may be of any degree of weight, from that of absolute conclusiveness down to the faintest presumption: and one which is in fact disregarded is said never to have become a precedent. In determining whether an adjudication is to be followed as a precedent, the following considerations are adverted to. First, the justice of the principle which it declares, and the reasonableness of its application. Hob. 270. If a precedent is to be followed because it is a precedent, even when decided against an established rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law. It is always safe to rely upon principles. See 16 Viner, Abr. 499; 2 J. & W. 318; 2 P. Wms. 258; 2 Bro. C. C. 86; Cooke v. Crawford, 1 Tex. 11, 46 Am. Dec. 93; 2 Evans, Poth. 377, where the author argues against the policy of making precedents binding when contrary to reason. "The reason and spirit of cases make law: not the letter of particular precedents." 3 Burr. 1364, per Lord Mansfield. See, also, Gresl. Eq. Ev. 300; Anderson v. Jackson, 16 Johns. (N. Y.) 402, 8 Am. Dec. 330; Cro. Jac. 527; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508. Ram, Judgments, gives an excellent statement of the circumstances which affect the value of precedents.

"The reports of judicial decisions contain the most certain evidence and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts and brought within the same reasons. . . . A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. . . . The language of Sir William Jones (Bailments 46) is exceedingly forcible on this point. 'No man,' says he, 'who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate.'" 1 Kent, Com. 473.

According to Lord Talbot, it is "much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us." Cas. *t.* Talb. 26. Blackstone, 1 Com. 70, says that a former decision is, in general, to be followed, unless "manifestly absurd or unjust;" and in the latter case it is declared, when overruled, not that the former sentence was *bad law*, but that it was *not* law. If an adjudication is questioned in these respects, the degree of consideration and deliberation upon which it was made; 4 Co. 94; the rank of the court, as of inferior or superior jurisdiction, which established it, and the length of time during which it has been acted on as a rule of property, are to be considered. The length of time which a decision has stood unquestioned is an important element; since where a rule declared to be law, even by an inferior tribunal, has been habitually adopted and acted upon by the community, and becomes thus imbedded in the actual affairs of men, it is frequently better to enforce it as it is, instead of allowing it to be re-examined and unsettled. It is said that in order to give precedents binding effect there must be a current of decision; Cro. Car. 528; Cro. Jac. 386; 8 Co. 163; Sauer v. Steinbauer, 10 Wis. 370; and even then, injustice in the rule often prevails over the antiquity and frequency of its adoption, and induces the court to overrule it. But this is to be very cautiously done where it is a rule of property, or wherever a departure from it would unjustly affect vested rights; Lindsay v.

Lindsay, 47 Ind. 286; Bates v. Relyea, 23 Wend. (N. Y.) 340.

"The only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him. . . . Where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the appellate court to say that a case is wrongly decided, if the appellate court should so think." 13 Ch. D. 712, per Jessel, M. R.

"Without minutely examining all the cases, or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases." 7 Term 148, per Lord Kenyon, C. J.

"Now, I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle, if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be a binding authority or guide for any subsequent judge, for the second judge who lays down the principle in effect reverses the decision." 13 Ch. D. 785, per Jessel, M. R.

The same judge is quoted in 23 L. Q. Rev. 88, as saying: "If a case lays down a principle, it is a guide to other judges, but a mere decision where you cannot find out the principle is of no use at all."

"If one authority were produced to me, and my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound." L. R. 19 Eq. 460, per Jessel, M. R.

"It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is that the decision of a superior court is binding on an inferior court and on a court of co-ordinate jurisdiction, in so far as it is a statement of the law which the court is bound to accept." James, L. J., in L. R. 7 Ch. Ap. Ca. 750.

"Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of parliament itself, in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognized law." 15 Ch. D. 336, per Thesiger, L. J.

"Where an old case is contrary to the principles of the general law, the court of appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the court of appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it." 9 Q. B. D. 352, per Jessel, M. R., cited by Lord Esher, M. R., in 22 Q. B. D. 619. See also 12 Q. B. D. 318. In [1909] 1 Ir. R. 172, the court after some deliberation felt itself bound to follow a case decided in 1726.

"Where there is a decision which has stood for more than two hundred years in respect of a subject-matter constantly arising in practice, the court does not overrule it unless absolutely obliged to do so. . . . Even if the court did not agree with the decision, it would not overrule it." [1895] 2 Q. B. 665. Where a dictum of law has been accepted, and is likely to have affected divers contracts and dealings between man and man, and if not followed, many transactions done on the faith of it would be disturbed, the court will follow the dictum; 26 Ch. D. 821. But where a decision had not stood wholly unquestioned the court need not feel bound to follow it merely because it has stood for twelve years without being authoritatively overruled; 27 Ch. D. 154.

"Where the decision is really one as to the jurisdiction of another court there is no reason why, at any distance of time, a superior court may not overrule it." 13 Q. B. D. 591, per Brett, M. R.

"Speaking for myself, I do not pay much attention to the *dicta* of modern judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern judges, nor to old recognized *dicta* by eminent judges." 23 Ch. D. 49, per Jessel, M. R. See, also, 23 Ch. D. 127; [1891] 3 Ch. 376.

Decisions on the constructions of instruments, if the words are similar, are not strictly binding; L. R. 10 Ch. App. 397, with footnote giving the judgment of Jessel, M. R., in the court below; or if the "instruments are couched in somewhat similar language;" 22 Ch. D. 488; and this is true even of the decisions of the appeal court; 23 Ch. D. 111.

In 25 Q. B. D. 57, Lord Esher drew a distinction between "fundamental propositions of law," which could be changed only by par-

liament, and "the evidence of the existence of such a proposition," which was within the disposition of the court.

In 44 L. T. 440, Jessel, M. R., stated that he had frequently differed from the courts of co-ordinate jurisdiction, and the same was said by Brett, L. J., in 10 Q. B. D. 328, in reference to a decision in the Exchequer Chamber, where the judges were equally divided; and it was said by Brett, M. R., in 13 Q. B. D. 355, that a court of law is not justified in overruling the decisions of another court of co-ordinate jurisdiction, citing Jessel, M. R., in 13 Ch. D. 130.

In L. J. N. S. 57 Ch. D. 157, Kekewich, J., said: "I think that the proper and safe course is to follow a decision of a court of co-ordinate jurisdiction, unless some cogent reason is given to the contrary."

"For us to reverse the judgment of a lord chancellor would require a tremendous case —a case of a clear error." 12 Ch. D. 47, per James, L. J. While the decisions of the lord chancellor, at all events sitting alone, are not absolutely binding, yet the greatest weight ought to be given to them, and unless manifestly wrong, they ought not to be overruled; 12 Ch. D. 54, per Thesiger, L. J. The old lord chancellors overruled one another, and sometimes they overruled their own decisions without the slightest trouble; 21 Ch. D. 346, Jessel, M. R.

It is said that the house of lords has the same power that every other tribunal has in subsequently applying the law laid down by it to other cases; 5 H. L. Cas. 63. The observations made by the members beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and to prior authorities. But the house of lords, as a tribunal, is bound by its own precedents which it will not overrule, and the doctrine on which the judgment of the house is founded must be universally taken for law, and can only be altered by act of parliament; 3 H. L. Cas. 391; 8 *id.* 391; 9 *id.* 338; L. R. 8 C. P. 313. This doctrine was again laid down, after argument, in [1898] A. C. 375.

In [1898] A. C. 375, 381, Halsbury, L. C. said: "A decision of this house upon a question of law is conclusive, and nothing but an act of parliament can set right that which is alleged to be wrong in a judgment of this house." See 15 Law Quart. Rev. 340. If two cases in the house of lords are not to be reconciled, the more recent ought to prevail; 5 App. Cas. 798; 7 *id.* 294, 302.

The judicial committee of the privy council is not bound by its own precedents; see 4 Moore, P. C. 63; but where a decision of the privy council has been reported to the queen, and been sanctioned and embodied in an order in council, it becomes the decree or order of the final court of appeal, and every subordinate tribunal to whom the order is addressed should carry it into execution; 6 App. Cas. 483.

A series of decisions based upon grounds of public policy however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal; Lord Watson in L. R. [1894] A. C. 553.

The supreme court of the United States has overruled its own precedents in some instances, notably on the question of the extent of admiralty jurisdiction and in the legal tender cases.

It has been said that the judgment of an equally divided court has no weight as a precedent; Bridge v. Johnson, 5 Wend. (N. Y.) 372; Kalamazoo v. Crawford, 154 Mich. 58, 117 N. W. 572, 16 Ann. Cas. 110; Hanifen v. Armitage, 117 Fed. 846; see cases in 7 Am. & Engl. Encycl. of Pr. 44; so held of a judgment of the supreme court; Kinney v. Conant, 166 Fed. 720, 92 C. C. A. 410; and does not even settle the question of law; Bridge v. Johnson, 5 Wend. (N. Y.) 372; but a judgment affirmed by a divided court in the house of lords is a binding precedent; 9 H. L. Cas. 338.

Instances of a lower court disregarding the decision of a higher court will be found in L. R. 2 Eq. 335, where a case formerly decided by Lord Westbury was disregarded because he had decided it in ignorance of a statute, and in L. R. 3 Ch. 420, where the lord chancellor made a ruling as to the abatement of legacies, which was nothing more than a blunder, and was subsequently disregarded by the vice-chancellors.

It is the duty of the court to reconcile decisions and, in order to enforce the correct doctrine, to determine which rest upon the right principle and to overrule or qualify those conflicting therewith; White, C. J., in Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

"General expressions in any opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." Cohens v. Virginia, 6 Wheat. (U. S.) 399, 5 L. Ed. 257. Per Marshall, C. J., quoted in U. S. v. Wong Kim Ark, 169 U. S. 679, 18 Sup. Ct. 456, 42 L. Ed. 890; Harriman v. Securities Co., 197 U. S. 291, 25 Sup. Ct. 493, 49 L. Ed. 739.

A judicial decision is an authority only in connection with the facts of the cause, and not for a position referred to by way of illustration of what is not decided because not involved in the case; Jones-L. Co. v. R. Co., 148 N. C. 580, 62 S. E. 701.

The opinion must be read as a whole in view of the facts on which it is based. The facts are the foundation of the entire structure, which cannot with safety be used without reference to the facts; U. S. v. Wong Kim Ark, 169 U. S. 649, 679, 18 Sup. Ct. 456, 42 L. Ed. 890.

". . . There are two observations of a general character which I wish to make, and one is to repeat what I have often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." Per Lord Halsbury, L. C., in [1901] A. C. 506.

"A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided." Trustees of School Dist. No. 28 v. Stocker, 42 N. J. L. 115.

"It is a mistaken opinion that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and considered, and deliberately decided by the court, leading up to the final conclusion reached are as effectually passed upon as the ultimate questions solved." Brown v. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579. "Nothing is *obiter*, strictly so called, except matters not within the questions presented—mere statements or observations . . . the result of turning aside for the time to some collateral matter by way of illustration;" *id.* "Whatever is necessarily implied in the former decision is deemed to have been actually decided." Pray v. Hegeman, 98 N. Y. 351, 358.

"It is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately decided by the court, as if the decision had hung upon but one point." Buchner v. R. Co., 60 Wis. 264, 19 N. W. 56.

Decisions in cases where the point in question might have been raised but was not are of much weight since they show the general understanding of the law by the bench and bar; Bank of U. S. v. Deveaux, 5 Cr. 61, 88, 3 L. Ed. 38.

That a federal court has never been asked to issue a certiorari to review a ruling by an executive of the United States suggests the want of power to issue such writs to such officers; Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. 1135. See also Western Union Tel. Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678.

It has been said that no decision can amount to a precedent unless made after full argument; Celluloid Mfg. Co. v. Tower, 26 Fed. 451; but this can hardly be taken to be broadly true. Doubtless this fact would lessen the weight of a case cited from another jurisdiction.

In a dissenting opinion in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 168, 17 Sup. Ct. 255, 41 L. Ed. 666, Gray, J., expressed regret that an important precedent for interference with the legislation of the several states should be established in a case argued on behalf of appellant only.

The court is not bound, on a question of jurisdiction, by a prior case in which jurisdiction was entertained without any suggestion as to the want of it; New v. Oklahoma, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. Ed. 182; Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118.

Decisions of the federal supreme court are binding upon state courts upon questions of due process of law; Liddell v. Landau, 87 Ark. 438, 112 S. W. 1085; on federal statutes; Mires v. R. Co., 134 Mo. App. 379, 114 S. W. 1052; questions of interstate commerce; State v. Glasby, 50 Wash. 598, 97 Pac. 734, 21 L. R. A. (N. S.) 797; State v. Davis, 50 Wash. 704, 97 Pac. 737; and bankruptcy; Stuart v. Bank, 137 Wis. 66, 117 N. W. 820, 16 Ann. Cas. 821.

The construction of federal statutes by the supreme court of the United States should control future decisions of state courts; U. S. Exp. Co. v. People, 195 Ill. 155, 62 N. E. 825; though not in accord with previous decisions in that state; Lyon v. Clark, 124 Mich. 100, 82 N. W. 1058, 83 N. W. 694. (After the decision of this case it appeared that the supreme court of the United States had reversed certain federal decisions, whereupon the Michigan case was reheard and the former decision reversed; Lyon v. Clark, 124 Mich. 105, 82 N. W. 1058, 83 N. W. 694). So in construing the federal constitution; In re Letcher, 145 Cal. 563, 79 Pac. 65; State v. Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422.

Advisory opinions of the judges given to state officers are held not to be precedents; Taylor v. Place, 4 R. I. 324; they are not binding upon the department that asked for them; State v. Cleveland, 58 Me. 573. Opinions of the judges asked for by the house of lords are said not to be binding; McQueen, App. Jurisd. of H. of L. 39.

See 24 Am. L. Rev. 369; 7 Harv. L. Rev. 153; OPINIONS OF THE JUDGES.

Judges of the same court should not overrule decisions of each other, especially upon questions involving rules of property and practice, except for the most cogent reasons; Plattner Imp. Co. v. Harvester Co., 133 Fed. 376, 66 C. C. A. 438.

Mr. Powell (Appellate Proceedings) develops at some length the thought that two of the most important ideas and principles in judicial proceedings are essentially of modern origin. These are the force and effect of precedent, and the aid afforded by appellate proceedings in the correction of errors and the perfecting of the law. Neither of these ideas were known to the ancients, or recognized in the civil law, and they were almost entirely disregarded in the courts of continental Europe until the present day.

"Judicial precedent is not simply part of the law in a general sense . . . but it is a part of our law in a sense, and with effects, which are distinctively and most strikingly peculiar. The doctrine, as established, is shortly this: that a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point, so decided, becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow, not only in cases precisely like the one which was first determined, but also in those which, however different in their origin or special circumstances, stand, or are considered to stand, upon the same principles." Dillon, Laws and Jurisp. 231.

"Indirectly, the reports embody also the results of the researches, studies, experience, and ability of the bar during the same period, since of these the judges have had the advantage in the argument of the causes so decided. Indeed the doctrine of judicial precedent implies that the point of the decision whereof such force is attributed should have been argued by opposing counsel." *Id.* 233.

The fortuitous and irregular growth of case law is the necessary result of the rule of its existence, that no point can become the subject of a judicial decision until it actually arises for judgment. So that it is left, as has been observed, to "the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete," with the result that "all kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty." Pollock, Essays, Jurispr. and Ethics, ch. iii.

Concerning the true office and use of adjudged cases, the views of Mr. Justice Miller are expressed in a letter which is published in a note to lecture ix. of Judge Dillon's work already referred to. After adverting to the difficulty experienced by a judge in the use of judicial decisions, he groups the cases into three classes: 1. Those which must be decided by principles not disputed, in which citations are of little value, because the duty of the judge is confined to the application of principles in a particular case. 2. Those which construe the constitutions and statutes, as to which the decisions of the highest court of the government which adopted them, are generally conclusive. 3. Those depending upon general principles of law or equity which must be determined, if there is a conflict of decision, by the weight of authority, and in which the citation of adjudged cases is most useful.

Allusion is also made to the fact that the opinions of certain judges, even when dissenting or *obiter*, carry special weight apart from the courts in which they were delivered.

O. W. Holmes, Jr. (Common Law 35), considers that the development of the law, by this system, results, to some extent, in a paradox both in form and substance. "In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents," but they "survive in the long run after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from a merely logical point of view." On the other hand, he considers that the growth of the law, in substance, is legislation in the sense that "the secret root from which it draws all the juices of life" is really to be found in the consideration of what is "expedient for the community concerned" on "more or less definitely understood views of public policy," not less so because the "unconscious result of instinctive preferences and inarticulate convictions." When the law is administered with ability and experience, even if ancient rules are maintained, they will be fitted with new reasons, so that both form and substance are changed by the transplanting.

Expressions by the supreme court (*obiter*) as to what the law would be on facts essentially different from those in issue are not controlling on a lower court; U. S. v. R. Co., 170 Fed. 542, 95 C. C. A. 628.

In deciding a question of the law of nations the decisions of foreign courts will be respected; Thirty Hogsheads of Sugar v. Boyle, 9 Cra. 191, 3 L. Ed. 701; decisions of courts of England, France, Spain or Holland upon general mercantile law are authorities in this country; Steinmetz v. Currie, 1 Dall. (U. S.) 270, 1 L. Ed. 132.

As to the value of American decisions in English courts, Lord Cockburn, C. J., said in 5 C. P. D. 303: "I am glad to think that

in laying down the rule we had the advantage of the assistance afforded to us by the decisions of the American courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part." But Halsbury, C., has said that American decisions are not "authorities" in English courts; 42 Ch. D. 321, 330, where he deprecated the practice of citing them as such.

In [1896] 1 Ch. 763, the reporter says in the headnote "Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388, not followed," as to which it is suggested that an English case first considering an established American doctrine could scarcely ignore the leading American case; 10 Harv. L. Rev. 179.

Few modern writers agree with the older theory formulated by Blackstone, that the courts are "not delegated to pronounce a new law, but to maintain and expound the old one;" 1 Bla. Com. 69; but see Lieber, Hermeneutics, Ham. ed. 312. The tendency is strongly to accept the view that it is a "childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing from eternity and merely declared from time to time by the judges;" 2 Aust. Lect. Jurisp. 655. The same view is elaborated by Sir Henry Maine who makes judicial decision the beginning of all law, and contends that the distinction between case law and code law is only one of form, and that both are, properly speaking, written, not unwritten, law. Anc. Law, ch. 1.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised to make up for the negligence or incapacity of the avowed legislature. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Aust. Lect. Jurisp. 224. See Holland, Jurispr. 56.

Mr. Carter, in his lectures on The Law remarks that "a precedent is but authenticated custom" (p. 65) and that "a judicial precedent is not law *per se*, but evidence of it only. The real law is custom" (p. 84).

But it has also been said that the application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases and to deny that the principles, (of which these cases are ordinarily said to be evidence) existed at all. 4 Harv. L. Rev. 213.

In a recent opinion it is said that "the modern, and we believe laudable, tendency of courts is to abandon the old and technical forms, to abbreviate litigation, to get at the heart of a case and decide it without delay"; Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47, on a bill to prevent multiplicity of actions.

Decisions of Spanish courts after 1898 on Spanish law applicable to possessions ceded by Spain are entitled to great consideration, but do not bind the local courts; Cordova v. Folgueras y Rijos, 227 U. S. 375, 33 Sup. Ct. 350, 57 L. Ed. 556.

On the Continent, under the civil law, a judge is at liberty to disregard the decisions of a higher court. In Scotland the position assigned to judicial precedents seems to be intermediate between that occupied by them on the Continent of Europe and that in England; John C. Gray, 9 H. L. R. 34.

As to federal courts following the decisions in another circuit, see COMITY.

As an instance of following precedent, reference is made to an observation of Lord Ellenborough in 17 C. B. N. S. 791: "I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they never ought to have been admitted. The doctrine in their favor rests on an authority in Show-er, which does not fully support it, and the practice of receiving them often leads, in its consequences, to the greatest injustice." See 3 Smith, Lead. Cas. 2045; JUDGE-MADE LAW.

As to what are considered precedents in prize courts, see that title.

As to federal courts following state courts, see CONFLICT OF LAWS.

See DISSENTING OPINIONS; AUTHORITIES; DICTUM; COMITY; LAW OF THE CASE; JUDGE-MADE LAW; STARE DECISIS; DICTUM; JUDICIAL POWER; RES JUDICATA; LAW; Wambaugh, Case Law; LAW OF CITATIONS.

Written forms of procedure which have been sanctioned by the courts or by long professional usage, and are commonly to be followed, are designated precedents. Steph. Pl. 392. And this term, when used as the title of a law-book, usually denotes a collection of such forms.

PRECEPARTIUM. The continuance of a suit by consent of both parties. Cowell.

PRECEPT (Lat, *precipio*, to command). A writ directed to the sheriff, or other officer, commanding him to do something.

PRECES PRIMARIÆ, OR PRIMÆ. A right of the crown to name to the first prebend that becomes vacant after the accession of the sovereign, in every church of the kingdom. This right was exercised by the

crown of England in the reign of Edward I. 2 Steph. Com. 670, n.

PRECINCT. The district for which a high or petty constable is appointed is, in England, called a precinct. Wilcox, Const. xii. See Brooks v. Norris, 124 Mass. 172.

Precinct is used, in certain legislation in Wyoming, relatively to assessing taxes on railroad property, as a general word and not a technical one, and indicates any district marked out and defined. It further signifies a district inferior to a county and superior to a township. Union P. R. Co. v. Cheyenne, 113 U. S. 524, 5 Sup. Ct. 601, 28 L. Ed. 1098.

In Pennsylvania and other states it is used to indicate a subdivision of a city for election purposes.

PRECIPUT. In French Law. An object which is ascertained by law or the agreement of the parties, and which is first to be taken out of property held in common by one having a right, before a partition takes place.

The preciput is an advantage or a principal part to which some one is entitled *præcipium jus*, which is the origin of the word preciput. Dalloz, Dict.; Pothier, Obl. By preciput is also understood the right to sue out the preciput.

PRECISE. When the terms "clear, precise, explicit, unequivocal, and indubitable," are used by the courts to define the requisite proof of a fact, it is meant that the witnesses shall be credible, that the facts are distinctly remembered by them, that details are narrated exactly, and that their statements are true. Spencer v. Colt, 89 Pa. 314.

PRECLUDI NON (Lat.). **In Pleading.** A technical allegation contained in a replication which denies or confesses and avoids the plea.

It is usually in the following form: "And the said A B, as to the plea of the said C D, by him secondly above pleaded, says that he, the said A B, by reason of anything by the said C D in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said C D, because he says that," etc. 2 Wils. 42; 1 Chitty, Pl. 573; Steph. Pl. 398.

PRECONTRACT. An engagement entered into by a person which renders him unable to enter into another; as, a promise or covenant of marriage to be had afterwards. When made *per verba de præsenti*, it is in fact a marriage, and in that case the party making it cannot marry another person. Bish. Mar. & D. § 53; 1 Bish. Mar. Div. & Sep. § 280, 1891. See PROMISE OF MARRIAGE.

PREDECESSOR. One who has preceded another.

This term is applied in particular to corporators who are now no longer such, and whose rights have been vested in their successor; the word ancestor is more usually applicable to common persons. The predecessor in a corporation stands in the same relation to the successor that the ancestor does to the heir.

One who has filled an office or station before the present incumbent.

PREDICATE. To affirm logically.

PREDOMINANT. Something greater or superior in power and influence to others with which it is connected or compared. Matthews v. Bliss, 22 Pick. (Mass.) 53.

PRE-EMPTION. In International Law. The right of pre-emption is the right of a nation to detain the merchandise of strangers passing through her territories or seas, in order to afford to her subjects the preference of purchase. 1 Chitty, Com. Law 103; 2 Bla. Com. 287.

According to general modern usage the doctrine of pre-emption, as applied in time of war rests upon the distinction between articles which are contraband (*q. v.*) *universally*, and those which are contraband only under the particular circumstances of the case. The carrying of the former class entails the penalty of confiscation, either of ship or cargo or both. The latter class, while confiscable according to strict law, are sometimes merely subjected to the milder belligerent right of *pre-emption*, which is regarded as a fair compromise between the right of the belligerent to seize, and the claim of the neutral to export his *native commodities*, though immediately subservient to the purpose of hostility; 3 Phill. Int. L. 450; 1 C. Rob. 241. The right of pre-emption is said to be rather a waiver of a greater right than a right itself; an indulgence to the neutral rather than a right of the belligerent; Ward, Contraband 196.

This right is sometimes regulated by treaty. In the treaty made between the United States and Great Britain, November 19, 1794, ratified in 1795, it was provided, after mentioning that the usual munitions of war, and also naval materials, should be confiscated as contraband, that, "whereas the difficulty of agreeing on precise cases in which alone provisions and other articles not generally contraband may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles so being contraband according to the existing laws of nations shall for that reason be seized, the same shall not be confiscated, but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessel the full value of all articles, with a reasonable mercantile profit thereon, together with the freight, and also the damages incident to

such detention." According to the practice of the British prize court, a profit of ten per cent. has been usually allowed to the proprietor of the goods seized, for the purposes of pre-emption; 3 Phill. Int. L. 451.

See NEUTRALITY.

PRE-EMPTION RIGHT. The right given to settlers upon the public lands to purchase them at a limited price in preference to others.

It gave a right to the actual settler who was a citizen of the United States, or who had filed a declaration of intention to become such, and had entered and occupied without title, to obtain a title to a quarter-section at the minimum price fixed by law, upon entry in the proper office and payment, to the exclusion of all other persons. It is an equitable title: McAfee's Heirs v. Keirn, 7 Smedes & M. (Miss.) 780, 45 Am. Dec. 331; Pettigrew v. Shirley, 9 Mo. 683; U. S. v. Fitzgerald, 15 Pet. (U. S.) 407, 10 L. Ed. 785; and does not become a title at law to the land till entry and payment; Craig v. Tappin, 2 Sandf. Ch. (N. Y.) 78; Brown v. Throckmorton, 11 Ill. 529. It may be transferred by deed; Delaunay v. Burnett, 4 Gilman (Ill.) 454; and descends to the heirs of an intestate; Hunt v. Wickliffe, 2 Pet. (U. S.) 201, 7 L. Ed. 397.

No person is entitled to more than one pre-emption right to public land; and where a party has filed a declaration, he cannot file another for another tract, or for an addition to the first tract; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290.

A person cannot acquire by his occupation only of unsurveyed lands of the United States, a right of pre-emption to them; Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920. The word heirs as used in R. S. § 2269, which provides for the issuance of a patent to the heirs of a deceased pre-emptor, includes illegitimate children, when such can inherit it from their father in the state where he was domiciled and the land located; Hutchinson Inv. Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. Ed. 356.

By act of March 3, 1891, the pre-emption laws were repealed, saving the rights of claims already initiated; 1 R. S. Sup. 942; and *bona fide* pre-emption claimants were permitted to transfer any part of their land for church, cemetery, and school purposes and for the right of way of railroads, canals and irrigation and drainage works.

See LANDS, PUBLIC.

PRE-EXISTING. Pre-existing debt includes all debts previously contracted whether they have become payable or not. In re Fletcher, 136 Mass. 340.

PREFER. To bring any matter before a court: as,—A. preferred a charge of assault against B.

To apply or move: thus,—"to prefer for costs." Abb. Law Dict.

PREFERENCE. The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest. The right which a creditor has acquired over others to be paid first out of the assets of his debtor; as, when a creditor has obtained a judgment against his debtor which binds the latter's land, he has a preference.

A failing creditor, if an individual or partnership, may at common law prefer any one creditor to the exclusion of others; Wilder v. Winne, 6 Cow. (N. Y.) 285; Clarke v. White, 12 Pet. (U. S.) 178, 9 L. Ed. 1046; York County Bk. v. Carter, 38 Pa. 446, 80 Am. Dec. 494. See Sartwell v. North, 144 Mass. 192, 10 N. E. 824. Knowledge of insolvency does not render a preference invalid, except under some statute; Merillat v. Hensey, 221 U. S. 333, 31 Sup. Ct. 575, 55 L. Ed. 758, 36 L. R. A. (N. S.) 370, Ann. Cas. 1912D, 497.

At common law, unless prohibited by statute, a corporation whether insolvent or not, had a right to pay a creditor, whether a director, officer, stockholder or outsider; Coats v. Donnell, 94 N. Y. 168; 2 Moraw. Corp. § 802. As to preference by failing corporations, there are now two doctrines; one that the assets are a trust fund for the benefit of all creditors *pro rata* and no preference can be given to any creditor; Consolidated Tank-Line Co. v. Varnish Co., 45 Fed. 7; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184; Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644; Gillet v. Moody, 3 N. Y. 479; State v. Brockman, 39 Mo. App. 131; Goodyear Rubber Co. v. G. D. Scott Co., 96 Ala. 439, 11 South. 370; Kendall v. Bishop, 76 Mich. 634, 43 N. W. 645. The other that a corporation has the same power in dealing with the assets and preferring creditors as an individual has under similar circumstances; Garrett v. Plow Co., 70 Ia. 697, 29 N. W. 395, 59 Am. Rep. 461; Allis v. Jones, 45 Fed. 148; Pyles v. Furniture Co., 30 W. Va. 123, 2 S. E. 909; Planters' Bk. v. Whittle, 78 Va. 737; Farwell Co. v. Sweetzer, 10 Colo. App. 421, 51 Pac. 1012; Cowan v. Glass Co., 184 Pa. 1, 38 Atl. 1075. In the absence of statutory prohibition it has been held a corporation may convey its property to a creditor upon condition that he pay himself and return the surplus; Catlin v. Bank, 6 Conn. 233.

It has been held that a failing corporation may prefer its own stockholders; Reichwald v. Hotel Co., 106 Ill. 439; but not its own directors; Sicardi v. Oil Co., 149 Pa. 148, 24 Atl. 163; Smith v. Putnam, 61 N. H. 632; Howe, B. & Co. v. Tool Co., 44 Fed. 231; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184; Lippincott v. Carriage Co., 25 Fed. 577; but see, *contra*, Garrett v. Plow Co., 70 Ia. 697, 29 N. W. 395,

59 Am. Rep. 461; Foster v. Mill Co., 92 Mo. 79, 4 S. W. 260; it is held that it may prefer its directors and its creditors on whose claims its directors are sureties; Nappanee Canning Co. v. R. M. & Co., 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199.

After suspension and insolvency no preference will be allowed; Richards v. Ins. Co., 43 N. H. 263; Olney v. Land Co., 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767. The directors may advance money to a corporation in difficulties and secure themselves by mortgage of its property; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Mullanphy Sav. Bk. v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401. If the preferred creditor be one of its officers, he must show that the preference was fair and conscionable and not collusive for the mere purpose of preference; Cowan v. Glass Co., 184 Pa. 1, 38 Atl. 1075. The liquidation in good faith of debts due to directors with the hope of continuing business, is not invalid; Dutcher v. Bank, 59 N. Y. 5. Judge Thompson takes very strong ground against the right of a corporation to prefer any creditor, but especially an officer, or stockholder; Thompson, Corp. § 6492; 32 Am. L. Rev. 138. The opposite ground is taken on principle in 2 No. W. L. Rev. by Prof. Harriman. In New York, by statute, a failing corporation cannot transfer any of its property to an officer, director or stockholder.

In some states assignments which attempt to create a preference are void and the assignment is for the equal benefit of all creditors. In other states they are allowed. Preferences are usually invalidated by bankrupt acts. By the bankrupt act of July 1, 1898, as amended Feb. 5, 1903, and June 25, 1910, it was provided as follows:

(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater portion of his debt than any other of such creditors of the same class. Where the preference consists of a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

(b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if at the time of the transfer, or of the entry of the judgment or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. Concurrent jurisdiction is in the bankruptcy court and the proper state court.

(c) If a creditor has been preferred and afterward in good faith gives the debtor further credit without security of any kind for property which becomes part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

(d) If a debtor, in contemplation of the filing of a petition by or against him, shall pay money or transfer property to his attorney for services to be rendered, the transaction shall be re-examined by the court and held valid to the extent of a reasonable amount and the excess may be recovered by the trustee.

To constitute a preference it must appear that, at the time, the debtor was insolvent, that he intended a preference, and that the transferee had reasonable ground to believe that a preference was intended; In re Leech, 171 Fed. 625, 96 C. C. A. 424; In re First N. Bk., 155 Fed. 100, 84 C. C. A. 16; there must be a parting with the bankrupts' property for the benefit of the creditor and a subsequent diminution of his estate; Continental & Commercial T. & S. Bk. v. Trust Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268; N. Bk. of Newport v. Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042.

There is a difference between intent to defraud and intent to prefer—the former is *malum per se* and the latter *malum prohibitum* and only to the extent forbidden; Van Iderstine v. Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652.

The mere knowledge of the creditor that the debtor could not pay all his debts unless he could collect all his accounts is not notice of insolvency; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464; nor is the mere fact that a debtor is financially embarrassed; J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433. In the case of a partnership, it must be shown that the firm and the partners themselves were insolvent when the payments were made; Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960.

It is reasonable ground to believe that a preference was intended, if the creditor knew

facts which would put a prudent man on inquiry and that would have shown that the transfer was preferential in its effect; In re W. W. Mills Co., 162 Fed. 42; but where a young woman with no business experience who had her money with a bankrupt firm, of which her uncle was the head, received a check for her deposit in full, with a statement that the firm could no longer use her money; it was held that she had no reasonable cause to believe it a preference; Wright v. Sampter, 152 Fed. 196.

The entry of a judgment and issuing execution, under an irrevocable power of attorney to confess judgment, given by the debtor to the creditor, upon a promissory note dated years before the petition in bankruptcy, may nevertheless be a preference; Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147; a mortgage given within four months of the petition without the mortgagee's knowledge of the mortgagor's insolvency is not voidable under section 67e; Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. An attempt to prefer is not necessarily an attempt to defraud, nor is a preferential transfer always a fraudulent one. The fraud depends upon the motive, and under § 67e, actual fraud must be shown; *id.* It is a preference for a creditor to procure a purchaser for the bankrupt stock and business where such purchaser assumes the bankrupt's indebtedness to such creditor; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464.

Payments by a merchant in the usual course of business on a running account and new sales succeeding payments, to the net benefit of the estate, and the seller having no reason to believe an intention to prefer, are not preferences; Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717; so of a creditor who had a claim on open account, and who had no knowledge of the debtor's insolvency; Wild & Co. v. Trust Co., 214 U. S. 292, 29 Sup. Ct. 619, 53 L. Ed. 1003. A *bona fide* transfer of securities to secure a loan to one who immediately thereafter became bankrupt is not an illegal preference if the vender had no knowledge of an intention to prefer, even though he knew the money was to be used to pay debts; Van Iderstine v. Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652.

A bank doing business with a customer who becomes insolvent may accept his money if it has no reasonable cause to believe that a preference will be given; Studley v. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. A bank, not a creditor, loaned money on mortgage to an insolvent corporation; the money was used to pay debts; it was not a preference; Grinstead v. Trust Co., 190 Fed. 546, 111 C. C. A. 398.

A customer has such interest in securities carried for him by a broker that a delivery to him after insolvency is not necessarily a preference; Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. A broker, if he uses securities belonging to his customer, is bound to use his own funds to replace them with others of the same kind, and in so doing he does not deplete his estate against his other creditors; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047. A broker paying excess margins to a customer held, in the circumstances, not giving a preference; Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981.

See BANKRUPT LAWS.

PREFERENCE SHARES. Shares of a corporation or a joint-stock company entitling their holders to a preferential dividend and sometimes to priority on the division of the assets. See STOCK.

PREFERENTIAL DEBTS. Preferential debts, in bankruptcy, are those prior to all others; as, wages of a clerk, servant, or workman, rates due and taxes. Brett, Comm. 890.

PREFERRED. This word is relative; it refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which, but for this advantage, would be like the others. State v. R. Co., 16 S. C. 530.

PREFERRED CLAIMS. See MORTGAGE; RECEIVER.

PREFERRED CREDITOR. A creditor whom the debtor has directed shall be paid before other creditors. See PREFERENCE.

PREFERRED STOCK. See STOCK.

PRÉFET. In French Law. A chief officer invested with the superintendence of the administration of the laws in each department. Merlin, *Répert.*

PREGNANCY. In Medical Jurisprudence. The condition of a woman who has within her the product of a conception which has occurred within a year. Billings, Nat. Med. Dictionary.

Extra uterine or ectopic pregnancy is the development of the ovum outside of the uterine cavity, as in the Fallopian tubes or ovary. Extra uterine pregnancy commonly terminates by rupture of the sac, profuse internal hemorrhage, and death if not relieved promptly by a surgical operation. Rupture usually takes place between the second and sixth month of pregnancy.

The signs of pregnancy. These acquire a great importance from their connection with the subject of *concealed*, and also of *pretended*, pregnancy. The first may occur in order to avoid disgrace, and to accomplish in a secret manner the destruction of offspring. The second may be attempted to gratify the wishes of a husband or relations, to deprive

the legal successor of his just claims, to gratify avarice by extorting money, and to avoid or delay execution.

These signs and indications are both subjective and objective. The chief subjective signs are: (1) *cessation of menstruation*, which rarely may not occur, and on the other hand may occur in other conditions; (2) *nausea and vomiting* which usually develop about the 6th week; (3) *nervous disorders*, including changes in disposition; (4) pain or discomfort in the breasts; (5) *quickening* or sensations due to the movements of the fœtus within the uterus. These sensations are first noticed about the end of the fourth month. The movements begin much earlier but are not felt until the uterus has developed sufficiently to come in contact with the abdominal walls.

The chief objective symptoms are: (1) changes in the facial expression with dark rings about the eyes and often spots of pigmentation resembling large freckles; (2) enlargement of the breast, the nipple becoming prominent, and in brunettes surrounded by an aureola of pigmentation; (3) enlargement of the abdomen, usually not evident before the third or fourth month. The prominence is pear-shaped with the small end downward; (4) fœtal movements which can be felt through the abdominal walls as early as the end of the fifth month; (5) the *uterine souffle* or sound heard with the ear upon the abdomen and caused by the blood current in the dilated uterine veins. This sound may be heard as early as the end of the fourth month, (6) the most important of all the signs consists of the sounds of the fœtal heart. These sounds can be heard about the beginning of the fifth month, and are of course a positive sign of pregnancy. The sounds have been aptly compared to the ticking of a watch heard through a pillow; (7) softening of the cervix or neck of the uterus; (8) ballottement, the impulse or wave excited by suddenly lifting the uterus with a hand in the vagina, the other hand being placed firmly upon the abdomen. A specific serum test to determine the existence of pregnancy has been devised by Abderhalden and bears his name. Like the specific tests employed in other conditions, it depends upon the fact that, with the growth of certain foreign cells or tissues in an animal body, certain substances are produced and cast into the circulation; the presence of these substances in the blood can be detected by the appropriate chemical methods.

The duration of pregnancy is normally about nine calendar or ten lunar months, or about 275 days from the cessation of the last menstrual period. The possibility of prolonged pregnancy has long been a fruitful subject of discussion but "by a study of the analogy of other functions of the body, by observations in the lower animals, and by accurate reliable data, from women in particular, we are forced to the conclusion that pregnancy may be and often is prolonged. . . . Gestation may be lengthened, parturition may be delayed from a few days to one or two months."

The laws relating to pregnancy concern the circumstances under and the manner in which the fact is ascertained. There are two cases where the fact whether a woman is or has been pregnant is important to ascertain. The one is when it is supposed she pretends pregnancy, and the other when she is charged with concealing it.

Pretended pregnancy may arise from two causes: the one when a widow feigns herself with child in order to produce a supposititious heir to the estate. The presumptive heir may in such case have a writ *de ventre inspiciendo*, by which the sheriff is commanded to have such made, and the fact determined whether pregnancy exists or not, by twelve matrons, in the presence of twelve knights. If the result determine the fact of pregnancy, then she is to be kept under proper guard until she is delivered. If the pregnancy be negatived, the presumptive heir is admitted to the inheritance; 1 Bla. Com. 456; Cro. Eliz. 566; 4 Bro. C. C. 90; 2 P. Wms. 591; Cox, C. C. 297. A practice quite similar prevailed in the civil law.

The second cause of pretended pregnancy occurs when a woman is under sentence of death for the commission of a crime. At common law, in case this plea be made before execution, the court must direct a jury of twelve matrons, or discreet women, to ascertain the fact, and if they bring in their verdict *quick with child* (for barely *with child*, unless it be alive in the womb, is not sufficient), execution shall be stayed, generally till the next session of the court, and so from session to session, till either she is delivered or proves by the course of nature not to have been with child at all; 4 Bla. Com. 394; State v. Arden, 1 Bay (S. C.) 487.

In Scotland, all that is necessary to be proved, to have execution delayed, is the fact of pregnancy, no difference being made whether she be quick with child or not. This is also the provision of the French penal code upon this subject. In this country, there is little doubt that clear proof that the woman was pregnant, though not quick with child, would at common law be sufficient to obtain a respite of execution until after delivery. The difficulty lies in making the proof sufficiently clear, the signs and indications being all somewhat uncertain, some of them wanting, all liable to variation, and conviction of the fact only fastening upon the mind when a number of them, inexplicable upon any other hypothesis, concur in that one result.

It has been held that pregnancy at the time of marriage by another than the hus-

band is sufficient ground for divorce, provided the pregnancy was unknown to the husband and there was no reasonable ground of suspicion by him; Appeal of Allen, 99 Pa. 196, 44 Am. Rep. 101; Nadra v. Nadra, 79 Mich. 591, 44 N. W. 1046. It is held that proof of concealed pregnancy of the wife before marriage entitles the husband to a divorce; May v. May, 71 Kan. 317, 80 Pac. 567; especially where he had had no sexual relations with her; Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; or he may have the marriage annulled for fraud; Fontana v. Fontana, 77 Misc. 28, 135 N. Y. Supp. 220; but not where he condones the fraud by continuing to cohabit with the wife after discovery; Lenoir v. Lenoir, 24 App. D. C. 160. This can hardly be laid down as an absolute rule; 1 Bish. Mar. Div. & Sep. § 483.

A husband who has been induced to marry a wife with whom he has had prior sexual relations, by representations that she was with child by him, may obtain a divorce on proof that the pregnancy was due to intercourse with another person; Wallace v. Wallace, 137 Ia. 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761; *contra*, Young v. Young (Tex.) 127 S. W. 898; Gondouin v. Gondouin, 14 Cal. App. 285, 111 Pac. 756.

Where adultery was in issue in a homicide case, proof of pregnancy was admitted as tending to show the improbability of intercourse; Washington v. State, 46 Tex. Cr. R. 184, 79 S. W. 811.

A carrier may be liable for injury to a pregnant woman, which would not have occurred but for her condition; Colorado S. & I. Ry. Co. v. Nichols, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215.

Pregnancy is seldom concealed except for the criminal purpose of destroying the life of the fœtus in utero, or of the child immediately upon its birth. Infant life is easily extinguished; while proof of the unnatural crime is hard to be furnished. This has led to the passage of laws, both in England and in this country, calculated to facilitate the proof and also to punish the very act of concealment of pregnancy and death of the child when, if born alive, it would have been illegitimate. In England, the very stringent act of 21 Jac. I. c. 27, required that any mother of such child who had endeavored to conceal its birth should prove by at least one witness that the child was actually born dead; and for want of such proof it arrived at the forced conclusion that the mother had murdered it. This cruel law was essentially modified in 1803, by the passage of an act declaring that women indicted for the murder of bastard children should be tried by the same rules of evidence and presumption as obtain in other trials of murder.

The early legislation of Pennsylvania was characterized by the same severity. The act of May 31, 1781, made the concealment of the death of a bastard child conclusive evidence to convict the mother of murder. This was repealed by the act of April 5, 1790, s. 6, which declared that the constrained presumption that the child whose death is concealed was therefore murdered by the mother shall not be sufficient to convict the party indicted, without probable presumptive proof is given that the child was born alive. The law was further modified by the act of April 22, 1794, s. 18, which declares that the concealment of the death of any such child shall not be conclusive evidence to convict the party indicted for the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy and take away the life of such a child. The act also punishes the concealment of the death of a bastard child by fine and imprisonment. The act of March 31, 1860, is in force in Pennsylvania. It makes the concealment of the death of an illegitimate child an offence punishable by fine and imprisonment, and leaves the question of the murder of the child by its mother subject to the mode of trial and punishment as in ordinary cases of murder. Counts for murder and concealing the death of the child may, however, be united in the same indictment.

(In Notebene v. Malore, Year Book, 12 Rich. II, 46, it was considered that three years was the possible duration of pregnancy.)

See PHYSICAL EXAMINATION; JURY OF WOMEN; EN VENTRE SA MERE; ABORTION; GESTATION; LIABILITY.

PREGNANT. See AFFIRMATIVE PREGNANT; NEGATIVE PREGNANT; PREGNANCY.

PREJUDICE (Lat. *præ*, before, *judicare*, to judge). A forejudgment. A leaning toward one side of a cause for some reason other than its justice. See Willis v. State, 12 Ga. 448.

PRELATE. Ecclesiastical officers are often so called. There are two orders of prelates: the first is composed of bishops, and the second, of abbots, generals of orders, deans, etc.

PRÉLÈVEMENT. In French Law. The portion which a partner is entitled to take out of the assets of a firm before any division shall be made of the remainder of the assets between the partners.

The partner who is entitled to a prélèvement is not a creditor of the partnership: on the contrary, he is a part-owner; for, if the assets should be deficient, a creditor has the preference over the partner; on the other hand, should the assets yield any profit, the partner is entitled to his portion of it, whereas the creditor is entitled

to no part of it, but he has a right to charge interest when he is in other respects entitled to it.

PRELIMINARY. Something which precedes: as, *preliminaries of peace*, which are the first sketch of a treaty, and contain the principal articles on which both parties are desirous of concluding, and which are to serve as the basis of the treaty.

PRELIMINARY ACT. In English Law. A document stating the time and place of a collision between vessels, the names of the vessels, and other particulars required to be filed by each solicitor in actions for damage by such collisions. Whart. Law. Dict.

PRELIMINARY EXAMINATION. The hearing given to a person accused of crime, by a magistrate or judge, exercising the functions of a committing magistrate, to ascertain whether there is evidence to warrant and require the commitment and holding to bail of the person accused. See Bish. New Cr. L. § 32, 225.

Coroners generally have the powers of a committing magistrate as also have the mayors of cities in many of the states; *id.* 229 *b*.

In case, as it often happens, there is question as to what precise crime should be charged against the prisoner or whether more than one crime is involved in the facts shown, the commitment should be so framed as to cover them all, leaving to the prosecuting officer and the grand jury the opportunity for election; but if the commitment does not cover all charges it does not discharge the prisoner from liability for the rest; *id.* § 33. The discharge of a prisoner on a preliminary examination will not operate as a bar to further proceedings; Duffy v. Britton, 47 N. J. L. 251; In re Garst, 10 Neb. 78, 4 N. W. 511.

It is said that a person charged with crime, unless a fugitive from justice, is entitled to a preliminary examination; Cofield v. State, 44 Neb. 417, 62 N. W. 875; but it was also held that such examination is not necessary as a basis for finding an indictment; State v. Schieler, 4 Idaho 120, 37 Pac. 272; and that in proper cases the court may direct the prosecuting attorney to submit indictments without such examination; Com. v. Taylor, 2 Dist. Rep. (Pa.) 743. A complaint made on such examination may be dismissed and a new charge prosecuted before another magistrate; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; but after holding the accused to bail the magistrate cannot discharge him without notice to the prosecutor; Hill v. Egan, 160 Pa. 119, 28 Atl. 646. The denial of the right to be taken before a magistrate of the county in which one is arrested, to give bail does not vitiate a subsequent trial and conviction; People v. Eberspacher, 79 Hun 410, 29 N. Y. Supp. 796.

Where the evidence seems to warrant the commitment of the accused person, or time is required for the introduction of other evidence or for further investigation, the person may be committed or held to bail for further hearing. The examination may be postponed on account of the physical inability to attend of important witnesses for the state; State v. Aucoin, 47 La. Ann. 1677, 18 South. 709.

Generally the offence charged is stated in the complaint and warrant and a preliminary examination is waived; and a plea that there was no such examination will not be entertained after information filed; State v. Myers, 54 Kan. 206, 38 Pac. 296. An objection that there was no preliminary examination must be raised before trial by plea in abatement or motion to quash; Coffield v. State, 44 Neb. 417, 62 N. W. 875.

A person arrested and taken before a magistrate for preliminary examination may waive it even where the state constitution secures the right to such examination; People v. Tarbox, 115 Cal. 57, 46 Pac. 896; State v. Larkins, 5 Idaho 200, 47 Pac. 945. See, also, as to waiver of such examinations, Ryan v. State, 83 Wis. 486, 53 N. W. 836; People v. Harris, 103 Mich. 473, 61 N. W. 871.

It is the duty of the committing magistrate to secure the attendance of witnesses for the prosecution who are examined by him, for which purpose he may require them to give bail for their appearance before the grand jury or in the criminal court, with or without surety which is usually in his discretion; 1 Bish. N. Cr. L. 34. Where the preliminary examination is provided for by law, the testimony of the witnesses taken thereat may be afterwards shown in contradiction; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; Dolan v. State, 40 Ark. 454. And the witnesses are liable to the penalties of perjury for false swearing if so authorized, otherwise not; State v. Furlong, 26 Me. 69; 2 McClain, Cr. Law § 858.

The filing of an information after the preliminary examination, but before a return of it made by the examining magistrate, is a mere irregularity and does not vitiate the proceedings; People v. Tarbox, 115 Cal. 57, 46 Pac. 896. In Colorado, by statute, an information may be filed without a preliminary examination, upon the affidavit of any person who has knowledge of the commission of the offence and is a competent witness; Holt v. People, 23 Colo. 1, 45 Pac. 374; Noble v. People, 23 Colo. 9, 45 Pac. 376.

Where a complaint charged perjury on a certain date, and examination was waived, and the information subsequently filed charged the commission of the crime on another date, a plea in abatement on the ground that there was no examination on the offence charged in the information, was

substained; Brown v. State, 91 Wis. 245, 64 N. W. 749.

A statutory requirement that the magistrate shall, on preliminary examination, examine the witnesses to support the accusation, does not require that all of the witnesses known to the state shall be examined, but merely sufficient to justify the magistrate in binding over the accused for trial; Emery v. State, 92 Wis. 146, 65 N. W. 848.

United States commissioners holding preliminary examinations have no judicial power, but only authority to determine whether there is probable cause to believe that the offence was committed; U. S. v. Hughes, 70 Fed. 972; and a district judge holding a preliminary examination has only, *quoad hoc*, the powers of a commissioner; *id.*

Where an examining magistrate certified that he found probable cause to believe that an offence had been committed and had taken bail, it was sufficient to sustain an information without a positive certificate by the magistrate that an offence had been committed; People v. Whittemore, 102 Mich. 519, 61 N. W. 13.

In England, when an accused person has been arrested, either without warrant or by a justice's warrant, if he is charged with an offence for which he may be tried before a jury, the justice holds a preliminary inquiry to decide whether he ought or ought not to be sent for trial. The admission of the public during those inquiries is a matter of discretion with the justice. The witnesses for the prosecution are examined under oath and may be cross-examined by the defendant or his counsel or solicitor. The evidence is taken down in writing and after the prosecution is closed, it is read in the hearing of the defendant and he is asked whether he has anything to say in answer to the charge, being first told that he is not required to speak but that whatever he does say will be taken down in writing and may be given in evidence against him on the trial. The defendant is then allowed to call witnesses to prove his innocence. He may examine these himself or by his counsel or solicitor, and they may be cross-examined by the prosecutor. The defendant may not be questioned nor may he give evidence on his own behalf, except in certain special cases. If he choose to give evidence on oath he is liable to be cross-examined by the prosecutor.

If a *prima facie* case is not made out the defendant is discharged. If the justices are of opinion that a case has been made out they send him to trial. Hearings may be adjourned upon reasonable grounds to a stated time and place, in which case the accused is either removed under custody or discharged on his own recognizance, with or without sureties, to appear at the adjourned hearing. The limit of time must not exceed eight days. If the accused be held for trial, the prosecutor and the witnesses are bound by recognizance to appear and give evidence at the trial. The accused will not be released on bail when the charge is treason. In cases of felony and a large number of misdemeanors, the justice has a discretion in the matter. In case of misdemeanors not specially provided for, they have no power to refuse bail. Haycraft, Exec. Pow. in Rel. to Crime.

As to present French system, see JUGE D'INSTRUCTION.

See PRISONER.

PRELIMINARY PROOF. In Insurance Marine policies in the United States generally have a provision that a loss shall be payable in a certain time, usually sixty days, "after proof," meaning "preliminary proof," which is not particularly specified. Fire policies usually specify the preliminary proof. Life policies, like marine, usually make the loss payable sixty or ninety days after notice and proof; Fuller v. Ins. Co., 31 Me. 325; Loomis v. Ins. Co., 6 Gray (Mass.) 396; Gilbert v. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Stew. Low. C. 354; Columbian Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507, 9 L. Ed. 512; Noyes v. Ins. Co., 30 Vt. 659. See PROOFS OF LOSS.

PREMEDITATEDLY. Thought of beforehand, for any length of time, however short. State v. Seaton, 106 Mo. 198, 17 S. W. 169. "Deliberately" logically contains in it all that is meant by "premeditatedly," and more. But "premeditatedly" is also contained in the phrase "malice aforethought." State v. Dale, 108 Mo. 205, 18 S. W. 976.

PREMEDITATION. A design formed to commit a crime or to do some other thing before it is done. State v. Coella, 3 Wash. 99, 28 Pac. 28.

Intent before the act, but not necessarily existing any extended time before. Killins v. State, 28 Fla. 313, 9 South. 711.

Premeditation differs essentially from *will*, which constitutes the crime; because it supposes, besides an *actual* will, a *deliberation*, and a *continued persistence* which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime are indications of premeditation, but are not absolute proof of it; as these preparations may have been intended for other purposes, and then suddenly changed to the performance of the criminal act. Murder by poisoning must of necessity be done with premeditation. See MALICE.

PREMIER. The principal minister of state; the prime minister. See CABINET.

PREMISES (Lat. *præ*, before, *mittere*, to put, to send). That which is put before. The introduction. Statements previously made. See 1 East 456.

In Conveyancing. That part of a deed which precedes the *habendum*, in which are set forth the names of the parties with their titles and additions, and in which are recited such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the contract then entered into is founded; and it is here, also, the consideration on which it is made is set down and the certainty of the thing granted. 2 Bla. Com. 298; Sumner v. Williams, 8 Mass. 174, 5 Am. Dec. 83; New Jersey Z. Co. v. Franklinite Co., 13 N. J. Eq. 331.

See [1907] K. B. 297.

In Equity Pleading. The stating part of a bill. It contains a narrative of the facts and circumstances of the plaintiff's case, and the wrongs of which he complains, and the names of the persons by whom done and against whom he seeks redress. Cooper, Eq. Pl. 9; Bart. Suit in Eq. 28; Mitf. Eq. Pl. 43; Story, Eq. Pl. § 27.

Every material fact to which the plaintiff intends to offer evidence must be stated in the premises; otherwise, he will not be permitted to offer or require evidence of such fact; 1 Bro. C. C. 94; 3 P. Wms. 276; 2 Hare 264; Peacock v. Terry, 9 Ga. 148.

In Estates. Lands and tenements. 3 Maule & S. 169; Bowers v. Pomeroy, 21 Ohio St. 188.

PREMIUM. In Insurance. The consideration for a contract of insurance.

A policy of insurance always expresses the consideration called the *premium*, which is a certain amount or a certain rate upon the value at risk, paid wholly in cash, or partly so and partly by promissory note or otherwise. 2 Pars. Marit. Law 182. By the charters of mutual fire insurance companies, the insured building is usually subject to a lien for the premium; Union Ins. Co. v. Hoge, 21 How. (U. S.) 35, 16 L. Ed. 61. The premium may be payable by service rendered; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

In life insurance, the premium is usually payable periodically; Buckbee v. Trust Co., 18 Barb. (N. Y.) 541; and the continuance of the risk is usually made to depend upon the due payment of a periodical premium; Hallock v. Ins. Co., 26 N. J. L. 268. Illness is no excuse for not paying; Hipp v. Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319. But if the practice of the company and its course of dealings with the insured, and others known to him, have been such as to induce a belief that so much of the contract as provides for a forfeiture upon non-payment at a fixed time will not be insisted on, the company will not be allowed to set up such a forfeiture, as against one in whom their conduct has induced such belief; May, Ins. § 361; Mut. Bl. Ins. Co. v. Higginbotham, 95 U. S. 380, 24 L. Ed. 499; Home Protection v. Avery, 85 Ala. 348, 5 South. 143, 7 Am. St. Rep. 54. But no course of dealing estops a company from refusing a premium after the death of the insured; Thompson v. Ins. Co., 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823. The acceptance by a manager of a life insurance company of a promissory note from the insured for the amount of the advance premium, and a delivery of the policy upon receipt of the note, constitute a waiver of the cash premium provided for in the application and policy which binds the company, although the policy also provides that the first premium shall be paid at the home office of the company on the delivery of the policy, and that no agent has power in any way to waive the terms of the contract; 18 N. Y. L. J. 1785.

A company receiving and appropriating money paid by a policy holder cannot avoid liability on the policy on the ground that no receipt in the prescribed form was given; Matthews v. Ins. Co., 147 N. C. 339, 61 S. E. 192, 18 L. R. A. (N. S.) 1219.

An action lies to recover a premium paid on a policy of life insurance where the company, upon the discovery of certain false statements inserted therein by the company's agents, cancelled the policy, but the cost of the insurance enjoyed by the insured during the life of the policy must first be deducted; McDonald v. Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548. But this is doubted in 46 Am. L. Reg. 40, because the insured should be entitled to recover the entire premium, he never having had any insurance under the void policy. New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. So far as the agreed risk is not run in amount or time under a marine policy, the whole or a proportional stipulated or customary part of the premium is either not payable, or, if paid, is to be returned unless otherwise agreed; 2 Pars. Mart. Law 185; Hill v. Reed, 16 Barb. (N. Y.) 280; Mut. Marine Ins. Co. v. Munro, 7 Gray (Mass.) 246. Where an insurance company authorizes the insured to send a premium by mail, such premium is paid when the letter containing it is deposited in the post office addressed to the company; McCluskey v. Life Ass'n, 77 Hun 556, 28 N. Y. Supp. 931.

PREMIUM NOTE. In Insurance. A note given in place of payment of the whole or a part of the premium.

The premium, or a part of it, is not unfrequently paid wholly or in part by a promissory note, with a stipulation in the policy that the unpaid amount shall be set off and deducted in settling for a loss; 1 Phill. Ins. § 51. It is also usually collaterally secured by a stipulation in the policy for the forfeiture of the policy by non-payment of the premium note, or any amount due thereon by assessment or otherwise; Bangs v. Gray, 12 N. Y. 477; Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

PREMIUM PUDICITIÆ (Lat. the price of chastity). The consideration of a contract by which a man promises to pay to a woman with whom he has illicit intercourse a certain sum of money.

When the contract is made as the payment of *past* cohabitation, as between the parties, it is good, and will be enforced, if under seal, but such consideration will not support a parol promise; 3 Q. B. 483; Poll. Contr. 288; 1 Story, Contr. § 670. It cannot be paid on a deficiency of assets, until all creditors are paid, though it has a preference over the heir, next of kin, or devisee. If the contract be for future cohabitation, it is void; 1 Story, Eq. Jur. 13th ed. § 296; 2 P. Wms. 432; 1 W. Bla. 517; Roberts, Fraud. Conv. 428; Trovinger v. McBurney, 5 Cow. (N. Y.) 253; Winebrinner v. Weisiger, 3 T. B. Monr. (Ky.) 35. See CONSIDERATION.

PRENDER, PRENDRE (L. Fr.). To take. This word is used to signify the right of taking a thing before it is offered: hence the phrase of law, it lies in render, but not in prender. See À PRENDRE; PROFITS À PRENDRE; Gale & W. Easem.; Washb. Easem.

PRENOMEN (Lat.). The first or Christian name of a person. Benjamin is the prenomen of Benjamin Franklin. See Cas. Hardw. 286; 1 Tayl. 148.

PREPENSE. Aforethought. See 2 Chitty, Cr. Law 1784.

See MALICE AFORETHOUGHT.

PREPONDERANCE OF EVIDENCE. Greater weight of evidence, or evidence which is more credible and convincing to the mind. Button v. Metcalf, 80 Wis. 193, 49 N. W. 809. That which best accords with reason and probability. U. S. v. McCaskill, 200 Fed. 332.

It is usually said that the party who has the burden of proof of a fact must produce a preponderance of evidence thereon. "By preponderance of evidence is meant the greater weight of the evidence; that it outweighs the evidence of the adverse party;" Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117. "Preponderance means the most weight. It is as correct a definition as can be given;" Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031. A jury should be charged that they should find according as they should be "satisfied of the truth of the matter in controversy by a preponderance of the evidence"; Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551. It has been said that when the scale stands in equipoise, the jury should find for the defendant; Ray v. Donnell, 4 McLean 504, Fed. Cas. No. 11,590. In such a case a verdict in favor of the party bound to maintain one of two inconsistent propositions is necessarily wrong; St. Louis, I. M. & S. R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878. If there is an opposing presumption, the preponderance should be sufficient to overcome that; Decker v. Ins. Co., 66 Me. 406; Elwood v. Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140. See Wigmore, Evid. § 2498.

PREPOSITUS. The person in question in any case of ascertaining next of kin or heirship.

PREROGATIVE. In Civil Law. The privilege, pre-eminence, or advantage which one person has over another: thus, a person vested with an office is entitled to all the rights, privileges, *prerogatives*, etc., which belong to it.

In English Law. The word simply means a power or will which is discretionary, and above and uncontrolled by any other will. It is frequently used to express the uncontrolled will of a sovereign power in the state and is applied not only to the king but also to the legislative and judicial branches of the government.

"The prerogative is the name for the remaining portion of the crown's original authority, and is therefore the name for the discretionary power left at any moment in the hands of the crown, whether such power be, in fact, exercised by the king himself or by his ministers. Every act which the executive government can lawfully do without the authority of an act of parliament is done by virtue of this prerogative." Dicey, Constitution 369; when a franchise is attached to the crown, it is a prerogative; when granted to a subject, it is a franchise; [1903] 2 Ch. 598.

It is sometimes applied by law writers to the thing over which the power or will is exercised, as fiscal prerogatives, meaning king's revenues; 1 Halleck, Int. L. 147.

PREROGATIVE COURT. In English Law. An ecclesiastical court held in each of the two provinces of York and Canterbury before a judge appointed by the archbishop of the province.

Formerly in this court testaments were proved, and administrations granted where a decedent left chattels to the value of five pounds (*bona notabilia*) in two distinct dioceses or jurisdictions within the province, and all causes relating to the wills, administrations, or legacies of such persons were originally cognizable. This jurisdiction was transferred to the court of probate by 20 & 21 Vict. c. 77, § 4, and 21 & 22 Vict. c. 95, and now, by the Judicature Acts, it is included in the supreme court of judicature.

An appeal lay formerly from this court to the king in chancery, by stat. 25 Hen. VIII. c. 19, afterwards to the privy council, by stat. 2 & 3 Will. IV. c. 92; 2 Steph. Com. 11th ed. 206; 3 Bla. Com. 65.

A court having a jurisdiction of probate matters, in the state of New Jersey.

PREROGATIVE WRITS. Processes issued by an exercise of the extraordinary power of the crown on proper cause shown. They are the writs of *procedendo*, *manda-*

mus, prohibition, *quo warranto*, *habeas corpus;* 3 Steph. Com. 11th ed. 626. They differ from other writs in that they are never issued except in the exercise of judicial discretion, and are directed generally not to the sheriff, but to the parties sought to be affected; 3 Bla. Com. 132. As to jurisdiction of a court of last resort to issue prerogative writs, see People v. Dist. Ct., 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768.

PRESCRIBABLE. To which a right may be acquired by prescription.

PRESCRIPTION. A mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment.

The distinction between a *prescription* and a *custom* is that a custom is a local usage and not annexed to a person; a prescription is a personal usage confined to the claimant and his ancestors or grantors. The theory of prescription was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time, in England, went back to the time of Richard I. To avoid the necessity of proof of such long duration, a custom arose of allowing a presumption of a grant on proof of usage for a long term of years.

The length of time necessary to raise a strict prescription was limited by statute 32 Hen. VIII. at sixty years; Coolidge v. Learned, 8 Pick. (Mass.) 504; 2 Greenl. Ev. § 539. See Arbuckle v. Ward, 29 Vt. 43; Clawson v. Primrose, 4 Del. Ch. 643.

One who claimed a right of way or the like, if his right were questioned and he could not produce his deed, could prescribe, *i. e.* show that he had enjoyed it before the time of legal memory, or that in the district in which the land was situated there was a special custom which entitled all persons in his position to the right claimed; 3 Holdsw. Hist. E. L. 136.

Proof of user as of right for so long as aged persons could remember was enough to raise a presumption that the right had existed from time immemorial, if it was neither secret, nor forcible, nor by permission; subsequently, user for 20 years was held sufficient; 25 Q. B. D. 484; but this presumption could, at common law, be rebutted by proof that the enjoyment had in fact commenced within the time of legal memory; Odgers, C. L. 565. By the Prescription Act (1832) it was provided that after user as of right and without interruption for thirty years in the case of a profit à prendre, and of twenty years in the case of an easement, the *prima facie* right should not be defeated by proof that it commenced at a date subsequent to 1189.

The expectation of acquiring an easement at the end of a current term of prescription "is not an interest in land or easement known to the law"; "there is no intermediate stage which has any existence"; Pollock, First Book of Jurispr. 194, citing L. R. 6 Ch. 768; [1901] 2 Ch. 324. Prescription is not a right which has been created or acquired, but a mere expectation, a hope, a realization of which depends upon numerous contingencies; People v. Dimas, 18 P. R. 1019.

Grants of incorporeal hereditaments are presumed upon proof of enjoyment of the requisite character for a period of years equal to that fixed by statute as the period of limitation in respect of real actions; 3 Kent 442; Arnold v. Foot, 12 Wend. (N. Y.) 330; Ford v. Whitlock, 27 Vt. 265; Watkins v. Peck, 13 N. H. 360, 40 Am. Dec. 156; Strickler v. Todd, 10 S. & R. (Pa.) 63, 13 Am. Dec. 649; Sargent v. Ballard, 9 Pick. (Mass.) 251.

A grant cannot be presumed where it would have been unlawful; Donahue v. State, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576.

In England an ancient user may be a justification for the exercise of a noisy (2 Bing. 134) or an offensive (4 *id.* 183) trade; or for discharging water in an impure state upon adjoining land; 1 M. & W. 77; or for polluting a stream; 1 H. & N. 797; 7 E. & B. 391; [1905] 1 Ch. 205. But the right to carry on an offensive trade, or to pollute water with sewage, is not acquired merely by having carried on the trade or having discharged the water for twenty years; but it must be shown that the air over the plaintiff's land, or the water has been corrupted for that time; 10 A. & E. 590; 7 E. & B. 391; and corrupted to the extent of the right claimed; L. R. 2 Ch. 478; and so as to be actionable or preventible by the plaintiffs or his predecessors; L. R. 11 Ch. Div. 852. In [1907] A. C. 476, a nuisance from noise and vibration was legalized on the ground of an implied grant, arising from the common intent of the parties.

Lapse of time cannot justify a nuisance arising from the manufacture of animal matter into a fertilizer, as every day's continuance is a new offence; N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; nor legalize a public nuisance; Leahan v. Cochran, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. Rep. 506; Reed v. Birmingham, 92 Ala. 339, 9 South. 161; People v. Min. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703; Baltimore v. Imp. Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344; State v. Holman, 104 N. C. 861, 10 S. E. 758; Meiners v. Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Woodruff v. Min. Co., 18 Fed. 753; where the defendant relied upon a prescriptive right to cause sewage to pass over certain places, an injunction was granted where such places were used as oyster beds and the defendants alleged that the sale of their oysters had been prohibited; 72 J. P. 404.

It is not a universal principle without exception that whatever incorporeal heredita-

ment may be granted may also be acquired by long and uninterrupted user. On the contrary, it is well settled that a right claimed by prescription must be such as must reasonably be presumed to have been granted. An owner of land who is *compos mentis* may grant an easement over it which will in effect destroy the usufruct of his property, but no man will be presumed to have made such a grant; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. It is there suggested that our departure from the common law as to the prescription of light and air might well have been put upon this principle; Hoy v. Sterrett, 2 Watts (Pa.) 331, 27 Am. Dec. 313; Wheatley v. Baugh, 25 Pa. 532, 64 Am. Dec. 721; Hazlett v. Powell, 30 Pa. 296; Haverstick v. Sipe, 33 Pa. 368.

A prescriptive claim of common without stint as annexed to a messuage without land has been held bad; 8 Term 396. A plea that the occupiers of a brick kiln for thirty years had enjoyed as of right the privilege to take from the plaintiff's close all the clay they required was overruled, because there could arise no reasonable presumption of such a grant; 5 Q. B. 415. The public cannot acquire a right by an uninterrupted user for twenty years, with the knowledge of the owner, of his soil on the bank of a navigable river as a landing for property in transit to and from vessels navigating such river; Post v. Pearsall, 22 Wend. (N. Y.) 425.

No right can be acquired by prescription or adverse user to impede or interfere with the waters of a navigable or floatable stream; Collins v. Howard, 65 N. H. 190, 18 Atl. 794; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631. Where one has constructed a dam across a floatable stream, and has always maintained it so that logs could go over it, he cannot set up a prescriptive right to obstruct such public use, though the dam has existed for more than twenty years; Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545. Nor can the use of a water course be adverse to the rights of another so long as there is an abundance of water to supply both; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883. The use of the surplus water flowing from a spring is a mere license which can never ripen into a prescriptive right; Jobling v. Tuttle, 75 Kan. 351, 89 Pac. 699, 9 L. R. A. (N. S.) 960; Talbott v. Water Co., 29 Mont. 17, 73 Pac. 1111. In Hunter v. Emerson, 75 Vt. 173, 53 Atl. 1070, it is said the open, notorious and continued taking of water from a spring for a period of more than fifteen years is permissive, and not under a claim of right, when it is consistent with another's title, though no express license is given.

Prescription properly applies only to incorporeal hereditaments; Ferris v. Brown, 3 Barb. (N. Y.) 105; Finch, Law 132; such as *casements* of water, light and air, way, etc.; Tyler v. Wilkinson, 4 Mas. 397, Fed. Cas. No. 14,312; Garrett v. Jackson, 20 Pa. 331; 1 Gale & D. 205, 210, n.; Tudor, Lead. Cas. 114; see Levy v. Brothers, 4 Misc. 48, 23 La. Ann. 825; Oldstein v. Bldg. Ass'n, 44 La. Ann. 492, 10 South. 928; Christ Church v. Lavezzolo, 156 Mass. 89, 30 N. E. 471; a class of *franchises;* Co. Litt. 114; Arundel v. McCulloch, 10 Mass. 70; Kuhn v. North, 10 S. & R. (Pa.) 401. See FERRY; Herbert, Prescription. The English law knows no positive prescription for corporeal things; for such things, the law provides a statute of limitations; 3 Holdsw. Hist. E. L. 135.

Corporations may exist by prescription; 2 Kent *277; Stockbridge v. West-Stockbridge, 12 Mass. 400. It is necessary in such case to presuppose a grant by charter or act of parliament, which has been lost; Robie v. Sedgwick, 35 Barb. (N. Y.) 319. It has been held that a railroad company cannot acquire a right of way by prescription; Narron v. R. Co., 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415; as against an owner who has not given his consent thereto, though the occupation was lawfully taken under the right of eminent domain; *id.;* that it can acquire such right (here by possession and use for 40 years after entry by consent or license); Louisville & N. R. Co. v. Smith, 128 Fed. 1, 63 C. C. A. 1; Cogsbill v. R. Co., 92 Ala. 252, 9 South. 512; Midland R. Co. v. Smith, 113 Ind. 233, 15 N. E. 256.

In 6 Mod. 73, it was held that every one had a right to fish in a navigable river, or in an arm of the sea. In 4 Burr. 2162, the court followed the language of that case to the effect that in navigable rivers the fishery is common, but held that since prescription was found in the case at bar, the plaintiff's right was good. And it was further said the crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea. The public may grant the exclusive right of fishing in a navigable river; and if it may be granted, it may be prescribed for. Such a right may never be presumed. It is however, capable of being proved; Chalker v. Dickinson, 1 Conn. 382, 6 Am. Dec. 250.

It has been said, on the contrary, that the king has no power, and since Magna Carta, never has had, to grant an exclusive right of fishing in an arm of the sea; 5 Barn. & Ald. 268; Browne v. Kennedy, 5 Har. & J. (Md.) 203, 9 Am. Dec. 503; and that a private and several right to fish in a navigable river must have had its origin before Magna Carta; L. R. 4 Ex. 369. In England there are such several and exclusive fisheries in navigable rivers attached to manors, either by early grant from the crown or by prescription, because there might have been such a grant on which to found it; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597,

where it is said: "Neither the proprietaries of Pennsylvania or New Jersey ever owned the bed of the Delaware. Their respective grants were to low water mark on either side. The bed of the river and the river itself were in the crown, and passed by force of the revolution and the definitive treaty of peace, Sept. 3, 1783, to the two states, to be owned and enjoyed on the same principle upon which a navigable river flowing between two coterminous nations is held." That a fishing place might be granted by compliance with the statute separate from the soil was settled in Pennsylvania by the decision in Hart v. Hill, 1 Whart. (Pa.) 124; but no point was decided in that case as to the nature of such a grant. It would seem, however, to have been considered an incorporeal hereditament; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597, per Sharswood, J., where it was held that a right to take fish is a profit *à prendre in alieno solo*. It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes or capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water mark as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing, and for that purpose; the grantor at all other times and for all other purposes.

Land or an interest in land cannot be prescribed for; 2 Bla. Com. 264. It may well be questioned whether such a profit *à prendre* can be, especially when not pleaded in a *que* estate, but in a man and his ancestors. That kind of a user for twenty-one years and upwards which may be sufficient to raise a presumption of a grant of a mere easement will not support a claim for an interest in the land itself or its profits.

Where a right to fish in a navigable river is set up as appurtenant or affixed to a several fishery in the river or to adjoining lands, if there be a dominant and a servient tenement, if the plaintiff prescribes in a *que* estate in him and those whose estate he had, there might be sufficient evidence to create the presumption of a grant. But there is a manifest reason for the distinction in the nature and amount of the evidence required in case of such an easement and one merely in gross. There is a certainty as to the owners and occupiers of the land of which the appurtenancy is predicated which does not exist where the claim is in gross. A fair presumption arises of knowledge that the exercise of it is under a claim of right; Washb. Easem. 86, cited in Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. No title by user to an inheritable easement in gross could safely be allowed to grow up; Donnell v. Clark, 19 Me. 174; Thomas v. Marshfield, 13 Pick. (Mass.) 240; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. The last case was appealed four times by the defendant on different questions. It is cited in Cobb v. Bennett, 75 Pa. 326, 15 Am. Rep. 752, as discussing the subject of fisheries with much research.

In Louisiana, a manner of acquiring property or discharging debts by the effect of time. Rev. Code of La. Art. 3457. See Linman v. Riggins, 40 La. Ann. 761, 5 South. 49, 8 Am. St. Rep. 549.

See ADVERSE POSSESSION; EASEMENT.

In International Law. The doctrine of Immemorial Prescription is indispensable in public law; 1 Phill. Int. L. § 255. The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. All nations are bound by this consent, since all are parties to it; none can safely disregard it without impugning its own title to its possessions; 1 Wheat. Int. L. 207; Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537; Rhode Island v. Massachusetts, 4 How. (U. S.) 591, 11 L. Ed. 1116; Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; Moore v. McGuire, 205 U. S. 214, 27 Sup. Ct. 483, 51 L. Ed. 776; 17 Harv. L. Rev. 346. Prescriptive rights to territory are binding as between two states; Maryland v. West Virginia, 217 U. S. 1, 30 Sup. Ct. 268, 54 L. Ed. 645.

The period of time cannot be fixed in public law as it can in private law; it must depend upon varying and variable circumstances; 1 Phill. Int. L. § 260.

Burke speaks of the "solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal, as in public jurisprudence." Vol. ix. p. 449.

PRESENCE. The being in a particular place.

In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid; for example, a party to a deed, when it is executed by himself, must personally acknowledge it, when such acknowledgment is required by law, to give it its full force and effect, and his presence is indispensable, unless, indeed, another person represent him as his attorney, having authority from him for that purpose.

Actual presence is being bodily in the precise spot indicated.

Constructive presence is being so near to or in such relation with the parties actually in a designated place as to be considered in law as being in the place.

Attempting to deter a witness from testifying, while he is in the witness-room or hallways of the court-room, by offering him money, is a misdemeanor in the presence of the court, and punishable without indictment, as contempt; Petition of Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150.

It is a rule in the civil law that he who is incapable of giving his consent to an act is not to be considered present although he be actually in the place. A lunatic, or a man sleeping, would not, therefore, be considered present; Dig. 41. 2. 1. 3. And so if insensible; 4 Bro. P. C. 71; 3 Russ. 441; or if the act were done secretly so that he knew nothing of it; 1 P. Wms. 740.

The English statute of frauds, § 5, directs that all devises and bequests of any lands or tenements shall be attested or subscribed in the presence of the devisor. Under this statute it has been decided that an actual presence is not indispensable, but that where there was a constructive presence it was sufficient; as, where the testatrix executed the will in her carriage standing in the street before the office of her solicitor, the witness retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in a situation to see the witness sign the will, through the window of the office; Bro. C. C. 98. See 2 Curt. Eccl. 320, 331; 1 Maule & S. 294; 2 C. & P. 491; Riggs v. Riggs, 135 Mass. 241, 46 Am. Rep. 464; Baldwin v. Baldwin's Ex'r, 81 Va. 410, 59 Am. Rep. 669.

In Criminal Law. In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record. There can be no judgment of conviction taken by default; Dunn v. Com., 6 Pa. 387; Whart. Cr. Pl. & Pr. § 540. The prisoner's actual presence is not requisite at the making and arguing of motions of all kinds, though in motions for arrest of judgment and in error, the old practice was to require it; Godfriedson v. People, 88 Ill. 284; Bish. New Cr. Pro. 265; State v. Elkins, 63 Mo. 159. This is not now usually required in proceedings in error; People v. Clark, 1 Park. C. C. (N. Y.) 360. In felonies presence at the verdict is essential, and this right cannot be waived; Prine v. Com., 18 Pa. 103; but where a prisoner was voluntarily absent during the taking of a portion of the testimony in an adjoining room, he was considered as constructively present; 25 Alb. L. J. 303. See Lynch v. Com., 88 Pa. 189, 32 Am. Rep. 445. In trials for misdemeanors these rules do not apply; People v. Winchell, 7 Cow. (N. Y.) 525; Whart. Cr. Pl. & Pr. § 550. See TRIAL.

PRESENT. A gift, or more properly, the thing given. It is provided by the constitution of the United States, art. 1, s. 9, n. 7, that "no person holding any office of profit or trust under them [the United States] shall, without the consent of congress, accept of any present, emolument, or office, or title, of any kind whatever, from any king, prince, or foreign state."

PRESENT USE. One which has an immediate existence and is at once operated upon by the statute of uses.

PRESENTATION. In Ecclesiastical Law. The act of a patron offering his clerk to the bishop of the diocese to be instituted in a church or benefice.

See PRESENTMENT.

PRESENTATION OFFICE. The office of the lord chancellor's official, the secretary of presentations.

PRESENTEE. In Ecclesiastical Law. A clerk who has been presented by his patron to a bishop in order to be instituted in a church.

PRESENTMENT. In Criminal Practice. The written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. 4 Bla. Com. 301.

Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill. In an extended sense, presentments include not only what are properly so called, but also inquisitions of office and indictments found by a grand jury. 2 Hawk. Pl. Cr. c. 25, s. 1.

The difference between a presentment and an inquisition is this: that the former is found by a grand jury authorized to inquire of offences generally, whereas the latter is an accusation found by a jury specially returned to inquire concerning the particular offence. 2 Hawk, Pl. Cr. c. 25, s. 6. See, generally, Com. Dig. *Indictment* (B); Bac. Abr. *Indictment* (A); 1 Chitty, Cr. Law 163; 7 East 387; State v. Muzingo, 1 Meigs (Tenn.) 112.

The writing which contains the accusation so presented by a grand jury. U. S. v. Hill, 1 Brock. 156, Fed. Cas. No. 15,364.

In Contracts. The production of a bill of exchange or promissory note to the party on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment.

The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all the parties he intends to hold liable; Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 386; Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Bk. of Bennington v. Raymond, 12 Vt. 401; Fernandez v. Lewis, 1 McCord (S. C.) 322; Nelson v. Fotterall, 7 Leigh (Va.) 179. And when a bill or note becomes payable, it must be presented for payment, if it is intended to charge endorsers, on default.

In general, the presentment for payment should be made to the maker of a note, or the drawee of a bill, for acceptance, or to the acceptor for payment; 2 Esp. 509; but a presentment made at a particular place, when payable there, is, in general, sufficient; Hunt v. Maybee, 7 N. Y. 266. A personal demand on the drawee or acceptor is not necessary, a demand at his usual place of residence; 1 M. & G. 83; Belmont Bk. v. Patterson, 17 Ohio 78; of his wife, or other agent, is sufficient; Byles, Bills 283; Branch Bk. at Decatur v. Hodges, 17 Ala. 42; or

place of business, of the acceptor; 3 Kent 64; Stainback v. Bank, 11 Gratt. (Va.) 260. When, on presentment of a bill of exchange at the acceptor's usual place of business, within proper hours, a notary finds the doors closed, he is justified, nothing further appearing, in protesting the bill for non-payment, without inquiry for the acceptor at his residence, and without making further effort to find him; Sulzbacher v. Bank, 86 Tenn. 201, 6 S. W. 129, 6 Am. St. Rep. 828. The term residence is not used in a strict sense, so necessarily implying a permanent, exclusive, or actual abode in a place, but it may be satisfied by a temporary, partial, or even constructive residence; Wachusett N. Bk. v. Fairbrother, 148 Mass. 181, 19 N. E. 345, 12 Am. St. Rep. 530. See RESIDENCE.

The presentment for acceptance must be made in reasonable time; and what this reasonable time is depends upon the circumstances of each case; 9 Moore, P. C. 66; 2 H. Bla. 565; Prescott Bank v. Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473. The presentment of a note or bill for payment ought to be made on the day it becomes due; 4 Term 148; Henry v. Jones, 8 Mass. 453; Farmers' Bank v. Duvall, 7 Gill & J. (Md.) 78; Edgar v. Greer, 8 Ia. 394, 74 Am. Dec. 316; and notice of non-payment given, otherwise the holder will lose the security of the drawer and indorsers of a bill and indorsers of a promissory note; The Nereid, 1 Wheat. (U. S.) 171, 4 L. Ed. 63; North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Woodworth v. Bank, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; Glasgow v. Pratte, 8 Mo. 336, 40 Am. Dec. 142; and if the money be lodged there for its payment, the holder would probably have no recourse against the maker or acceptor if he did not present them on the day and the money should be lost; 5 B. & Ald. 244; Lyon v. Williamson, 27 Me. 149. The facts being undisputed, the question of reasonable time for presentment of a draft is one of law; Singer v. Dickneite, 51 Mo. App. 245.

The excuses for not making a presentment are general, and applicable to all persons who are indorsers; or they are special, and applicable to the particular indorser only.

Among the former are—*inevitable accident* or overwhelming calamity; Story, Bills § 308; Schofield v. Bayard, 3 Wend. (N. Y.) 488; Reddington v. Julian, 2 Ind. 224. *The prevalence of a malignant disease*, by which the ordinary operations of business are suspended; Tunno v. Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 141; 3 Maule & S. 267. The *breaking out of war* between the country of the maker and that of the holder; U. S. v. Barker, 1 Paine 156, Fed. Cas. No. 14,517. *The occupation of the country* where the note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. Ed. 793. *The obstruction of the ordinary* negotiations of trade by *vis major. Positive interdictions* and public regulations of the state which suspend commerce and intercourse. *The utter impracticability of finding* the maker or ascertaining his place of residence; Story, Pr. Notes §§ 205, 236, 238, 241, 264; Moore v. Coffield, 12 N. C. 247; Stewart v. Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222.

Among the latter, or special excuses for not making a presentment, may be enumerated the following. *The receiving the note by the holder* from the payee, or other antecedent party, too *late* to make a due presentment; this will be an excuse as to such party; 16 East 248; Freeman v. Boynton, 7 Mass. 483; Story, Pr. Notes §§ 201, 265; Mills v. Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Byles, Bills 206. *The note being an accommodation note* of the maker for the benefit of the indorser; Story, Bills § 370. A *special agreement* by which the indorser waives the presentment; Fuller v. McDonald, 8 Greenl. (Me.) 213, 23 Am. Dec. 499; Story, Bills § 371. *The receiving security or money by an endorser* to secure himself from loss, or to pay the note at maturity. In this case, when the indemnity or money is a full security for the amount of the note or bill, no presentment is requisite; Story, Bills § 374; Story, Pr. Notes § 281; Mechanic's Bk. v. Griswold, 7 Wend. (N. Y.) 165; Bond v. Farnham, 5 Mass. 170, 4 Am. Dec. 47; Prentiss v. Danielson, 5 Conn. 175, 13 Am. Dec. 52. *The receiving the note by the holder* from the indorser as a collateral security for another debt; Story, Pr. Notes § 284; Story, Bills § 372; Rhett v. Poe, 2 How. (U. S.) 457, 11 L. Ed. 338.

Where a negotiable note is by its terms payable at a particular bank, proof of presentment at that bank for payment, at its maturity, is indispensable to a recovery in an action thereon against an endorser; Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

A want of presentment may be waived by the party to be affected, after full knowledge of the fact; Richter v. Selin, 8 S. & R. (Pa.) 438.

Under the Uniform Negotiable Instrument Act presentment for *payment* is not necessary in order to charge the person primarily liable, but if the instrument be payable at a special place and he is able and willing to pay it there at maturity, that is equivalent to a tender.

To charge the drawer and endorsers, presentment of an instrument not payable on demand must be made on the day it falls due; if payable on demand must be made within a reasonable time after its issue, or, if a bill of exchange, after the last negotia-

tion. Presentment must be made at a reasonable hour on a business day; if the person is absent or inaccessible, then to any person found at the place where the presentment is made. It is made at the proper place, if at the place specified in the instrument or if none be specified, then at the address given in the instrument, if any, of the person who is to make payment; if neither is specified, then at the usual place of business or residence; in any other case, if presented to the person wherever found, or at his last known place of business or residence.

If the persons primarily liable are liable as partners, and no place of business is specified, presentment may be made to any one of them, even after dissolution; but if they are not partners, then presentment must be made to them all. Presentment is not required in order to charge an endorser if the instrument was for his accommodation, and he has no reason to expect it will be paid on presentment.

Delay in presentment is excused when caused by circumstances beyond the holder's control, and not imputable to his default, misconduct or negligence; when the cause of delay ceases to operate, presentment must be made with reasonable diligence.

If the day of maturity falls on Sunday, or a holiday, the instrument is payable on the next succeeding business day; so as to Saturday, except that instruments payable on demand may, at the holder's option, be presented before twelve o'clock on Saturday, when that entire day is not a holiday.

Time is computed by excluding the day from which the time is to begin to run and including the date of payment.

An instrument payable at a bank is equivalent to an order to the bank to pay it and charge the principal debtor's account.

Presentment of a bill for *acceptance* must be made where the bill is payable after sight, or in any other case, where such presentment is necessary in order to fix the maturity; or where the bill expressly stipulates that it shall be presented for acceptance; or where it is drawn elsewhere than at the residence or place of business of the drawee. A bill must be presented or negotiated within a reasonable time; if not, the drawer and endorsers are discharged. If the drawee is dead, presentment must be made to his personal representative, or if he has been adjudged a bankrupt or insolvent, or has made an assignment for creditors, then to him or to his trustee or assignee. A bill may be presented for acceptance on any day on which negotiable instruments (see *supra*) may be presented for payment, and on Saturday before twelve o'clock, if not otherwise a holiday. Where the holder of a bill payable elsewhere than at the place of business or residence of the drawee has not time, with the exercise of reasonable diligence, to present it for acceptance before presenting it for payment on the day it falls due, the delay is excused. It is also excused, and a bill may be treated as dishonored by nonacceptance, where the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill, or where, after reasonable diligence, presentment cannot be made, or where, although presentment has been irregular, acceptance has been refused on other grounds. If a bill is dishonored by nonacceptance, no presentment for payment is necessary.

Sight drafts are allowed three days of grace in Massachusetts, North Carolina and Rhode Island.

See 13 L. R. A. (N. S.) 303, note; PAYMENT.

PRESENTS. This word signifies the writing then actually made and spoken of: as, *these presents;* know all men by *these presents;* to all to whom *these presents* shall come.

PRESERVATION. Keeping safe from harm; avoiding injury. This term always presupposes a real or existing danger.

A jettison, which is always for the preservation of the remainder of the cargo, must therefore be made only when there is a real danger existing. See AVERAGE; JETTISON.

In certain cases the court may make orders for the preservation of the subject-matter of litigation. An order has been made for the sale of a horse which was consuming its value in food while an action on a warranty was pending; 3 C. P. D. 316; Brett Comm. 762. See PERISHABLE GOODS.

PRESIDENT. An officer of a company who is to direct the manner in which business is to be transacted. From the decision of the president there is an appeal to the body over which he presides.

PRESIDENT JUDGE. A title sometimes given to the presiding judge. It was formerly used in England and is now used in the courts of common pleas in Pennsylvania. So in the old Virginia court of appeals. The lord chief justice is now permanent president of the high court of justice in England. The title president is said to have a high Norman flavor. Inderwick, King's Peace 225.

PRESIDENT OF A BANK. This officer, under the banking system in the United States, is ordinarily a member of the board of directors of the bank, and is chosen by them. It is his duty to preside at all meetings of the board of directors; to exercise a constant, immediate, and personal supervision over the daily affairs of the bank; and to institute and carry on legal proceedings to collect demands or claims due the institution; Morse, Banks 144; Alexandria C. Co. v. Swann, 5 How. (U. S.) 83, 12 L. Ed. 60; Tremont Bk. v. Paine's Estate, 28 Vt. 24. Mortgages to secure subscriptions to stock

are often put in his name; Valk v. Crandall, 1 Sandf. Ch. (N. Y.) 179; but he has no more control over the property of the bank than any other director; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Hoyt v. Thompson, 5 N. Y. 320. He has no authority to release the claims of the bank without the authorization of the board of directors; Olney v. Chadsey, 7 R. I. 224; Davis v. Randall, 115 Mass. 547, 15 Am. Rep. 146; and an agreement made by him, after the bank has gone into liquidation, to continue its guarantee upon certain notes, is not binding upon the stockholders; Schrader v. Bank, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564. See NATIONAL BANKS; OFFICER; Michie, Banking.

PRESIDENT OF THE COUNCIL. An officer of state who is a member of the cabinet. He attends on the sovereign, proposes business at the council table, and reports to the sovereign the transactions there. 1 Bla. Com. 230.

PRESIDENT OF THE UNITED STATES OF AMERICA. The title of the chief executive officer of the United States.

The constitution directs that the executive power shall be vested in a president of the United States of America. Art. 2, s. 1.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years resident within the United States. Art. 2, s. 1, par. 5.

He is chosen by presidential electors (*q. v.*). See 1 Kent 276; Story, Const. 5th ed. § 1453. The votes of the electors are transmitted to the vice-president and by him opened in the presence of both houses of congress and counted by tellers previously selected by the two houses separately. If there is no election, a president is chosen by the house of representatives, the members voting by states, from the candidates not exceeding three, having the highest number of electoral votes.

In case of a vacancy the vice-president succeeds, and if there be none then certain members of the cabinet succeed in a prescribed order; see CABINET.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them. Art. 2, s. 1, par. 7.

In addition to certain specified powers, the president is vested by the constitution with the executive power of the federal government and the duty of seeing that the laws are faithfully executed. As to his powers, generally, and the historical development of the executive office, see EXECUTIVE POWER.

The president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Art. 2, sec. 4.

The acts of the head of a department are presumed to have been by his direction; Northern Pac. R. Co. v. Mitchell, 208 Fed. 469.

PRESIDENTIAL ELECTORS. Persons chosen in the different states whose sole duty it is to elect a president and vice-president of the United States. Each state appoints a number of electors equal to the whole number of senators and representatives to which the state is entitled in congress, and it is within the power of the state legislature to direct how such electors shall be appointed. (Const. art. ii. sect. 1). The electors have frequently been appointed by the state legislatures directly, and they have been elected separately by congressional districts; but the more usual method of appointment is by general ballot, so that each voter in a state votes for the whole number of electors to which his state is entitled.

The appointment and mode of appointment of electors belong exclusively to the states, under the constitution; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869.

The constitution provides, Amend. art. 12, that "the electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate." See PRESIDENT OF THE UNITED STATES; ELECTORAL COLLEGE; CONSTITUTION.

PRESS. By a figure this word signifies the art of printing.

All men have a right to print and publish whatever they may deem proper, unless by doing so they infringe the rights of another, as in the case of copyrights (*q. v.*), when they may be enjoined. For any injury they may commit against the public or individuals they may be punished, either by indictment or by a civil action at the suit of the party injured, when the injury has been committed against a private individual. See U. S. Const. Amendm. art. 1; LIBERTY OF THE PRESS; LIBEL.

PRESS COPIES. The identity of the handwriting as shown on the impression is not destroyed, nor rendered unrecognizable by persons acquainted with its characteris-

tics. A person having accurate knowledge can testify to the genuineness with as much accuracy as if the original sheets were before him. Such copies are the same as other writings partially obliterated by damp and exposure, which are admissible as evidence, if duly identified by testimony. They are not however satisfactory as standards of comparison of handwriting. Enough originality is left to be identified by a witness when its own originality is in question; Com. v. Eastman, 1 Cush. (Mass.) 217, 48 Am. Dec. 596; to prove the contents of a lost letter, or where a party refused to give up the original; Dennis v. Barber, 6 S. & R. (Pa.) 420; Cameron v. Peck, 37 Conn. 555. The necessity of producing the original, or laying the foundation in the usual way for secondary evidence, is not obviated by the fact that a party keeps letter press copies; Foot v. Bentley, 44 N. Y. 171, 4 Am. Rep. 652; Marsh v. Hand, 35 Md. 123. A copy, sworn to be correctly made from a press copy of a letter, is admissible as secondary evidence, to prove its contents, without producing the press copy; Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469. Press copies are admissible against a party when they appear to be in his handwriting and the originals cannot be produced; Com. v. Jefferies, 7 Allen (Mass.) 561, 83 Am. Dec. 712. Strictly speaking, a letter-press copy is secondary to the document from which it is taken, and cannot be treated as an original; 3 Camp. 228; Marsh v. Hand, 35 Md. 123; Merritt v. Wright, 19 La. Ann. 91; Anglo-American Packing & P. Co. v. Cannon, 31 Fed. 313.

Press copies, duly proved and attached to a deposition, are admissible where timely notice was given defendant to produce originals at the trial, and they were not produced; notice need not be given when depositions are taken; Illinois Car & E. Co. v. Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

PRESS-GANG. See IMPRESSMENT.

PRESSING. See PEINE FORTE ET DURE.

PREST. A duty in money that was to be paid by the sheriff on his account in the exchequer, or for money left or remaining in his hands. Cowell.

PRESTATION. A presting or payment of money. Cowell.

It is used of a right by which neutral vessels may be appropriated by way of hire by a belligerent on payment of freight beforehand. In 1870 the Prussian troops sank six British vessels to obstruct navigation in the river Seine. The act was defended by Prussia on the ground of military necessity; indemnification was subsequently made; 1 Halleck, Int. L. Baker's Ed. 520.

PRESTIMONY, or PRÆSTIMONIA. In the Canon Law. A fund or revenue appropriated by the founder for the subsistence of a priest, without being erected into any title or benefice, chapel, prebend, or priory. It is not subject to the ordinary; but of it the patron, and those who have a right from him, are the collators. Whart. Law Lex.

PRESUME. To believe or accept upon probable evidence. It is not so strong a word as infer; Morford v. Peck, 46 Conn. 385. See INFERENCE; PRESUMPTION.

PRESUMPTION. An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of its truth or falsehood, or until such certainty can be ascertained. Best, Presump. 4.

An inference affirmative or disaffirmative of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning, from some one or more matters of fact, either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12.

A rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Steph. Ev. 4; Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. 606, 18 L. R. A. 37.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Best, Presump. 20. They are called, also, *absolute* and *irrebuttable* presumptions.

Disputable presumptions are inferences of law which hold good until they are invalidated by proof or a stronger presumption. Best, Presump. 29; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. 3 B. & Ad. 890.

Presumptions of law are rules which, in certain cases, either forbid or dispense with any ulterior inquiry. 1 Greenl. Ev. § 14. Inferences or positions established, for the most part, by the common, but occasionally by the statute, law, which are obligatory alike on judges and juries. Best, Presump. 17. They are either conclusive or disputable.

Mixed presumptions hold an intermediate place and consist of presumptive inferences which, from their strength, importance, or frequent occurrence, attract the observation of the law, and, from being constantly recommended by judges and acted on by juries, become as familiar to the courts as presumptions of law, and occupy as important a place in the administration of justice. They have been termed *quasi* legal presumptions, and are divided into three classes: 1st, Where the inference is one which common-sense would have made for itself; 2d, Where

an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and 3d, Where from motives of legal policy, juries are recommended to draw inferences which are purely artificial. Chamb. Best, Ev. § 324.

The distinctions between presumptions of law and presumptions of fact are—*first*, that in regard to presumptions of law a certain inference must be made whenever the facts appear which furnish the basis of the inference; while in case of other presumptions a discretion more or less extensive is vested in the tribunal as to drawing the inference. See 9 B. & C. 643. *Second*, in case of presumptions of law, the court may draw the inference whenever the requisite facts are developed in pleading; Steph. Pl. 382; while other presumptions can be made only by the intervention of a jury. Presumptions of law are reduced to fixed rules, and form a part of the system of jurisprudence to which they belong; presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. See 2 Stark. Ev. 684; Douglass v. Mitchell's Ex'r, 35 Pa. 440.

It has been said that a more useful and accurate division of presumptions of fact is obtained by treating them with reference to their effect upon the burden of proof and designating them in this aspect as *slight* and *strong;* Chamb. Best, Ev. § 319. Slight presumptions, though sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof; *id.* Strong presumptions shift the burden of proof even though the evidence to rebut them involved the proof of a negative; *id.* § 321. These are of great weight and in the absence of other evidence are decisive in civil cases; *id.* § 322. It has been suggested as the characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury, a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court; Chamb. Best, Ev. § 327; 1 Term 167; Turnley v. Black, 44 Ala. 159; Goggans v. Monroe, 31 Ga. 331.

The lack of precision which attaches to the use of the word presumption springs naturally from the variety of the uses to which the word is applied. Of these Prof. J. B. Thayer in his pamphlet on the Presumption of Innocence (much of which is reprinted as Appendix B, in his Preliminary Treatise on Evidence) enumerates seven: (1) The presumption of facts properly defined, where a fact or set of facts furnishes evidence or inference of another. (2) The presumption of law properly defined, as, where a fact or set of facts is considered sufficient evidence of another in the absence to the contrary. (3) Where a fact or set of facts makes out a case which shall stand until overthrown by a specific quantity of evidence; (*a*) sufficient to satisfy a jury; (*b*) a preponderance; (*c*) evidence beyond a reasonable doubt. (4) Where the term is used to imply that a certain fact is the legal equivalent of another fact; *e. g.* the presumption of malice. (5) Where the contrary of the so-called presumption is not to be taken as true without evidence, the effect being to regulate the burden of proof. (6) Where neither a fact nor the contrary of it is to be assumed as true without evidence, the presumption being of the truth of what is termed a neutral fact, or in other words, that there is no presumption; as in case of shipwreck where there is no presumption of survivorship. 8 H. L. Cas. 183. (7) Where the word is used as a rhetorical term to express a legal doctrine as the presumption of innocence. See, for a discussion of this classification and a collection of cases relating thereto, Chamb. Best, Ev. 306.

A legal presumption does not take the place of evidence, but only determines the burden of proof; Graves v. Colwell, 90 Ill. 612, 616; Vincent v. Life Ass'n, 77 Conn. 281, 58 Atl. 963; 4 Wigm. Ev. § 2491; no presumption can be evidence; it is a rule about the duty of producing evidence; *id.* §§ 2490, 2511; State v. Linhoff, 121 Ia. 632, 97 N. W. 77.

The frequent statement that the presumption of innocence does not cease on the submission of the case to the jury is "based on a misunderstanding of the loosely used phrase that the presumption of innocence is to be regarded by the jury in every case as a matter of evidence" but which merely means that the burden of proof is on the other party; Gr. Ev. (16th ed.) § 34. It is not error to refuse to instruct the jury that they ought to regard a presumption of innocence as evidence; Wooten v. State, 24 Fla. 335, 5 South. 39, 1 L. R. A. 819. In a much cited case, Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, a conviction was reversed because a charge that in order to be convicted there must be proof of guilt beyond a reasonable doubt did not sufficiently embody the statement of the presumption of innocence. That case, which held that the presumption of innocence is evidence, has been very much discussed, and has been said to have been possibly overruled in Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, and it was rejected in State v. Soper, 148 Mo. 217, 49 S. W. 1007; State v. Kennedy, 154 Mo. 268, 55 S. W. 293; People v. Ostrander, 110 Mich. 60, 67 N. W. 1079. In those cases the court preferred to follow Morehead v. State, 34 Ohio St. 212,

and Stevens v. Com., 45 S. W. 76, 20 Ky. L. Rep. 48. In Ogletree v. State, 28 Ala. 693, and People v. Lenon, 79 Cal. 625, 21 Pac. 967, it was held that the presumption of innocence and the doctrine of reasonable doubt were practically synonymous. The Coffin case was followed in People v. O'Brien, 106 Cal. 104, 39 Pac. 325, and People v. McNamara, 94 Cal. 509, 29 Pac. 953. In the Iowa case cited, the refusal to charge in the language of the opinion in the Coffin case was assigned as error and the exception overruled upon the ground that that case had been repudiated; Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; but in Kirby v. U. S., 174 U. S. 47, 55, 19 Sup. Ct. 574, 43 L. Ed. 890, the declaration in the Coffin case that presumption is an instrument of proof was quoted with apparent approval. See Thayer, Evid.

There is no added presumption of innocence in favor of a husband who had killed his wife; State v. Soper, 148 Mo. 217, 49 S. W. 1007.

In giving effect to presumptions of fact, it is said that the presumption stands until proof is given of the contrary: 1 Cr. M. & R. 895; Miller v. The Resolution, 2 Dall. (Pa.) 22, 1 L. Ed. 271; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562. See BURDEN OF PROOF; ONUS PROBANDI. This contrary proof may be a conflicting presumption; and Mr. Best lays down the following rules for application in such cases: *first*, special presumptions take the place of general ones; see 8 B. & C. 737; 5 Taunt. 326; Hazzard v. Smith, 1 J. J. Marsh. (Ky.) 68; *second*, presumptions derived from the ordinary course of nature are stronger than casual presumptions; 4 B. & C. 71; Co. Litt. 373 *a*; *third*, presumptions are favored which tend to give validity to acts; 1 Mann. & R. 668; 3 Camp. 432; 7 B. & C. 573; Tilson v. Thompson, 10 Pick. 359; Ripple v. Ripple, 1 Rawle (Pa.) 386; People v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609; State v. Peterson, 38 Minn. 143, 36 N. W. 443; and see MAXIMS, *Omnia præsumuntur*, etc.; *fourth*, the presumption of innocence is favored in law; 4 C. & P. 116; Russ. & R. 61; 10 M. & W. 15.

Among conclusive presumptions may be reckoned *estoppels* by deed, see ESTOPPELS; *solemn admissions*, of parties and *unsolemn admissions* which have been acted on; 1 Camp. 139; Simmons v. Bradford, 15 Mass. 82; see ADMISSIONS; 1 Greenl. Ev. § 205; *that a sheriff's return is correct* as to facts stated therein as between the parties; Simmons v. Bradford, 15 Mass. 82; *that an infant under the age of seven years* is incapable of committing a felony; 4 Bla. Com. 23; see Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; *that a boy under fourteen* is incapable of committing a rape; 7 C. & P. 582; *contra*, Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; that children born in wedlock are legitimate; Phillips v. Allen, 2 Allen (Mass.) 453; Illinois Land & L. Co. v. Bonner, 75 Ill. 315; In re Romero, 75 Cal. 379, 17 Pac. 434; at least where the husband might have had access and though the infidelity of the wife be proved; 3 C. & P. 215; 5 Cl. & F. 163; and positive proof of non-access is required to rebut the presumption; Pittsford v. Chittenden, 58 Vt. 49, 3 Atl. 323; Scott v. Hillenberg, 85 Va. 245, 7 S. E. 377; and it cannot be proved by the wife; Mink v. State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386; *that despatches of an enemy* carried in a neutral vessel between two hostile ports are hostile; 6 C. Rob. 440; *that all persons subject to any law* which has been duly promulgated, or which derives its validity from general or immemorial custom, are acquainted with its provisions; 4 Bla. Com. 27; 1 Co. 177; 2 *id.* 3 *b*; 6 *id.* 54 *a*.

Among rebuttable presumptions may be reckoned the presumptions that a *man is innocent* of the commission of a crime; Steph. Ev. 97; see Com. v. Hawkins, 3 Gray (Mass.) 465; 4 B. & C. 247; Long v. State, 23 Neb. 33, 36 N. W. 310; that *the possessor of property* is its owner; Magee v. Scott, 9 Cush. (Mass.) 150, 55 Am. Dec. 49; Mayor, etc., of New York v. Carleton, 113 N. Y. 284, 21 N. E. 55; Drummond v. Hopper, 4 Harring. (Del.) 327; that buildings belong to the owner of the land on which they stand; Kinkead v. U. S., 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152; that possession of real property accompanies ownership; Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705, 30 L. Ed. 801; that *possession of the fruits of crime* is guilty possession; 2 C. & P. 359; State v. Merrick, 19 Me. 398; People v. Weldon, 111 N. Y. 569, 19 N. E. 279; Bryant v. State, 25 Tex. App. 751, 8 S. W. 937; that *things usually done in the course of trade* have been done; 8 C. B. 827; Garlock v. Geortner, 7 Wend. (N. Y.) 198; Weidner v. Schweigart, 9 S. & R. (Pa.) 385; and in the usual and ordinary way; Allen v. Logan, 90 Mo. 591, 10 S. W. 149; that *solemn instruments are duly executed;* 9 C. & P. 570; White v. Perley, 15 Me. 470; New-Haven Co. Bk. v. Mitchell, 15 Conn. 206; that a *person, relation, or state of things* once shown to exist continues to exist, as, *life;* Conard v. Ins. Co., 1 Pet. (U. S.) 452, 7 L. Ed. 189; see DEATH; a *partnership;* 1 Stark. 405; *insanity;* 3 Bro. C. C. 443; Perkins v. Perkins, 39 N. H. 163; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; State v. Potts, 100 N. C. 457, 6 S. E. 657; but not that it existed previously to the time shown; W. F. Corbin & Co. v. U. S., 181 Fed. 296, 104 C. C. A. 278; that *official acts have been properly performed;* Wallace v. Maxwell, 1 J. J. Marsh. (Ky.) 447; Hilts v. Colvin, 14 Johns. (N. Y.) 182;

Hanson v. Barnes' Lessee, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322; Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705, 30 L. Ed. 801; but see Befay v. Wheeler, 84 Wis. 135, 53 N. W. 1121; *that a public officer has done his duty;* Erhardt v. Ballin, 150 Fed. 529, 80 C. C. A. 271; Houseman v. Nav. Co., 214 Pa. 562, 64 Atl. 379; that *statutes of other states* are the same as those of the state in which the court is sitting; Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; but see Thorn v. Weatherly, 50 Ark. 237, 7 S. W. 33; that a *mature male has normal powers* of virility; Gardner v. State, 81 Ga. 144, 7 S. E. 144; that a *child was born* in lawful wedlock; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159; that a *person has testamentary capacity;* McCoon v. Allen, 45 N. J. Eq. 708, 17 Atl. 820; that he is *sane;* Guild v. Hull, 127 Ill. 523, 20 N. E. 665; De Witt v. Mattison, 26 Neb. 655, 42 N. W. 742; *identity of person* is presumed from identity of name; People v. Riley, 75 Cal. 98, 16 Pac. 544; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Wilson v. Holt, 83 Ala. 528, 3 South. 321, 3 Am. St. Rep. 768; *homicide* committed by means of a deadly weapon, creates a presumption of malice; Brown v. State, 83 Ala. 33, 3 South. 857, 3 Am. St. Rep. 685; State v. Byers, 100 N. C. 512, 6 S. E. 420; that a *vote is legal;* Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Hahn v. Stinson, 98 N. C. 591, 3 S. E. 490; that a letter duly directed and mailed, was received by the person to whom it was directed, in the regular course of mail; Hastings v. Ins. Co., 63 Hun (N. Y.) 624, 17 N. Y Supp. 333; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372, 63 Hun 624.

In the absence of a contrary showing, names of witnesses for an applicant for naturalization are presumed to have been posted for the time required by law; U. S. v. Erickson, 188 Fed. 747.

All interstate freight rates established in accordance with law are presumed to be just and reasonable; Hooker v. Interst. Com. Com'n, 188 Fed. 242, reversed Hooker v. Knapp, 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099 (on the ground that the commerce court had no jurisdiction).

While it is presumed that a man is sober until shown to have been intoxicated, yet when he is shown to have been very much intoxicated, a court or jury may infer from that fact alone that he had been drinking intoxicants, and if it was proved that he took one drink and his whereabouts and abstinence were not shown, and there was an opportunity, it might also be inferred and found without further proof that he drank more; Hoagland v. Canfield, 160 Fed. 146.

The failure of a party to produce testimony within his knowledge and power, on a material question involved in the case, raises a presumption that the fact is against him; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655.

The maxim as to all presumptions being against a spoliator of documents applies only when intentional fraud or wrongful conduct is involved, and the presumption is one of fact which may be overcome by explanation of circumstances; Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98; Drosten v. Mueller, 103 Mo. 624, 15 S. W. 967; Warren v. Crew, 22 Ia. 315.

It is not permissible for a jury to base an inference of fact upon another fact which is only established by presumption. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed; Cunard S. S. Co. v. Kelley, 126 Fed. 610, 61 C. C. A. 532; Manning v. Ins. Co., 100 U. S. 693, 25 L. Ed. 761.

A favorite maxim is that *ignorantio legis neminem excusat,* or that every one is conclusively presumed to know the law. There is no such presumption in fact; 2 C. B. 720; L. R. 3 Q. B. 629. See IGNORANCE.

Another very much misused maxim is that one is presumed to intend the natural consequence of his act. This has been characterized as "merely a fantastic transference into the law of evidence of the phrascology of positive law;" Chamb. Best, Ev. 310; Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373; Jones v. Ricketts, 7 Md. 108. So far as it is a rule of law it means simply that mere carelessness is not a ground of defence against legal liability; Germania Fire Ins. Co. v. R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hartford Life & Annuity Ins. Co. v. Gray, 80 Ill. 28; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

There is a presumption of jurisdiction which attaches to the record of the judgment or the decree of a court of general jurisdiction in another state, and where the record discloses nothing in regard to the service of process or notice and no evidence is given on the subject, jurisdiction over the person will be presumed; Smith v. Trust Co., 154 N. Y. 333, 48 N. E. 553.

For a discussion of the "Instinct of Self-Preservation as Affording Presumption of Due Care" in cases where there were no eyewitnesses to an accident causing death, see 77 Cent. L. J. 331. In Illinois the rule is that some evidence must be adduced to fortify the presumption of the exercise of due care, though it need not be connected with the occurrence of the accident; Newell v. R. Co., 261 Ill. 505, 104 N. E. 224. In an action against an electric railway company for the death of a pedestrian, it was error to instruct that, because of the instinct of self-preservation, a presumption must be indulged in that decedent was using due care and

did not intend to commit suicide, without referring to testimony on the subject, and charging the jury when such presumption would cease to operate; Jones v. R. Co., 91 Kan. 282, 137 Pac. 796.

See AGE; DEATH; INSANITY.

PRESUMPTIVE EVIDENCE. See EVIDENCE.

PRESUMPTIVE HEIR. See HEIR PRESUMPTIVE.

PRESUMPTIVE TITLE. See TITLE.

PRET A USAGE (Fr. loan for use). A phrase used in the French law instead of *commodatum.*

PRETENDED TITLE STATUTE. The statute 32 Hen. VIII. c. 9, § 2. It enacts that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor.

PRÉTENTION. In French Law. The claim made to a thing which a party believes himself entitled to demand but which is not admitted or adjudged to be his.

The words *right, action,* and *prétention* are usually joined; not that they are synonymous, for *right* is something positive and certain, *action* is what is demanded, while *prétention* is sometimes not even accompanied by a demand.

PRETERITION (Lat. *præter* and *eo,* to go by). **In Civil Law.** The omission by a testator of some one of his heirs who is entitled to a legitime (*q. v.*) in the succession.

Among the Romans, the preterition of children when made by the mother was presumed to have been made with design; the preterition of sons by any other testator, was considered as a wrong, and avoided the will, except the will of a soldier in service, which was not subject to so much form.

PRETEXT. The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation, or which, if true, are not the true reasons for such act. Vattel, liv. 3, c. 3, § 32.

Ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretence. State v. Ball, 27 Neb. 604, 43 N. W. 398.

PRETIUM AFFECTIONIS (Lat.). An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it. Bell, Dict.

When an injury has been done to an article, it has been questioned whether in estimating the damage there is any just ground, in any case, for admitting the *pretium affectionis.* It seems that when the injury has been done accidentally by culpable negligence, such an estimation of damages would be unjust, but when the mischief has been intentional it ought to be so admitted. Kames, Eq. 74, 75.

PRETIUM PERICULI. The price of the risk, *e. g.* the premium paid on a policy of insurance; also the interest paid on money advanced on bottomry or respondentia.

PRETORIUM. A court house or hall of justice. 3 How. St. Tr. 425.

PREUVE (Fr.). Evidence in the sense of the term in English law, and of *probatio* in the canon and civil law. The French word *evidence,* Latin *evidentia,* is commonly restricted to the testimony of the senses. 1 Best, Evid. § 11.

PREVAILING PARTY. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it. Bangor & P. R. Co. v. Chamberlain, 60 Me. 286. See Hawkins v. Nowland, 53 Mo. 330.

PREVARICATION. In Civil Law. The acting with unfaithfulness and want of probity. The term is applied principally to the act of concealing a crime. Dig. 47. 15. 6.

PREVENT. To hinder; to obstruct; to intercept. Burr v. Williams, 20 Ark. 185. It is held not to mean to obstruct by physical force; 17 Q. B. 145.

PREVENTION (Lat. *prevenire,* to come before). **In Civil Law.** The right of a judge to take cognizance of an action over which he has concurrent jurisdiction with another judge.

In Pennsylvania it has been ruled that a justice of the peace cannot take cognizance of a cause which has been previously decided by another justice. Sharpe v. Thatcher, 2 Dall. (U. S.) 77, 1 L. Ed. 296; Coventry v. Cummings, 2 Dall. (U. S.) 114, 1 L. Ed. 312.

PREVIOUS QUESTION. In parliamentary practice, the question whether a vote shall be taken on the main issue, or not, brought forward before the main or real question is put by the speaker and for the purpose of avoiding, if the vote is in the negative, the putting of this question. The motion is in the form "that the question be now put," and the mover and seconder vote against it. See CLOTURE.

In the house of representatives of the United States and in many state legislatures the object of moving the previous question is to cut off debate and secure immediately a vote on the question under consideration. See Hinds, Precedents in the House of Repr.

PREVIOUSLY. An adverb of time, used in comparing an act or state named, with another act or state, subsequent in order of time, for the purpose of asserting the priority of the first. Lebrecht v. Wilcoxon, 40 Ia. 94.

PREVISORS, STATUTE OF. A statute of 25 Edw. III. St. 6, for the protection of spiritual patrons against the pope. See Maitl. Canon L. 69.

PRICE. The consideration in money given for the purchase of a thing.

It is not synonymous with value; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083.

There are three requisites to the quality of a price in order to make a sale.

It must be *serious* and such as may be demanded; if, therefore, a person were to sell me an article, and by the agreement, reduced to writing, he were to release me from the payment, the transaction would no longer be a sale, but a gift. Pothier, *Vente*, n. 18.

It must be *certain* and *determinate;* but what may be rendered certain is considered as certain; if, therefore, I sell a thing at a price to be fixed by a third person, this is sufficiently certain, provided the third person make a valuation and fix the price; Pothier, *Vente*, n. 23; Brown v. Bellows, 4 Pick. (Mass.) 179; 2 Kent 477. When the parties have not expressed any price in their contract, the presumption of law is that the thing is sold for the price it generally brings at the time and place where the agreement was made; Lyles v. Lyles's Ex'rs, 6 H. & J. (Md.) 273; Coxe 261; 10 Bingh. 376; 11 U. C. Q. B. 545.

The third quality of a price is that it consists in money, to be paid down, or at a future time; for if it be of anything else it will no longer be a price, nor the contract a sale, but exchange or barter; Pothier, *Vente*, n. 30; 16 Toullier, n. 147; Mitchell v. Gile, 12 N. H. 390; Vail v. Strong, 10 Vt. 457; see, Hudson I. Co. v. Alger, 54 N. Y. 173, where it was held that *price* in an act meant *value* or *compensation.*

The true price of a thing is that for which things of a like nature and quality are usually sold in the place where situated, if real property; in the place where exposed to sale, if personal; Pothier, *Vente*, n. 243. The first price or cost of a thing does not always afford a sure criterion of its value. It may have been bought very dear or very cheap; Ayl. Parerg. 447; Merlin, *Répert;* Brown v. Bellows, 4 Pick. (Mass.) 179.

In a declaration in trover it is usual, when the chattel found is a living one, to lay it as of such a price; when dead, of such a value; 8 Wentw. Pl. 372, n.; 2 Lilly, Abr. 629.

Lord Tenterden's act has substituted *value* for *price* in the English statute of frauds; 25 L. J. C. P. 257. See Campb. Sales 162; Cost.

PRICE CURRENT. A list or enumeration of various articles of merchandise, with their prices, the duties (if any), payable thereon, when imported or exported, with the drawbacks occasionally allowed upon their exportation. Wharton.

PRIDE GAVEL. A rent or tribute. Tayl. Gavelk. 112.

PRIEST. An officer in the second order of ministry in the church.

PRIMA FACIE (Lat.). At first view or appearance of the business; as the holder of a bill of exchange, indorsed in blank, is *prima facie* its owner.

Prima facie evidence of fact is in law sufficient to establish the fact, unless rebutted; Kelly v. Jackson, 6 Pet. (U. S.) 622, 632, 8 L. Ed. 523; U. S. v. Wiggins, 14 Pet. (U. S.) 334, 10 L. Ed. 481. See, generally, Pinkham v. Gear, 3 N. H. 484; Finn v. Com., 5 Rand. (Va.) 701; Armstrong v. Boylan, 4 N. J. L. 77; Ducoign v. Schreppel, 1 Yeates (Pa.) 347; Rector v. Welch, 1 Mo. 334; Allen v. Gray, 11 Conn. 95; Parker v. Smedly, 2 Root (Conn.) 286; Taylor v. Pettibone, 16 Johns. (N. Y.) 66; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Benjamin v. Sinclair, 1 Bail. (S. C.) 174; Bodley v. Hord, 2 A. K. Marsh. (Ky.) 244; Troy v. Evans, 97 U. S. 3, 24 L. Ed. 941. For example, when buildings are fired by sparks emitted from a locomotive engine passing along the road, it has been held to be *prima facie* evidence of negligence on the part of those who have the charge of it; 3 C. B. 229; and proof of the mailing of a letter duly stamped is *prima facie* evidence of its receipt by the person to whom it is addressed; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Hastings v. Ins. Co., 63 Hun 624, 17 N. Y. Supp. 333.

PRIMA TONSURA (Lat.). A grant of a right to have the first crop of grass. 1 Chitty, Pr. 181.

PRIMACY OF THE GREAT POWERS. See CONCERT OF EUROPE.

PRIMAGE. **In Mercantile Law.** A duty payable to the master and mariners of a ship or vessel,—to the master for the use of his cables and ropes to discharge the goods of the merchant, to the mariners for lading and unlading in any port or haven. Abb. Sh. 270.

A small payment to the master for his care and trouble which he is to receive for his own use, unless he has otherwise agreed with the owner. Abb. Sh. 13th ed. 531; it is of a very ancient date and subject to authority and regulations. "In the 'Guidon,' it is called *la contribution des chausses ou pot-de-vin du maître.*" It is sometimes called the master's hat-money;" *id.*

It is no longer a gratuity to the master, unless especially stipulated; but it belongs to the owners or freighters, and is nothing

but an increase of the freight rate; Carr v. R. Co., 14 Fed. Rep. 421.

PRIMARY. That which is first or principal: as, *primary evidence*, that evidence which is to be admitted in the first instance, as distinguished from secondary evidence, which is allowed only when primary evidence cannot be had.

PRIMARY ELECTION. A popular election held by members of a particular political party, for the purpose of choosing delegates to a convention empowered to nominate candidates for that party to be voted for at an approaching election. State v. Hirsch, 125 Ind. 210, 24 N. E. 1062, 9 L. R. A. 170.

Laws regulating primary elections are constitutional; In re County Treasurers, 9 Colo. 631, 21 Pac. 474; if there is nothing in the constitution forbidding such laws; State v. Miles, 210 Mo. 127, 109 S. W. 595; Kenneweg v. Co. Com'rs, 102 Md. 119, 62 Atl. 249. See a note in 24 L. R. A. (N. S.) 465. They have been upheld as a valid exercise of the police power; Hopper v. Stack, 69 N. J. L. 569, 56 Atl. 1; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65. Such laws do not violate the constitutional provision which forbids the restraining of any of the inhabitants from assembling in a peaceable manner to consult for their common good; the act is considered as merely providing for reasonable regulation; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

The following provisions in primary election laws have been held not to render an act invalid: Requiring the voter to declare his membership in the party holding the election and to agree in advance to support the nominee; State v. Michel, 121 La. 374, 46 South. 430; State v. Drexel, 74 Neb. 776, 105 N. W. 174; that when he has voted at a primary election he shall not sign a petition for another candidate; Katz v. Fitzgerald, 152 Cal. 433, 93 Pac. 112; that no person shall vote at a primary election who has signed a petition for a candidate of a party to which he does not belong, or has voted at a primary election of another party within one year, or refuses to state his name, residence, and party affiliations; Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; precluding voters at a primary election from taking part in other nominations for the same office; State v. Michel, 121 La. 374, 46 South. 430; that no person shall vote at a primary election unless he be a resident of the voting district in which he desires to vote, and unless he voted with a particular political party at the last general election; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121.

But a provision forbidding persons to vote whose names do not appear on the precinct register, etc., used at the last general election, or upon its supplement, is unconstitutional because it debars native-born citizens who since the last election have attained the right to vote, and persons naturalized since the last election, etc., and voters who have changed their residences; Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; and so is a provision as to native-born citizens which is an enlargement of the constitutional right of suffrage; *id.;* also a provision that in case of a special election to fill a vacancy, the various political parties shall nominate candidates; *id.*

It has been held that a provision that candidates must first pay a polling fee of from $10 to $50 is valid; Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181; especially if it was to be used to pay the expenses of the election; Kenneweg v. County Com'rs, 102 Md. 119, 62 Atl. 249; so of a requirement of the payment of filing fees aggregating $30; State v. Scott, 99 Minn. 145, 108 N. W. 828; other cases have held such requirements invalid where the fees were to go to the state treasury; People v. Board, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; Ballinger v. McLaughlin, 22 S. D. 206, 116 N. W. 70; so of a requirement that every candidate should pay a filing fee of two per cent. of the salary of the office; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662; so of a one per cent. filing fee; State v. Drexel, 74 Neb. 776, 105 N. W. 174.

A provision is valid that a candidate defeated at a primary election shall not run on an independent ticket; State v. Moore, 87 Minn. 308, 92 N. W. 4, 59 L. R. A. 447, 94 Am. St. Rep. 702; otherwise of a provision which requires a candidate to declare under oath his purpose to become a candidate; Dapper v. Smith, 138 Mich. 104, 101 N. W. 60; and one which requires candidates for the legislature to pledge themselves to support the candidate for United States senator who shall receive the majority vote of that party at such primary; State v. Blaisdell, 18 N. D. 55, 118 N. W. 141, 24 L. R. A. (N. S.) 465, 138 Am. St. Rep. 741; State v. Berry, 18 N. D. 75, 118 N. W. 150.

Provisions are valid which limit the primaries to parties which polled three per cent. of the total vote at the last preceding election; Katz v. Fitzgerald, 152 Cal. 433, 93 Pac. 112; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; so if the limit be one per cent.; State v. Drexel, 74 Neb. 776, 105 N. W. 174; or ten per cent.; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65; State v. Jensen, 86 Minn. 19, 89 N. W. 1126; State v. Michel, 121 La. 374, 46 South. 430; or even if the primaries be restricted to the two parties which had polled the largest vote, the primary of the largest party to be held first; Kenneweg v. County Com'rs, 102 Md. 119, 62 Atl. 249.

A voter at a primary election cannot be required to declare his intention to support the nominee; Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

A provision that in a senatorial district, consisting of two counties, not more than two persons of the same political party, that is, one candidate for senator and one for representative, shall be nominated from any one county, is held in conflict with the constitutional provision merely requiring that senators and representatives shall be residents of the district. Provisions to the effect that in Cook county no party may hold a primary election unless it cast twenty per cent. of the vote at the last election for president, while outside that county a party which cast ten per cent. may hold a primary election, and that outside of Cook county a person may vote at the primaries upon stating his present party affiliations, while in Cook county he cannot so vote if he has voted at the primary election of another party within two years, are declared to be void because special legislation and interfering with the freedom of voters; People v. Board of Election, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562.

Provisions in primary election laws which fail to preserve the secrecy of the ballot do not render such acts unconstitutional; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65; State v. Michel, 121 La. 374, 46 South. 430; Hopper v. Stack, 69 N. J. L. 569, 56 Atl. 1; Line v. Board of Canvassers, 154 Mich. 329, 117 N. W. 730, 18 L. R. A. (N. S.) 412, with note, 16 Ann. Cas. 248.

The legislature may provide that a party committee may establish qualifications for voters at primary elections in addition to those provided by the general election laws; State v. Michel, 121 La. 374, 46 South. 430; or may prescribe the time, manner, etc., of holding primary elections and also the qualifications of voters; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65. But in People v. Board of Election, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562, it was held that a law authorizing a party's central committee to determine whether candidates should be nominated at the primaries or by delegates chosen there or should be selected by a majority or plurality vote, was an invalid delegation of legislative power.

An act permitting the voters at primary elections to name their choice for a senator of the United States is not an invalid delegation of power; State v. Blaisdell, 18 N. D. 55, 118 N. W. 141, 24 L. R. A. (N. S.) 465, 138 Am. St. Rep. 741; Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181. See note in 22 L. R. A. (N. S.) 1135.

PRIMARY EVIDENCE. The best evidence of which the case in its nature is susceptible. 3 Bouvier, Inst. n. 3053. See Steph. Ev. 67; EVIDENCE.

PRIMARY OBLIGATION. An obligation which is the principal object of the contract: for example, the primary obligation of the seller is to deliver the thing sold, and to transfer the title to it. It is distinguished from the accessory or secondary obligation to pay damages for not doing so. 1 Bouvier, Inst. n. 702. See SURETYSHIP.

PRIMARY POWERS. The principal authority given by a principal to his agent: it differs from *mediate powers*. Story, Ag. § 58.

PRIMATE. In Ecclesiastical Law. An archbishop who has jurisdiction over his province, or one of several metropolitans presiding over others. Exarch comes nearest to it in the Greek church. The Archbishop of Canterbury is the Primate of All England; the Archbishop of York is Primate of England.

PRIME. In a contract for delivery of "prime barley" prime will be understood according to its use among merchants. Whitmore v. Coates, 14 Mo. 9.

Prime cost, the true price paid for goods upon a *bona fide* purchase. U. S. v. Sixteen Packages, 2 Mas. 53, Fed. Cas. No. 16,303.

Used in Louisiana as "having precedence of"; as, to *prime* a mortgage.

PRIME MINISTER. The head of the British cabinet. He usually holds the office of First Lord of the Treasury, unless he is a peer, in which case he takes some other office. At the present writing the prime minister is also secretary of state for war.

The office was unknown to the law until 1906, when the prime minister was accorded a place in the order of precedence. Lowell, Gov. of Engl. 68.

"He is the principal executive of the British constitution, and the sovereign a cog in the mechanism." Bagehot.

See CABINET; PREMIER.

PRIME SERJEANT. The Queen's first serjeant at law.

PRIMER ELECTION. A term used to signify first choice.

In England, when coparcenary lands are divided, unless it is otherwise agreed, the eldest sister has the first choice of the purparts: this part is called the *enitia pars*. Sometimes the oldest sister makes the partition; and in that case, to prevent partiality, she takes the last choice. Hob. 107; Litt. §§ 243, 245; Bac. Abr. *Coparceners* (U).

PRIMER FINE. The fine due the crown by ancient prerogative on suing out the writ of præcipe. 1 Steph. Com. 560.

PRIMER SEISIN. In English Law. The right which the king had, when any of his tenants died seised of a knight's fee, to receive of the heir, provided he were of full age, one whole year's profits of the lands, if they were in immediate possession; and half

a year's profits, if the lands were in reversion, expectant on an estate for life. 2 Bla. Com. 66. See FEUDAL LAW.

PRIMICERIUS. The first of any degree of men. 1 Mon. Ang. 838.

PRIMO BENEFICIO. A writ directing a grant of the first benefice in the sovereign's gift. Cowell.

PRIMOGENITURE. The state of being first born; the eldest.

At common law, in cases of the descent of land, primogeniture gave a title to the oldest son in preference to the other children. This distinction has been abolished in the United States. Formerly in Pennsylvania, in cases of intestacy, the oldest son took a double portion of the real estate; Jenk's Lessee v. Backhouse, 1 Binn. (Pa.) 91, where it was held that a trust estate (the legal title) descends as at common law; and this case was followed in Delaware; Doe v. Lank, 4 Houst. (Del.) 648.

It was not the general rule at the end of the 12th century; Pollock, First Book of Jurispr. 241. It was probably first applied to military fiefs. Perhaps at first the younger brothers lived on the land with the elder brother, holding the land in "parage." But under military tenures, primogeniture became the rule. In a charter of 1276, it was said that if property was divided among coheirs, no one portion would suffice even for its owner's maintenance; 3 Holdsw. Hist. E. L. 140.

The law of primogeniture has not been altered in England; see however the radical act of 1897, cited in LAND TRANSFER.

PRIMOGENITUS (Lat.). The first-born. 1 Ves. 290. And see 3 Maule & S. 25; 8 Taunt. 468.

PRIMUM DECRETUM (Lat.). In the courts of admiralty, this name is given to a provisional decree. Bacon, Abr. *The Court of Admiralty* (E).

PRINCE. In *a general sense*, a sovereign; the ruler of a nation or state. The son of a king or emperor, or the issue of a royal family: as, princes of the blood. The chief of any body of men.

PRINCE OF WALES. A title given to the eldest son of the British sovereign or to the heir apparent to the crown.

He is so created by letters patent, and is also created Earl of Chester. He is Duke of Cornwall by inheritance.

Mary and Elizabeth, though each, at the time, was only heiress presumptive, were created Princesses of Wales by Henry VIII.

PRINCES OF THE BLOOD. The younger sons of the British sovereign and male members of other branches of the royal family not in the direct line of succession.

Princess Royal. The eldest daughter of the king.

PRINCIPAL. Leading; chief; more important.

This word has several meanings. It is used in opposition to *accessary*, to show the degree of crime committed by two persons. Thus, we say, the principal is more guilty than the accessary after the fact.

In estates, principal is used as opposed to *incident* or *accessary:* as in the following rule: "The incident shall pass by the grant of the principal; but not the principal by the grant of the incident: *accessorium non ducit sed sequitur suum principale.*" Co. Litt. 152 *a.*

It is used in opposition to *agent*, and in this sense it signifies that the principal is the prime mover. See PRINCIPAL AND AGENT.

It is used in opposition to *interest:* as, the principal being secured, the interest will follow. See INTEREST.

The corpus or capital of the estate in contradistinction to the income.

Money bearing interest; a capital sum lent on interest.

It is used also in opposition to *surety:* thus, we say, the principal is answerable before the surety. See SURETYSHIP; GUARANTY.

Principal is used also to denote the more important: as, the principal person.

In the English law, the chief person in some of the inns of chancery is called principal of the house. Principal is also used to designate the best of many things: as, the principal bed, the principal table, and the like.

In Criminal Law. The actor in the commission of a crime.

All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime; U. S. v. Boyd, 45 Fed. 851. See Fernandez v. State, 25 Tex. App. 538, 8 S. W. 667.

Principals are of two kinds, namely, principals in the first degree, and principals in the second degree.

A *principal in the first degree* is one who is the actual perpetrator of the act. 1 Hale, Pl. Cr. 233, 615; Hately v. State, 15 Ga. 346. But to constitute him such it is not necessary that he should be actually present when the offence is consummated; People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; Smith v. State, 21 Tex. App. 107, 17 S. W. 552. For if one lay poison purposely for another, who takes it and is killed, the offender, though absent when it was taken, is a principal in the first degree; Clark, Cr. L. 83; 4 Bla. Com. 34; 1 Chitty, Cr. L. 257. And the offence may be committed in his absence, through the medium of an innocent agent: as, if a person incites a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ig-

norance of the fact, or other cause, to the commission of crime, the inciter, though absent when the act was committed, is *ex necessitate* liable for the act of his agent and a principal in the first degree; 1 Hale, Pl. Cr. 514; 2 Leach 978. But if the instrument be aware of the consequences of his act, he is a principal in the first degree; the employer, in such case, if present when the fact is committed, is a principal in the second degree, and, if absent, an accessary before the fact; 1 C. & K. 589; 1 Archb. Cr. L. 58.

Principals in the second degree are those who are present aiding and abetting the commission of the act. Rasnick v. Com., 2 Va. Cas. 356. They are generally termed aiders and abettors, and sometimes, improperly, accomplices; for the latter term includes all the *particeps criminis*, whether principals in the first or second degree or mere accessaries. A person to be a principal in the second degree need not be actually present, an ear or eye witness of the transaction. The presence may be constructive. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. If, for instance, he be outside the house watching to prevent surprise or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make a principal in the second degree; Clark, Cr. L. 85; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; 9 C. & P. 437; Brennan v. People, 15 Ill. 511. There must, however, be a participation in the act; for although a person be present when a felony is committed, yet if he does not consent to the felonious purpose or contribute to its execution, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon; 1 Russ. Cr. 27; 1 Hale, Pl. Cr. 439; State v. Hildreth, 31 N. C. 440, 51 Am. Dec. 369; Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370.

The law recognizes no difference between the offence of principals in the first and principals in the second degree. And so immaterial is the distinction considered in practice that, if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offence, although his was not the hand which actually did it, will support the indictment; and if he be indicted as principal in the second degree, proof that he was not only present, but committed the offence with his own hand, will support the indictment. So, when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute as much as the parties who actually commit the offence; 1 Archb. Cr. L. 66. See State v. Anderson, 89 Mo. 312, 1 S. W. 135.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation, or specially, as aiders and abettors; Archb. Cr. Pl. 7; Com. v. Chapman, 11 Cush. (Mass.) 422; 1 C. & M. 187. But where by particular statutes the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors; Archb. Cr. Pl. 7. If indicted as aiders and abettors, an indictment charging that A gave the mortal blow, and that B, C, and D were present aiding and abetting, will be sustained by evidence that B gave the blow, and that A, C, and D were present aiding and abetting; and even if it appears that the act was committed by a person not named in the indictment, the aiders and abettors may, nevertheless, be convicted; Dougl. 207; 1 East, Pl. Cr. 350. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting; 1 Den. Cr. Cas. 52; 2 C. & K. 382.

See ACCESSARY; ACCOMPLICE; PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT. *Agency* is a relation between two or more persons, by which one party, usually called the agent or attorney, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal, constituent, or employer. Prof. Joel Parker, MS. Lect. 1851.

A contract by which one person, with greater or less discretionary power, undertakes to represent another in certain business relations. Whart. Ag. 1.

The right on the part of the agent to act, is termed his authority or power. In some instances the authority or power must be exercised in the name of the principal, and the act done is for his benefit alone. In others, it may be executed in the name of the agent, and if the power is coupled with an interest on the part of the agent, it may be executed for his own benefit; Prof. Joel Parker, Harvard Law School Lect. 1851.

The *principal* is one who, being competent *sui juris* to do any act for his own benefit or on his own account, confides it to another person to do for him. 1 Domat b. 1, tit. 15, Introd.; Story, Ag. § 3.

The *agent* is one who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it; 1 Livermore, Ag. 67. See Co. Litt. 207; 1 B. & P. 316.

The term is one of a very wide application, and includes a great many classes of persons to which distinctive appellations are given; as, factors, brokers, attorneys, cashiers of banks, auctioneers, clerks, super cargoes, consignees, ships' husbands, masters of ships, and the like.

Other names for an agent are proxy, delegate, representative; and for principal, employer, constituent or chief; Mech. Agency § 3. In fact the terms agent and attorney are often used synonymously. Thus, a letter or power of attorney is constantly spoken of as the formal instrument by which an agency is created; Paley, Ag. Dunl. ed. 1, n.

No word is more commonly used than agent; [1897] A. C. 180. It is sometimes used as meaning one who has no principal, but who on his own account offers for sale some particular article having a special name; 39 L. J. Ch. 36.

"The line of demarkation between the relation of principal and agent, and that of master and servant is exceedingly difficult to define; . . . the two relations are essentially similar; . . . the difference between them is one of degree only, and not of kind;" Mechem, Agency § 2. It is that the former relates to commercial or business transactions and the latter deals with matters of manual or mechanical execution; Kingan & Co. v. Silvers, 13 Ind. App. 80, 37 N. E. 413. A contract giving the right to sell all the product of a company for five years at a certain commission was merely an employment to sell on commission and did not create the relation of master and servant; Morrow v. Ice Co., 211 Pa. 445, 60 Atl. 1004. An agency to manage, lease and sell property and pay expenses upon it and to collect debts and pay over the money received to the principal, is fiduciary in its character; Zetelle v. Myers, 19 Grat. (Va.) 62. The correspondent of a firm of brokers who received money on representations that they would purchase options on the Chicago Board of Trade and who shared with him the commissions taken, was not an agent of either party, but a *particeps criminis* in a gambling enterprise; Munns v. Commission Co., 117 Ia. 516, 91 N. W. 789. But where a bank represented itself as acting as agent for one who corresponded directly with the other person respecting loan applications, which the bank offered to submit to the plaintiff's assignor, it was merely an agent and not liable for the proposed lender's failure to furnish the money and to accept the loan; Klay v. Bank, 122 Ia. 506, 98 N. W. 315. Where a canner agreed to ship to defendant for sale the entire output of his establishment during the season it made him merely an agent and not a joint owner of the shipments; Elwell v. Coon (N. J.) 46 Atl. 580. But an offer to furnish engines on defendant's order at certain discounts and terms for a year did not create an agency but merely gave the right to purchase at the discount; Russell & Co. v. McSwegan, 84 N. Y. Supp. 614. Another text writer says that agency and service are "distinguishable . . . by the fact that the former relates to business transactions, in which there is more or less discretion allowed to the employee, while the latter relates to manual services which the employee is, as a rule, obliged to perform under specific orders;" Whart. Agency, §§ 19, 20. Mechem also points out in the section above cited that agency relates to transactions with third persons and implies more or less of discretion in the agent, whereas service has reference to actions upon or about things in which the servant acts under the direction and control of the master. He adds truly that this distinction is not altogether satisfactory in its application, as, except in the very lowest form of service, more or less discretion is allowed the servant; and in almost any form of agency, the agent is subject to the specific control of the principal. Usually, however, "the distinction is sufficiently clear for practical purposes, particularly as the same principles of law will ordinarily be applied to either relation."

In distinguishing between partnership and agency, it is to be remembered primarily that each partner acts in every transaction as principal for himself and as agent for the other members of the firm. And hence the question sometimes arises whether the action taken by one person was as the agent of another who would be entitled to the benefits of the transaction, or partly on his own behalf and partly on the behalf of others jointly interested in him. In the former case there would be an agency and in the latter a partnership, and in dealing with such questions, it is necessary to remember that each partner does act in the dual capacity of principal and agent; Cox v. Hickman, 8 H. L. Cas. 268, 311; Worrall v. Munn, 5 N. Y. 229, 239, 55 Am. Dec. 330. No general rule can be stated which will determine the character of the transaction as between those two relations in every case, but each must depend upon circumstances which show the intentions of the parties and determine the construction of the contract; see Grinton v. Strong, 148 Ill. 587, 36 N. E. 559.

Another question may arise as to whether the transaction is one between principal and agent for the sale of goods by the latter for the account of the former, and this may affect not only the parties themselves but their obligations and liabilities to third persons. In these cases, also, resort must be had to the construction of the contract and the light which may be thrown upon it by proof of the intention of the parties; Bayliss v. Davis, 47 Ia. 340; see SALE; and for a collection of cases on this particular point see Clark & Skyles, Ag. p. 16 *et seq.*, §§ 8–10.

Another distinction which is involved in

many cases is whether a person is an independent contractor or an agent, he being in the former case in no sense under the control of the person for whom he is working. See INDEPENDENT CONTRACTOR.

Cases may also arise where it is necessary to determine whether the relation between parties is that of principal and agent or landlord and tenant, particularly where the question of liability for repairs and improvements is involved. Unsuccessful efforts to establish an agency in such case were made in Ragsdale v. Industrial Co., 71 Miss. 284, 14 South. 193; and Hawley v. Curry, 74 Ill. App. 309, in both of which cases the relation was held to be that of landlord and tenant. See that title.

The question has also arisen as to whether a person was acting under an agency or a license. It would seem that these relations would be easily distinguished, but in Bingaman v. Hickman, 115 Pa. 420, 8 Atl. 644, it was held that a committee of creditors of mine owners who operated the mine and managed the business were agents and not mere licensees as was contended. See LICENSE.

The creation of the agency, when express, may be either by deed, in writing not by deed, or by a verbal delegation of authority; 2 Kent 612; 9 Ves. 250; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Ewing v. Tees, 1 Binn. (Pa.) 450, 2 Am. Dec. 455; McComb v. Wright, 4 Johns. Ch. (N. Y.) 667.

An authority may be delegated by deed for any purpose whatever; for whenever one by parol would be sufficient, one by deed will be equally so, and a power under seal, authorizing the agent to sign the principal's name, includes authority to affix his seal also; Wickham v. Knox, 33 Pa. 71; but it does not authorize the agent to make a deed in his own name; Bassett v. Hawk, 114 Pa. 502, 8 Atl. 18. When it is to do something which must be performed through the medium of a deed, then the authority must also be by deed, and executed with all the forms necessary to render the instrument perfect; Gordon v. Bulkeley, 14 S. & R. (Pa.) 331; Harshaw v. McKesson, 65 N. C. 688, 694; Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83; and subsequent parol ratification is not sufficient to bind the principal, though a written recognition with other acts *in pais* may do so; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; but it has been held that the agent's authority may be shown by an oral ratification or by acts of the principal from which such ratification may be inferred; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; if the principal be present, and verbally or impliedly authorize the agent to affix his name to the deed he will be bound; Croy v. Busenbark, 72 Ind. 48. But written authority is not required to authorize an agent to sign an unsealed paper, or a contract in writing not under seal, even where a statute makes it necessary that the contract, in order to bind the party, shall be in writing, unless the statute positively requires that the authority shall also be in writing; Wagoner v. Watts, 44 N. J. L. 126; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. In Riley v. Minor, 29 Mo. 439, it was held that the authority of an agent to make an executory contract for the sale of land need not be in writing; and in Watson v. Sherman, 84 Ill. 263, it was held that a power of attorney not under seal was sufficient to authorize the agent to sell land, but not to make a conveyance; for the latter purpose the power must be in writing and of equal dignity with the deed to be executed. In that case the sale was held good in equity. A contract for the sale of land, signed and sealed by an agent, was held valid though the agent's authority was not sealed, and ejectment might be supported thereon; Baum v. Dubois, 43 Pa. 260.

An authority is to be so construed as to include not only all the necessary and proper means of executing it with effect, but also all the various means which are justified or allowed by the usages of trade; Denman v. Bloomer, 11 Ill. 177; or are fairly to be implied from the transactions between the parties or papers relating thereto; Rogers v. Kneeland, 10 Wend. (N. Y.) 218.

The rule that an authority must be of the same character as the instrument to be signed by the agent was a rigid common law rule, but it was considered so technical that it has been changed in some states by statute; J. B. Streeter, Jr., Co. v. Janu, 90 Minn 393, 96 N. W. 1128. In other states the courts, without any statute, have shown a disposition to relax the rule, as where it is held that a seal attached unnecessarily by an agent will be treated as surplusage, and the instrument, though not effectual as a deed, may be held good as a contract of sale; Viser v. Rice, 33 Tex. 139; Blacknall v. Parish, 59 N. C. 70, 78 Am. Dec. 239; and this tendency to relax the rule is shown in other cases above cited. In Harshaw v. McKesson, 65 N. C. 688, 694, the court, after some discussion of the cases, said, "There is little use in holding on to a rule after it has been reduced to such a shadow." A lease executed by an agent without authority in writing, though void, may be admitted in evidence in an action for use and occupation; Jennings v. McComb, 112 Pa. 518, 4 Atl. 812; and the same was held of a lease void within the statute of frauds; McIntosh v. Hodges, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550.

It may be stated generally that the authority of an agent may be conferred either in writing, not under seal, or verbally, or by his mere employment, and that if a person knowingly permits another to act for him or clothes him with apparent authority to do

so, he will be bound to third persons who in good faith have dealt with the supposed agent and thus there is created what has been termed "an agency by estoppel." 1 Clark & Skyles, Agency 140, sec. 55; Bronson v. Chappell, 12 Wall. (U. S.) 681, 20 L. Ed. 436.

Parol authority has been held sufficient to authorize one as agent to make an assignment of a claim against an insolvent; Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790; to sell mules and apply the proceeds; Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678; to fill in the name of the grantee in a deed; Otis v. Browning, 59 Mo. App. 326; to execute bills and notes; Harrison v. Tiernans, 4 Rand. (Va.) 177; to settle a controversy; Piercy v. Hedrick, 2 W. Va. 458, 98 Am. Dec. 774; to sign one's name as surety in a bond; Bannister v. Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250; *contra*, Com. v. Magoffin, 25 S. W. 599, 15 Ky. L. Rep. 775. The authority may be conferred merely by letter; Lyon v. Pollock, 99 U. S. 668, 25 L. Ed. 265; Smith v. Allen, 86 Mo. 178.

When the agency is not express, it may be inferred from the relation of the parties and the nature of the employment, without proof of any express appointment; 2 Kent 613; 15 East 400; Judson v. Sturges, 5 Day (Conn.) 556. Where relations exist which constitute agency, it will be such whether the parties understand it to be or not; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768. The admissions of a supposed agent cannot prove the existence of the agency; Osgood v. Pacey, 23 Ill. App. 116; French v. Wade, 35 Kan. 391, 11 Pac. 138; Fullerton v. McLaughlin, 70 Hun 568, 24 N. Y. Supp. 280; Larson v. Inv. Co., 51 Minn. 141, 53 N. W. 179; Salmon Falls Bk. v. Leyser, 116 Mo. 51, 22 S. W. 504.

An agency may be created by law, as in those cases where the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency; Mechem, Ag. § 82; Benjamin v. Dockham, 134 Mass. 418.

The *authority* may be *general*, as when it extends to all acts connected with a particular business or employment; Gibson v. Hardware Co., 94 Ala. 346, 10 South. 304; Fatman v. Leet, 41 Ind. 138; or *special*, when it is confined to the authority to do one or more specific acts, in which case it is confined within the limits of the authority and extends to no other business than is authorized; Lattomus v. Ins. Co., 3 Houst. (Del.) 404; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Martin v. Farnsworth, 49 N. Y. 555; Union S. & T. Co. v. Mallory, 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341.

Where the powers are general, they are more liberally construed according to the necessity of the transaction and, in the absence of notice, parties dealing with an agent have the right to presume that his authority is general; Austrian v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Coles v. Ins. Co., 41 W. Va. 261, 23 S. E. 732; and, particularly, one dealing with the agent of a corporation may regard his agency as general in the absence of notice to the contrary; Maher v. Moore (Del.) 42 Atl. 721; and this rule was extended so far as to be applied to a subagent employed by the general agent of a corporation; Louisville & N. R. Co. v. Tift, 100 Ga. 86, 27 S. E. 765. On the other hand, a special agent is limited as to the business to be done, and his authority must in general be strictly pursued; Kramer v. Blair, 88 Va. 456, 13 S. E. 914; Hooe v. Oxley, 1 Wash. (Va.) 19, 1 Am. Dec. 425; and it will be strictly construed; Young v. C. H. Ass'n, 99 Ill. App. 290; MacDonald v. O'Neil, 21 Pa. Super. Ct. 364; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; but it will be treated as including all usual means for effectually executing it; Bass Dry Goods Co. v. Mfg. Co., 119 Ga. 124, 45 S. E. 980. As if it be to do an act upon condition, and the agent does it absolutely, it is void; and *vice versa*. If a person do less than the authority committed to him, the act is void; but if he does that which he is authorized, and more, it is good for that which is warranted, and void for the rest. Both of these rules, however, may have many exceptions and limitations; Paley, Ag. 178.

An authority given to two or more persons cannot as a general rule be executed by one, though one die or refuse, unless there is an express provision that a certain number of them may act, or unless the power is coupled with an interest; Paley, Ag. 177; Co. Litt. 112 *b*, 181 *b*; Salisbury v. Brisbane, 61 N. Y. 617; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Copeland v. Ins. Co., 6 Pick. (Mass.) 198; Low v. Perkins, 10 Vt. 532, 33 Am. Dec. 217; but if the instrument creating the power shows such an intention, the authority may be executed by part of those named as agents; Cedar Rapids & St. P. R. Co. v. Stewart, 25 Ia. 115; and it has been held that where the act is merely ministerial, anyone may do it; and so where the agency is expressly made joint and several; Purinton v. Annuity Co., 72 Me. 22 (but in another case the rule requiring all the appointees to join in the execution of the power was held to apply, whether the duty be ministerial or judicial; Johnston v. Bingham, 9 W. & S. [Pa.] 56); and powers delegated to a committee of corporate directors can be exercised by a majority; McNeil v. Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559. Where, however, the authority is of a public nature, it may be executed by a majority; Jefferson Co. v. Slagle, 66 Pa. 202; Worcester v. Board of R. Com'rs, 113 Mass. 161; Cooley v. O'Connor, 12 Wall. (U. S.) 391, 20 L. Ed. 446; People v. Nichols, 52

N. Y. 478, 11 Am. Rep. 734. It is also to be noted that the rule under consideration has no application to the case of a partnership, as each partner may execute an authority delegated to his firm, and the act of one is the act of the firm in pursuance of the power; Jeffries v. Life Ins. Co., 110 U. S. 309, 4 Sup. Ct. 8, 28 L. Ed. 156; Deakin v. Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827.

As to the form to be observed in the execution of an authority, where an agent is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him; but in the name of the principal and not merely in the attorney's name, though the latter be described as attorney in the instrument; Fowler v. Shearer, 7 Mass. 19; Buffalo Catholic Institute v. Bitter, 87 N. Y. 250. But it matters not in what words this is done, if it sufficiently appear to be in the name of the principal. "For A B" (the principal), "C D" (the attorney) has been held to be sufficient; Story, Ag. § 153; Clark & Skyles, Ag. 679, § 296; Hunter's Adm'rs v. Miller's Adm'rs, 6 B. Monr. (Ky.) 612; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 105; Wamb. Cas. 614. The strict rule of law in this respect applies, however, only to sealed instruments; and the rule is further modified, even in such cases, where the seal is not essential to the validity of the instrument; Story, Ag. §§ 148, 154; New England M. Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56.

Where a person acts merely as agent of another, and as such signs papers, an express disclosure of his principal's name on their face or in the signature is not essential to protect him from personal liability to a party having full knowledge of the facts; Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665 (a check signed "W. G. Williams, V. Pres't"), where it was held that the ordinary rule is that if a person merely adds to his signature the word "Agent," "Trustee," "Treasurer," without disclosing his principal, he is personally bound. The appendix is a mere *descriptio personæ*. But if he be in fact such "agent" etc. of some principal, the instrument will be given the same effect as was given to it by the parties themselves. In Kean v. Davis, 21 N. J. L. 683, 47 Am. Dec. 182, a bill was signed "J. K., Pres. etc." It was held that parol proof was admissible to show that the bill was a company bill. One who signs as "A, Secretary of X Co.," binds himself, but evidence of the understanding of the parties is admissible if the suit is between the original parties; Janes v. Bank, 9 Okl. 546, 60 Pac. 290. The cases are, however, conflicting.

An authority must be executed within the period to which it is limited; 4 Campb. 279.

The business of the agency may concern either the property of the principal, of a third person, of the principal and a third person, or of the principal and the agent, but must not relate solely to the business of the agent. A contract in relation to an illegal or immoral transaction cannot be the foundation of a legal agency; Liverm. Ag. 6. 14.

Agency created by ratification of acts previously done. The agency must be antecedently given, or subsequently adopted; and in the latter case there must be an act of recognition, or an acquiescence in the act of the agent from which a recognition may be fairly implied; 2 Kent 614. If, with full knowledge of what the agent has done, the principal ratify the act, the ratification will be equivalent to an original authority,—according to the maxim, *omnis ratihabitio retrotrahitur et mandato æquiparatur;* Paley, Ag. 172; 4 Ex. 798. The ratification relates back to the original making of the contract; 31 L. J. Ex. 163; Russ v. Telfener, 57 Fed. 973; except as to intermediate vested rights; Fowler v. Pearce, 49 Ill. 59; Norton v. Bull, 43 Mo. 113. It must be ratified in its entirety; Elwell v. Chamberlin, 31 N. Y. 611; Krider v. College, 31 Ia. 547; Rogers v. Hardware Co., 24 Neb. 653, 39 N. W. 844; E. O. Standard Milling Co. v. Flower, 46 La. Ann. 315, 15 South. 16; and subject to the charges imposed by the agent; 9 H. L. C. 391. If the principal accepts the benefit of a contract, he is responsible for the fraudulent representations of the agent, although made without authority; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Murray v. Mayo, 157 Mass. 248, 31 N. E. 1063; Wheeler & Wilson Mfg. Co. v. Aughey, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638.

Ratification will, in general, relieve the agent from all responsibility on the contract, when he would otherwise have been liable; 2 Br. & B. 452. See Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62. See ASSENT; Ayliffe, Pand. *386; 18 Viner, Abr. 156; Story, Ag. 239. See, generally, 25 Am. Law Rev. 14; AGENCY.

A principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; Indianapolis Rolling Mill v. R. Co., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639. The principle of ratification by laches or delay is applicable to a municipal corporation, such as a county; Boone Co. v. R. Co., 139 U. S. 684, 11 Sup. Ct. 687, 35 L. Ed. 319.

An infant is not, in general, liable on his contracts; but if, after coming of age, he ratify the contract by an actual or express declaration, he will be bound to perform it, as if it had been made after he attained full age. The ratification must be voluntary, deliberate, and intelligent, and the party must know that without it he would not be bound; Hinely v. Margaritz, 3 Pa. 428; see Martin

v. Mayo, 10 Mass. 137, 6 Am. Dec. 103; Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; and now in England must be in writing. But a confirmation or ratification of a contract may be implied from acts of the infant after he becomes of age, as, by enjoying or claiming a benefit under a contract he might have wholly rescinded; Barnaby v. Barnaby, 1 Pick. (Mass.) 221; and an infant partner will be liable for the contracts of the firm, or at least such as were known to him, if he, after becoming of age, confirm the contract of partnership by transacting business of the firm, receiving profits, and the like; Salinas v. Bennett, 33 S. C. 285, 11 S. E. 968; but his mere failure to disaffirm a conveyance on coming of age, without some positive and clear act of affirmation, will not amount to a ratification; Hill v. Nelms, 86 Ala. 442, 5 South. 796; Hoffert v. Miller, 86 Ky. 572, 6 S. W. 447. See INFANT.

A board of directors may ratify the unauthorized execution of a promissory note by the secretary and bind the corporation when it has authority to borrow money and execute securities therefor; Nebraska & K. Farm Loan Co. v. Bell, 12 U. S. App. 699, 58 Fed. 326, 7 C. C. A. 253; and the bringing of a suit by a limited partnership upon a contract made by its agents without proper authority, though not *ultra vires*, is a ratification of its terms; Park Bros. & Co. v. Mfg. Co., 6 U. S. App. 26, 49 Fed. 618, 1 C. C. A. 395.

A principal cannot ratify the acts of his agent where he has no knowledge of such acts; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036; Beebe v. E. Ass'n, 76 Ia. 129, 40 N. W. 122; but when a claim is founded upon an act done without the claimant's knowledge and authority, by a person claiming to act as his agent, the bringing of an action by him based upon that act is a ratification of it; Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52.

Ratification can only take place where the agent professed to act for the person ratifying; 5 B. & C. 909; Leake, Contr. 470. Thus a forged signature to a note cannot be ratified; Henry v. Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613; Shisler v. Van Dike, 92 Pa. 447, 37 Am. Rep. 702; Brook v. Hook, L. R. 6 Ex. 89; *contra*, Livings v. Wiler, 32 Ill. 387; Williams v. Bayley, L. R. 1 H. L. 200; Garrett v. Gonter, 42 Pa. 143; Greenfield Bank v. Crafts, 4 Allen (Mass.) 447, where the view is taken that the party whose signature is forged adopts it with full knowledge as his own, he may be bound as if he had made it originally; Forsyth v. Day, 46 Me. 176, where the liability was placed upon the ground of estoppel; as it was also in Union Bank v. Middlebrook, 33 Conn. 95.

An intention to ratify may be presumed from the silence of the principal who has received a letter from the agent informing him of what has been done on his account; Smith v. Sheeley, 12 Wall. (U. S.) 358, 20 L. Ed. 430; Bassett v. Brown, 105 Mass. 551; Hall v. Vanness, 49 Pa. 457; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Swartwout v. Evans, 37 Ill. 442; Viele v. Ins. Co., 26 Ia. 38, 96 Am. Dec. 83; or from any acts inconsistent with a contrary inference; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; St. Louis & M. Packet Co. v. Parker, 59 Ill. 23; or from a suit by the principal; 9 B. & C. 59; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Bredin v. Dubarry, 14 S. & R. (Pa.) 30; or by adoption of a submission to arbitration, although the agent exceeded his authority; Hall v. Ins. Co., 57 Conn. 105, 17 Atl. 356; or by keeping and enforcing a mortgage, obtained by an agent for the release of another mortgage; Nichols, Shepard & Co. v. Shaffer, 63 Mich. 599, 30 N. W. 383.

The acts of the agent must be disapproved within a reasonable time after notice, or the principal will be considered as having ratified them by his silence; Johnson v. Carrere, 45 La. Ann. 847, 13 South. 195.

By ratifying a contract a man adopts the agency altogether, as well what is detrimental as what is for his benefit; Findley v. Breedlove, 4 Mart. N. S. (La.) 105; Story, Ag. § 250; 9 B. & C. 59; Rogers v. Hardware Co., 24 Neb. 653, 39 N. W. 844; Findlay v. Pertz, 31 U. S. App. 340, 66 Fed. 427, 13 C. C. A. 559. See Rader v. Maddox, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. Ed. 1025.

Agency for Both Parties. In general an agent for one party cannot act in the same transaction for the other, and if he does so, the contract is voidable; Greenwood Ice & Coal Co. v. Ins. Co., 72 Miss. 46, 17 South. 83; New York Cent. Ins. Co. v. Ins. Co., 14 N. Y. 85. There seems to be an exception in the case of an auctioneer's clerk, their business being simply ministerial and the custom generally understood; 9 H. L. R. 218; additional New York cases are cited in 9 Harv. L. Rev. 349; Pratt v. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Bank of N. Y. Assoc. v. Trust Co., 143 N. Y. 559, 38 N. E. 713.

The New York test as to an agent representing both parties is whether or not he is invested with discretion. No other jurisdiction seems to have recognized this distinction; see 9 Harv. L. Rev. 349.

The test of discretion is distinctly repudiated in Porter v. Woodruff, 36 N. J. Eq. 174; Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207. The rule that the contract is voidable is followed in Cannell v. Smith, 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Berlin v. Farwell, 3 Cal. Unrep. Cas. 634, 31 Pac. 527; Bell v. McConnell 37 Ohio St. 396, 41 Am. Rep. 528; Kronenberger v. Fricke, 22 Ill. App. 550; Salomans v.

Pender, 34 L. J. Ex. 95; but see Hammond v. Bookwalter, 12 Ind. App. 177, 39 N. E. 872. As to the agent's right to commissions from both parties where he simply introduces them and they make their own contract, see Montross v. Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323; Green v. Robertson, 64 Cal. 75, 28 Pac. 446.

An agent with orders from two customers for certain stock joined the orders and purchased the full amount from the plaintiffs; held that there was no contractual relation with either principal and that they were not liable for the price; Beckhusen v. Hamblet, 16 T. L. Rep. 278 (Q. B. D.). This case is commented on in 14 Harv. L. Rev. 146, where it is said that if there have been two separate contracts for the precise number of shares ordered by each customer, he would have been liable to the seller on his own contract whether the broker disclosed his principal or not, and while it seems odd that by lumping the orders the seller loses the right of action against the customers, yet the writer considers the result logical. The decision in the English case is sustained by Roosevelt v. Doherty, 129 Mass. 301, 37 Am. Rep. 356, which is the converse and where the action was brought by one principal against a third party.

Who may be Principal. Every one of full age, and not otherwise disabled, is capable of being a principal; for it is a rule that whenever a person has power, as owner, or in his own right, to do a thing, he may do it by another; Com. Dig. *Attorney* (C 1); Heineccius, ad Pand. p. 1, l. 3, tit. 1, § 424; 9 Co. 75 *b;* Story, Ag. § 6. Infants are generally incapable of appointing an agent; but under special circumstances they may make such appointments. For instance, an infant may authorize another to do any act which is beneficial to him, but not to do an act which is to his prejudice; 2 Kent 233; 9 Co. 75; 3 Burr. 1804; Tucker v. Moreland, 10 Pet. (U. S.) 58, 69, 9 L. Ed. 345; Whitney v. Dutch, 14 Mass. 463, 7 Am. Dec. 229. A married woman could not, in general, appoint an agent or attorney; and when it was requisite that one should be appointed, the husband usually appointed for both. She might, perhaps, dispose of or incumber her separate property, through an agent or attorney; Cro. Car. 165; 2 Bulstr. 13; but this seemed to be doubted; Cro. Jac. 617; 1 Brownl. 134; Ad. Ej. 174. Idiots, lunatics, and other persons not *sui juris* are wholly incapable of appointing an agent; Story, Ag. § 6.

His Liability as Affected by the Character of the Agency. The general principle which governs the liability of a principal is that the responsibility is measured by the character and extent of the authority given; for example, authority to an agent to vote at a corporate meeting upon the stock of his principal does not empower the former to act for the latter in connection with other stockholders, who were also creditors of the corporation, in taking measures for cancelling a mortgage of the corporation under which the claims of the principal and those stockholders against the corporation were secured; Moore v. Ensley, 112 Ala. 228, 20 South. 744. The powers of the agent must be measured by the application to each particular case of ordinary business principles, and sound judgment to be exercised by the agent in executing his authority, and by the court which is to deal with the case in considering the question of the responsibility of the principal. Where a discretion has been conferred upon the agent, the principal must abide the result of its exercise and will be held liable to third persons where it has been honestly exercised. So where an agent has power to borrow money on exceptional terms in cases of emergency, a lender is not bound to inquire whether in the particular case the emergency has or has not arisen; 15 L. R. App. 357. And where the agent was entrusted with securities and instructed by the principal to raise a certain sum upon them, but borrowed a larger sum and fraudulently appropriated the difference, the principal could not redeem the securities without paying the lender in full where he had acted *bona fide* and in ignorance of the limitation, although he had no knowledge of the agent's authority to borrow and made no inquiry, and the agent practised fraud and forgery to obtain the loan; [1895] App. Cas. 173, affirming [1895] 3 Ch. 130.

His right to the Service of the Agent, and His Correlative Obligations. The principal is entitled to the service of the agent with respect to the matter in hand as though the agent were attending to his own business; and the latter will be considered, to that extent, as merging his own individuality and will be held to act entirely for the benefit of the principal. He cannot make a profit out of the business which he transacts for the principal derived from any knowledge acquired by him in the course of it, except consistently with the engagements between the principal and agent. So where an agent, acting in a confidential capacity, obtained information of a defect in his principal's title and put in an outstanding claim through a third party, it was held that he could not profit by his purchase but held the title for his principal; Kelley-Goodfellow Show Co. v. Scales, 12 U. S. App. 610, 58 Fed. 161, 7 C. C. A. 140. On the other hand, a principal cannot retain the fruit of his agent's acts and yet disclaim his authority in order to escape the corresponding obligation. Where a corporation obtained from the plaintiff the right to construct a road in front of his property and constructed it, it could not refuse to recognize its agent's authority to bind it to pay the sum he agreed

to pay; Nutting v. R. Co., 21 App. Div. 72, 47 N. Y. Supp. 327. It is said in this case that agency cannot be proved by the uncorroborated testimony of the agent, nor can any implication of consent to the work done arise, in the absence of proof of knowledge that it was being done.

Their Rights and Liabilities. The rights to which principals are entitled arise from obligations due to them by their agents or by third persons.

Their Rights as against the Agents. The rights of principals in relation to their agents are—*first*, to call them to an account at all times in relation to the business of the agency; 2 Bouvier, Inst. 28. *Second*, when the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omissions in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity; Story, Ag. § 217c; Dodge v. Tileston, 12 Pick. (Mass.) 328; 7 Beav. 176. But the loss of damage must be actual, and not merely probable or possible; Story, Ag. § 222; Paley, Ag. 7, 8, 74, 75. But see *id.* 74, *note* 2. *Third*, where both the principal and agent may maintain a suit against a third person for any matter relating to the agency, the principal has a right to supersede the agent by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract; Story, Ag. § 403; 4 Camp. 194; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618. But, as we shall presently see, an exception to this rule arises in favor of the agent, to the extent of any lien, or other interest, or superior right, he may have in the property; Story, Ag. §§ 393, 397, 407, 424. The principal has a right to determine or revoke the authority given to his agent, at his own mere pleasure, where not otherwise agreed between them; Willcox & Gibbs Sewing Mach. Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882.

Agents are not entitled to use the materials gained or collected by them in the cause of their employment to the detriment of their principal; [1893] 1 Ch. 218.

Their Rights with Respect to Third Persons. In general, the principal, *as against third persons*, has a right to all the advantages and benefits of the acts and contracts of his agent, and is entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally; Story, Ag. §§ 418, 420; Paley, Ag. 323; Brewster v. Saul, 8 La. 296; 2 Stark. 443. But to this rule there are the following exceptions. *First*, when the instrument is under seal, and it has been exclusively made between the agent and the third person, as, for example, a charter-party or bottomry bond made by the master of a ship in the course of his employment, in this case the principal cannot sue or be sued on it; Story, Ag. § 422; Dubois v. Canal Co., 4 Wend. (N. Y.) 285. *Second*, when an exclusive credit is given to and by the agent, and therefore the principal cannot be considered in any manner a party to the contract, although he may have authorized it and be entitled to all the benefits arising from it. The case of a foreign factor buying or selling goods is an example of this kind; he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue or be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to, for the safety and convenience of foreign commerce; Story, Ag. § 425; 9 B. & C. 87; 4 Taunt. 574. *Third*, when the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount of its value, the principal cannot sue without the consent of the agent; Story, Ag. §§ 403, 407, 424.

But contracts are not unfrequently made without mentioning the name of the principal. In such case he may avail himself of the agreement; for the contract will be treated as that of the principal as well as of the agent. If, however, the person with whom the contract was made, *bona fide* dealt with the agent as owner, he will be entitled to set off any claim he may have against the agent, in answer to the demand of the principal; and the principal's right to enforce contracts entered into by his agent is affected by every species of fraud, misrepresentation, or concealment of the agent which would defeat it if proceeding from himself; Story, Ag. §§ 420, 440; 2 Kent 632; Paley, Ag. 324; 3 B. & P. 490; Hogan v. Shorb, 24 Wend. (N. Y.) 458.

Undisclosed Principal. Where one enters into a contract in his own name, but is in fact the agent of another for whose benefit he is acting, and he does not disclose the name of his principal, though the fact that he is acting as an agent is known to the other party, the person for whose benefit such contract is made is termed an undisclosed principal. The rules concerning his rights and liabilities are fairly well settled both in this country and in England, though constantly and severely criticised, but at the same time acknowledged by the critics to be probably unchangeable. The cases have resulted in a settled rule of decision that the other party to the contract may at his option sue the agent on the contract to the same extent as if he were principal; Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Brigham v. Herrick, 173 Mass. 460, 53 N. E. 906; Bey-

mer v. Bonsall, 79 Pa. 298; Mitchell v. Beck, 88 Mich. 342, 50 N. W. 305; 7 Term 360.

Where the principal, under a written contract, is disclosed on its face by the agent, in England the other party may sue either; L. R. 6 C. P. 486; 8 M. & W. 834; unless the contract sufficiently shows that the agent is not to be bound; 2 T. L. R. (K. B.) 7. In this country there is said to be no case on the agent's liability; 19 Harv. L. Rev. 456 (1906), where the question is discussed on principle. The cases are collected in Wambaugh, Cas. Ag. 548–582. Or he may maintain an action against the undisclosed principal when it is ascertained who he is; York Mfg. Co. v. R. Co., 3 Wall. (U. S.) 107, 18 L. Ed. 170; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Hubbard v. Ten Brook, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; Kayton v. Barnett, 116 N. Y. 625, 23 N. E. 24; Woodford v. Hamilton, 139 Ind. 481, 39 N. E. 47; 9 B. & C. 78; [1893] 1 Q. B. 346; and the rule of the liability of the undisclosed principal applies not only to oral contracts, but to written ones other than negotiable instruments; and parol evidence is permissible to show that the principal is liable; Higgins v. Senior, 8 M. & W. 834; Darrow v. Produce Co., 57 Fed. 463; Chandler v. Coe, 54 N. H. 561; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530; and this doctrine is also true as to contracts required by the statute of frauds to be in writing; Trueman v. Loader, 11 Ad. & El. 589; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; Waddill v. Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766; but where the other party, with knowledge of all the circumstances, makes his election as to whom he will charge, the other is discharged, and cannot afterwards be sued by such third person; New York & C. S. S. Co. v. Harbison, 16 Fed. 688.

The rule of the liability of the principal does not apply to contracts under seal; Badger Silver Mining Co. v. Drake, 88 Fed. 48, 31 C. C. A. 378; Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913; 6 Ch. App. 525; nor to negotiable instruments; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225; Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; Sparks v. Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351; Rand v. Hale, 3 W. Va. 495, 100 Am. Dec. 761; Siffkin v. Walker, 2 Camp. 308. This exception naturally results from the doctrine of the law merchant holding only the parties to a negotiable instrument as liable to a suit upon it, but it is to be noted that if there is uncertainty upon the face of the paper, whether it is intended to bind the principal or the agent, parol evidence may be admitted to make clear the intention of the parties; Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665; Simanton v. Vliet, 61 N. J. L. 595, 40 Atl. 595; Keidan v. Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; but such evidence is inadmissible to render liable a person who is not named in, or bound by, a written contract; Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65.

In considering the right of an undisclosed principal to sue the other party, it might be considered that since, ordinarily, a contract cannot confer a right of action upon a person not a party to it, such principal would have no action. It is, however, now fairly well settled, both in England and in this country, that the principal may sue upon the contract and introduce parol evidence to show that it was made for his benefit; 10 B. & C. 671; L. R. 6 Eq. 165; Buchanan v. Linseed-Oil Co., 91 Fed. 88, 33 C. C. A. 351; Prichard v. Budd, 76 Fed. 710, 22 C. C. A. 504; Nicoll v. Burke, 78 N. Y. 580; Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300; Cushing v. Rice, 46 Me. 303, 7 Am. Dec. 579.

Either principal or agent may recover on such a contract not under seal; Stockbarger v. Sain, 69 Ill. App. 436; Nitro Powder Co. v. Marx & Rawolle, 148 App. Div. 571, 133 N. Y. Supp. 151; and the principal need only prove by a preponderance of evidence that he is the real party; it need not be "clear and satisfactory"; Barbre v. Goodale, 28 Or. 465, 43 Pac. 378. An undisclosed principal may sue on a parol contract made by an agent in his own name; Coulter v. Blatchley, 51 W. Va. 163, 41 S. E. 133; Battey v. Lunt, Moss & Co., 30 R. I. 1, 73 Atl. 353, 136 Am. St. Rep. 926; but not upon one under seal; Smith v. Pierce, 45 App. Div. 628, 60 N. Y. Supp. 1011. Such principal may be sued by the other party; Brooks v. Shaw, 197 Mass. 376, 84 N. E. 110; Schweyer v. Jones, 152 Mich. 241, 115 N. W. 974; but not on a specialty; Western S. R. Co. v. Fire Ins. Co., 163 Fed. 644; and the agent may be sued; Whitney v. Woodmansee, 15 Idaho 735, 99 Pac. 968; Fitzpatrick v. Manheimer, 157 Mich. 307, 122 N. W. 83; Jewell v. Theater Co., 12 Cal. App. 681, 108 Pac. 527; Leterman v. Lumber Co., 110 Va. 769, 67 S. E. 281; Hale v. Triest, 150 App. Div. 166, 134 N. Y. Supp. 673. The third party may sue either principal or agent; Gay v. Kelley, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742; but he must elect; Cherrington v. Burchell, 147 App. Div. 16, 131 N. Y. Supp. 631. If the principal sues, the other party may set off a demand against the agent; Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 S. E. 950; his rights as undisclosed principal are subject to claims acquired in good faith against the agent; Kent v. De Coppet, 149 App. Div. 589, 134 N. Y Supp. 195.

One who contracted under seal as agent for a fictitious principal was himself held liable; Schenkberg v. Treadwell, 94 N. Y.

Supp. 418; this is true as to a contract not under seal; L. R. 2 C. P. 174; but the New York case is a *per curiam* one with a dissenting opinion by MacLean, J., which is very brief, but well reasoned, and is substantially repeated in a criticism of the case in 19 Harv. L. Rev. 59. Case is the proper action against an agent who has exceeded his authority in a contract under seal; Roberts v. Button, 14 Vt. 195; or an action in the nature of case against one who, without authority, signs as agent a contract for and in the name of another; Sheffield v. Ladue, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145.

In an interesting discussion of the rights and liabilities of the undisclosed principal, Prof. Ames (Lect. on Leg. Hist. 453), assuming that the doctrine of his liability to the other party is "so firmly established in the law of England and of this country that it would be quixotic to attack it in the courts," contends that it is an anomaly to be reckoned with but not treated as an analogy. It has been so treated by Lords Davey and Lindley, and Smith, L. J., and by text writers; [1901] A. C. 240, 256, 261; [1901] 1 Q. B. 629, 635; Tiffany, Ag. 232; Huffcut, Ag. 166; 9 Colum. L. Rev. 116, 130; 3 L. Q. R. 359; 14 *id.* 5; though by others the rule has been treated as of self-evident soundness; Lord Cairns, in 4 App. Cas. 504, 514; Anson, Cont. 2d ed. 346. The article concludes with three objections to the rule as admitted and established: 1. It violates fundamental principles of contract. 2. The third person has no relief against the principal upon his agent's sealed or negotiable contracts, or his liability as a shareholder. 3. It frequently works unjustly in the case of simple contracts, and, while it is too late to apply it to the last class, it is suggested that to cases within the second there may be applied the doctrine of equitable execution on the debtor's right of exoneration, which has the merits of accord with legal principle, uniform application to all forms of contract and the production of just results. See notes on undisclosed principal in 16 L. Ed. 36, and 27 L. Ed. 903.

A more detailed reference to cases is impracticable here, but it may be noted that the right of action in cases involving the question of an undisclosed principal has resulted in many cases, where not only is the existence of an agency a question, but, where forgery is resorted to to create the appearance of an agency, there has been a question whether obtaining the money under a forged paper by an alleged agent creates a liability in tort or upon an implied warrant of authority only. A very few of the cases involving this question, which has been much discussed in the English courts, may be noted.

A stockbroker acting in good faith under a forged power of attorney, purporting to be signed by Oliver, effected a transfer of stock standing in the Bank of England, in the name of Oliver. He was held liable on an implied warrant of authority in a suit by the bank which had made good the loss to Oliver, although the bank had equally good means of knowing of the forgery; Oliver v. Bank of England, 17 T. L. R. 286, [1902] 1 Ch. 610. It is suggested in 15 Harv. L. Rev. 71, that there being no contract, the action should be in tort theoretically, but there being no such action for innocent misrepresentation, courts have implied a warranty of authority; 18 Q. B. D. 54. In Collen v. Wright, 8 E. & B. 647, it was first authoritatively held that an agent acting without authority and inducing the plaintiff to enter into a contract, an existing principal impliedly warrants his agency. The propriety of applying this case to the facts in Oliver v. Bank of England is objected to in 18 L. Q. R. 364, but its criticism is dissented from in 16 Harv. L. Rev. 312, which cites as authority supporting a warranty in consideration of the detriment incurred by the bank from the reason that the result of the transfer might be contrary to its interests; Callisher v. Bischoffscheim, L. R. 59 B. 449; Seward v. Mitchell, 1 Cold. (Tenn.) 87. In Derry v. Peek, L. R. 14 App. Cas. 337, it was held that one who suffers by acting in reliance on a merely negligent misrepresentation cannot recover, and a writer in 16 Harv. L. Rev. 312, is of opinion that Collen v. Wright must be recognized in England as an exception to Derry v. Peek. Where the agent acquainted the person with whom he dealt of the doubt as to his authority, he was held not liable; [1892] 1 Q. B. 456; Newman v. Sylvester, 42 Ind. 106; but Oliver v. Bank of England, *supra*, does not come within this exception. On similar facts, the doctrine of implied warranty has been held to apply; Boston & A. R. Co. v. Richardson, 135 Mass. 473. The writer above cited suggests that the principle established is practical and in accordance with sound business principles, though, in fact, it is but a veiled exception to a settled principle in the law of torts; Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846. There are notes on this line of cases in 15 Harv. L. Rev. 221, and 16 *id.* 311.

It was held in [1901] 1 Ch. 344, that where an agent makes a contract for the principal in the name of the principal, but claims no authority, there is no implied warranty, the rule being that the agent is liable on an implied warranty of authority only when the other party relied on the existence of authority in fact. In that case, Kekewich, J., points out that the modern rule of implied warranty laid down in Collen v. Wright, 8 El. & Bl. 647 (to which this case is a curious exception), that a person making a contract as agent, in the name of the principal, impliedly contracts that he has authority, and, if he has not, he is liable in an action on

such implied contract; overruling the opinion in Smout v. Ilberry, 10 M. & W. 12, which held that a professed agent for a named principal cannot be held personally liable without some sort of actual personal default.

Where the principal gives notice to the debtor not to pay money to the agent, unless the agent has a superior right, from a lien or otherwise, the amount of any payment afterwards made to the agent may be recovered by the principal from the debtor; Story, Ag. § 429; 4 Camp. 60; Corlies v. Cumming, 6 Cow. (N. Y.) 186. Money paid by an agent may also be recovered by the principal under any of the following circumstances: *first*, where the consideration fails; *second*, where money is paid by an agent through mistake; *third*, where money is illegally extorted from an agent in the course of his employment; *fourth*, where the money of the principal has been fraudulently applied by the agent to an illegal and prohibited purpose; Paley, Ag. 335. When goods are intrusted to an agent for a specific purpose, a delivery by him for a different purpose, or in a manner not authorized by the commission, passes no property in them, and they may, therefore, be reclaimed by the owner; Paley, Ag. 340; Peters v. Ballistier, 3 Pick. (Mass.) 495. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency. If both the agent and third person have been parties to the tort or injury, they are jointly as well as severally liable to the principal, and he may maintain an action against both or either of them. Story, Ag. § 436; 3 Maule & S. 562.

The Liabilities of the Principal to His Agent or to Third Persons—To the Agent. The liabilities of the principal to his agent are—to reimburse him all his advances, expenses, and disbursements lawfully incurred about the agency, and also to pay him interest upon such advances and disbursements whenever interest may fairly be presumed to have been stipulated for or to be due to the agent; Story, Ag. § 335; Paley, Ag. 107, 108; *second*, to pay him his commissions as agreed upon, or according to the usage of trade, except in cases of gratuitous agency; Story, Ag. § 324; *third*, to indemnify the agent when, without his own default, he has sustained damages in following the directions of his principal: for example, when the agent has innocently sold the goods of a third person, under the direction or authority of his principal, and a third person recovers damages against the agent, the latter will be entitled to reimbursement from the principal; Story, Ag. § 339; Greene v. Goddard, 9 Metc. (Mass.) 212.

To Third Persons. The principal is bound to fulfill all the engagements made by the agent for or in the name of the principal, which come within the scope of his usual employment, although the agent in the particular instance has in fact exceeded or violated his private instructions; Story, Ag. 443; Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Ruggles v. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; Sails v. Miller, 98 Mo. 478, 11 S. W. 970. See [1893] 1 Q. B. 346. And where an exclusive credit is not given to the agent, the principal is liable to third persons upon contracts made by his agent within the scope of his authority, although the agent contracts in his own name and does not disclose his agency; Story, Ag. § 446. But if the principal and agent are both known, and exclusive credit be given to the latter, the principal will not be liable though the agent should subsequently become insolvent; Story, Ag. § 447. When goods are sold to a person who in fact is the agent of another, but the seller has no knowledge of the agency, the latter may elect to make the principal his debtor on discovering him; Merrill v. Kenyon, 48 Conn. 314, 40 Am. Rep. 174; Benjamin v. Birmingham, 50 Ark. 433, 8 S. W. 183. The same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is; 9 B. & C. 78; Raymond v. Proprietors of C. & E. Mills, 2 Metc. (Mass.) 319. Where money is paid by a third person to the agent, by mistake or upon a consideration that has failed, the principal will be liable to repay it although he may never have received it from his agent; Story, Ag. § 451; Paley, Ag. 293; 2 Esp. 509.

A principal who accepts the benefits of a contract made on his behalf by his authorized agents is responsible for the fraudulent representation of the agent, although made without authority; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21; Continental Ins. Co. v. Ins. Co., 51 Fed. 884, 2 C. C. A. 535; and a person who has adopted a sale made by his agent, and receives the benefit of it, takes the sale with all the burdens created by false representations of the agent; Riser v. Walton, 78 Cal. 490, 21 Pac. 362; Albitz v. R. Co., 40 Minn. 476, 42 N. W. 394; Ehrsam v. Mahan, 52 Kan. 245, 34 Pac. 800; Akberg v. Brewing Co., 65 Hun 182, 19 N. Y. Supp. 956; and a principal must adopt the acts of his agents as a whole; Rogers v. Hardware Co., 24 Neb. 653, 39 N. W. 844; E. O. Stanard Mill. Co. v. Fowler, 46 La. Ann. 315, 15 South. 16. A ratification by a principal of an unauthorized contract made by his agent, relates back to the beginning of the transaction; Russ v. Telfener, 57 Fed. 973; and a principal having the right to disaffirm acts of an agent must do it promptly, and if not done within a reasonable time ratification will be presumed; Indianapolis Rolling Mill v. R. Co., 120 U. S. 256, 7 Sup.

Ct. 542, 30 L. Ed. 639. There can be no ratification by a principal of the acts of his agent, where he has no knowledge of such acts; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036; Beebe v. Life & E. Ass'n, 76 Ia. 129, 40 N. W. 122.

The principal is not, in general, liable to a criminal prosecution for the acts or misdeeds of his agent, unless he has authorized or co-operated in such acts or misdeeds; Story, Ag. § 452; 1 Mood. & M. 433. He is, however, civilly liable to third persons for the misfeasance, negligence, or omission of duty of his agent in the course of the agency, although he did not authorize or know of such misconduct, or even although he forbade it; Story, Ag. § 452; Hunter v. Machine Co., 20 Barb. (N. Y.) 507; Southwick v. Estes, 7 Cush. (Mass.) 385; Ewing v. Shaw, 83 Ala. 333, 3 South. 692; City Nat. Bank of Birmingham v. Dun, 51 Fed. 160; Halsell v. Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358; and he is liable for the injuries and wrongs of sub-agents who are retained by his direction, either express or implied; Story, Ag. § 454; 1 B. & P. 409. But the responsibility of the principal for the negligence or unlawful acts of his agent is limited to cases properly within the scope of the agency. Nor is he liable for the *wilful* acts of his agent whereby damage is occasioned to another, unless he originally commanded or subsequently assented to the act; Paley, Ag. 298, 299; Story, Ag. § 456; Inhabitants of Lowell v. R. R. Corp., 23 Pick. (Mass.) 25, 34 Am. Dec. 33; Church v. Mansfield, 20 Conn. 284. Strict compliance with the instructions of a principal by the agent is a condition of exemption of the agent from liability; Bank of British North America v. Cooper, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759.

There is a general presumption that an agent has disclosed to his principal all facts which come to his knowledge in the course of the agency, and this presumption remains in force so long as the agent acts within the scope of his employment in good faith for the interest of the principal; Duncan v. Jaudon, 15 Wall. (U. S.) 165, 21 L. Ed. 142; Humphreys v. Beneficial Ass'n, 139 Pa. 214, 20 Atl. 1047, 11 L. R. A. 564; Hyatt v. Clark, 118 N. Y. 563, 23 N. E. 891; but if he forms the purpose of dealing with the principal's property for his own benefit or that of some one else opposed in interest, his subsequent action based upon such purpose is considered to be in fraud of the rights of the principal, and the presumption no longer prevails; Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; Lamson v. Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822.

An interesting collection of cases illustrating the doctrine of the liability of the principal for the act of the agent is the subject of an annotation in 35 Am. L. Reg. N. S. 530, as to the authority of officers of corporations to employ physicians and nurses in cases of accident to employés or others. It has been held that the superintendent or general manager of a railroad company has the authority to employ a physician in such cases; Cincinnati, I., St. L. & C. R. Co. v. Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; Marquette & O. R. Co. v. Taft, 28 Mich. 289; L. R. 2 Ex. 228. Such employment was sustained in the case of any superior officer, where no higher one was present; as, a division superintendent; Union Pac. R. Co. v. Winterbotham, 52 Kan. 433, 34 Pac. 1052; a conductor; Louisville, N. A. & C. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320; Peninsular R. Co. v. Gary, 22 Fla. 356, 1 Am. St. Rep. 194; a master mechanic; Pacific R. Co. v. Thomas, 19 Kan. 256; a yard master; Marquette & O. R. Co. v. Taft, 28 Mich. 289; and a station agent; 3 Ex. 268. In any case the company will be bound if the employment be ratified by the superintendent; Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Pacific R. Co. v. Thomas, 19 Kan. 256. There is no inherent power in the general manager, but the question of his delegated authority is for the jury; Swazey v. Mfg. Co., 42 Conn. 556; Chaplin v. Freeland, 7 Ind. App. 676, 34 N. E. 1007; and so the authority of a superintendent and general manager of an electric light company, who was also a director, to bind the corporation by employing a nurse, was held a question for the jury; Hodges v. Light & Power Co., 109 Mich. 547, 67 N. W. 564.

Ordinarily a person authorized to deliver and delivering, the property of another to a common carrier for shipment, may by the latter be treated as having authority to stipulate for and accept the terms of affreightment, and, as against the carrier, the owner is bound by them; Jennings v. Ry. Co., 127 N. Y. 438, 28 N. E. 394; and where the managing editor of a newspaper contracted to hire a yacht for gathering news, having done the same thing before, his authority, either direct or indirect, is presumed; Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366.

Who may be Agent. Many persons disqualified from acting for themselves, such as infants; Brown v. Fire Ins. Co., 117 Mass. 479; persons attainted, or outlaws; aliens; Monsseaux v. Urquhart, 19 La. Ann. 482; see Washington University v. Finch, 18 Wall. (U. S.) 106, 21 L. Ed. 818; Robinson v. Life Assur. Soc., 42 N. Y. 54, 1 Am. Rep. 400; slaves, and others, could act as agents in the execution of a naked authority; Whart. Ag. § 14; Lyon v. Kent, 45 Ala. 656; Chastain v. Bowman, 1 Hill (S. C.) 270; Co. Litt. 252 *a*; Story, Ag. § 4. A *feme covert* may be the agent of her husband, and as such, with his consent, bind him by her con-

tract or other act; Miller v. Watt, 70 Ga. 385; Martin v. Rector, 101 N. Y. 77, 4 N. E. 183; Pullam v. State, 78 Ala. 31, 56 Am. Rep. 21; Rogers v. Roberts, 58 Md. 523; but she cannot contract for the sale of his land without express authority; Edwards v. Tyler, 141 Ill. 454, 31 N. E. 312; she may be the agent of another in a contract with her husband; Bacon, Abr. *Authority*, B; Pickering v. Pickering, 6 N. H. 124; Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532. But although she is in general competent to act as the agent of a third person; 7 Bingh. 565; Butler v. Price, 110 Mass. 97; Goodwin v. Kelly, 42 Barb. (N. Y.) 194; it is not clear that she can do so when her husband expressly dissents, particularly when he may be rendered liable for her acts; Story, Ag. § 7. The husband may be agent for the wife; Anderson v. Ames, 151 Mass. 11, 23 N. E. 577; Meyer v. Montgomery, 87 Mich. 278, 49 N. W. 616; Barnett v. Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; by virtue of his relations alone he has no implied power to act; Price v. Seydel, 46 Ia. 696; or a son may be the agent of his father; Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912. Persons *non compos mentis* cannot be agents for others; Whart. Ag. § 15 (but see Ewell's Evans, Agency *10; 4 Exch. 7; S. C. Ewell, Lead. Cas. on Disabilities 614; as to cases when one deals with a lunatic, not knowing of his lunacy; see, also, First Nat. Bank v. Hart, 55 Ill. 62; Wilder v. Weakley's Estate, 34 Ind. 181; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Gibson v. Soper, 6 Gray [Mass.] 279, 66 Am. Dec. 414; Henry v. Fine, 23 Ark. 417; Somers v. Pumphrey, 24 Ind. 258; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. L. 536; 4 Q. B. D. 661); nor can a person act as agent in a transaction where he has an adverse interest or employment; 11 Cl. & F. 714; Walker v. Palmer, 24 Ala. (N. S.) 358; Bentley v. Ins. Co., 19 Barb. (N. Y.) 595; Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 459; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528; and whenever the agent holds a fiduciary relation, he cannot contract with the same general binding force with his principal as when such a relation does not exist; 1 Story, Eq. Jur. §§ 308, 328; 4 M. & C. 134; Chamberlain v. Harrod, 5 Greenl. (Me.) 420; Copeland v. Ins. Co., 6 Pick. (Mass.) 198; Ringo v. Binns, 10 Pet. (U. S.) 269, 9 L. Ed. 420.

Extent of Authority. The authority of the agent, unless the contrary clearly appears, is presumed to include all the necessary and usual means of executing it with effect; 2 H. Bla. 618; Rogers v. Kneeland, 10 Wend. (N. Y.) 218; Peck v. Harriott, 6 S. & R. (Pa.) 146, 9 Am. Dec. 415; Denman v. Bloomer, 11 Ill. 177; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Hit-tuk-ho-Mi v. Watts, 7 Smedes & M. (Pa.) 363, 45 Am. Dec. 308; Goodale v. Wheeler, 11 N. H. 424; Bradford v. Bush, 10 Ala. 386; Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516; Benninghoff v. Ins. Co., 93 N. Y. 495. Where, however, the whole authority is conferred by a written instrument, its nature and extent must be ascertained from the instrument itself, and cannot be enlarged by parol evidence; 5 B. & Ald. 204; Schimmelpennich v. Bayard, 1 Pet. (U. S.) 264, 7 L. Ed. 138; State v. Bank, 45 Mo. 528; and parol evidence cannot be used to contradict the writing; Bish. Cont. § 169. As to the authority of joint agents, see *supra*.

Duties and Liabilities. The particular obligations of an agent vary according to the nature, terms, and end of his employment; 2 Ld. Raym. 917. He is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them; Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 Am. Dec. 555. When his authority is limited by instructions, it is his duty to adhere faithfully to those instructions; 3 B. & P. 75; Rundle v. Moore, 3 Johns. Cas. (N. Y.) 36; Wilson v. Wilson, 26 Pa. 394; Fowler v. Colt, 25 N. J. Eq. 202; Lee v. Clements, 48 Ga. 128; Brakeley v. Tuttle, 3 W. Va. 133; Thornton v. Boyden, 31 Ill. 200; but cases of extreme necessity and unforeseen emergency constitute exceptions to this rule; Forrestier v. Bordman, 1 Story 45, Fed. Cas. No. 4,945; Wilson v. Wilson, 26 Pa. 394; 4 Campb. 83; Milbank v. Dennistoun, 21 N. Y. 386; Goodwillie v. McCarthy, 45 Ill. 186; and where the agent is required to do an illegal or an immoral act; 6 C. Rob. Adm. 207; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468; Brown v. Howard, 14 Johns. (N. Y.) 119; Davis v. Barger, 57 Ind. 54; he may violate his instructions with impunity; Story, Ag. §§ 193, 194, 195. If he have no specific instructions, he must follow the accustomed course of the business; Burrill v. Phillips, 1 Gall. C. C. 360, Fed. Cas. No. 2,200. Where parties carry on business in name of another, they are justified in employing an attorney to defend a suit in the name of such person; Mason v. Taylor, 38 Minn. 32, 35 N. W. 474.

When the transaction may, with equal advantage to the principal, be done in two or more different ways, the agent may in general do it in either, provided a particular mode has not been prescribed to him; 1 Liverm. Ag. 103. He is to exercise the skill employed by persons of common capacity similarly engaged, and the same degree of diligence that persons of ordinary prudence are accustomed to use about their own affairs; Savage v. Birckhead, 20 Pick. (Mass.) 167; Harriman v. Stowe, 57 Mo. 93; Marsh v. Whitmore, 21 Wall. (U. S.) 178, 22 L. Ed. 482; New Orleans, J. & G. N. R. Co. v. All-

britton, 38 Miss. 242, 75 Am. Dec. 98; Stewart v. Parnell, 147 Pa. 523, 23 Atl. 838; 11 M. & W. 113; Whitney v. Martine, 88 N. Y. 535; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478; Phillips v. Moir, 69 Ill. 155. It is his duty to keep his principal informed of his doings, and to give him reasonable notice of whatever may be important to his interests; 5 M. & W. 527; Forrestier v. Bordman, 1 Story 43, 56, Fed. Cas. No. 4,945; Harvey v. Turner, 4 Rawle (Pa.) 229. He is also bound to keep regular accounts, and to render his accounts to his principal at all reasonable times, without concealment or overcharge; Haas v. Damon, 9 Ia. 589; Kerfoot v. Hyman, 52 Ill. 512; Clark v. Moody, 17 Mass. 145.

As to their principals, the liabilities of agents arise from a violation of duties and obligations to them by exceeding his authority, by misconduct, or by any negligence, omission, or act by the natural result or just consequence of which the principal sustains a loss; 1 B. & Ad. 415; 6 Hare 366; Rundell v. Kalbfus, 125 Pa. 123; 17 Atl. 238; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Whitney v. Martine, 88 N. Y. 535. And joint agents who have a common interest are liable for the misconduct and omissions of each other, in violation of their duty, although the business has, in fact, been wholly transacted by one with the knowledge of the principal, and it has been privately agreed between themselves that neither shall be liable for the acts or losses of the other; 7 Taunt. 403; Snelling v. Howard, 51 N. Y. 373.

One undertaking to settle a debt for another cannot purchase it on his own account; Albertson v. Fellows, 45 N. J. Eq. 306, 17 Atl. 816; and a sale by agent of principal's property to himself is void at the option of the principal; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; and a sale of land by agent to his wife is voidable; Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97.

An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission, and becomes indebted to his principal for any profit made by his breach of duty; McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312. The wilful default of the agent to keep and render true accounts operates as a forfeiture of his compensation; Sipley v. Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, and note citing cases, 112 Am. St. Rep. 309, 5 Ann. Cas. 611.

The degree of neglect which will make the agent responsible for damages varies according to the nature of the business and the relation in which he stands to his principal. The rule of the common law is, that where a person holds himself out as of a certain business, trade, or profession, and undertakes, whether gratuitously or otherwise, to perform an act which relates to his particular employment, an omission of the skill which belongs to his situation or profession is imputable to him as a fraud upon his employer; Paley, Ag. Lloyd ed. 7, *note* 4. But where his employment does not necessarily imply skill in the business he has undertaken, and he is to have no compensation for what he does, he will not be liable to an action if he act *bona fide* and to the best of his ability; 1 Liverm. Ag. 336, 339, 340. See 11 M. & W. 113.

As to third parties, generally, when a person having full authority is known to act merely for another, his acts and contracts will be deemed those of the principal only, and the agent will incur no personal responsibility; 2 Kent 629; Poll. Contr. 94; 3 P. Wms. 277; Mauri v. Heffernan, 13 Johns. (N. Y.) 58; Lehman v. Feld, 37 Fed. 852. But when an agent does an act without authority, or exceeds his authority, and the want of authority is unknown to the other party, the agent will be personally responsible to the person with whom he deals; Story, Ag. § 264; 2 Taunt. 385; Meech v. Smith, 7 Wend. (N. Y.) 315; Sumner v. Williams, 8 Mass. 178, 5 Am. Dec. 83. In case the agent conducts the business in his own name, for the benefit and with the property of the principal, the latter cannot escape liability for the purchase price of goods by a secret limitation on the agent's authority to purchase; Hubbard & Co. v. Ten Brook, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190. If the agent having original authority contract in the name of his principal, and it happen that at the time of the contract, unknown to both parties, his authority was revoked by the death of the principal, the agent will not be personally responsible; 10 M. & W. 1; but no notice of the death is necessary to relieve the estate of the principal from responsibility, those dealing with an agent assuming the risk that his authority may be terminated without notice to them; Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985.

An agent will be liable on a contract made with him when he expressly, or by implication, incurs a personal responsibility; Bell v. Teague, 85 Ala. 211, 3 South. 861; as, if he make an express warranty of title, and the like; or if, though known to act as agent, he give or accept a draft in his own name; 5 Taunt. 74; Com. v. Stow, 1 Mass. 54; Sharp v. Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554; Argersinger v. Macnaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Florida M. & G. R. Co. v. Varnedoe, 81 Ga.

175, 7 S. E. 129; and public as well as private agents may, by a personal engagement, render themselves personally liable; Paley, Ag. 381. If he makes a contract, signs a note, or accepts a draft as "agent," without disclosing his principal, he becomes personally liable unless the person with whom he is dealing has knowledge of the character and extent of the agency or the circumstances of the transaction are sufficient to inform him; 1 Am. L. C. 766, 767; Sharpe v. Bellis, 61 Pa. 69, 100 Am. Dec. 618; Hewes v. Andrews, 12 Colo. 161, 20 Pac. 338; Jones v. Johnson, 86 Ky. 530, 6 S. W. 582; Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Bartlett v. Raymond, 139 Mass. 275, 30 N. E. 91; Ye Seng Co. v. Corbitt, 9 Fed. 423. In general, although a person contract as agent, yet if there be no other responsible principal to whom resort can be had, he will be personally liable; as, if a man sign a note as "guardian of A. B.," an infant, in that case neither the infant nor his property will be liable, and the agent alone will be responsible; 2 Brod. & B. 460; Duvall v. Craig, 2 Wheat. (U. S.) 45, 4 L. Ed. 180; Bryson v. Lucas, 84 N. C. 680, 37 Am. Rep. 634. The fact that a person may sue an agent in a contract made with him does not prevent suit from being brought against principal when he is discovered; Hall v. White, 123 Pa. 95, 16 Atl. 521. The case of an agent of government, acting in that capacity for the public, is an exception to this rule, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation; it not being presumed that a public agent meant to bind himself individually; Paley, Ag. 376, 377; and see 5 B. & Ald. 34; Hodgson v. Dexter, 1 Cra. (U. S.) 345, 2 L. Ed. 130; Knight v. Clark, 48 N. J. L. 22, 2 Atl. 780, 57 Am. Rep. 534. Masters of ships, though known to contract for the owners of the ships and not for themselves, are liable for the contracts they make for repairs, unless they negative their responsibility by the express terms of the contract; Leonard v. Huntington, 15 Johns. (N. Y.) 298; James v. Bixby, 11 Mass. 34. As a general rule, the agent of a person resident in a foreign country is personally liable upon all contracts made by him for his employer, whether he describe himself in the contract as agent or not, this being the usage of trade, and it being presumed that the credit was given to him and not to his principal; L. R. 9 Q. B. 572; Miller v. Lea, 35 Md. 396, 6 Am. Dec. 417; Kirkpatrick v. Stainer, 22 Wend. (N. Y.) 244; Rogers v. Marsh, 33 Me. 106; In re Merrick's Estate, 5 W. & S. (Pa.) 9; but this presumption may be rebutted by proof of a contrary agreement; 11 Ad. & E. 589, 594, 595; and does not apply to agents in a different state within the United States; Vawter v. Baker, 23 Ind. 63. An agent for a foreign principal now stands upon the same grounds as those acting for domestic employers; Oelricks v. Ford, 23 How. (U. S.) 49, 16 L. Ed. 534; L. R. 9 Q. B. 572.

An agent is personally responsible where money has been paid to him for the use of his principal under such circumstances that the party paying it becomes entitled to recall it. In such cases, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal *fresh credit* upon the faith of it, it may be recovered from the agent; 3 M. & S. 344; Hearsey v. Pruyn, 7 Johns. (N. Y.) 179; and if, in receiving the money, the agent was a wrong-doer, he will not be exempted from liability by payment to his principal; 1 Campb. 396. If his principal was not entitled to it, but the agent pays it to him after notice not to do so, the agent is liable therefor; Carter v. Stork, 63 Hun 636, 18 N. Y. Supp. 470.

With regard to the liability of agents to third persons for torts, there is a distinction between acts of misfeasance or positive wrongs, and nonfeasances or mere omissions of duty. In the former case, the agent is personally liable to third persons, although authorized by his principal; 1 B. & P. 410; Clark v. Lovering, 37 Minn. 120, 33 N. W. 776; Berghoff v. McDonald, 87 Ind. 549; Crane v. Onderdonk, 67 Barb. (N. Y.) 47; Weber v. Weber, 47 Mich. 569, 11 N. W. 389; Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Reed v. Peterson, 91 Ill. 297; but see Ewing v. Shaw, 83 Ala. 333; while in the latter he is, in general, solely liable to his principal; Story, Ag. § 308; Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456; Carey v. Rochereau, 16 Fed. 87; Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503.

A principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his *general* agent, though personally innocent of the fraud; Robinson v. Walton, 58 Mo. 380; Jewett v. Carter, 132 Mass. 335; Witherwax v. Riddle, 121 Ill. 140, 13 N. E. 545; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940.

But this rule does not apply to *special* agents; Rice v. Sanders, 152 Mass. 112, 24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804. If a special agent makes false representations on the subject of the transaction in order to influence the other party to enter into the contract, the principal is responsible for the deceit; Sandford v. Handy, 23 Wend. (N. Y.) 260; Webb's Poll. Torts 383.

Where the principal receives and retains the benefit of a contract obtained through the fraud of his agent, he is liable to an action for deceit; Mundorff v. Wickersham, 63 Pa. 87, 3 Am. Rep. 531.

For an independent fraud by an agent not within the scope of his agency, the princi-

pal is not responsible; Webb's Poll. Torts 384, citing Fellows v. Com'rs, 36 Barb. (N. Y.) 655.

As to misrepresentations by an agent, the rules are thus given in Poll. Torts 384: Where the principal knows the representation to be false and authorizes the making of it, he is clearly liable; the agent is liable or not according as he does or does not himself believe the representation to be true. Where the principal knows the contrary of the representation to be true and it is made by the agent in the general course of his employment, but without specific authority, if the agent does not believe his representation to be true, he commits a fraud in the interest of the principal and the principal is liable; 6 M. & W. 373. If the agent does believe the representation to be true, an action would probably lie against the principal; though see 14 App. Ca. 337. In the latter class of cases there is no doubt that the other contracting party may rescind; Poll. Torts 384. See DECEIT.

The principal and agent are both liable where a tortious act was committed by the agent; Block v. Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Rights and Privileges. As to his principal, an agent is ordinarily entitled to compensation for his services, commonly called a commission, which is regulated either by special agreement, by the usage of trade, or by the presumed intention of the parties; 8 Bingh. 65; Martin v. Roberts, 36 Fed. 217. In general, he must have faithfully performed the whole service or duty before he can claim any commissions; 1 C. & P. 384; Sea v. Carpenter, 16 Ohio, 412. The right to commissions accrues on orders for the sale of articles where there is absence of warranty as to responsibility of parties giving the orders, when they are accepted and the goods forwarded; Steinbach v. Carriage Co., 37 Fed. 760. The right to commissions accrues where the agent has a purchaser who accepts property and is ready to perform a contract of sale, although the principal refuse to be bound by authority of agent; Witherell v. Murphy, 147 Mass. 417, 18 N. E. 215; Flood v. Leonard, 44 Ill. App. 113. Also if vendor releases the purchaser from his obligation; Granger v. Griffin, 43 Ill. App. 421. He may forfeit his right to commissions by gross unskilfulness, by gross negligence, or gross misconduct, in the course of his agency; 3 Campb. 451; Dodge v. Tileston, 12 Pick. (Mass.) 328; as, by not keeping regular accounts; 8 Ves. 48; Clark v. Moody, 17 Mass. 145; by violating his instructions; by wilfully confounding his own property with that of his principal; 5 B. & P. 136; Woodward v. Suydam, 11 Ohio, 363; by fraudulently misapplying the funds of his principal; Chit. Com. L. 222; by embarking the property in illegal transactions; or by doing anything which amounts to a betrayal of his trust; Segar v. Parrish, 20 Gratt. (Va.) 672; Vennum v. Gregory, 21 Ia. 326; L. R. 9 Q. B. 480; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168; Kerfoot v. Hyman, 52 Ill. 512; Jones v. Hoyt, 25 Conn. 386; Hobson v. Peake, 44 La. Ann. 383, 10 South. 762.

See REAL ESTATE BROKER.

The agent has a right to be reimbursed his advances, expenses, and disbursements reasonably and in good faith incurred and paid, without any default on his part, in the course of the agency; 5 B. & C. 141; Warren v. Hewitt, 45 Ga. 501; Maitland v. Martin, 86 Pa. 120; Searing v. Butler, 69 Ill. 575. And also to be paid interest on such advancements and disbursements whenever it may fairly be presumed to have been stipulated for, or to be due to him; 3 Campb. 467; Meech v. Smith, 7 Wend. (N. Y.) 315; Delaware Ins. Co. v. Delaunie, 3 Binn. (Pa.) 295. But he cannot recover for advances and disbursements made in the prosecution of an illegal transaction, though sanctioned by or even undertaken at the request of his principal; 3 B. & C. 639; Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; and he may forfeit all remedy against his principal even for his advances and disbursements made in the course of legal transactions by his own gross negligence, fraud, or misconduct; Williams v. Littlefield, 12 Wend. (N. Y.) 362; Dodge v. Tileston, 12 Pick. (Mass.) 328; Godman v. Meixsel, 65 Ind. 32; nor will he be entitled to be reimbursed his expenses after he has notice that his authority has been revoked; 2 Term 113; 3 Brown, Ch. 314.

The agent may enforce the payment of a debt due him from his principal on account of the agency, either by an action at law or by a bill in equity, according to the nature of the case; and he may also have the benefit of his claim by way of set-off to an action of his principal against him, provided the claim is not for uncertain damages, and is in other respects of such a nature as to be the subject of a set-off; 4 Burr. 2133; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Beckwith v. Sibley, 11 Pick. (Mass.) 482. He may recover actual damages sustained in an action brought at the end of the term for breach of contract; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Richardson v. Machine Works, 78 Ind. 422, 41 Am. Rep. 584; 15 Ad. & El. N. S. 576; James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821. He has also a lien for all his necessary commissions, expenditures, advances, and services in and about the property intrusted to his agency, which right is in many respects analogous to the right of set-off; Wilson v. Martin, 40 N. H. 88; Lovett v. Brown, 40 N. H. 511; United States Exp. Co. v. Haines, 67 Ill. 139; Nevan v. Roup, 8 Ia. 211; but it is only a *particular* lien; Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. Dec.

41; 8 H. L. Cas. 838; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291; Nevan v. Roup, 8 Ia. 207; Farrington v. Meek, 30 Mo. 581, 77 Am. Dec. 627; Mathias v. Sellers, 86 Pa. 486, 27 Am. Rep. 723. Factors have a *general* lien upon the goods of their principal in their possession, and upon the price of such as have been lawfully sold by them, and the securities given therefor; 2 Kent 640; McGraft v. Rugee, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378; Weed v. Adams, 37 Conn. 378; Eaton v. Truesdail, 52 Ill. 307. There are other cases in which a general lien exists in regard to particular classes of agents, either from usage, from a special agreement of the parties, or from the peculiar habit of dealing between them: such, for example, as insurance brokers, bankers, common carriers, attorneys-at-law, and solicitors in equity, packers, calico-printers, fullers, dyers, and wharfingers; Story, Ag. §§ 379–384. See LIEN.

As to third persons, in general, a mere agent who has no beneficial interest in a contract which he has made on behalf of his principal cannot support an action thereon; Baltimore & P. Steamboat Co. v. Atkins, 22 Pa. 522. An agent acquires a right to maintain an action upon a contract against third persons in the following cases: *First*, when the contract is in writing, and made expressly with the agent, and imports to be a contract personally with him; as, for example, when a promissory note is given to the agent, as such, for the benefit of the principal, and the promise is to pay the money to the agent *eo nomine;* in such case the agent is the legal plaintiff, and alone can bring an action; Dicey, Parties 134; Druckenmiller v. Young, 27 Pa. 97; Borrowscale v. Bosworth, 99 Mass. 378; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835; L. R. 6 Q. B. 361; and it has been held that the right of the agent in such case to sue in his own name is not confined to an express contract; thus, it has been said that one holding, as mere agent, a bill of exchange, or promissory note, indorsed in blank, or a check or note payable to bearer, may yet sue on it in his own name; Goodman & Mitchell v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pierce v. Robie, 39 Me. 205, 63 Am. Dec. 614; Buffum v. Chadwick, 8 Mass. 103. *Second*, the agent may maintain an action against third persons on contracts made with them, whenever he is the only known and ostensible principal, and consequently, in contemplation of law, the real contracting party; Story, Ag. § 393; Dicey, Parties 136–138; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; 5 B. & Ad. 389; as, if an agent sell goods of his principal in his own name, as though he were the owner, he is entitled to sue the buyer in his own name; Beebee v. Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; 5 M. & S. 833; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; 4 Bing. 2; and, on the other hand, if he so buy, he may enforce the contract by action. The renunciation of the agent's contract by the principal does not necessarily preclude the agent from maintaining an action, but he will still be entitled to sue the party with whom he has contracted for any damages which he may have sustained by reason of a breach of contract by the latter; 2 B. & Ald. 962. *Third*, the right of the agent to sue in his own name exists when, by the usage of trade or the general course of business, he is authorized to act as owner, or as a principal contracting party, although his character as agent is known; Story, Ag. § 393. *Fourth*, where the agent has made a contract in the subject-matter of which he has a special interest or property, he may enforce his contract by action, whether he held himself out at the time to be acting in his own behalf or not; Story, Ag. § 393; Bryan v. Wilson, 27 Ala. 215; Dicey, Parties 139; Baltimore & P. Steamboat Co. v. Atkins & Co., 22 Pa. 522; Porter v. Raymond, 53 N. H. 519; Morrill v. De la Granja, 99 Mass. 383; for example, an auctioneer who sells the goods of another may maintain an action for the price, though the sale be on the premises of the owner of the goods, because the auctioneer has a possession coupled with an interest; 1 H. Bla. 81, 84, 85. But this right of the agent to bring an action in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent; 5 M. & Sel. 385; Morrill v. De la Granja, 99 Mass. 383; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835.

An agent may maintain an action of trespass or trover against third persons for injuries affecting the possession of his principal's property; and when he has been induced by the fraud of a third person to sell or buy goods for his principal, and he has sustained a personal loss, he may maintain an action against such third person for such wrongful act, deceit, or fraud; Story, Ag. §§ 414, 415; 9 B. & C. 208; 3 Campb. 320; 1 B. & Ald. 59. But his remedy for mere torts is confined to cases like the foregoing, where his "right of possession is injuriously invaded, or where he incurs a personal responsibility, or loss, or damage in consequence of the tort"; Story, Ag. § 416.

Gifts procured by agents and purchases made by them from their principals should be scrutinized with vigilant and close scrutiny; Ralston v. Turpin, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747.

Sub-agents. A mere agent cannot, generally, appoint a sub-agent, so as to render the latter directly responsible to the principal; 9 Co. 75; 2 M. & S. 298, 301; Appeal of Locke,

72 Pa. 491, 13 Am. Rep. 716; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Warner v. Martin, 11 How. (U. S.) 209, 13 L. Ed. 667; Gillis v. Bailey, 21 N. H. 149; Connor v. Parker, 114 Mass. 331; but may when such is the usage of trade or is understood by the parties to be the mode in which the particular business might be done; 1 M. & S. 484; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; Bodine v. Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Inhabitants of Buckland v. Inhabitants of Conway, 16 Mass. 396; Smith v. Sublett, 28 Tex. 163; or when necessity requires it; Dorchester & Milton Bank v. Bank, 1 Cush. (Mass.) 177; Johnson v. Cunningham, 1 Ala. 249; Gray v. Murray, 3 Johns. Ch. (N. Y.) 167; and also if agent is given all the powers the principal might have exercised; Meyer v. Montgomery, 87 Mich. 278, 49 N. W. 616; but not if the agency is of such a nature as to be personal to the agent; Drum v. Harrison, 83 Ala. 384, 3 South. 715; or if it requires special skill, discretion, or judgment; Emerson v. Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Planters' & Farmers' Nat. Bank v. Bank, 75 N. C. 534; Pendall v. Rench, 4 McLean 259, Fed. Cas. No. 10,917. But the power to appoint a sub-agent may be implied, either from the terms of the original authority, from the ordinary custom of trade, or from the fact that it is indispensable in order to accomplish the end; Davis v. King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104.

A sub-agent is generally invested with the same rights, and incurs the same liabilities in regard to his immediate employers, as if the latter were the real principal. To this general rule there are some exceptions: for example, where, by the general usage of trade or the agreement of the parties, sub-agents are ordinarily or necessarily employed to accomplish the ends of the agency, there, if the agency is avowed and the credit is exclusively given to the principal, the intermediate agent may be entirely exempted from all liability to the sub-agent. The agent, however, will be liable to the sub-agent unless such exclusive credit has been given, although the real principal or superior may also be liable; Story, Ag. § 386. When the agent employs a sub-agent to do the whole or any part of the business of the agency, without the knowledge or consent of his principal, either express or implied, the latter will only be entitled to recover from his immediate employer, and his sole responsibility is also to him. In this case the superior or real principal is not responsible to the sub-agent, because there is no privity between them; Story, Ag. §§ 13, 217, 387.

Where, by an express or implied agreement of the parties, or by the usages of trade, a sub-agent is to be employed, a privity exists between the principal and the sub-agent, and the latter may justly maintain his claim for compensation both against the principal and his immediate employer, unless exclusive credit is given to one of them; and in that case his remedy is limited to that party; Mech. Ag. 690; 6 Taunt. 147.

A sub-agent employed without the knowledge or consent of the principal has his remedy against his immediate employer only, with regard to whom he will have the same rights, obligations, and duties as if the agent were the sole principal. But where sub-agents are ordinarily or necessarily employed in the business of the agency, the sub-agent can maintain his claim for compensation both against the principal and the immediate employer, unless the agency be avowed and exclusive credit be given to the principal, in which case his remedy will be limited to the principal; Dubois v. Canal Co., 4 Wend. (N. Y.) 285; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469.

A sub-agent will be clothed with a lien against the principal for services performed and disbursements made by him on account of the sub-agency, whenever a privity exists between them; Story, Ag. § 388; 2 Campb. 218, 597; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291. If he is appointed without the express or implied authority of the principal he can acquire no lien; 4 Campb. 348. He will acquire a lien against the principal if the latter ratifies his acts, or seeks to avail himself of the proceeds of the sub-agency, though employed by the agent without the knowledge or consent of the principal; 2 Campb. 218, 597, 598; 4 *id.* 348, 353; McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291. He may avail himself of his general lien against the principal by way of substitution to the rights of his immediate employer to the extent of the lien of the latter; 2 M. & S. 298. And there are cases in which a sub-agent who has no knowledge or reason to believe that his immediate employer is acting as an agent for another will have a lien on the property for his general balance; Story, Ag. § 390; 4 Campb. 60, 349, 353.

Where the *sub-agents* are appointed, if the agent has either express or implied authority to appoint a sub-agent, he will not ordinarily be responsible for the acts or omissions of the substitute; 2 B. & P. 438; Waite v. Leggett, 8 Cow. (N. Y.) 198, 18 Am. Dec. 441 (but only for negligence in choosing the substitute; Whart. Negl. § 277; Mechem, Ag. § 197); and this is especially true of public officers; 15 East 384; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206; M'Millan v. Eastman,

4 Mass. 378; Schroyer v. Lynch, 8 Watts (Pa.) 455; but the sub-agent will himself be directly responsible to the principal for his own negligence or misconduct; Taber v. Perrot, 2 Gall. C. C. 565, Fed. Cas. No. 13,721; Waite v. Leggett, 8 Cow. (N. Y.) 198, 18 Am. Dec. 441.

Termination of the Agency. In general, an authority is revocable from its nature, unless it is given for a valuable consideration, or is part of a security, or coupled with an interest; Story, Ag. § 476; 2 Kent 643; Kent v. Kent, 2 Mass. 342; Barr v. Schroeder, 32 Cal. 609; Chambers v. Seay, 73 Ala. 372; Attrill v. Patterson, 58 Md. 226. "By the phrase 'coupled with an interest' (used with reference to a power of attorney) is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate;" quoted from Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589, in Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116.

An authority to sell on commission is not coupled with an interest but is revocable; Chambers v. Seay, 73 Ala. 372; Walker v. Denison, 86 Ill. 142; Blackstone v. Buttermore, 53 Pa. 266; and the fact that an authority is expressed as being irrevocable will not make it so; Walker v. Denison, 86 Ill. 142; Blackstone v. Buttermore, 53 Pa. 266; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Attrill v. Patterson, 58 Md. 226. It may generally be revoked at any moment before the actual exercise of it; Story, Ag. §§ 463, 465; and although the agent is appointed under seal, it has been held that his authority may be revoked by parol; Story, Ag. § 463; Copeland v. Ins. Co., 6 Pick. (Mass.) 198. The revocation may be express, as by the direct countermand of the principal, or it may be implied. The death of the principal determines the authority; Davis v. Bank, 46 Vt. 728; Saltmarsh v. Smith, 32 Ala. 404; Johnson v. Wilcox, 25 Ind. 182.

The authority may be renounced by the agent before any part of it is executed, or when it is in part executed; but in either case, if the agency is founded on a valuable consideration, the agent, by renouncing it, makes himself liable for the damages which his principal may sustain thereby; Story, Ag. § 478; Story, Bailm. § 202. If by the express terms of the commission the authority of the agent be limited to a certain period, it will manifestly cease so soon as that period has expired. The authority of the agent is *ipso facto* determined by the completion of the purpose for which it was given. If the agency is indefinite in duration, the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal; Barrows v. Cushway, 37 Mich. 481; Coffin v. Landis, 46 Pa. 426.

The *termination of the agency* may be by a countermand of authority on the part of the principal, at the mere will of the principal; and this countermand may, in general, be effected at any time before the contract is completed; Story, Ag. §§ 463, 465; Barr v. Reitz, 53 Pa. 256; Whart. Ag. § 94; Willcox & Gibbs Sewing Mach. Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882; even though in terms irrevocable, provided there is no valid consideration, and the agent has not an interest in the execution of the authority entrusted to him; Story, Ag. §§ 476, 477; but when a contract has been made with contingent compensation for agency it cannot be revoked; Warren Chemical & Mfg. Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788. But when the authority or power is coupled with an interest, or when it is given for a valuable consideration, or when it is a part of a security, then, unless there is an express stipulation that it shall be revocable, it cannot be revoked; Story, Ag. §§ 476, 477; 2 Kent 643, 644; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Hutchins v. Hebbard, 34 N. Y. 24; Hartley, Appeal of, 53 Pa. 212, 91 Am. Dec. 207; Oregon & W. M. Sav. Bk. v. Mortg. Co., 35 Fed. 22. When the authority has been partially executed by the agent, if it admit of severance, or of being revoked as to the part which is unexecuted, it may be revoked as to that part; but if it be not thus severable, and the agent by its execution in part will sustain damage, it cannot be revoked as to the unexecuted part unless the agent be fully indemnified; Story, Ag. § 466. This revocation may be by a formal declaration publicly made known, by an informal writing, or by parol; or it may be implied from circumstances, as, if another person be appointed to do the same act; Story, Ag. § 474; Morgan v. Stell, 5 Binn. (Pa.) 305; Copeland v. Ins. Co., 6 Pick. (Mass.) 198.

Though the agent hold a power of attorney under seal which may be revoked by parol; Brookshire v. Brookshire, 30 N. C. 74, 47 Am. Dec. 341. It takes effect from the time it is made known, and not before, both as regards the agent and third persons; Story, Ag. § 470; 2 Kent 644; Poll. Contr. 93; Beard v. Kirk, 11 N. H. 397; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339; Fellows v. Steamboat Co., 38 Conn. 197. When one is not notified of revocation of agent's authority, he is justified in acting upon the presumption of its continuance; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; Quinn v. Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; Smith v. Watson, 82 Va. 712, 1 S. E. 96.

The determination may be by the *renunciation* of the agent either before or after a part of the authority is executed; Story, Ag. § 478; it should be observed, however, that if the renunciation be made after the authority has been partly executed, the

agent by renouncing it becomes liable for the damages which may thereby be sustained by his principal; Story, Ag. § 478; Jones, Bailm. 101; Thorne v. Deas, 4 Johns. (N. Y.) 84; or by *operation of law*, in various ways. And the agency may terminate by the expiration of the period during which it was to exist and to have effect; as, if an agency be created to endure a year, or until the happening of a contingency, it becomes extinct at the end of the year, or on the happening of the contingency; Story, Ag. § 480.

The determination may result from the *marriage* of a principal, if a *feme sole;* Brown v. Miller, 46 Mo. App. 1; the *insanity* of the principal; Davis v. Lane, 10 N. H. 156; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; his bankruptcy; Story, Ag. § 482; 16 East 382; Baldw. C. C. 38; or death of the principal which usually revokes the authority to act for him or for his estate; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232. Where an agent by the sudden death of his principal without known heirs is left in sole charge of his principal's estate, he is entitled to compensation for services in connection with the estate until the persons entitled to the property are found and their rights established in the orphans' court; In re Bryant's Estate, 180 Pa. 192, 36 Atl. 738.

As to revocation of agency by *death*, see 14 Harv. L. Rev. 562. In England and most of the States this revocation is instantaneous, even as to third parties without notice; L. R. 4 C. P. 744; Turnan v. Temke, 84 Ill. 286; 10 M. & W. 1; Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194; Scruggs v. Driver's Ex'rs, 31 Ala. 274; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274.

No Notice Required. No notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent has entered with third persons, who are ignorant of principal's death; Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985; if an order is sent by mail the day before principal died and is filled in ignorance of the death, the contract is binding as of the date on which the order was mailed; Davis v. Davis, 93 Ala. 173, 9 South. 736; but notice is necessary in Pennsylvania, Missouri, and, in some cases, in Ohio; Cassiday v. McKenzie, 4 W. & S. (Pa.) 282, 39 Am. Dec. 76; Carriger's Adm'r v. Whittington's Adm'r, 26 Mo. 313, 72 Am. Dec. 212; Ish v. Crane, 8 Ohio St. 520; and under the civil law; Whart. Ag. § 101; *but death* does not revoke when the authority is coupled with an interest; Blackstone v. Buttermore, 53 Pa. 266; 4 Campb. 325; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; or from the *insanity;* Story, Ag. § 487; *bankruptcy;* 5 B. & Ald. 27, 31; or *death* of the agent; 2 Kent 643; though not necessarily by *marriage* or *bankruptcy;* Story, Ag. §§ 485, 486; 3 Burr. 1471; from *the extinction* of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust; Story, Ag. 499.

As to revocation by *lunacy* of principal, see 4 Q. B. D. 661; s. c. 19 Am. L. Reg. 106, with Judge Bennett's note reviewing cases. As to revocation by *death* of principal, see *id.* 401.

PRINCIPAL CHALLENGE. See CHALLENGE.

PRINCIPAL CONTRACT. One entered into by both parties on their own account or in the several qualities they assume.

PRINCIPAL OBLIGATION. That obligation which arises from the principal object of the engagement which has been contracted between the parties. It differs from an accessory obligation. For example, in the sale of a horse, the principal obligation of the seller is to deliver the horse; the obligation to take care of him till delivered is an accessory engagement. Pothier, Obl. n. 182. By principal obligation is also understood the engagement of one who becomes bound for himself, and not for the benefit of another. Pothier, Obl. n. 186.

PRINCIPAL PLACE OF BUSINESS. See FOREIGN CORPORATIONS.

PRINCIPLES. By this term is understood truths or propositions so clear that they cannot be proved nor contradicted unless by propositions which are still clearer.

That which constitutes the essence of a body or its constituent parts. 8 Term 107. See Parker v. Stiles, 5 McLean 63, Fed. Cas. No. 10,749; PATENT.

They are of two kinds: one when the principle is universal, and these are known as axioms or maxims: as, *no one can transmit rights which he has not; the accessory follows the principal,* etc. The other class are simply called first principles. These principles have known marks by which they may always be recognized. Those are—*first,* that they are so clear that they cannot be proved by anterior and more manifest truths; *second,* that they are almost universally received; *third,* that they are so strongly impressed on our minds that we conform ourselves to them whatever may be our avowed opinions.

First principles have their source in the sentiment of our own existence, and that which is in the nature of things. A principle of law is a rule or axiom which is founded in the nature of the subject, and it exists before it is expressed in the form of a rule. Domat, *Lois Civiles,* liv. prél. t. 1, s. 2; Toullier, tit. prél. n. 17. *The right to defend one's self continues as long as an unjust attack,* was a principle before it was ever decided by a court: so that a

court does not *establish* but *recognizes* principles of law.

PRINT. The word includes most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface. Arthur v. Moller, 97 U. S. 367, 24 L. Ed. 1046; U. S. v. Harman, 38 Fed. 829.

PRINTED FORMS. A court in construing a contract will look at what was originally the printed form and at what was introduced in writing to alter that printed form; 2 C. & M. 539. Words written in a printed form, such as an insurance policy, will in case of doubt have a greater effect than the printed words; 22 Q. B. D. 501.

See INTERPRETATION.

PRINTING. The art of impressing letters; the art of making books or papers by impressing legible characters.

In patent cases in the circuit court, the taxable costs do not include expenditures for printing, charts, models, exhibits, printed records, briefs, copies of testimony, and the like; Kelly v. R. Co., 83 Fed. 183; but the practice varies in different circuits.

See LIBEL; LIBERTY OF THE PRESS; PRESS.

PRIORITY. Precedence; going before.

He who has the precedency in time has the advantage in right, is the maxim of the law; not that time, considered barely in itself, can make any such difference, but because, the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards; 1 Fonbl. Eq. 320.

In the payment of debts, the United States is entitled to priority when the debtor is insolvent or dies and leaves an insolvent estate. The priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding or absent debtor, on which an act of legal bankruptcy had been committed; 1 Kent 243.

Among common creditors, he who has the oldest lien has the preference,—it being a maxim both of law and equity, *qui prior est tempore potior est jure;* Berry v. Ins. Co., 2 Johns. Ch. (N. Y.) 608. See INSOLVENCY.

But in respect to privileged debts, arising *ex contractu*, existing against a ship or vessel under the general admiralty law, the order of priority is most generally that of the inverse order of their creation,—thus reversing the order of priority generally adopted in the courts of common law. The ground of this inversion of the rule is that the services performed at the latest hour are more efficacious in bringing the vessel and her freightage to their final destination. Each foregoing incumbrance is, therefore, actually benefited by means of the succeeding incumbrance; 16 Bost. Law Rep. 1, 264; 17 *id.* 421. See MARITIME LIENS; ASSETS; LIEN.

PRISAGE. An ancient duty or right of the crown of one-tenth of the amount of wine carried by the ships of merchants, aliens, or denizens. 3 Bulstr. 1.

PRISEL EN AUTER LIEU. A taking in another place. A plea in abatement to a writ of replevin.

PRISON. A public building for confining persons, either to insure their production, in court, as accused persons and witnesses, or to punish them as criminals.

The root is French, as is shown by the Norman *prisons*, prisoners; Kelham, Norm. Fr. Dict.; and Fr. *prisons*, prisons. Britton, c. 11, *de Prisons*. Originally it was distinguished from gaol, which was a place for confinement, not for punishment. See Jacob, Dict. *Gaol*. But at present there is no such distinction.

The United States has no prisons. The joint resolution of September 3, 1789, recommended to the states to authorize state prisons to receive United States prisoners, the latter paying the states for the service. In the absence of a state prison, the marshal, under the jurisdiction of the district judge, may procure a suitable place. See R. S. § 5537, 5539; Randolph v. Donaldson, 9 Cra. (U. S.) 76, 3 L. Ed. 662. A federal prisoner may be incarcerated in any of the jails of the district; Johnson v. Crawford, 154 Fed. 761.

See PENITENTIARY; GAOL; PRISONER; DETAINER; RULES.

PRISON BREAKING, or BREACH. The act by which a prisoner, by force and violence, escapes from a place where he is lawfully in custody. This is an offence at common law. This offence is to be distinguished from rescue (*q. v.*), which is a deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. L. § 1065.

To constitute this offence there must be —a *lawful commitment* of the prisoner on criminal process; Co. 2d Inst. 589; 1 Carr. & M. 295; Com. v. Miller, 2 Ashm. (Pa.) 61; see In re Edwards, 43 N. J. L. 555, 39 Am. Rep. 610; an *actual breach* with force and violence of the prison, by the prisoner himself, or by others with his privity and procurement; Russ. & R. 458; *the prisoner must escape;* 2 Hawk. Pl. Cr. c. 18, s. 12. See 1 Hale, Pl. Cr. 607; 4 Bla. Com. 130; Co. 2d Inst. 500; People v. Duell, 3 Johns. (N. Y.) 449; Com. v. Briggs, 5 Metc. (Mass.) 559.

A convict who has been made a "trusty" and was not confined within the prison walls is guilty of an escape if he leaves the state; Jenks v. State, 63 Ark. 312, 39 S. W. 361; and so is one who flees from the custody of a jailer while being worked on a highway; Saylor v. Com., 122 Ky. 776, 93 S. W. 48; Johnson v. State, 122 Ga. 172, 50 S. E. 65; *contra*, State v. King, 114 Ia. 413, 87 N. W.

282, 54 L. R. A. 853, 89 Am. St. Rep. 371, where it was held that a convict who had concealed himself in a crevice of rock in a quarry, and thereby escaped, was not guilty of breaking prison because no force was used. One may be guilty of escape after sentence and before commitment; Com. v. Briggs, 5 Metc. (Mass.) 559. It is no defense to a prosecution for escape if the defendant left a chain-gang to avoid unmerited punishment; Johnson v. State, 122 Ga. 172, 50 S. E. 65. A sheriff is not excused for a negligent escape by merely using care in keeping the prisoner; State v. Mullen, 50 Ind. 598.

See BREACH OF PRISON; ESCAPE.

PRISON LABOR. In most of the states prisoners convicted of crime are sentenced to hard labor, and in the constitution of the United States and of several of the states, the right to require the services of prisoners is secured by the exception of cases of punishment for crime from the provisions which abolish involuntary servitude.

In some states convict labor is farmed out to contractors, who thereby acquire a right in the prison and its inmates where the former is leased. The state, in order to resume its possession, must compensate the lessee as in other cases of taking private property; People v. Brooks, 16 Cal. 11. The right of the lessee, however, is subject to the pardoning power; State v. McCauley, 15 Cal. 429; and to the legislative power to modify and control the punishment: *id.;* Hancock v. Ewing, 55 Mo. 101. A contract by the warden of a penitentiary for the hire of convicts is substantially a contract by the state, and a bill for the specific performance of it will not lie; Comer v. Bankhead, 70 Ala. 493; Jones v. Lynds, 7 Paige (N. Y.) 301.

In some states the sale or lease of convict labor is forbidden by constitution or statute, is unlawful, unless authorized by the court before which the prisoner has been tried, and this authority cannot be given at a term other than that at which the prisoner was convicted; State v. Pearson, 100 N. C. 414, 6 S. E. 387.

As the result of labor agitation there have been attempts by legislation to forbid or regulate strictly the sale of convict-made goods. The Ohio act of May 19, 1894, forbidding any person to sell without license convict-made goods, was held unconstitutional; Arnold v. Yanders, 56 Ohio St. 417, 47 N. E. 50, 60 Am. St. Rep. 753.

An act prohibiting the use of machinery for manufacturing goods in any penal institutions of the state was held to forbid the use of machinery within the walls of prisons, even though operated by free workmen; Kempf v. Francies, 238 Pa. 320, 86 Atl. 190.

See PRISONER; HARD LABOR.

In England, by 60 & 61 Vict. c. 63, the importation of foreign prison-made goods is absolutely prohibited.

A convict may recover for injuries inflicted on him by a railroad company by negligence, where he has been hired out to the company and is under the orders of a state officer; San Antonio & A. P. R. Co. v. Gonzales, 31 Tex. Civ. App. 321, 72 S. W. 213. Where a convict was hired to a corporation, a servant of which wrongfully caused him to be whipped, the corporation is liable for the assault; Sloss-Sheffield S. & I. Co. v. Dickinson, 167 Ala. 211, 52 South. 594. Lessees of convicts are not liable to a convict for injuries due to the wrongful act of a guard or the negligence of a sub-lessee; Mason v. Hamby, 6 Ga. App. 131, 64 S. E. 569.

An act authorizing the keeper of a prison to make contracts for the labor of the prisoners does not give him power to make a contract binding upon the state beyond his term of office; Trask v. State, 32 N. J. L. 478.

Articles made by prison labor are denied entry by act of 1913.

See Prison Labor, published, 1913, by Amer. Acad. of Pol. & Soc. Science.

PRISON-MADE GOODS. See PRISON LABOR.

PRISONER. One held in confinement against his will.

Lawful prisoners are either prisoners charged with crimes or for a civil liability. Those charged with crimes are either persons accused and not tried; and these are considered innocent, and are therefore entitled to be treated with as little severity as possible, consistently with the certain detention of their persons; they are entitled to their discharge on bail, except in capital cases; or those who have been convicted of crime, whose imprisonment, and the mode of treatment they experience, is intended as a punishment: these are to be treated agreeable to the requisitions of the law, and, in the United States, always with humanity. Prisoners in civil cases are persons arrested on original or mesne process, and these may generally be discharged on bail; and prisoners in execution, who cannot be discharged except under the insolvent laws.

Persons unlawfully confined are those who are not detained by virtue of some lawful, judicial, legislative, or other proceeding. They are entitled to their immediate discharge on *habeas corpus.* For the effect of a contract entered into by a prisoner, see 1 Salk. 402, n.; 6 Toullier 82.

"An officer may take from a prisoner any articles of property which it is presumable may furnish evidence against him, but money should not be taken unless it is in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his defence. The arresting officer if he finds on the prisoner's body, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime as its fruits, or as supplying proofs relating to the

transaction, may take and hold them to be disposed of as the court directs;" Stuart v. Harris, 69 Ill. App. 668. By statute in Iowa an officer making an arrest, or a jailer upon committing a person to jail, may search him and take from him all offensive weapons and property which might be used in effecting an escape, but he has no right to take from him watches and money in no way connected with crime; Commercial Exch. Bk. v. McLeod, 65 Ia. 666, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36, where it was said: "Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance; when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner."

Where money had been taken from a prisoner and an effort was made to reach it by garnishment against the officer, it was held that it was illegally taken, not being connected with the offence charged or necessary as evidence of the crime; but an application for a mandamus to compel the restoration of the money by the officer was denied because the propriety of its restoration was the subject of litigation under the attachment; Ex parte Hurn, 92 Ala. 102, 9 South. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23.

Pieces of silver intended for the manufacture of counterfeit coin were held to have been properly taken by the sheriff from the person who was carrying them to the place of manufacture, and it was held that the owner could not sustain trover therefor against the sheriff; Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68, where it was held by Redfield, J., that the base metal was properly detained both as evidence and because from its character it was, "so to speak, outlawed, and common plunder." In New Hampshire it was held that "if a prisoner has about his person money, or other articles of value, by means of which, if left in his possession, he might obtain tools or implements, or assistance, or weapons, with which to effect his escape, the officer arresting him may seize and hold such property for a time, without being liable for a conversion of the property, if he acts in good faith and for the purposes aforesaid;" Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.

It has been held that United States officials have no right to confiscate money found on federal prisoners, and when it has been done and the money paid into the treasury, it may be recovered back by suit against the United States under the act of March 3, 1887; U. S. v. Harris, 77 Fed. 821, 23 C. C. A. 483.

In England an officer who arrests a prisoner has no right to take from him money unless it is in some way connected with the offence with which he is charged, as he thereby deprives him of the means of making his defence; 7 C. & P. 138, 488, 515; and it was so held with respect to a watch and other articles taken by a police officer at the time of arrest; *id.* 447. In this case the indictment was for rape, and it was said by Patteson, J.: "Certainly the property must be given up; it has nothing whatever to do with the charge. It ought not to have been taken."

Though the laws of a state permit a prison warden to receive and care for property found on convicts, the warden is not thereby authorized to receive payment on a certificate of deposit; Thompson v. Niles, 115 Ia. 67, 87 N. W. 732. See SEARCH.

Keeping a prisoner on bread and water is a cruel and unusual punishment; Johnson v. Waukesha Co., 64 Wis. 281, 25 N. W. 7.

It is no defence to a prosecution for murder that the accused was a convict for life; Singleton v. State, 71 Miss. 782, 16 South. 295, 42 Am. St. Rep. 488; *contra*, Ex parte Meyers, 44 Mo. 279; State v. Jolly, 96 Mo. 435, 9 S. W. 897, where it was held that the prisoner could not be tried for another crime until the expiration of the term imposed upon him. In Gaines v. State (Tex.) 53 S. W. 623, it was held that a prisoner could be brought into court to be tried on another charge.

A convict who escapes before the completion of his term is not entitled to an allowance for the time he was at large; Ex parte Moebus, 137 Fed. 154. See ESCAPE.

One in jail and awaiting trial is entitled freely to consult with his counsel, privately and apart; State v. Davis (Okl.) 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

A prisoner, who is serving a life sentence at the time of his father's death, does not inherit from him; In re Donnelly's Estate, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62; but though a life prisoner is declared civilly dead by statute, the descent of his property is not thereby cast on his heirs; Smith v. Becker, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141. A prisoner sentenced to death is not incapable of managing his own estate prior to execution; Gray v. Stewart, 70 Kan. 429, 78 Pac. 852, 109 Am. St. Rep. 461; where a life prisoner is insane, a committee may be appointed for his estate; Trust Co. v. Deposit Co., 187 N. Y. 178, 79 N. E. 996. A contract by one confined for life is valid; Stephani v. Lent, 30 Misc. 346, 63 N. Y. Supp. 471.

See TICKET-OF-LEAVE; SENTENCE; PUNISHMENT; ACCUMULATIVE SENTENCE.

PRISONER OF WAR. One who has been captured while fighting under the banner of some state. He is a prisoner even though never confined in a prison.

In modern times, prisoners are treated with more humanity than formerly: the indi-

vidual captor has now no personal right to his prisoner. Prisoners are under the superintendence of the government. See 1 Kent 14.

The Convention Concerning the Laws and Customs of War on Land, adopted at The Hague in 1899, lays down (arts. 4–20) specific rules regarding the status of prisoners of war and the treatment to be accorded to them. It is provided that they must be humanely treated; that their personal belongings, except those of a military character, are to remain their property; that they are not to be confined unless as an indispensable measure of safety; that, while they may be put to work for the benefit of the captor state, they are to receive pay for such work, and they are not to be set to tasks connected with the operations of war; that they shall be treated as regards food and clothing on the same footing as the troops of the captor government; that, if set at liberty on parole, their own government is bound not to require of them any service incompatible with such parole; that they are to be allowed opportunity for the exercise of their religion; that wills drawn up by them are to be received on the same conditions as for soldiers of the national army. Moreover, the Convention provides for the establishment of a bureau of information whose duty it is to answer all inquiries about prisoners of war; and relief societies are to receive from the belligerents every facility for the effective accomplishment of their humane task. Higgins, The Hague Peace Conferences 206–272; Spaight, War Rights on Land 260–319.

It is a general rule that a prisoner of war is out of the protection of the laws of the state so far that he can have no civil remedy under them, and he can, therefore, maintain no action. But his person is protected against all unlawful acts. Spaight, War Rights on Land 260–319.

See PAROLE.

PRIVACY. The right of privacy has been defined as the right of an individual to withhold himself and his property from public scrutiny, if he so chooses. The doctrine is of recent growth, and is as yet insufficiently defined. It is said to be incapable of exact definition, and to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain, or malice. Such remedy has been invoked to prevent the publication of oral lectures delivered by a professor; 12 App. Cas. 326; 3 L. J. Ch. 209; or copies of private drawings and etchings; 1 MacN. & G. 25; or a letter in the possession of a person by whom it was received, without the writer's consent, where the publication is not necessary for the vindication of the receiver or the public interests; 2 Ves. & B. 19; 2 Atk. 342; Ambl. 737; Woolsey v. Judd, 4 Duer (N. Y.) 379; Grigsby v. Breckinridge, 2 Bush. (Ky.) 480, 92 Am. Dec. 509; a telegram of a private nature; Kiernan v. Tel. Co., 50 How. Pr. (N. Y.) 194; a scientific, artistic, or literary composition kept for the private use of the composer; 4 Burr. 2303, 2330, 2408; 2 Eden 329; 2 Meriv. 435; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; a portrait in a newspaper; Marks v. Jaffa, 6 Misc. 290, 26 N. Y. Supp. 908; or a photograph by the photographer; 40 Ch. Div. 345; Corliss v. Walker Co., 64 Fed. 280, 31 L. R. A. 283. But such publication of a photograph or portrait will not be prevented where the person is a "public character," such as a foremost inventor of world-wide reputation; Corliss v. Walker Co., 64 Fed. 280, 31 L. R. A. 283. The case on appeal held that the publication of such a photograph will not be restrained. The doctrine prevailed one time that an injunction against the publication of letters could only be granted where they were of the nature of a literary composition; Wetmore v. Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt v. Mackenzie, 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178; but this doctrine no longer prevails; Woolsey v. Judd, 4 Duer (N. Y.) 379. In many cases the unauthorized use of one's name, where it will tend to cause irreparable damage, will be enjoined, as a recommendation of a medicinal preparation by a physician; Mackenzie v. Mineral Springs Co., 27 Abb. N. C. (N. Y.) 402, 18 N. Y. Supp. 240; see 11 Beav. 561; a use of a person's name as director of a corporation; 10 Beav. 561; or a publisher's statement that one is a member of a bankrupt firm; 7 L. R. Eq. 488; a false statement of a dispute pending a suit in relation thereto; 52 L. J. Ch. 134; 8 W. R. 734.

The property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished and kept for his private use or pleasure, cannot be questioned; 1 MacN. & G. 42.

Every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk; 2 Hare 393; 1 MacN. & G. 45.

The court will interfere by injunction to prevent a party's availing himself in any manner of a title arising out of the violation of right or any breach of confidence; 1 MacN. & G. 25.

A photographer who had taken a negative likeness of A. for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also that such sale or exhibition was a breach of confidence. The right to enjoin the copying of a photograph does not depend on the existence of a property right; the

court of chancery has always had original jurisdiction to prevent what it considered and treated as a wrong, whether arising from the violation of a right or from breach of contract or confidence; 40 Ch. Div. 354, following 1 MacN. & G. 25.

In Prince Albert v. Strange, De G. & S. 652, and, on appeal, 1 MacN. & G. 23, it was held that the reproduction of etchings belonging to the plaintiff and Queen Victoria, and made for their own pleasure, would be restrained, and the defendants would also be restrained from publishing a description of them, whether more or less limited or summary, and whether in the form of a catalogue or otherwise.

An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a common and exclusive copyright therein unless he has unequivocally dedicated them to the public or some private person, but no person has the right to publish them without his consent unless such publication be required to establish a personal right or claim or to vindicate character. The government has perhaps a right to publish official letters addressed to it by public officers; but no private person has such a right without the sanction of the government; Folsom v. Marsh, 2 Story 100, Fed. Cas. No. 4,901.

If the recipient of a letter attempt to publish such letter on occasions not justifiable, equity will prevent the publication as a breach of private rights. . . . The general property, and the general rights incident to property, belong to the writer, whether the letter is a literary composition, or a familiar letter, or contains details of business. Third persons standing in no privity with either party are not entitled to publish letters to subserve their own private purposes of interest or curiosity or passion; Folsom v. Marsh, 2 Story 111, Fed. Cas. No. 4,901. The writer of letters, though written without any purpose of profit or any idea of literary property, possesses such a right of property in them that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication; 2 Swanst. 418, Romilly, arguendo; but see High, Inj. § 1012, *contra.*

This subject of the right to privacy was much discussed in the case Schuyler v. Curtis, in which an injunction was sought to prevent certain persons from making a statue of a deceased woman and exhibiting it at the Columbian Exposition, the avowed object being to honor her as a philanthropist and reformer. A decree for an injunction entered by the supreme court of New York was affirmed by the general term, but was reversed by the court of appeals; Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671, reversing 70 Hun 598, 24 N. Y. Supp. 512. In this case the question whether the action contemplated was a violation of the right of privacy was discussed, and the conclusion reached by a majority of the court that "the individual right of privacy which any person has during his life dies with the person, and any right of privacy which survives is a right pertaining to the living only," and that "any privilege of surviving relatives of a deceased person to protect his memory exists for the benefit of the living to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased." It was held that "persons attempting to raise a statue or bust of a woman who is no longer living, if their motive is to do honor to her, and if the work is to be done in an appropriate manner, cannot be restrained by her surviving relatives from carrying out such a purpose, merely because they had not the honor of her personal acquaintance or friendship while she was living, or, at the most, had merely been associated with her philanthropic enterprises. The mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative was decided not to be a ground for an injunction against its erection, unless there is reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice, nor of pure fancy, nor the result of a supersensitive and morbid mental organization dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy."

The opposite view was presented by Gray, J., who dissented:

"Upon the findings in this case, I think we are bound to say that the purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler intact from public comment and criticism. As the representative of all her immediate living relatives, it was competent for him to maintain action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person."

In 1893 it was held in a New York case that an injunction will lie to restrain the publication of the plaintiff's picture in a newspaper, with an invitation to the readers of the newspaper to vote upon the question of the popularity of the plaintiff as compared with that of another person whose picture was also published; Marks v. Jaffa, 6 Misc. 290, 26 N. Y. Supp. 908.

The common law right of privacy was up-

held in the following cases: Pavesich v. Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417, the court in the last case basing its conclusion on a right of property. It was squarely denied in Roberson v. Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, reversing 64 App. Div. 30, 71 N. Y. Supp. 876; and in Henry v. Cherry, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006, holding that it was a personal right not guaranteed by the constitution and not a property right.

As a result of Roberson v. Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, an act was passed in New York to prevent the use of a person's name or picture without written consent, for purposes of advertising or trade; it was held constitutional in Rhodes v. S. & H. Co., 120 App. Div. 470, 104 N. Y. Supp. 1102, affirmed in 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. (N. S.) 1143, 127 Am. St. Rep. 945, and in S. & H. Co. v. Rhodes, 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561. Other cases under the act are: Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644; Wyatt v. McCreery & Co., 126 App. Div. 650, 111 N. Y. Supp. 86; Wyatt v. Wanamaker, 126 App. Div. 656, 111 N. Y. Supp. 90; Kunz v. Bosselman, 131 App. Div. 288, 115 N. Y. Supp. 650; Wyatt v. Wanamaker, 58 Misc. 429, 110 N. Y. Supp. 900; Ellis v. Hurst, 66 Misc. 235, 121 N. Y. Supp. 438; Binns v. Vitagraph Co., 67 Misc. 327, 124 N. Y. Supp. 515. In Moser v. Pub. Co., 59 Misc. 78, 109 N. Y. Supp. 963, the act was held not to prohibit a newspaper from publishing a person's name or picture without his consent in a single issue.

Binns, wireless operator on the Republic when in collision, who heroically saved many lives, procured an injunction against a moving picture concern for exhibiting films representing the disaster in which he was represented by one of its employees; Binns v. Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108.

In a suit brought by an Austrian consul against a beneficial association using in its corporate title the name of the emperor of Austria-Hungary and his portrait without authority, the court said *obiter* that the emperor only could proceed for the breach of privacy; Von Thodorovich v. Beneficial Ass'n, 154 Fed. 911.

An injunction will be refused on a bill alleging libel, but proving merely loss of privacy; 22 T. L. R. 532; 78 L. T. R. N. S. 840; Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507. But in Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417, plaintiff was allowed to recover in an action for libel without proving special damages, where it appeared that his picture had been published without his consent as part of an advertisement.

The publication by a newspaper of an inoffensive photograph and true likeness of a person in connection with the story of her father's crime is not an invasion of the right of privacy for which the law affords any remedy; Hillman v. Pub. Co., 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595.

Vassar College, having a public character, cannot invoke the rule as to privacy and enjoin a corporation from selling "Vassar Chocolates" in packages containing a representation of a girl in scholastic garb, an imitation of the Vassar pennant and college seal, etc.; Vassar College v. Biscuit Co., 197 Fed. 982.

It has been held that loss of privacy in the use of land resulting from the construction of a railroad is a proper element of damages; L. R. 5 H. L. 418; and so of rooms in a dwelling house after the erection of an elevated railway; Moore v. R. Co., 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731.

In an article in 4 Harv. Law Rev. 193, by Samuel D. Warren and Louis D. Brandeis, the following are suggested as the limitations to the right to privacy:

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

2. The right to privacy does not prohibit the publication of any matter, if in itself not private, when the publication is made under circumstances which would render it a privileged publication according to the law of slander and libel.

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

4. The right to privacy ceases upon the publication of facts by the individual, or with his consent.

5. The truth of the matter published does not afford a defence.

6. The absence of "malice" in the publisher does not afford a defence.

See No. Amer. Rev. July, 1896; 30 Am. Law Rev. 582; 2 A. & E. Dec. Eq. 462, with note by Ardemas Stewart; 89 Am. St. Rep. 844, note; INJUNCTION; LETTER; MANUSCRIPT; PHOTOGRAPH; PHYSICAL EXAMINATION; TRADE SECRETS.

PRIVATE. Affecting or belonging to individuals, as distinct from the public generally. Not clothed with office.

PRIVATE ACT. See STATUTE; GENERAL LAW.

PRIVATE BILL OFFICE. An office of the British parliament where the business of securing private acts of parliament is conducted.

PRIVATE BILLS. A private member's bill is one of a public nature introduced by a private member; a private bill is one dealing only with a matter of private personal or local interest; Lowell, Gov. of Eng. 266.

PRIVATE CARRIER. One who agrees in some special case with some private individual to carry for hire, as distinguished from a common carrier who holds himself out to all persons who choose to employ him as ready to carry for hire. Story, Cont. 752 *a;* Allen v. Sackrider, 37 N. Y. 342. See CARRIER.

PRIVATE CORPORATION. See CORPORATION.

PRIVATE DWELLING-HOUSE. A covenant which requires a house to be used as a private dwelling-house only, is broken by its being used as a school or dancing academy; 25 L. J. Q. B. 264; or as an institution for educating the daughters of missionaries; 47 L. J. Ch. 230; or as a club; *id.;* or as a hotel or lodging-house; 53 *id.* 682; but not by a public auction of the furniture of the house; 24 W. R. 485.

PRIVATE INTERNATIONAL LAW. A name used by some writers to indicate that branch of the law which is now more commonly called Conflict of Laws.

Mr. Dicey (Conflict of Laws, Moore's Ed. 12) points out that the defect of "Conflict of Laws" is that the supposed conflict is fictitious and never really takes place; that the expression has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed is often too plain to admit of doubt. If, he says, the term applies to the conflict in the mind of a judge as to which of two systems of law should govern a given case, this amounts simply to saying that the term "conflict of laws" may be used as an inaccurate equivalent for the less objectionable phrase "choice of laws." He considers the expression "private international law" as "handy and manageable," but that it is at bottom inaccurate, and has led to endless misconception of the true nature of this department of legal science. It confounds two classes of rules which are generically different from each other. The principles of international law are truly "international," because they prevail between or among nations; but they are not in the proper sense of the term "laws," for they are not commands proceeding from any sovereign; on the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state; but they are not "international," for they are laws which determine the private rights of one individual against another, and these individuals may, or may not, belong to the same nation. The expression "international private law" is, no doubt, a slight improvement on "private international law" as it points out that the rules which the name denotes belong to the domain of private law. But the name has the insuperable fault of giving to the adjective international a meaning different from the sense in which it is generally and correctly employed.

Other suggested names are "comity," the "local limits of law," "intermunicipal law," but these have not become current. Holland (Jurisprudence 370) first employed the term "extra-territorial recognition of rights," but Mr. Dicey points out that this is a description, and not a name.

Hannis Taylor (Jurisprudence 611), after considering the opinion of many writers, American, English and Continental, as to the use of this name, reaches the conclusion that its use is subject to many objections and expresses his regret for having adopted it (following Kent) in his International Public Law. Holland, Jurisprudence 410, considers the term "wholly indefensible." Gray, Nature, etc., of the Law 124, approves this view and points out that Dicey has returned to the title "Conflict of Laws."

Sir F. Pollock (First Book of Jurispr. 99) speaks of this department of the law as "now commonly" the "conflict of laws," but he prefers the German term—Internationale Privat-recht.

See INTERNATIONAL LAW; CONFLICT OF LAWS.

PRIVATE LAND CLAIMS. The United States obtained from the Republic of Mexico by the treaty of Guadalupe Hidalgo, of February 2, 1848, and by the Gadsden purchase, December 30, 1853, all the property included in what is now the states of California, Colorado, Utah, Wyoming, and Nebraska, and the territories of new Mexico and Arizona; and by these treaties the United States agreed to protect and recognize the rights of property of every kind belonging to Mexicans that was situated in the ceded territory. Under the stipulations contained in the treaty of Guadalupe Hidalgo, congress, on March 3, 1851, passed a law to determine the validity of private land grants in the state of California; and on March 3, 1891 (26 Stat. L. 854), it passed a law for the settlement of title to private land grants under both treaties, entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain states and territories." By this act all persons claiming rights protected by the treaties, whether their title was complete and perfect or incomplete and inchoate, are given the right to present their claims and have the validity thereof ascertained and determined by the court. This court ceased to exist June 30, 1903; Act of March 3, 1903; its powers in the approval of sur-

veys executed under its decrees of confirmation were conferred upon the commissioner of the general land office; Act of April 28, 1904.

PRIVATE NUISANCE. Anything done to the hurt and annoyance of the lands, tenements, or hereditaments of another. 3 Bla. Com. 215; Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. "Some unauthorized act which causes injury to property, or interferes with a person's rights over the property of others, or materially interferes with the ordinary physical enjoyment of property by causing injury to health or sensible personal discomfort." 3 Steph. Com. 406.

See NUISANCE.

PRIVATE PROPERTY. As used in a constitution, the term applies to such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels; Com'rs of Homochitto River v. Withers, 29 Miss. 32, 64 Am. Dec. 126.

PRIVATE WAY. An incorporeal hereditament of a real nature, entirely different to a common highway. The right of going over another man's ground. Kister v. Reeser, 98 Pa. 5, 42 Am. Rep. 608. See WAY.

PRIVATEER. A vessel owned by one or more private individuals, armed and equipped at his or their expense, for the purpose of carrying on a maritime war, by the authority of one of the belligerent parties.

A privateer is a private vessel commissioned by the state by the issue of a letter of marque to its owner to carry on all hostilities by sea, presumably according to the laws of war. She continues under the control of her private owner, and her crew are under the same discipline as the crew of a merchant ship. Formerly a state issued letters of marque to its own subjects, and to those of neutral states as well, but a privateersman who accepted letters of marque from both belligerents was regarded as a pirate.

For the purpose of encouraging the owners of private armed vessels, they are usually allowed to appropriate to themselves the property they capture, or, at least, a large proportion of it; 1 Kent 96. See Keane v. The Gloucester, 2 Dall. (U. S.) 36, 1 L. Ed. 278; The Mary and Susan, 1 Wheat. (U. S.) 46, 4 L. Ed. 32.

By the Declaration of Paris (*q. v.*) privateering was abolished, but the United States, Spain, Mexico, and Venezuela did not accede to this declaration.

The creation of a volunteer navy by a belligerent was not prohibited by the Declaration of Paris. A volunteer cruiser is a vessel loaned by her private owner to the state. Her officers are commissioned and her crew are subject to the discipline of a ship of war; she only resembles a privateer in that her prizes belong to her owner. In 1870, when Prussia proposed the creation of a volunteer navy, the French government protested, but the English government held that such a navy was to be distinguished from privateers, and that their employment was no evasion of the Declaration of Paris; but from this opinion Phillimore decidedly dissented. Risley, Law of War 112.

The Convention Relative to the Conversion of Merchant-Ships into War-Ships, adopted at The Hague in 1907, defines the conditions subject to which merchant-ships may be incorporated into the fighting fleet of a state in time of war. Such ships must be under the direct authority and immediate control of the power whose flag they fly; they must bear the external marks which distinguish the war-ships of their nationality; their commanders must be duly-commissioned officers in the service of the state; their crews must be subject to the rules of military discipline; they are bound to observe in their operations the laws and customs of war; and their names must figure on the list of the ships of the military fleet of the belligerent. Higgins, The Hague Peace Conferences, 308–321.

A merchant vessel without any commission may become a lawful combatant in self-defence, and if she captures her assailant, the latter may be condemned as lawful prize.

During the civil war in America, congress authorized the president to issue letters of marque, but he did not do so. The confederates offered their letters of marque to foreigners, but they were not accepted. The confederate vessels were commissioned as of its regular navy. Boyd's Wheat. Int. Law.

The president's proclamation at the outbreak of the Spanish-American war, 1898, declared that privateering would not be resorted to by the United States.

It has been thought that the constitutional provision empowering congress to issue letters of marque deprives it of the power to join in a permanent treaty abolishing privateering. See 28 Am. L. Rev. 615; 24 *id.* 902; 19 Law Mag. & Rev. 35.

PRIVATION. A taking away or withdrawing. Co. Litt. 239.

PRIVEMENT ENCEINTE (L. Fr.). A term used to signify that a woman is pregnant, but not *quick with child.* See Wood, Inst. 662; ENCEINTE; FŒTUS; PREGNANCY.

PRIVIES. Persons who are partakers or have an interest in any action or thing, or any relation to another. Wood, Inst. b. 2, c. 3, p. 255; Co. Litt. 271 *a.*

There are several kinds of privies: namely, privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased;

privies in estate, as the relation between the donor and donee, lessor and lessee; privies in respect to contracts; and privies on account of estate and contract together. Prest. Conv. 327. Privies have also been divided into privies in fact and privies in law. 8 Co. 42 *b*. See Viner, Abr. *Privity;* 5 Com. Dig. 347; Hamm. Part. 131; Woodf. Landl. & T. 279; 1 Dane, Abr. c. 1, art. 6. The latter are created by the law casting land upon a person, as in escheat; 1 Greenl. Ev. § 189.

No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. Freem. Judg. § 162; Norton v. Fruit-Packing Co., 83 Fed. 515, 27 C. C. A. 576.

See PRIVITY; Bigelow v. M. & S. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875.

PRIVIGNUS (Lat.). **In Civil Law.** Son of a husband or wife by a former marriage; a stepson. Calvinus, Lex.; Vicat, Voc. Jur.

PRIVILEGE. Exemption from such burdens as others are subjected to. State v. Betts, 24 N. J. L. 557. See Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Ripley v. Knight, 123 Mass. 519. See a full title in Jacob, Law Dict.

In Civil Law. A right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors. Dalloz, Dict. *Privilege;* Domat, *Lois Civ.* liv. 2, t. 1, s. 4, n. 1; 43 La. Ann. 1078, 1194.

Privilege is "a real right in a thing (*jus in re*) springing from the nature of a debt which has been contracted with reference to that thing, and securing the debt by a preference on the proceeds of the thing when it is sold under legal process." Howe, Stud. Civ. L. 86.

"A mortgage under the civil law is to all intents and purposes what it is in equity in the English law or the law of Connecticut, a security for a debt given by the agreement of the debtor. But a debtor cannot, by his mere agreement, *proprio vigore*, confer a privilege.

"If he contracts a debt, which by its nature has a privilege under the law, then the privilege exists, as a method of securing the debt. It inheres in the thing with reference to which the debt has been contracted, follows it into the hands of third persons (in the absence of some law of recordation providing to the contrary), and as a rule would prime a mortgage of the same property." "The one is legal; the other conventional. This former is sometimes called by the civilians a privileged hypothecation; the latter a mere hypothecation." Howe, Stud. Civ. L. 88.

The civil law privilege became, by adoption of the admiralty courts, the admiralty lien; Howe, Stud. Civ. L. 89; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

Creditors of the same rank of privileges are paid in concurrence, that is, on an equal footing. Privileges may exist either in movables or immovables, or in both at once. They are general or special, on certain movables. The debts which are privileged on *all the movables in general* are the following, which are paid in this order. *Funeral charges. Law charges*, which are such as are occasioned by the prosecution of a suit before the courts. But this name applies more particularly to costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. Charges, of whatever nature, occasioned by the *last sickness*, concurrently among those to whom they are due. See LAST SICKNESS. The *wages of servants* for the year past, and so much as is due for the current year. *Supplies of provisions* made to the debtor or his family during the last six months by retail dealers, such as bakers, butchers, grocers, and during the last year by keepers of boarding-houses and taverns. The *salaries of clerks, secretaries*, and other persons of that kind. *Dotal rights* due to wives by their husbands.

The debts which are privileged on *particular movables* are—the debt of a workman or artisan, for the price of his labor, on the movable which he has repaired or made, if the thing continues still in his possession; that debt on the pledge which is in the creditor's possession; the carrier's charges and accessory expenses on the thing carried; the price due on movable effects, if they are yet in the possession of the purchaser; and the like. See LIEN.

Creditors who have a privilege on moveables in Louisiana are (1) vendors for purchase money, (2) architects, mechanics, contractors, etc., for construction, rebuilding and repair of houses, etc., (3) material men, (4) those who have worked by the job in the manner required by law or police regulation on levees, bridges, ditches, and roads of a proprietor; Code §§ 3249–51.

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

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

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

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

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

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

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

The privilege was lost by a novation, or by anything in the original contract which showed that the vendor had taken some other security inconsistent with the privilege. See Domat, pt. i. lib. iii. tit. i. sec. v.

See Dalloz, Dict. *Privilege;* LIEN; LAST SICKNESS; PREFERENCE.

In Maritime Law. An allowance to the master of a ship of the general nature of primage, being compensation, or rather a gratuity, customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties.

PRIVILEGE FROM ARREST. Privilege from arrest on civil process.

It is either permanent, as in case of diplomatic representations and their servants, the royal family and servants, peers and peeresses, etc., or temporary, as in case of members of both houses of congress, and of the state legislature, who are privileged *eundo, manendo, et redeundo;* 1 Kent 243; Cooley, Const. Lim. 163; 8 R. I. 43; see 2 Stra. 985; practising barristers, while actually engaged in the business of the court; 1 H. Bla. 636; 1 M. & W. 488; 6 Ad. & E. 623; a clergyman in England whilst going to church, performing services, and returning; 7 Bingh. 320; witnesses and parties to a suit and bail, *eundo, manendo, et redeundo;* 5 B. & Ad. 1078; 1 Maule & S. 638; 6 Ad. & E. 623; Ellis v. Degarmo, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560; Parker v. Marco, 136 N. Y. 585, 32 N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770; and other persons who are privileged by law. See ARREST. Privilege (from arrest) does not extend to defendants in criminal cases; Smith v. Nicola, 6 Pa. Dist. Rep. 595.

A suitor going to, attending or returning from court is privileged from service of summons, whether he is a resident of the state or not; Barber v. Knowles, 77 Ohio St. 81, 82 N. E. 1065, 11 Ann. Cas. 1144, 14 L. R. A. (N. S.) 663, with note upon the question of the effect of delay in returning.

In case of the arrest of a legislator contrary to law, the legislative body of which he is a member may give summary relief by ordering his discharge, and if this be not complied with, by punishing the persons concerned in such arrest, as for contempt of its authority. If it neglect to interfere, the court from which the process issued should set it aside; and any court or officer having authority to issue writs of *habeas corpus* may inquire into the case and release the party; Cooley, Const. Lim. 163; Cush. Parl. Pract. § 546. "When attachment is mere process, privilege exists; when it is punitive or disciplinary, privilege does not exist." Brett, Comm. 748.

In some states, by constitution the privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process: Michigan, Kansas, Nebraska, California, Wisconsin, Indiana, Oregon.

See EXTERRITORIALITY; Piggott, Consular Jurisdiction.

PRIVILEGE, WRIT OF. A process to enforce or maintain a privilege. Cowell.

PRIVILEGED COMMUNICATIONS. Communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contain matter which without this privilege would be defamatory and actionable.

Duty, in this canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation; 5 E. & B. 347. The proper meaning of a privileged communication, said Baron Parke, is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made; 2 Cr. M. & R. 573. So, also, in Lewis v. Chapman, 16 N. Y. 373. See Lowry v.

Vedder, 40 Minn. 475, 42 N. W. 542; Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803; White v. Nicholls, 3 How. (U. S.) 287, 11 L. Ed. 591; [1891] App. Cas. 78; Brown v. Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860.

The law recognizes two classes of cases in which the occasion either supplies an absolute defence, or a defence subject to the condition that the party acted *bona fide* without malice. The distinction turns entirely on the question of malice. The communications last mentioned lose their privilege on proof of express malice; Erber v. Dun, 12 Fed. 526. The former depend in no respect for their protection upon the *bona fides* of the defendant. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion; Heard, Lib. & S. § 89. See Webb, Pollock, Torts 335; Odg. Sl. & L. 184; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775.

As to communications which are thus absolutely privileged, no person is liable, either civilly or criminally, in respect of anything published by him as a member of a legislative body, in the course of his legislative duty, or in respect of anything published by him in the course of his duty in any judicial proceeding. This privilege extends not only to parties, counsel witnesses, jurors, and judges in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty or the honest pursuit of private right, are compelled to take part in the administration of justice, or in legislation.

Allegations in pleadings imputing criminal or fraudulent acts to the opposite party, if pertinent, are absolutely privileged and cannot be made the ground of an action for libel; McGehee v. Ins. Co., 112 Fed. 853, 50 C. C. A. 551. Likewise words uttered by a judge in the course of judicial proceedings with reference to the case before him; 4 F. 783, Sc. Ct. of Sess.; and an official report of an executive or administrative officer; De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163; Spalding v. Vilas, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780; a city council resolution; Wachsmuth v. Bank, 96 Mich. 427, 56 N. W. 9, 21 L. R. A. 278; a mayor's written veto message; Trebilcock v. Anderson, 117 Mich. 39, 75 N. W. 129; and statements made by a witness to one of the parties and his attorney in preparing proofs for trial; [1905] A. C. 480. But facts furnished by a client to his attorney and incorporated in a petition which are misleading and defamatory and are foreign to the object of the suit are *not* privileged; Wimbish v. Hamilton, 47 La. Ann. 246, 16 South. 856.

A fair report of any judicial proceeding or inquiry is privileged; Heard, Lib. & S. §§ 90, 103, 110; Odg. Lib. & S. *185; but to be privileged it must be an accurate and impartial account of what actually occurred; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921. A report to a newspaper of judicial proceedings, if made by an outsider, is actionable if made from motives of personal hostility; 5 Ex. Div. 53. See Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313; Randall v. Hamilton, 45 La. Ann. 1184, 14 South. 73, 22 L. R. A. 649; [1893] 1 Q. B. 65.

The *bona fide* statements of one church member on the trial of another, before a church tribunal, are privileged; Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698. They are said to have a qualified privilege; Pollock, Torts 253.

Freedom of speech in parliament is protected by the Bill of Rights; 1 W. & M. Sess. 2, c. 2.

In America, as in England, the defence of privilege, when applied to comment and criticism of the acts of public men, is confined to facts as they actually happened, and does not extend to false assertions of fact; Hallam v. Pub. Co., 55 Fed. 456. See Jackson v. Pittsburgh Times, 152 Pa. 406, 25 Atl. 613, 34 Am. St. Rep. 659; Burt v. Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

An action will not lie against a judge for words spoken in his judicial capacity in a court of justice; L. R. 3 Ex. 220.

Unfounded insinuations made by counsel against the prosecutor are privileged; 11 Q. B. Div. 588; so are volunteered statements of a witness involving a criminal charge against a person not connected with the case under inquiry. Military courts stand in the same way; L. R. 7 H. L. 744; communications relating to affairs of state and passing between officials are absolutely privileged; Pollock, Torts 253; [1895] 1 Q. B. 888; as to whether military and naval reports, not made in the cause of some judicial inquiry, are absolutely privileged, or have only a qualified privilege, see L. R. 5 Q. B. 94. Fair reports of judicial and parliamentary inquiries are said to have an absolute privilege; Pollock, Torts 253.

A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered, when the party to whom it is made has an interest in it and such party stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information.

"A communication which would otherwise be privileged, if made with malice in fact or through hatred, ill-will, and a malicious design to injure, is not a privileged communication, but the burden of proof is on the plaintiffs to show malice in fact." Erber v. Dun & Co., 12 Fed. 526; Briggs v. Garrett, 111

Pa. 404, 2 Atl. 513, 56 Am. Rep. 274. A member of a legislative body cannot take advantage of his position to utter private slanders against others; McGaw v. Hamilton, 184 Pa. 108, 39 Atl. 4, 63 Am. St. Rep. 786.

A physician's statements to a druggist in respect of a prescription wrongfully compounded by the druggist are privileged unless malice is proved; [1907] A. C. 708; and so of the report of a school committee; Haight v. Cornell, 15 Conn. 74; and the report of a road commissioner; Pearce v. Brower, 72 Ga. 243. See De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A. (N. S.) 163, where it is said in a note that probably the leading American case, is Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384, where the endorsement by the superintendent of the Naval Academy upon the resignation of a professor was held to be privileged only so far as to rebut the presumption of malice and cast upon the plaintiff the burden of proving actual malice.

Independent books and documents of a defunct corporation, left with the attorney for the corporation by a client, are not a privileged communication. They must be produced upon subpœna, even if they might incriminate the attorney; Grant v. U. S., 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. 423.

Information furnished by a charity organization society at the request of a person not a member, but who was interested, is a privileged communication; 13 Cent. L. J. 432. So are communications to a near relative respecting the character of a person with whom the relative is negotiating for a marriage; 8 C. & P. 88 (but not by a stranger; The Count Joannes v. Bennett, 5 Allen [Mass.] 170, 81 Am. Dec. 738); so where one communicated to an employer his suspicions of dishonest conduct in a servant towards himself; 8 C. B. N. S. 597.

Other cases in which the privilege was sustained are statements by a school superintendent of his reason for revoking the certificate of a teacher; Rausch v. Anderson, 75 Ill. App. 526; a report of a committee appointed at a public school meeting to investigate the financial report of the school trustees; Lent v. Underhill, 54 App. Div. 609, 66 N. Y. Supp. 1086; the official report of the principal of a school to the city superintendent concerning the work of a teacher; Walker v. Best, 107 App. Div. 304, 95 N. Y. Supp. 151; the report of a committee appointed by the governor of a state to investigate charges against a state board of charities; In re Investigating Commission, 16 R. I. 751, 11 Atl. 429; a report of grand jurors to the court; Rector v. Smith, 11 Ia. 302; statements by the superintendent of a city water department in response to an inquiry from his superiors; Stevenson v. Ward, 48 App. Div. 291, 62 N. Y. Supp. 717; the report of a committee of aldermen appointed to investigate charges against a saloon keeper, made in the course of their official duty; Weber v. Lane, 99 Mo. App. 69, 71 S. W. 1099; charges by the superintendent of a state charitable institution against the head of a department under him; Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440.

A publication by a newspaper of an article without inquiry is not privileged because received from a regular correspondent; Schuyler v. Busbey, 68 Hun 474, 23 N. Y. Supp. 102. Communications between an applicant for a patent and the patent office touching an unissued patent are not privileged; Edison E. L. Co. v. Lighting Co., 44 Fed. 294.

As to statements made to commercial agencies, see that title; [1908] A. C. 390; 14 Col. L. Rev. 187, article by Prof. Jeremiah Smith.

Whenever it is right, in the interest of society, for one person to communicate to another what he believes or has heard concerning any person's conduct or character, it is a privileged occasion; Poll. Torts 256; L. R. 5 Q. B. 11. Thus a solicitor to his client about the soundness of a security, or a father to his daughter about her suitor; Poll. Torts 256; a creditor of a firm in liquidation to another of its creditors as to a member of the debtor firm; L. R. 4 Ex. 232; communications addressed to a person in public position relating to the redress of grievances; 5 E. & B. 344. Where the defendant dismissed the plaintiff from its service on account of gross neglect of duty, a statement by the defendant to its servants of the reason for plaintiff's dismissal is a privileged communication. The occasion being privileged, the communication is so, unless the plaintiff can show that it was malicious; [1891] 2 Q. B. 189.

In making privileged communications of a confidential kind, the failure to use the ordinary means of insuring privacy will destroy the privilege; L. R. 9 C. P. 393.

If the occasion be privileged the plaintiff must prove malice; that is dishonest or reckless ill-will. To constitute malice there must be something more than the absence of reasonable ground for belief; Poll. Torts 262. See 8 Harv. L. Rev. 9; CONFIDENTIAL COMMUNICATIONS; LIBEL; MALICE; JUSTIFICATION; SLANDER.

PRIVILEGED COPYHOLDS. Those copyholds which are held according to the *custom of the manor* and not according to the *will of the lord.* They include ancient demesne and customary freehold. See CUSTOMARY COPYHOLD; 2 Woodd. Lect. 33; Lee, Abs. 63; 1 Crabb, R. P. 709, 919; 2 Bla. Com. 100.

PRIVILEGED DEBTS. Those which an executor or administrator, assignee in bankruptcy, etc., may pay in preference to others, such as funeral expenses, servants' wages, and doctors' bills during last sickness, etc. See PRIVILEGE; ADMINISTRATOR.

PRIVILEGED DEED. In Scotch Law. An instrument, for example, a testament, in the execution of which certain statutory formalities usually required are dispensed with, either from necessity or expediency. Erskine, Inst. 3. 2. 22; Bell, Dict.

PRIVILEGED VILLEINAGE. Villein socage. 1 Steph. Com. 188, 223. See SOCAGE.

PRIVILEGES AND IMMUNITIES. The words privileges and immunities are used in the 14th amendment of the United States constitution, and in other parts of that document, and were also used in the Articles of Confederation. They are such privileges as are fundamental, which belong to the citizens of all free governments and which have at all times been enjoyed by citizens of the United States; Slaughter House Cases, 16 Wall. (U. S.) 76, 21 L. Ed. 394; Spies v. Illinois, 123 U. S. 150, 8 Sup. Ct. 21, 31 L. Ed. 80; O'Neil v. Vermont, 144 U. S. 361, 12 Sup. Ct. 693, 36 L. Ed. 450.

These have been enumerated as some of the principal privileges: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the state, to take, hold, and dispose of property, and an exemption from higher taxes or impositions than are paid by other citizens of the state; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230. This enumeration by Mr. Justice Washington in the leading case of *Corfield v. Coryell* has acquired a somewhat historic value. It has been much quoted and in the Slaughter House Cases, 16 Wall. 36, 75, 21 L. Ed. 394, it is largely quoted by Mr. Justice Miller as a definition which had been adopted in the main by that court.

Another definition more general in its character was one of counsel, *arguendo*, in Spies v. Illinois, 123 U. S. 131, 150, 8 Sup. Ct. 21, 22, 31 L. Ed. 80. "I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States." And of this Mr. Justice Field, in his dissenting opinion in O'Neil v. Vermont, 144 U. S. 323, 361, 12 Sup. Ct. 693, 36 L. Ed. 450, said that, while it might be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, "after much reflection, I think the definition given at one time before this court by a distinguished advocate—Mr. John Randolph Tucker of Virginia—is correct," quoting his words as above. It is, however, to be noted that a citizen of a state passing through or residing in any other state is entitled to no greater privileges and immunities than are possessed by the citizens of the latter state; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260.

The privileges and immunities of a citizen of the United States and those of a state are distinct from each other, and it is only the former which are placed by the 14th amendment under the protection of the federal constitution; the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Slaughter-House Cases, 16 Wall. (U. S.) 36, 74, 21 L. Ed. 394; Com. v. Milton, 12 B. Monr. (Ky.) 212, 54 Am. Dec. 522; U. S. v. Anthony, Fed. Cas. No. 14,459, 11 Blatchf. 200.

The privileges and immunities protected by the amendment are those of national citizenship; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; such as arise out of the essential character of the national government; Slaughter-House Cases, 16 Wall. (U. S.) 36, 74, 21 L. Ed. 394; Ex parte Kinney, Fed. Cas. No. 7,825, 3 Hughes 9; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; State v. McCann, 21 Ohio St. 198; and belong to the citizens of all free governments; O'Neil v. Vermont, 144 U. S. 361, 12 Sup. Ct. 693, 36 L. Ed. 450; Spies v. Illinois, 123 U. S. 150, 8 Sup. Ct. 21, 31 L. Ed. 80; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; those common to the citizens of the states; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; they are that limited class depending immediately upon the constitution of the United States; Charge to Grand Jury, Fed. Cas. No. 18,260. They are such only as pertain to citizenship of the United States as distinguished from state citizenship; Rosenthal v. New York, 226 U. S. 260, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71.

Before the adoption of this amendment, the rights known as privileges and immunities of the citizens of the states (with a few exceptions specifically named in the federal constitution) depended for protection exclusively upon the states, and it was not the purpose of the amendment to subject them to the control of congress. The citizens of the states, as such, are left to the state governments for security and protection in respect to such rights; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394. The amendment adds nothing to the rights of one citizen as against another; U. S. v. Cruikshank, 92 U. S. 543, 23 L. Ed. 588; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; nor does it control the power of the state over its own citizens; Short v. State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404.

It applies only to such privileges and immunities as existed when it was adopted; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; and secures them against impairment or invasion by the states; U. S. v. Cruikshank, 92 U. S. 543, 23 L. Ed. 588; *id.*, 1 Woods, 308, Fed. Cas. No. 14,897; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

The police power of the state and its authority for the protection of life, health and property of its citizens are unimpaired; Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Munn v. People, 69 Ill. 80; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; Green v. State, 58 Ala. 190, 29 Am. Rep. 739. Not only the supreme court, but judges generally, have been disinclined to define broadly what are the privileges and immunities protected by the 14th amendment as appertaining to citizenship of the United States, except to characterize them as those "which owe their existence to the federal government, its national character, its constitution or its laws."

There have been suggested as illustrations in various cases, in addition to those cited *supra*, the right of free transit from one state to another and to the federal capital; of access to sea-ports, public offices and courts; protection upon the high seas or in foreign countries; the right of petition; of peaceable assemblage; the privilege of the writ of *habeas corpus;* the right to become a citizen of any state by residence therein; and the right to use the navigable waters of the United States; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; State v. Medbury, 3 R. I. 141; Crandall v. State, 10 Conn. 343; Oliver v. Washington Mills, 11 Allen (Mass.) 281; Cooley, Const. Lim. (4th Ed.) 498. As deprecating a general definition, see McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248. The right of free transit through or from a state has been declared to be a privilege and immunity secured by art. IV, sec. 2, of the United States constitution and a statute prohibiting laborers from leaving the state without a license was held void on that ground, it being unnecessary to consider it as affected by the 14th amendment; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347. The same right is protected against adverse legislation by decisions of the United States supreme court; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. Ed. 449; in which cases the same result is reached upon different grounds. The states are not prohibited from abridging any rights and immunities of their own citizens except such as are protected by express provisions of the federal constitution; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; Short v. State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404.

Whether the privileges and immunities referred to in the 14th amendment include those protected by the first eight amendments is a point touched upon, but not determined or discussed at large, by the supreme court. See Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; O'Neil v. Vermont, 144 U. S. 323, 361, 12 Sup. Ct. 693, 36 L. Ed. 450; Re Kemmler, 136 U. S. 436, 446, 10 Sup. Ct. 930, 34 L. Ed. 519; Hodgson v. Vermont, 168 U. S. 262, 18 Sup. Ct. 80, 42 L. Ed. 461; Guthrie, Fourteenth Amend. 62–65. It has been held in a state court that this amendment does not extend the operation of the 4th and 5th amendments; State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

Privileges and immunities protected by the constitution are the enjoyment, on terms of equality with others in similar circumstances, of pursuing a trade and of acquiring, holding and selling property; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Mason v. Missouri, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214 (and there are a number of *dicta* to the effect that the right to follow the ordinary callings of life is a privilege of citizens of the United States; Butchers' Union S. H. & L. S. L. Co. v. Slaughter-House Co., 111 U. S. 746, 762, 4 Sup. Ct. 652, 28 L. Ed. 585; Powell v. Pennsylvania, 127 U. S. 678, 684, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Hodges v. U. S., 203 U. S. 1, 35, 27 Sup. Ct. 6, 51 L. Ed. 65); the right of an individual or class not to be singled out as a special subject of hostile or discriminating legislation; Pembina Consol. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; to be protected from class legislation; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

A corporation is not a citizen secured by the protection given to privileges and immunities; Ducat v. Chicago, 10 Wall. (U. S.) 410, 19 L. Ed. 972; Pembina Consol. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Waters-Pierce Oil Co. v. Texas, 177 U. S. 45, 20 Sup. Ct. 518, 44 L. Ed. 657; Selover, B. & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146; and the same view was taken prior to this amendment; Bank of Augusta v. Earle, 13 Pet. (U. S.) 586, 10 L. Ed. 274; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Ducat v. Chicago, 48 Ill. 172, 95 Am. Dec. 529.

A citizen of the United States has been said to have a right as such to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, to pass from state to state and into foreign countries; he may petition the federal authorities, visit the

seat of government without being subjected to the payment of a tax for the privilege; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745; be the purchaser of public lands on the same terms as others; U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; participate in the government if he comes within the conditions of suffrage, be protected from violence while exercising his right of suffrage; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; demand the protection of the government on the high seas or in foreign countries; Cooley, Const. 489, 246; see Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; take out patents and copyrights, buy, sell, or devise United States securities, and take the benefit of the national bankrupt laws; Black, Const. L. 531. A state may not impose a tax upon travellers passing by public conveyance out of the state; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745; nor impose conditions upon the rights of citizens of other states to sue its citizens in the federal courts; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445, 22 L. Ed. 365; see Coger v. Packet Co., 37 Ia. 145; nor deny to colored citizens the privilege of serving on the jury, because of their color; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Re Virginia, 100 U. S. 339, 25 L. Ed. 676; or to citizens who have become such by naturalization; Com. v. Towles, 5 Leigh (Va.) 743.

Trial by jury is not a privilege or immunity which the states are prevented by the 14th amendment from abridging; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; but citizens of African descent cannot be excluded from jury duty, on account of race or color, whether the discrimination is by statute or in the administration of the law independently of it; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; In re Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354; but if there is no discrimination on account of race or color and the jury be drawn wholly of white persons, it is valid; Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354; Hicks v. Com., 3 Ky. Law Rep. 87. A white man may not complain that negroes were excluded from the jury which tried him; Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203. The exclusion of Chinese from juries is valid; State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

The right to practice law is not such a privilege or immunity as is protected by the federal constitution; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; In re Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. Ed. 929; In re Taylor, 48 Md. 28, 30 Am. Rep. 451; nor the right to marry; Ex parte Kinney, 3 Hughes 9, Fed. Cas. No. 7,825; nor the right to vote; U. S. v. Cruikshank, 92 U. S. 543, 23 L. Ed. 588; Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Spencer v. Board of Registration, 1 MacArthur (D. C.) 169, 29 Am. Rep. 582; People v. Barber, 48 Hun (N. Y.) 198; nor the right to practise medicine; Ex parte Spinney, 10 Nev. 323; State v. Carey, 4 Wash. 424, 30 Pac. 729; nor to sell intoxicating liquors; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; nor of fishery; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; nor the right of marriage as between different races; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Ex parte Francois, 3 Woods 367, Fed. Cas. No. 5,047; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42; State v. Reinhardt, 63 N. C. 547; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; see Conner v. Elliott, 18 How. (U. S.) 591, 15 L. Ed. 497; nor the privilege of attending the public schools of the state; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Bertonneau v. Board, 3 Woods 177, Fed. Cas. No. 1,361; Claybrook v. Owensboro, 16 Fed. 297; nor the right of free education; State v. Maryland Institute, 87 Md. 643, 41 Atl. 126; nor the use of the mails for remitting money to a lottery company; Dauphin v. Key, 4 MacArthur (D. C.) 203; nor the right to associate as a military company and drill with arms, not being a regular state organized militia; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; nor to use the national flag for advertising purposes; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525. Nor is a registration law for certain cities, though there be but one in the class affected by it; Mason v. Missouri, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214; nor a classification of towns; Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; nor to have a controversy in the state court prosecuted or determined by one form of action rather than by another; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467; nor to ride in a particular car or part of a public conveyance; Chilton v. R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269, where a regulation requiring negroes to ride in separate cars was held to violate no constitutional right.

In Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812, it was held that a state statute prohibiting the carrying of dangerous weapons does not abridge the privileges and immunities of citizens of the United States as defined in the Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745; Ward v. Maryland, 12 Wall.

(U. S.) 163, 20 L. Ed. 260; and to the same effect is State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600.

Among statutes which have been held not to abridge the privileges or immunities of citizens are: Requiring that every child attending school shall be vaccinated; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; that policies of insurance shall not be issued without securing a charter of incorporation; Com. v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; that contractors shall accept no more than eight hours' work in twenty-four except in cases of necessity; People v. Warren, 77 Hun 120, 28 N. Y. Supp. 303; that every person before registration for election must be able to read and write; Stone v. Smith, 159 Mass. 413, 34 N. E. 521; that one who sells patents shall file an authenticated copy of the letters patent and an affidavit that such letters are genuine; Reeves v. Corning, 51 Fed. 774 (distinguishing Castle v. Hutchinson, 25 Fed. 394); that women shall not be employed in saloons, theatres, etc., where liquor is sold; In re Considine, 83 Fed. 157; that minors shall not remain therein; People v. Japinga, 115 Mich. 222, 73 N. W. 111; prohibiting plumbers from exercising their calling without a certificate from a board of examiners; People v. Warden of City Prison, 81 Hun 434, 30 N. Y. Supp. 1095; requiring that the seller of fertilizers shall take out a license; American Fertilizing Co. v. Board of Agriculture, 43 Fed. 609, 11 L. R. A. 179; that those carrying on the banking business shall comply with the provisions of an act relating thereto; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; regulating the right to practise medicine; Brooks v. State, 88 Ala. 122, 6 South. 902; State v. Green, 112 Ind. 462, 14 N. E. 352; dentistry; Gosnell v. State, 52 Ark. 228, 12 S. W. 392; State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306 (but such regulation cannot discriminate against citizens of other states; State v. Hinman, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22); suppressing a nuisance; In re Hong Wah, 82 Fed. 623; regulating or prohibiting the sale of liquor within a state. See LIQUOR LAWS.

Refusal to any person of the accommodations of any public conveyance or place of amusement; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; refusing to allow colored children to attend the public schools; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895 (but see State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713); excluding persons of color *not taxed*, in an enumeration of inhabitants for the purpose of reorganizing a senatorial district; People v. Board of Sup'rs, 19 N. Y. Supp. 978; the establishment of separate schools for white and colored children; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; do not abridge the privileges or immunities of citizens; nor does a statute prohibiting the intermarriage of white and colored persons; State v. Reinhardt, 63 N. C. 547.

See CIVIL RIGHTS; DUE PROCESS OF LAW; PROTECTION OF THE LAW; LIBERTY OF CONTRACT; SCHOOLS.

PRIVILEGIUM (*priva lex*, i. e. *de uno homine*). **In Civil Law.** A private law inflicting a punishment or conferring a reward. Calvinus, Lex.; Cicero, *de Lege* 3, 19; *pro Domo* 17; Vicat, Voc. Jur. Every peculiar right by which one creditor or class of creditors is preferred to another in personal actions. Vicat, Voc. Jur. Every privilege granted by law in derogation of common right. Mackeldey § 188. A claim or lien on a thing, which once attaching, continues till waiver or satisfaction, and which exists apart from possession. So at the present day in maritime law; *e. g.* the lien of seamen on ship for wages. 2 Pars. Marit. Law 561. See PRIVILEGE.

PRIVILEGIUM CLERICALE (Lat.). Benefit of clergy, which see.

PRIVILEGIUM, PROPTER, PROPERTY. A qualified property in animals *feræ naturæ*, *i. e.* a privilege of hunting, taking, and killing them, in exclusion of others. 2 Bla. Com. 394.

PRIVITY. The mutual or successive relationship to the same rights of property. 1 Greenl. Ev. § 189; Stacy v. Thrasher, 6 How. (U. S.) 60, 12 L. Ed. 337; Bailey v. Sundberg, 49 Fed. 585, 1 C. C. A. 387, 1 U. S. App. 101; Hummel v. Bank, 2 Colo. App. 571, 32 Pac. 72. See PRIVIES.

PRIVITY OF CONTRACT. The relationship which subsists between two contracting parties.

From the nature of the covenant entered into by him, a lessee has both privity of contract and of estate; and though by an assignment of his lease he may destroy his privity of estate, still the privity of contract remains, and he is liable on his covenant notwithstanding the assignment; Dougl. 458, 764; Viner, Abr.; Stacy v. Thrasher, 6 How. (U. S.) 60, 12 L. Ed. 337.

See CAUSA PROXIMA NON REMOTA SPECTATUR; THIRD PARTIES.

PRIVITY OF ESTATE. Identity of title to an estate.

The relation which subsists between a landlord and his tenant.

It is a general rule that a termor cannot transfer the tenancy or privity of estate between himself and his landlord without the latter's consent: an assignee who comes in only in privity of estate is liable only while he continues to be legal assignee; that

is, while in possession under the assignment; Bac. Abr. *Covenant* (14); Woodf. Landl. & T. 261; Viner, Abr.; Washb. R. P.

PRIVITY OF POSSESSION. To establish this, the later occupant must enter under the prior one, and must obtain his possession either by purchase or deed. When the possession is actual, it may commence in parol without deed or writing; and it may be transferred or pass from one occupant to another by parol, bargain, and sale, accompanied by delivery. All the law requires is continuity of possession, where it is actual; Shuffleton v. Nelson, 2 Sawy. 545, Fed. Cas. No. 12,822; Vance v. Wood, 22 Or. 77, 29 Pac. 73.

PRIVY. One who is a partaker or has any part or interest in any action, matter, or thing.

PRIVY COUNCIL. The chief council of the sovereign, called, by pre-eminence, "the Council," composed of those whom the king appoints. 1 Bla. Com. 229.

The number was anciently twelve; afterwards it was increased to an inconvenient number and was thereupon (1679) limited to thirty, of whom fifteen were the principal officers of state *virtute officii*, ten were lords and five were commoners. The number is now indefinite. With the exception of those of them who are cabinet ministers, the Privy councillors are not now ordinarily summoned to advise the king. The cabinet ministers are those members of the Council who actually conduct the business of the government. Privy councillors are made by the king's nomination, without either patent or grant. They have the title of "Right Honourable" during the life of the monarch who created them; they are subject to removal at his discretion.

Formal meetings of the Council for the discharge of official business are held about ten times a year, but only a small number of the members are summoned to these meetings. Orders in Council, and other matters resolved on by the cabinet, with the approval of the king, are brought forward and passed without discussion.

A committee of the Privy Council is called the Judicial Committee of the Privy Council and possesses extensive appellate jurisdiction. See that title; COURTS OF ENGLAND; CURIA REGIS; CABINET; ORDERS IN COUNCIL.

PRIVY PURSE. The income set apart for the sovereign's personal use.

PRIVY SEAL. In English Law. A seal which the king uses to such grants or things as pass the great seal. Co. 2d Inst. 554. A seal of the British government which is affixed to documents not requiring the great seal. Encycl. Br.

PRIVY SIGNET. The seal which is first used in making grants, etc., of the crown. It is always in custody of the secretary of state. 2 Bla. Com. 347; 1 Steph. Comm. 593.

PRIVY TOKEN. By stat. 33 Henry VIII. c. 1, punishment is provided against those evil-disposed persons who devised how they might unlawfully get into their possession goods, chattels, and jewels of other persons by "privy tokens and counterfeit letters in other men's names," unto divers persons their friends and acquaintances, by color whereof they have unlawfully obtained the same. A false privy token within the statute has generally been taken to denote some seal, visible mark, or thing, as a key, a ring, etc. 13 Viner, Abr. 460. When one makes use of a false token, he is indictable for the cheat, though the act is not larceny; 1 Bish. Cr. L. § 585. But when the consent obtained covers no more than the possession, and the goods are converted to his own use, the offence becomes larceny; 1 Leach 420; East, Pl. Cr. 691. See FALSE TOKEN; CHEAT.

PRIVY VERDICT. One which is delivered privily to a judge out of court.

PRIZE. In Maritime Law. The apprehension and detention at sea of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo. 1 C. Rob. 228. See Bened. Adm. § 509.

The vessel or goods thus taken.

Goods taken on land from a public enemy are called booty; and the distinction between a prize and booty consists in this, that the former is taken at sea and the latter on land.

A lawful prize includes enemy's property captured on the high seas or in territorial waters belonging either to the captor or to the enemy, and property of neutrals captured and confiscated for breach of blockade or as contraband of war; Risley, Law of War 144.

In order to vest the title of the prize in the captors, it must ordinarily be brought with due care into some convenient port for adjudication by a competent court. But circumstances may render such a step improper; and of these the captor must be the judge. In making up his decision, good faith and reasonable discretion are required; Jecker v. Montgomery, 18 How. (U. S.) 110, 15 L. Ed. 311; 1 Kent 101. The condemnation must be pronounced by a prize court of the government of the captor sitting in the country of the captor or his ally; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. Ed. 454; the prize court of an ally cannot condemn.

Strictly speaking, as between the belligerent parties the title passes, and is vested when the capture is complete; and that was formerly held to be complete and perfect when the battle was over, or the flag

hauled down, and the *spes recuperandi* was gone. Later, twenty-four hours' possession was required, and in still later times it was considered that the captured vessel must be brought *infra præsidia* (*q. v.*) to a place of safety. But by the modern usage of nations this is not sufficient to change the property. A judicial tribunal must pass upon the case; and the property is not charged in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation; 1 Kent 102; 1 C. Rob. 135; but this rule is not inflexible.

A neutral ship in the employment of a belligerent is, as well as the enemy's cargo, subject to capture; The City of Mexico, 24 Fed. 33. Where a vessel is captured by the army it is not subject to condemnation as prize; The Nuestra Señora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662.

Formerly prizes could be brought into a neutral port and kept there until condemned by a prize court sitting in the belligerent's territory; but it is probable that, at present, this right would be limited to cases arising out of stress of weather, lack of supplies, etc., and only for such length of time as necessity requires; Risley, Law of War, 176.

All captures are made for the government; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. Ed. 328; and the title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the result of local law or regulation; The Florida, 101 U. S. 42, 25 L. Ed. 898; 2 Russ. & M. 56. The government may restore a prize, and the courts cannot condemn captured property that had been restored under a treaty of peace before decree; Manila Prize Cases, 188 U. S. 254, 23 Sup. Ct. 415, 47 L. Ed. 463.

The question of prize or no prize in England is triable only in a court of admiralty under a commission from the crown, with an appeal to the crown in council, for the crown reserves the right to decide such questions by its own authority and does not commit its determination to any municipal court.

Under the prize laws of the United States a ship includes a torpedo steam launch; U. S. v. Steever, 113 U. S. 747, 5 Sup. Ct. 765, 28 L. Ed. 1133.

Where there is a probable cause to believe that a vessel is liable to capture, it is proper to take her and subject her to the examination and adjudication of a prize court; Talbot v. The Amelia, 4 Dall. (U. S.) 34, 1 L. Ed. 730. Circumstances creating a reasonable suspicion of conduct warranting her capture are sufficient; The George, 1 Mas. 24, Fed. Cas. No. 5,328.

A captured vessel is usually put in charge of a prize master, whose duty is, immediately on his arrival in port, to institute proceedings for condemnation. He is a bailee for the captors, and may become liable for negligence resulting in loss to them, for demurrage, etc.; 2 Halleck, Int. L., Baker's ed. 391. A captor should bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a competent prize court, though under imperious circumstances, he may take it to a foreign port or even sell it. The proceeds of a sale must be subject to the order of a prize court.

Rules are to be found in article 11 of the Naval War Code of 1900, withdrawn in 1904. Articles 5–8 of the Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War lay down regulations regarding the crews of enemy merchantships captured by a belligerent.

A captor's right of prize may be forfeited in various ways, as by delay in seeking a prize court; cruel treatment of the captured crew, embezzlement, etc.

By act of March 3, 1899, all laws providing for prize money are repealed. Reference may be made to cases arising out of the Spanish War. U. S. v. Taylor, 188 U. S. 283, 23 Sup. Ct. 412, 47 L. Ed. 477; The Mangrove Prize Money, 188 U. S. 720, 23 Sup. Ct. 343, 47 L. Ed. 664.

See PRIZE COURT; NEUTRALITY; RECAPTURE; CAPTURE; INFRA PRÆSIDIA; PRE-EMPTION.

In Contracts. A reward which is offered to one of several persons who shall accomplish a certain condition; as, if an editor should offer a silver cup to the individual who shall write the best essay in favor of peace. In this case there is a contract subsisting between the editor and each person who may write such essay that he will pay the prize to the writer of the best essay; Wolff, *Dr. de la Nat.* § 675.

PRIZE COURT. In English Law. That branch of admiralty which adjudicates upon cases of maritime captures made in time of war. A special commission issues in England, in time of war, to the judge of the admiralty court, to enable him to hold such court. See ADMIRALTY.

Some question has been raised whether the prize court is or is not a separate court from the admiralty court. Inasmuch as the commission is always issued to the judge of that court, and the forms of proceeding are substantially those of admiralty, while the law applicable is derived from the same sources, the fact that the commission of prize is only issued occasionally would hardly seem to render the distinction a valid one. But Lord Mansfield said that the whole system of procedure, litigation, and jurisprudence is different; Dougl. 613. See JUDICATURE ACTS.

In the United States, the admiralty courts discharge the duties both of a prize and an instance court (*q. v.*). The district courts are

prize courts; Glass v. The Betsey, 3 Dall. (U. S.) 6, 1 L. Ed. 485. And are given such jurisdiction by the Judicial Code, March 3, 1911, with a direct appeal to the supreme court.

On the breaking out of hostilities the district court appoints commissioners, not exceeding three, to examine witnesses, etc., under the direction of the court; one shall be a retired naval officer, and at least one of the others shall be a member of the bar of the court; R. S. § 4621. For the practice see Bened. Adm. §§ 509–512; 1 Wheat. (U. S.) 494, note; 2 Wheat. (U. S.) 429, note; and as to the English practice, 2 Halleck, Int. L., Baker's ed. 421. Questions of booty may be referred to the admiralty by the crown; Knapp, P. C. 360.

If there is probable cause for the seizure of a vessel that is not a good prize, the captors may have their costs though the vessel is not condemned; Hooper v. U. S., 22 Ct. Cls. 408; they are not liable in damages; The Rover, 2 Gall. 240, 325, Fed. Cas. No. 12,091; but if a captor unreasonably delays bringing suit for condemnation, he is liable for demurrage if the court decrees a restoration; U. S. v. The Nuestra Senora De Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662, where the United States was held liable for demurrage from the time when surrender might have been made, at the rate fixed by the charter party. A captor does not lose his right by delay in sending home a prize for adjudication, if he thinks it necessary and uses discretion and good faith; Jecker v. Montgomery, 18 How. (U. S.) 110, 15 L. Ed. 311. It is the usual practice of the prize court to give freight to the neutral carrier of enemy's goods that are seized; 3 Phill. Int. L. 373. The burden of proof that the prize is neutral rests upon the claimant; and if he fails to show it, condemnation ensues; 2 C. Rob. 77; he must clear himself of suspicion; Hooper v. U. S., 22 Ct. Cls. 408.

A prize court of the captors cannot sit in neutral territory, though it may in conquered territory, and in that of a co-belligerent; 2 Halleck, Int. L., Baker's ed. 401.

The decision of a prize court is conclusive against the subject of the state and as to the property in the subject-matter against all parties; but unlawful condemnation may subject the state of the captors to demands for indemnity by a foreign state; *id.* 407. But courts of other nations may examine as to the jurisdiction of a prize court, and if a condemnation therein was not according to the rules of international law, may treat it as a nullity; *id.* 411. Condemnations of prize courts are final in actions between individuals, and as to the vessel condemned, giving purchasers a good title against all the world, but do not bind foreign nations, if wrongfully decreed; Cushing v. U. S., 22 Ct. Cls. 1.

There is a clearly marked distinction between proceedings for prize and forfeiture. "The libel for prize is founded upon the law of nations, and depends for proof upon the facts of her acts upon the high seas. The libel for forfeiture is for the violation of a municipal statute, and depends upon a set of facts and circumstances entirely different from that of piratical aggression. The offences charged are separate and distinct, and the cause of action is in no wise the same." The City of Mexico, 28 Fed. 150. In the case of *The Itata*, it was said that "when a ship is libelled for prize, and the facts fail to sustain the libel, but make out a strong *prima facie* case of a statutory forfeiture, it would be the duty of the court to remand the case for a new libel; but under no circumstances could a ship be libelled for one offence, and have a decree entered against it for another distinct and separate offence." The Itata, 56 Fed. 505, 515, 5 C. C. A. 608.

The duties of prize courts are thus described by Lord Stowell:

"In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls for from me; namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer, with indifference, that justice which the Law of Nations holds out, without distinction, to independent States, some happening to be neutral, and some belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." 1 C. Rob. 340.

In another case, he says:

"It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the Law of Nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance." 6 *id.* 349.

There are obvious objections to the system of national prize courts. Although in theory they apply international law to cases coming before them, they are in fact influenced by the municipal laws of their own

country. In consequence, their decisions have often given rise to controversies, especially between the belligerent and neutral states. In 1877, the Institute of International Law proposed a reform of the system by the establishment of a court of five judges, two to be appointed by the belligerents and three by neutral powers. At the Second Hague Conference a Convention Relative to the Establishment of an International Prize Court was adopted, consisting of 57 articles, providing for the jurisdiction and constitution of the court and the procedure to be followed by it. The international court is a court of appeal, so that jurisdiction in the first instance is still to be exercised by the prize courts of the belligerent captor. A number of states refused to sign the Convention, while others objected to the constitution of the court. As it has not yet been generally ratified, its fate is still in doubt. Higgins, The Hague Peace Conferences, 407–444.

Nevertheless, British prize courts have at times enforced doctrines of prize law which have been vigorously attacked by other governments. The doctrine of "continuous voyages" as applied by the British courts to contraband, holding that a vessel is liable to condemnation, even if bound for a neutral port, if it be shown that the vessel is to go thence with the same cargo to an enemy port, is condemned by the majority of continental writers. Likewise the application of the doctrine of "continuous voyages" to blockade, made by the American prize courts during the civil war, has called forth protests from British as well as continental writers. 2 Opp. § 401.

PRIZE-FIGHT. A public prize-fight is an indictable offence. No concurrence of wills can justify a public tumult and alarm; therefore, persons who voluntarily engage in a prize-fight and their abettors are all guilty of assault; 4 C. & P. 537; Poll. Tort 186, n.; 1 Cox, C. C. 177; 2 Bish. C. L. § 535. Prize-fights are unlawful, and all persons guilty of aiding and abetting a prize-fight are guilty of an assault; 8 Q. B. Div. 534. See, also, Com. v. Barrett, 108 Mass. 302; Sullivan v. State, 67 Miss. 350, 7 South. 275.

To constitute prize-fighting there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, and there must be an intent to inflict some degree of bodily harm on the contestant; People v. Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

If two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no danger or ill-will; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, disagreeing with State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190; it is no bar to an action for assault that the parties fought with each other by mutual consent, but such consent may be shown in mitigation of the damages; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply; Bell v. Hansley, 48 N. C. 131; mere voluntary presence at a fight does not, as a matter of law, necessarily render persons so present guilty of an assault, as aiding and abetting in such fight; 8 Q. B. Div. 534 (4 C. & P. 537, distinguished); *semble*, mere presence of a person at a prize-fight affords some evidence for the consideration of a jury of an aiding and abetting in such fight; 8 Q. B. Div. 534.

To constitute a prize-fight it is not essential that the fight should be with the naked fist or hand, but the fact that a contest was had with gloved hands, as also the kind, size, weight, and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case in determining whether a contest was a prize-fight, or merely a sparring or boxing exhibition without prize or reward to the victor; State v. Moore, 4 Ohio N. P. 81.

Prize-fighting was not a distinct offence at common law and participants were indictable and punishable for assault, riot, or affray; 8 Q. B. Div. 534; 3 C. & M. 314; 2 C. & P. 234; Sullivan v. State, 67 Miss. 350, 7 South. 275.

A spectator at a sparring match is not *particeps criminis;* there is nothing unlawful in sparring, unless the men fight until they are so weak that a dangerous fall is likely to be the result of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter; 10 Cox, C. C. 371.

In Arkansas equity has power to issue an injunction to restrain a prize-fight advertised to take place within its jurisdictional limits; 35 Am. Law Reg. & Rev. 100; the state obtained an injunction on the ground that a corporation was misusing its franchise and maintaining its property as a nuisance, although the act complained of was a crime; 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407. A private citizen cannot sue to enjoin a prize fight unless he suffers some special injury from it; Louisville Athletic Club v. Nolan, 134 Ky. 220, 119 S. W. 800, 23 L. R. A. (N. S.) 1019.

Evidence is not admissible to prove that such matches are common and harmless amusements, practised in the colleges of this country, nor was there error in refusing to allow the jury to examine the boxing gloves used by the respondent; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

An agreement to engage in a prize-fight

is a conspiracy to commit a crime; and the declarations of either party with reference to the common object, or in furtherance of the criminal design, while engaged in its prosecution, are competent evidence against the other, though the agreement was made through backers or other representatives of the principals and the latter were unknown to each other; Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

Whether a pugilistic encounter is a fight or boxing exhibition, is not a question upon which expert testimony is admissible on the trial of an indictment for engaging in a prize-fight. The question must be decided by the jury upon the evidence of what actually took place, under proper instructions from the court, and not upon the opinions of professional pugilists, and others experienced in such combats, or the rules adopted by associations for conducting such contests; Seville v. State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; but it has also been held to be a question of law; People v. Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

Statutes prohibiting prize-fights have been passed in nearly all the states.

By statute it is even made criminal for inhabitants of a state by previous agreement made in the state to leave the state and engage in a fight outside of its limits; Com. v. Barrett, 108 Mass. 302.

PRIZE PACKAGES. See SALES; LOTTERY.

PRO BONO PUBLICO (Lat.). For the public good.

PRO CONFESSO (Lat. as confessed).

In Equity Practice. A decree taken where the defendant has either never appeared in the suit, or, after having appeared, has neglected to answer. 1 Dan. Ch. Pr. 479; Ad. Eq., 8th ed. *328, 330, 374.

A decree pro confesso is not a decree according to the prayer of the bill, but should be made by the court according to what is proper upon the statements of the bill assumed to be true. After such decree the defendant cannot set up anything in opposition to it either below or on appeal, except what appears on the face of the bill. The subject is fully considered in Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

PRO CONSILIO (Lat.). For counsel given. An annuity *pro consilio* amounts to a condition, but in a feoffment or lease for life, etc., it is the consideration, and does not amount to a condition; for the state of the land by the feoffment is executed, and the grant of the annuity is executory. Plowd. 412.

PRO DEFECTU EXITUS (Lat.). For, or in case of, default of issue. 2 Salk. 620.

PRO DIGNITATE REGALI (Lat.). In consideration of the royal dignity. 1 Bla. Com. 223.

PRO EO QUOD (Lat.). **In Pleading.** For this that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment. 1 Saund. 117; 2 Chit. Pl. 369–393; Gould, Pl. c. 3, § 34.

PRO FALSO CLAMORE SUO (Lat.). A nominal amercement of a plaintiff for his *false claim*, which used to be inserted in a judgment for the defendant.

PRO FORMA (Lat.). As a matter of form. 2 Kent 245.

Entering a *pro forma* decree for the sake of expediting a case on appeal, even though the court were actuated in doing so by a sense of public duty, is not sanctioned; Cramp & Sons S. & E. Bldg. Co. v. Turbine Co., 228 U. S. 645, 33 Sup. Ct. 722, 57 L. Ed. 1003.

PRO HAC VICE (Lat.). For this occasion.

PRO INDIVISO (Lat.). For an undivided part. The possession or occupation of lands or tenements belonging to two or more persons, and where, consequently, neither knows his several portion till divided. Bract. l. 5.

PRO INTERESSE SUO (Lat.). According to his interest.

PRO LÆSIONE FIDEI (Lat.). For breach of faith. 3 Bla. Com. 52.

PRO LEGATO (Lat.). As a legacy.

PRO MAJORI CAUTELA (Lat.). From greater caution.

PRO PARTIBUS LIBERANDIS (Lat.). An ancient writ for partition of lands between co-heirs. Reg. Orig. 316.

PRO QUERENTE (Lat.). For the plaintiff; usually abbreviated *pro quer.*

PRO RATA (Lat.). According to the rate, proportion, or allowance. A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

According to a certain rule or proportion. 19 Am. L. Reg. N. S. 355, n. (U. S. D. C. Cal.). It is presumed to be used in that sense in a will; *id.*

PRO RE NATA (Lat.). For the occasion as it may arise.

PRO SALUTE ANIMÆ (Lat.). For the good of his soul.

PRO TANTO (Lat.). For so much. See Donley v. Hays, 17 S. & R. (Pa.) 400.

PRO TEMPORE (Lat.). For the time being; temporary.

PROAMITA (Lat.). A grandfather's sister; a great aunt. Ainsworth, Dict.

PROAVIA (Lat.). A great-grandmother. Ainsworth, Dict.

PROAVUNCULUS (Lat.). A great-grandmother's brother. Ainsworth, Dict.

PROAVUS (Lat.). Great-grandfather. This term is employed in making genealogical tables.

PROBABILITY. Likelihood; consonance to reason; for example, there is a strong probability that a man of good moral character, and who has heretofore been remarkable for truth, will, when examined as a witness under oath, tell the truth; and, on the contrary, that a man who has been guilty of perjury will not, under the same circumstances, tell the truth: the former will, therefore, be entitled to credit, while the latter will not.

PROBABLE. Having the appearance of truth; appearing to be founded in reason.

PROBABLE CAUSE. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offence with which he is charged. Carl v. Ayers, 53 N. Y. 17; Fugate v. Millar, 109 Mo. 281, 19 S. W. 71; Clement v. Major, 1 Colo. App. 297, 29 Pac. 19.

Want of probable cause is one of the elements required to support an action for malicious prosecution, which title see for a discussion of the subject. See MALICIOUS PROSECUTION.

In extradition cases, probable cause is made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it; Ornelas v. Ruiz, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787. See EXTRADITION.

In cases of municipal seizure for the breach of revenue, navigation and other laws, if the property seized is not condemned, the party seizing is exempted from liability for such seizure if the court before which the cause is tried grants a certificate that there was *probable cause* for the seizure. If the seizure was without probable cause, the party injured has his remedy at common law. See The Apollon, 9 Wheat. (U. S.) 362, 6 L. Ed. 111; Taylor v. U. S., 3 How. (U. S.) 197, 11 L. Ed. 559; Buckley v. U. S., 4 How. (U. S.) 251, 11 L. Ed. 961; Jecker v. Montgomery, 13 How. (U. S.) 498, 14 L. Ed. 240. See FOOD AND DRUG ACTS.

PROBATE. Originally, relating to proof; afterwards, relating to the proof of wills. In American law, now a general name or term used to include all matters of which probate courts have jurisdiction. Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 382.

PROBATE CODE. The body or system of law relating to the estates of deceased persons, and of persons under guardianship. Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 382.

PROBATE COURT. See COURTS OF PROBATE.

PROBATE DUTY. A tax laid by the government on the gross value of the personal property of the deceased testator.

PROBATE OF A WILL. The proof before an officer authorized by law that an instrument offered to be proved or registered is the last will and testament of the deceased person whose testamentary act it is alleged to be.

Jurisdiction. In England, the ecclesiastical courts were the only tribunals in which, except by special prescription, the validity of wills of personal estate could be established or disputed. Hence in all courts, the seal of the ecclesiastical court was conclusive evidence of the *factum* of a will of personalty; from which it followed that an executor could not assert or rely on his authority in any other court, without showing that he had previously established it in the spiritual court,—the usual proof of which was the production of a copy of the will by which he was appointed, certified under the seal of the ordinary. This was usually called the probate. The probate of a will was conclusive as to personalty; but not as to realty, which could only be settled by an issue out of chancery or a trial at law; 4 Kent 510.

The ecclesiastical courts had no jurisdiction of devises of lands; and in a trial at common law or in equity the probate of a will is not admissible as evidence, but the original will must be produced, and proved the same as any other disputed instrument. This rule has been modified by statute in some of the states. In New York, the record, when the will is proved by the subscribing witnesses, is *prima facie* evidence, and provision is made for perpetuating the evidence. See Jackson v. Hasbrouck, 12 Johns. (N. Y.) 192. In Massachusetts, North Carolina, and Michigan the probate is conclusive of its validity, and a will cannot be used in evidence till proved; Waters v. Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122; 2 Mich. Comp. Laws (1871) 1375; Battle, Rev. 849. In Pennsylvania, the probate was held not conclusive as to lands, and, although not allowed by the register's court, it might be read in evidence; Smith v. Bonsall, 5 Rawle (Pa.) 80; but see McCay v. Clayton, 119 Pa. 138, 12 Atl. 860; but it becomes conclusive as to realty, unless within five years from probate those interested shall contest its validity. In South Carolina the will must be proved *de novo* in the court of common pleas, though allowed in the ordinary; Gibson v. Brown, 1 N. & McC. (S. C.) 326. In New Jersey, probate is necessary, but it is not conclusive; Denn v. Allen, 2 N. J. L. 42; except in actions not commenced within seven years from the probate; N. J. Rev. Stat. 1250. See EXECUTORS AND ADMINISTRATORS.

The effect of the probate in this country, and the rules in regard to jurisdiction, are generally the same as in England; but, as no ecclesiastical courts exist in the United States, probate is granted by some judicial officer, who performs the part of the ordinary in England, but generally with more ample powers in relation to the administration of the estate. See SURROGATE; LETTERS TESTAMENTARY.

The proof of the will is a judicial proceeding, and the probate a judicial act. The party propounding the instrument is termed the proponent, and the party disputing, the contestant. In England, proof *ex parte* was called probate in common form, and proof on notice to the next of kin, proof in solemn form. In the United States, generally speaking, proofs are not taken until citation or notice has been issued by the judge to all the parties interested to attend. On the return of the citation, the witnesses are examined, and the trial proceeds before the court. If the judge, when both parties have been heard, decides in favor of the will, he admits it to probate; if against the will he rejects it. In Pennsylvania no citation is required.

More than one instrument may be proved; and where the contents of two or more instruments are not wholly inconsistent with each other, they may all be admitted as together constituting the last will and testament of the deceased; Will. Exec. *138.

On the probate, the alleged will may be contested on any ground tending to impeach its validity; as, that it was not executed in due form of law and according to the requisite statutory solemnities; that it was forged, or was revoked, or was procured by force, fraud, misrepresentation, or undue influence over a weak mind, or that the testator was incompetent by reason of idiocy or lunacy.

PROBATIO (Lat.). Evidence. See PREUVE.

PROBATION. The evidence which proves a thing. It is either by record, writing, the party's own oath, or the testimony of witnesses. Proof. It also signifies the time of a novitiate; a trial. Nov. 5.

PROBATION SYSTEM. An effort to encourage good behavior in a convicted criminal by granting a deduction from his sentence or in case of its being his first offence, releasing him on condition that, for a stated period, he lead an orderly life. See SENTENCE; JUVENILE COURTS; PRISONER.

PROBATOR. In Old English Law. Strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessary, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another. Jacob, Law Dict.

PROBATORY TERM. In the British courts of admiralty, after the issue is formed between the parties, a time for taking the testimony is assigned. This is called a probatory term. It is common to both parties, and either party may examine his witnesses. When good cause is shown, the term will be enlarged. 2 Brown, Civ. Law 418; Dunlop, Adm. Pr. 217.

PROBI ET LEGALES HOMINES (Lat.). Good and lawful men; persons competent in point of law to serve on juries. Cro. Eliz. 654, 751; Cro. Jac. 635; Mart. & Y. 147; Bac. Abr. *Juries* (A).

PROCEDENDO (Lat.). **In Practice.** A writ which issues where an action is removed from an inferior to a superior jurisdiction by *habeas corpus*, *certiorari*, or writ of privilege, and it does not appear to such superior court that the suggestion upon which the cause has been removed is sufficiently proved; in which case the superior court by this writ remits the cause to the court from whence it came, commanding the inferior court to *proceed* to the final hearing and determination of the same. See 2 W. Bla. 1060; 6 Term 365.

PROCEDURE. The methods of conducting litigation and judicial proceedings.

"Practice," like "procedure," which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. Per Lush, L. J., in 7 Q. B. Div. 333.

Prof. Thayer says (Evid. 200) that in the early days procedure was more important than law. It is the life of ancient law; 1 P. & M. XXXIII.

The term is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice, And practice in this sense means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in; and evidence as a part of procedure signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted. Bish. Cr. Proc. § 2; Kring v. Missouri, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506. See Cochran v. Ward, 5 Ind. App. 95, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229.

The term is, with respect to its present use, rather a modern one. Recently the supreme court of the United States commented on the fact that it was unable to find anywhere a satisfactory definition of

it. Apart from observations of the most general character the subject is one which does not admit of distinct or detailed treatment under this title. It includes all the practical titles of the law to which reference should be had, with respect to any particular matter, as they are separately treated in this work.

Probably the most salient fact with respect to legal procedure in civil cases is the modern tendency in England and the United States to obliterate technical distinctions between law and equity and to authorize the enforcement of equitable remedies, as well in courts of law as of chancery. But with respect to this tendency it has been very justly said: "Although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on." Eddy & B. Live-Stock Co. v. Blackburn, 70 Fed. 949, 17 C. C. A. 532.

Another feature of modern thought on the subject of procedure is the controversy between the advocates of common-law practice and that under codes.

In England the most radical changes in procedure have been introduced by the Judicature Acts, which title see. Under the changes thus introduced, where one formerly, in seeking relief from judicial tribunals, was obliged to use different forms of procedure in different courts, these acts, and the rules made pursuant to them, "have to a very large extent introduced uniformity in this respect into the practice of the different divisions of the court." 1 Brett, Com. 336.

In criminal procedure there is a strong tendency indicated towards simplification and expedition. The most notable tendency of a general character is that towards the abolition or modification of the grand jury system, as to which see that title. Comprehensive changes have been made in the criminal procedure of France relating to the preliminary examination of accused persons. See JUGE D'INSTRUCTION.

A new criminal code, notable both as to the changes introduced and the care with which it was prepared, went into effect in Italy in 1890, an analysis of which will be found in 35 Am. L. Reg. N. S. 696. In Great Britain the criminal procedure of Scotland is very different from that of England notwithstanding the Union, and a carefully detailed account of it may be found in 35 Am. L. Reg. N. S. 619. As to code changes in other countries, see CODE.

In a case defining the functions and authority of a prosecuting attorney and his right to enter a *nolle prosequi* after conviction, the supreme court of Louisiana directed attention to some differences between the criminal procedure of that state and that of England and the states which follow English precedents. The great power given to the prosecuting officer under the common law is greatly diminished in that state, and the court concludes its examination of the subject by this classification:

"First. The inauguration or preliminary stage, when the prosecuting officer has absolute control of his indictments.

"Second. The trial of the cause, and its incidents, during which the court has control and the power of the prosecuting officer is suspended.

"Third. The period between the verdict of the jury and the sentence of the court, when the pardoning power comes into operation." State v. Moise, 48 La. Ann. 109, 18 South. 943, 35 L. R. A. 701.

See POSTULATIO.

PROCEDURE ACTS. Three acts of parliament passed in 1852, 1854, and 1860, for the amendment of procedure at common law. Moz. & W. They have been largely superseded by the Judicature Acts of 1873 and 1875. See JUDICATURE ACTS.

PROCEEDING. In its general acceptation, the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing. It includes certified copies of pleadings on which the case was tried. School Dist. No. 49 v. Cooper, 44 Neb. 714, 62 N. W. 1084.

Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course at common law.

Summary proceedings are those where the matter in dispute is decided without the intervention of a jury; these must be authorized by the legislature, except, perhaps in cases of contempt, for such proceedings are unknown to the common law.

In U. S. v. Bell, 81 Fed. 830, the question was suggested whether proceedings before pension commissioners are judicial proceedings within the meaning of R. S. § 860, which provides that evidence obtained from a party or witness shall not be used against him in any criminal proceeding. The court passed the question without deciding it, though apparently inclined to the affirmative.

In Louisiana there is a third kind of proceeding, known by the name of executory process (*q. v.*).

In New York the code of practice divides remedies into actions and special proceedings. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding.

PROCEEDS. Money or articles of value arising or obtained from the sale of prop-

erty. Goods purchased with money arising from the sale of other goods, or obtained on their credit, are *proceeds* of such goods. 2 Pars. Marit. L. 201; Bened. Adm. 290. The sum, amount, or value of goods sold, or converted into money. Whart. Dict. Proceeds does not mean necessarily money; Phelps v. Harris, 101 U. S. 380, 25 L. Ed. 855.

PROCERES (Lat.). The name by which the chief magistrates in cities were formerly known. St. Armand, Hist. Eq. 88.

PROCÈS-VERBAL. In French Law. A true relation in writing in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.

The *procès-verbal* should be dated, contain the name, qualities, and residence of the public functionary who makes it, the cause of complaint, the facts tending to prove the existence of the crime, that which serves to substantiate the charge, point out its nature, the time, the place, the circumstances, state the proofs and presumptions, describe the place,—in a word, everything calculated to ascertain the truth. It must be signed by the officer. Dalloz, Dict. See JUGE D'INSTRUCTION.

PROCESS. In Practice. The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.

The method taken by law to compel a compliance with the original writ or commands of the court.

A writ, warrant, subpœna, or other formal writing issued by authority of law; also the means of accomplishing an end, including judicial proceedings; Gollobitsch v. Rainbow, 84 Ia. 567, 51 N. W. 48; the means or method pointed out by a statute, or used to acquire jurisdiction of the defendants, whether by writ or notice. Wilson v. R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

In civil causes, in all real actions and for injuries not committed against the peace, the first step was a summons, which was served in personal actions by two persons called summoners, in real actions by erecting a white stick or wand on the defendant's grounds. If this summons was disregarded, the next step was an attachment of the goods of the defendant, and in case of trespasses the attachment issued at once without a summons. If the attachment failed, a distringas issued, which was continued till he appeared. Here process ended in injuries not committed with force. In case of such injuries, an arrest of the person was provided for. See ARREST. In modern practice some of these steps are omitted; but the practice of the different states is too various to admit of tracing here the differences which have resulted from retaining different steps of the process.

In the English law, process in civil causes is called *original* process, when it is founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as, to summon juries, witnesses, and the like; *mesne* process is also sometimes put in contradistinction to *final* process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit. 3 Bla. Com. 279. See REGULAR PROCESS; OBSTRUCTING PROCESS; SHERIFF; SERVICE.

No court can, at common law, exercise jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699. See JURISDICTION.

As to the grant of letters patent for a process, see PATENT.

PROCESS OF INTERPLEADER. See INTERPLEADER.

PROCESS OF LAW. See DUE PROCESS OF LAW.

PROCESSION. A peaceable procession in the streets of a town, if lawful, and the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of those composing it. State v. Hughes, 72 N. C. 25.

The peaceable procession in the streets of a religious body, known as the Salvation Army, has been held lawful, although the members were aware of the lawless intention of their opponents to make it the occasion of a riot; 26 Sol. Journ. 505. See 26 Alb. L. J. 22; STREETS.

PROCESSIONING. A term used to denote the manner of ascertaining the boundaries of land, as provided for by the laws of that state. 1 Tenn. Comp. Stat. § 2020. The term is also used in North Carolina and Georgia. Cansler v. Hoke, 14 N. C. 268; Christian v. Weaver, 79 Ga. 406, 7 S. E. 261.

PROCESSUM CONTINUANDO. A writ for the continuation of process after the death of the chief justice or other justices in the commission of *oyer* and *terminer*. Reg. Orig. 128.

PROCHEIN (L. Fr.). Next. A term somewhat used in modern law, and more frequently in the old law; as, *prochein ami, prochein cousin*. Co. Litt. 10.

PROCHEIN AMI (L. Fr.; spelled, also, *prochein amy* and *prochain amy*). Next friend (*q. v.*).

PROCLAMATION. The act of proclaiming or making publicly known certain affairs of state. A written or printed document in which are contained such matters, issued by proper authority: as, the president's proclamation, the governor's, the mayor's proclamation. Also used to express the public nomination of any one to a high office: as, such a prince was *proclaimed* emperor.

The president's proclamation may give force to a law, when authorized by congress; as, if congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the president by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then it wanted. How far a proclamation is evidence of facts, see Bac. Abr. *Evidence* (F); 8 How. St. Tr. 212; 4 Maule & S. 546; 2 Camp. 44; Dane, Abr. ch. 96, a. 2, 3, 4; Cook v. Hall, 1 Gilman (Ill.) 577; Brooke, Abr. The public proclamation of pardon and amnesty has the force of public law, of which courts and officers will take notice though not specially pleaded; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. Courts take judicial notice of official proclamations and messages of the governor of the state; Wells v. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847.

On the breaking out of war it is usual for a nation to issue a proclamation announcing the existence of hostilities. See MANIFESTO; WAR.

In Practice. The declaration made by the crier, by authority of the court, that something is about to be done.

It usually commences with the French word *Oyez, do you hear*, in order to attract attention: it is particularly used on the opening of the court, and at its adjournment; it is also frequently employed to discharge persons who have been accused of crimes or misdemeanors.

PROCLAMATION OF EMANCIPATION. See BONDAGE.

PROCLAMATION OF EXIGENTS. In Old English Practice. On awarding an *exigent*, in order to outlawry, a writ of proclamation issued to the sheriff of the county where the party dwelt, to make three proclamations for the defendant to yield himself or be outlawed.

PROCLAMATION OF A FINE. The proclamation of a fine was a notice, openly and solemnly given at all the assizes held in the county where the lands lay. It was made within one year after engrossing the fine; and anciently consisted in the fine as expressed being openly read in court sixteen times,—four times in the term in which it was made, and four times in each of the three succeeding terms. This, however, was afterwards reduced to one reading in each term. These proclamations were upon transcripts of the fine, sent by the justices of the common pleas to the justices of assize and the justices of the peace. 2 Bla. Com. 352.

PROCLAMATION OF REBELLION. In Old English Practice. When a party neglected to appear upon a *subpœna*, or an attachment in chancery, a writ bearing this name issued; and, if he did not surrender himself by the day assigned, he was reputed and declared a rebel.

PROCLAMATOR. An officer of the English court of common pleas.

PROCREATION. The generation of children: it is an act authorized by the law of nature. One of the principal ends of marriage is the procreation of children. Inst. tit. 2, in pr.

PROCTOR. One appointed to manage the affairs of another or represent him in judgment. The authority was in writing under the hand of the principal and was called a proxy.

One who is employed to manage for another proceedings in admiralty and ecclesiastical causes.

A proctor, strictly speaking, conducts the proceeding out of court, as an English solicitor does in common-law courts; while the advocate conducts those in court. But in this country the distinction is not observed. A proctor is properly appointed in writing, but not necessarily so. Until final decree, he has entire control of the cause; but after decree he has no power except to enforce it. See Benedict. Adm. § 334; W. Rob. 335. The fees of proctors are fixed by R. S. §§ 823–829; but fees not in the statute may be allowed in special cases; The Sarah E. Kennedy, 25 Fed. 672.

In England under the judicature acts proctors may practise in all divisions of the supreme court of judicature.

One of the representatives of the clergy in the convocations of the two provinces of Canterbury and York in the church of England.

An official in a university whose function it is to see that good order is kept.

See QUEEN'S PROCTOR.

PROCURATION. In Civil Law. The act by which one person gives power to another to act in his place, as he could do himself. A letter of attorney.

An *express* procuration is one made by the express consent of the parties. An *implied* or *tacit* procuration takes place when an individual sues another managing his affairs and does not interfere to prevent it. Dig. 17. 1. 6. 2; 50. 17. 60; Code 7. 32. 2.

Procurations are also divided into those which contain absolute power, or a general authority, and those which give only a limited power. Dig. 3. 3. 58; 17. 1. 60. 4.

Procurations are ended in three ways:

first, by the revocation of the authority; *second*, by the death of one of the parties; *third*, by the renunciation of the mandatory, when it is made in proper time and place and it can be done without injury to the person who gave it. Inst. 3. 27; Dig. 17. 1; Code 4, 35. See AUTHORITY; LETTER OF ATTORNEY; MANDATE; PER PROC.

The use of the word procuration (usually, *per procuratione*, or abbreviated to p. p.) on a promissory note by an agent is notice that the agent has but a limited authority to sign. Neg. Instr. Act § 21. See [1893] App. Cas. 170.

The act or offence of procuring women for lewd purposes. It is an offence in England, punishable by whipping; Act of December, 1912. See Odgers, C. L. 214.

See WHITE SLAVE ACT.

PROCURATIONS. In Ecclesiastical Law. Certain sums of money which parish priests pay yearly to the bishops or archdeacons, *ratione visitationis*. Dig. 3. 39. 25; Ayliffe, Parerg. 429; 17 Viner, Abr. 544.

PROCURATOR. In Civil Law. A proctor; a person who acts for another by virtue of a procuration. *Procurator est, qui aliena negotia mandata Domini administrat.* Dig. 3. 3. 1. See ATTORNEY; AUTHORITY.

PROCURATOR FISCAL. In Scotch Law. A public prosecutor. Bell, Dict.

PROCURATOR LITIS (Lat.). **In Civil Law.** One who by command of another institutes and carries on for him a suit. Vicat, Voc. Jur. *Procurator* is properly used of the attorney of *actor* (the plaintiff), *defensor* of the attorney of *reus* (the defendant). It is distinguished from *advocatus*, who was one who undertook the defence of persons, not things, and who was generally the patron of the person whose defence he prepared, the person himself speaking it. It is also distinguished from *cognitor* who conducted the cause in the presence of his principal, and generally in cases of citizenship; whereas the procurator conducted the cause in the absence of his principal. Calvinus, Lex.

PROCURATORIUM (Lat.). The proxy or instrument by which a proctor is constituted and appointed.

PROCURATORY OF RESIGNATION. A proceeding by which the vassal authorized the return of the fee to his superior. Bell, Dict.

PROCURE. To contrive, effect, or bring about; to cause. Long v. State, 23 Neb. 45, 36 N. W. 310.

There is a clear legal distinction between procuring an act to be done and suffering it to be done. 2 Ben. 196.

PROCUREUR DE LA RÉPUBLIQUE. The name of an officer charged with the prosecution of crimes under the French procedure, corresponding to the prosecuting attorney in the United States. See JUGE D'INSTRUCTION.

PRODIGAL. In Civil Law. A person who, though of full age, is incapable of managing his affairs, and of the obligations which attend them, in consequence of his bad conduct, and for whom a curator is therefore appointed. See PRODIGUS.

PRODIGUS. A prodigal. According to the Code Napoléon, a French subject of full age, who is of extravagant habits, when adjudged to be a "prodigal," is restrained from dealing with his movables without the consent of a legal adviser. Such judgment in France will be disregarded by an English court; [1902] 1 Ch. 488; 49 L. J. Ch. 261.

PRODITORIE (Law Lat.). Treasonably. This is a technical word formerly used in indictments for treason, when they were written in Latin. Tomlins.

PRODUCE. The product of natural growth, labor, or capital. The produce of a farm has been held not to include beef raised and killed thereon; Philadelphia v. Davis, 6 W. & S. (Pa.) 269; and yearly produce of a farm is held to be confined to crops gathered annually; Ladd v. Abel, 18 Conn. 513.

PRODUCE BROKER. A person occupied in buying and selling agricultural or farm products. 1 Abb. 470. See BROKER; COMMISSION MERCHANT; FACTOR.

PRODUCENT. In Ecclesiastical Law. He who produces a witness to be examined.

PRODUCTION. That which is produced or made product; fruit of labor; as the productions of the earth, comprehending all vegetables and fruits; the productions of intellect or genius, as poems and prose compositions; the productions of art, as manufactures of every kinds. Dano v. R. Co., 27 Ark. 567.

PRODUCTION OF DOCUMENTS. Where there is an issue either direct or collateral on the forgery of papers, courts of equity or law will compel their production for inspection in advance of trial. A party to an action at law may, before trial, maintain a bill for discovery of letters relied on by the other party to the suit and alleged to have been written by the plaintiff in the bill, but which the plaintiff alleges are forgeries. The production of private writings in which another person has an interest may be had by a bill of discovery in proper cases, or in trials at law by an order for inspection, a notice to produce or a writ of subpœna *duces tecum*.

The *order for inspection*, though now provided for by statute in most states, was within the practice of the English common-law courts at an early date. It is resorted to where documents in the possession of the other party are required for use in preparing the pleadings either by the plaintiff;

4 Bing. 539; 8 Dowl. 118; Churchill v. Loeser, 89 Hun 613, 35 N. Y. Supp. 310; or the defendant; 6 B. & S. 888; Earle v. Beman, 1 App. Div. 136, 36 N. Y. Supp. 833; but an order requiring a prospective defendant to produce books at an examination by plaintiff to enable the latter to prepare his complaint is erroneous; Green v. Carey, 81 Hun 496, 31 N. Y. Supp. 8. Where there was but one copy of an agreement between two persons, he who retained it would be compelled to produce it for the inspection of the other who might also take a copy of it, as, in the case of a partnership agreement; 1 Brod. & B. 318; or a lease; 4 Taunt. 666; or plans constituting part of an agreement sued on; Frescole v. Lancaster, 70 Fed. 337.

The practice was originally confined to cases in which there was but one copy, but it was speedily extended to any case in which the parties seeking an inspection have an interest in the document; 8 C. B. N. S. 617; nor was it necessary that it should be a single paper, but it extended to correspondence, as, a letter accepting an oral offer; *id.* An order for inspection might also be obtained by a defendant who suggested the alteration or forgery of the document which formed the cause of action; 2 Man. & G. 758. In such a case it was usual and proper for the application to be founded on an affidavit attacking the genuineness of the paper; Jackson v. Jones, 3 Cow. (N. Y.) 17.

The right of inspection is confined to documents supporting the case of the party applying for it and does not extend to those which support the case of his opponent; 1 Myl. & K. 88; 8 Eng. Rul. Cas. 712, and note; nor can the right be used for the purpose of finding out the case of the other party; [1897] 2 Q. B. 62; or where the books applied for contain entries of a confidential, privileged nature, not relative to the action, and the legitimate information from them can be obtained at the trial, and they are in possession of the plaintiff and can be produced under subpœna; Lowenthal v. Leonard, 20 App. Div. 330, 46 N. Y. Supp. 818; and in a libel suit an order will not be made for the production of the original manuscript where the publication is admitted; [1897] 2 Q. B. 188; [1895] 2 Q. B. 148. If, however, the party is entitled to the production of the document as being applicable to his case, his right is unaffected by the circumstance that it discloses the case of his opponent; *id.*; or that it is evidence for the other party's case also; Dock v. Dock, 180 Pa. 14, 36 Atl. 411, 57 Am. St. Rep. 617.

The right of common-law courts to order an inspection was established in England by stat. 14 & 15 Vict. c. 99, § 6, which authorized the exercise of the power where an action was pending, and documents were in the control of the other party, of which by a bill of discovery the inspection could be secured. In the United States prior to the statutes of the same character which were passed in most states, the courts were indisposed to assume the power; Utica Bank v. Hillard, 6 Cow. (N. Y.) 62; and resort was more frequently had to a bill of discovery.

Public documents are subject to the general rule that their inspection will not be ordered where it would be detrimental to the public interest; 1 Greenl. Ev. §§ 251, 476. As to the right of inspection of public records generally, see RECORDS.

Books of a corporation are not the private books of any of the officers and do not become so on the dissolution of such corporation; Wheeler v. U. S., 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309.

In England, counsel may notify opposing counsel to inspect documents in his (the former's) possession; failing such notice, they must be strictly proved at the trial; Odgers, C. L. 1242.

An objection to the production of documents on the ground that they may tend to criminate the party ordered to produce them must be taken only to the production of the documents alleged to have that effect and not to the order; [1897] 2 Q. B. 124.

In a libel suit against a newspaper proprietor and other defendants for a joint claim for the same libel and also a joint claim for damages for conspiracy, a newspaper proprietor cannot refuse production of the newspapers, either on the ground of privilege or that its production would tend to incriminate him, if the court considers that he does not honestly believe that its production will have that effect; [1899] 2 Ir. Rep. Q. B. 199. The publisher had admitted publication.

A person who has obtained an order for inspection of books cannot have irrelevant parts kept concealed during the whole litigation or unsealed and resealed on oath from time to time as the books are required in business, so as to cause interruption of it; it is sufficient if irrelevant entries are covered, during the actual inspection, with the affidavit of the person producing them that nothing material has been covered; [1897] 1 Ch. 761.

An order for production will be refused where the party applying refuses to state how the papers in question are material; Bull v. Thompson Co., 99 Ga. 134, 25 S. E. 31.

Too great generality in the application for production of books is cured by particularizing books in the order; Hofman v. Seixas, 12 Misc. 3, 33 N. Y. Supp. 23.

Where a relevant letter is scheduled in an application for the production of documents and it refers to another letter, the latter is relevant in the same application; 95 L. T. 694; and letters produced by the other party or his solicitor as a matter of courtesy must, subject to the explanation that they were

produced incautiously, be treated as relevant and as if scheduled; 95 L. T. 694.

Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers in order to convict him of crime or to forfeit his property, was held unconstitutional as contrary to the fourth and fifth amendments; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. No statute which leaves the party or witness subject to prosecution after he answers the incriminating questions can supplant the privilege conferred by the constitution. R. S. § 860, does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

The act of Feb. 11, 1893, provided that no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, on the ground that the evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. This act (1893) was passed in view of the Counselman Case, *supra*. It was held to afford absolute immunity against prosecution, federal or state, for the offence to which the question relates, and to deprive the witness of his constitutional right to refuse to answer; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

By act of Feb. 19, 1903, courts may compel the attendance of witnesses both on the part of a carrier and shipper, who shall be required to answer on all subjects relating, directly or indirectly, to the matter in controversy, and may compel the production of all books and papers both of the carrier and shipper which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding.

It is held that under this act the giving of testimony and the production of books does not deprive the witness of any rights under the fourth and fifth amendments; Interstate Com. Com'n v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

A corporation has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the state; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as ground of a refusal to produce its books; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652.

A state, under its visitorial powers over corporations doing business therein, may compel them to produce books and papers (including those kept outside the state) for investigation, and may require the testimony of their officers and employees to ascertain whether its laws have been complied with; Hammond P. Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645.

A *subpœna duces tecum*, which is specific and properly limited in its scope, and calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced, does not violate the unreasonable search and seizure provisions of the fourth amendment, and the constitutional privilege against testifying against himself cannot be raised for his personal benefit by an officer of the corporation having the documents in his possession; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

An officer of a corporation cannot refuse to produce documents of a corporation on the ground that they would incriminate him simply because he himself wrote or signed them, and this even if indictments are pending against him; *id.*

The act of June 30, 1906, provides that under the immunity provisions of the acts of Feb., 1893, and Feb., 1903, immunity shall extend only to a natural person who in obedience to a subpœna gives testimony under oath or produces evidence, documentary or otherwise.

A state may require a corporation doing business therein, to produce before its tribunal books and papers kept by it or the state, although, at the time the books may be outside the state. It cannot refuse on the ground of incrimination; the court, on inspection, will determine the sufficiency of the objection, and what portion of them should be excluded. Such a statute does not deny to corporations the equal protection of the law, as the classification is a proper one. A Vermont act so providing, and subjecting to contempt proceedings corporations failing to comply with the act, is not unconstitutional as depriving corporations of their property without due process of law, or as constituting unreasonable searches or seizures, or requiring corporations to incriminate themselves; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658.

See NOTICE TO PRODUCE PAPERS; INCRIMINATION; SUBPŒNA DUCES TECUM; PROFERT IN CURIA.

PRODUCTION OF SUIT (*productio sectæ*). The concluding clause of all declarations is, "and thereupon he brings his suit." In old pleading, this referred to the production by the plaintiff of his *secta* or suit, *i. e.* persons prepared to confirm what he had stated in the declaration. The phrase has remained; but the practice from which it arose is obsolete; 3 Bla. Com. 295; Steph. Pl., Andr. ed. § 220.

PROFANE. That which has not been consecrated. By a profane place is understood one which is neither sacred, nor sanctified, nor religious. Dig. 11. 7. 2. 4.

PROFANELY. In a profane manner. In an indictment, under the act of assembly of Pennsylvania, against profanity, it is requisite that the words should be laid to have been spoken profanely. Updegraph v. Com., 11 S. & R. (Pa.) 394. See BLASPHEMY.

PROFANENESS, PROFANITY. In Criminal Law. A disrespect to the name of God or His divine providence. This is variously punished by statute in the several states. See Cooley, Const. Lim., 2d ed. 580. See BLASPHEMY.

PROFECTITUS (Lat.). **In Civil Law.** That which descends to us from our ascendants. Dig. 23. 3. 5.

PROFERT IN CURIA (Lat. he produces in court: sometimes written *profert in curiam*, with the same meaning). **In Pleading.** A declaration on the record that a party produces in court the deed under which he makes title. In ancient practice, the deed itself was actually produced; in modern times, the allegation only is made in the declaration, and the deed is then constructively in possession of the court; 6 M. & G. 277; Tucker v. State, 11 Md. 322; Germain v. Wilgus, 67 Fed. 597, 14 C. C. A. 561.

Profert is, in general, necessary when either party pleads a deed and claims rights under it, whether plaintiff; Patten v. Heustis, 26 N. J. L. 293; or defendant; Duncan v. Clements, 17 Ark. 279; to enable the court to inspect and construe the instrument pleaded, and to entitle the adverse party to oyer thereof; 10 Co. 92 *b*; 1 Chitty, Pl. 414; Andr. Steph. Pl. 160; and is not necessary when the party pleads it without making title under it; Gould, Pl. c. 7, p. 2, § 47. But a party who is actually or presumptively unable to produce a deed may plead it without profert, as in suit by a stranger; Com. Dig. *Pleader*, O. 8; Cro. Jac. 217; Cro. Car. 441; or one claiming title by operation of law; Co. Litt. 225; Bac. Abr. *Pleas* (I 12); 5 Co. 75; or where the deed is in the possession of the adverse party or is lost. In all these cases the special facts must be shown, to excuse the want of profert. See Gould, Pl. c. 8, p. 2; Lawes, Pl. 96; 1 Saund. 9 *a*.

Profert of a patent can be made by reference to the letters patent or to a certified copy thereof; Heaton Peninsular B. F. Co. v. Schlochtermeyer, 69 Fed. 592. The profert of any recorded instrument, as letters patent, is equivalent to annexing a copy; American Bell Tel. Co. v. Tel. Co., 34 Fed. 803.

Profert and oyer are abolished in England by the Common Law Procedure Act, 15 & 16 Vict. c. 76; and a provision exists, 14 & 15 Vict. c. 99, for allowing inspection of all documents in the possession or under the control of the party against whom the inspection is asked. See 25 E. L. & E. 304. In many of the states profert has been abolished, and in some instances the instrument must be set forth in the pleading of the party relying upon it. The operation of profert and oyer, where allowed, is to make the deed a part of the pleadings of the party producing it; Tucker v. State, 11 Md. 322.

See PRODUCTION OF DOCUMENTS; LOST INSTRUMENT.

PROFESSION. A public declaration respecting something. Code 10. 41. 6. A state, art, or mystery: as, the legal profession. Dig. 1. 18. 6. 4; Domat, *Dr. Pub.* l. 1, t. 9, s. 1, n. 7.

In Ecclesiastical Law. The act of entering into a religious order. See 17 Viner, Abr. 545.

The term professions in a statute laying a tax includes lawyers; Lanier v. Macon, 59 Ga. 187. See Pennock v. Fuller, 41 Mich. 155, 2 N. W. 176, 32 Am. Rep. 148; People v. McAllister, 19 Mich. 217.

PROFIT A PRENDRE. The right to take soil, gravel, minerals, and the like from the land of another. An interest in the estate. Black v. Min. Co., 49 Fed. 549; Washb. Easem. 11. This right may be the subject of a separate grant; Engel v. Ayer, 85 Me. 448, 27 Atl. 352. It is an interest in the estate; Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612.

Profit à prendre is a peculiar species of easements. It is "the right to take something which is the produce of the land." It is in its nature an incorporeal right incapable of livery, though it is imposed upon corporeal or tangible property. It may be appurtenant to a dominant tenement, in the nature of an easement, or it may be a right in gross. It may be held apart from the possession of land, and differs therein from an easement, which requires a dominant tenement for its existence. When attached to other land it is in the nature of an easement; when not so attached it cannot properly be said to be an easement, but is an interest or estate in the land itself. Jones, Easements § 49. But it is said that it is not, strictly speaking, an easement; 1 Odgers, Com. L. 25.

The right can be acquired only by grant or prescription. Such a right in the soil of another cannot be claimed by custom.

Thus a claim by the inhabitants of a township upon the land of another to take sand, etc., from the seashore, is without foundation; 15 C. B. N. S. 240; Nudd v. Hobbs, 17 N. H. 524.

The privilege of watering cattle at a pond or brook or of taking the water for domestic purposes is an easement and not a *profit à prendre;* 5 Ad. & El. 758; the right to take seaweed from the shores is a right to a profit in the soil; Hill v. Lord, 48 Me. 100; and so is the right to take coal or any mineral from the land of another; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; and so is a right to use lands of another to cut grass, for pasturage, for hunting, or fishing; Jones, Easements 57; so is the right to take and kill game on land or water; 9 Q. B. D. 315.

The right to *profit à prendre* acquired by grant or prescription as appurtenant to certain lands cannot be used as a right in gross by one not holding any connection with the land; 12 C. B. N. S. 91.

Profit à Rendre may be prescribed for in gross in fee; whether a *profit à prendre* can be is not so clear; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 37, 100 Am. Dec. 597.

See EASEMENTS; À PRENDRE.

PROFITS. The advance in the price of goods sold beyond the cost of purchase. See Delaney v. Van Aulen, 84 N. Y. 23.

The gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.

An excess of the value of returns over the value of advances.

The excess of receipts over expenditures; that is, net earnings. Connolly v. Davidson, 15 Minn. 519 (Gil. 428), 2 Am. Rep. 154.

The receipts of a business, deducting current expenses; it is equivalent to net receipts. Eyster v. Board of Finance, 94 U. S. 500, 24 L. Ed. 188; Lepore v. Loan Ass'n, 5 Pa. Super. Ct. 276.

This is a word of very extended signification. In *commerce*, it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital of stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital or stock. Adam Smith, Wealth of Nat. b. 1. c. 6, and M'Culloch's Notes; Mill, Polit. Econ. c. 15. After indemnifying the capitalist for his outlay, there commonly remains a surplus, which is his profit, the net income from his capital. 1 Mill, Polit. Econ. c. 15. The word profit is generally used by writers on political economy to denote the difference between the value of advances and the value of returns made by their employment.

The profit of the farmer and the manufacturer is the gain made by the sale of produce or manufactures, after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed,—whether land, buildings, machinery, instruments, or money. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions. The income or the net income of an estate means only the profit it will yield after deducting the charges of management; Andrews v. Boyd, 5 Greenl. (Me.) 202; Earl v. Rowe, 35 Me. 420, 58 Am. Dec. 714.

Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface; as, herbage, wood, turf, coals, minerals, stones: Koen v. Bartlett, 41 W. Va. 559, 23 S. E. 666, 31 L. R. A. 128, 56 Am. St. Rep. 884; also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the proprietor himself, and *profits à rendre*, namely, such as are received at the hands of and rendered by another. Hamm. N. P. 172.

Profits are divided by writers on political economy into gross and net,—gross profits being the whole difference between the value of advances and the value of returns made by their employment, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits minus the net profits, has no particular name, but it represents the profits attributable to industry skill and enterprise. See Malthus, Political Econ.; M'Culloch, Political Econ. 563. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances.

Using profit in this more limited and popular sense, persons who share profits do not necessarily share losses; for they may stipulate for a division of gain, if any, and yet some one or more of them may, by agreement, be entitled to be indemnified against losses by the others: so that whilst all share profits, some only bear losses. Persons who share gross returns share profits in the sense of gain; but they do not by sharing the returns share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits if there are any, it is so only incidentally, and because such profits are included in what is divided: it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither; 1 Lindl. Part. 8, 17. These considerations have led to the distinction between agreements to

share profits and agreements to share gross returns, and to the doctrine that, whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not. See PARTNERSHIP.

It was said by Jessel, M. R., that "there is no such thing as gross profits." See 10 App. Cas. 446. Where a life insurance company issued "participating policies" for an increased premium, agreeing at the end of every five years to give two-thirds of the "gross profits" of such policies to the policy holders, it was held that this two-thirds constituted "annual profits or gains" of the company and were assessable for income tax; 10 App. Cas. 438, per Lords Blackburn and Fitzgerald; Lord Bramwell dissenting. The case seems to disregard the nature of the return of that portion of the premium charged in advance and subsequently ascertained to have been excessive, which the companies curiously enough call "dividends." See DIVIDENDS; NET PROFITS; OPERATING EXPENSES.

There is no rule of law that profits of one year cannot be divided because there was a debit balance in former years; [1901] 2 Ch. 184.

See Cotting v. R. Co., 54 Conn. 156, 5 Atl. 851, as to profits.

Commissions may be considered as profits, for some purposes. A participation in commissions has been held such a participation in profits as to constitute the participants partners; 2 H. Bla. 235; 4 B. & Ald. 663. So, commissions received from the sales of a pirated map are profits which must be accounted for by the commission merchant on a bill by the proprietor of the copyright; Stevens v. Gladding, 2 Curt. C. C. 608, Fed. Cas. No. 13,399. As between partners, all gains which equitably belong to the firm, but which are clandestinely received by one partner, are accounted profits of the firm; *id.;* Story, Part. § 174.

Depreciation of buildings in which a business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the profits; Eyster v. Centennial Board of Finance, 94 U. S. 500, 24 L. Ed. 188 (a special case).

In computing the profits to which a party is entitled, interest on fines, debts, and taxes should be charged off and also a proper sum for depreciation of plant; Conville v. Shook, 24 N. Y. Supp. 547.

A direction or power given in a will to raise money out of the rents and profits of an estate for the payment of debts and legacies, or to raise a portion within a definite period, within which it could not be raised out of the annual rents and profits, authorizes a sale; 2 Ch. Cas. 205; 1 Vern. 104; 1 Ves. Sen. 491. And judges in later times, looking to the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, even at an indefinite period, as authorizing a sale or mortgage; 2 Jarm. Wills, 282; 1 Ves. 234; 1 Ves. Sen. 42. But, as a general rule, the question whether the money is to be raised by a sale or mortgage or out of the annual rents and profits will depend upon the nature of the purpose for which the money is to be raised, and the general tenor of the will; 2 Jarm. Wills, 383; 3 Bro. P. C. 66; 3 Yo. & J. 360; 2 P. Wms. 63. The circumstances that have chiefly influenced the decisions are—the appointment of a time within which the charge cannot be raised by annual profits; the situation of the estate, where a sale or mortgage would be very prejudicial, as in the case of a reversion, especially if it would occasion any danger that the charge would not be answered in its full extent; the nature of the charge, as where it is for debts or portions, and, in the latter instance, the age or death of the child; 2 Ves. 480, n. 1; 2 P. Wms. 13, 650. But in no case where there are subsequent restraining words has the word profit been extended; Prec. Ch. 586, note, and the cases cited there; 1 Atk. 506; 2 *id.* 105.

A devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein; 2 B. & Ald. 42; Reed v. Reed, 9 Mass. 372; Fox v. Phelps, 17 Wend. (N. Y.) 393; Earl v. Rowe, 35 Me. 414, 58 Am. Dec. 714; 1 Bro. C. C. 310. A direction by the testator that a certain person *shall receive for his support the net profits of the land* is a devise of the land itself, for such period of time as the profits were devised; Earl v. Rowe, 35 Me. 419, 58 Am. Dec. 714.

An assignment of the profits of an estate amounts to an equitable lien, and would entitle the assignee in equity to insist upon a mortgage. Thus, if a tenant for life of the real estate should, by covenant, agree to set apart and pay the whole or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him; 2 Cox, Ch. 253; 3 Bro. C. C. 531, 538.

Profits expected to arise from merchandise employed in maritime commerce are a proper subject of insurance in England and in the United States; 3 Kent 271; French v. Ins. Co., 16 Pick. (Mass.) 399. So in Italy; Targa, cap. xliii. No. 5; Portugal; Santerna, part iii. No. 40; and the Hanse Towns; 2 Magnus 213; Beneck, Ass. chap. 1, sect. 10, vol. 1, p. 170. But in France; *Code de Comm.* art. 347; Holland; Rynkershoek, Quæst. Priv. Jur. lib. iv. c. 5; and in Spain, except to certain distant parts; Ordinanzas de Bilboa, ch. xxii. art. 7, 8, 11; it is illegal to insure expected profits. Such insurance is required by the course and in-

terest of trade, and has been found to be greatly conducive to its prosperity; 3 Kent 271; 2 East 544; 1 Arn. Ins., 6th ed. 37, 205. Sometimes the profits are included in a valuation of the goods from which they are expected to arise; sometimes they are insured as profits; Mumford v. Hallett, 1 Johns. (N. Y.) 433; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. Ed. 659; 6 E. & B. 312. They must be insured as profits; May, Ins. § 79. They may be insured equally by valued and by open policies; 3 Camp. 267. But it is more judicious to make the valuation; Mumford v. Hallett, 1 Johns. (N. Y.) 433; 3 Kent 273. The insured must have a real interest in the goods from which the profits are expected; 3 Kent 271; but he need not have the absolute property in them; French v. Ins. Co., 16 Pick. (Mass.) 397, 400. See INSURANCE.

A trustee, executor, or guardian, or other person standing in a like relation to another, may be made to account for and pay all the profits made by him in any of the concerns of his trust, as by embarking the trust funds in trade; 1 Story, Eq. Jur. 465; 2 Myl. & K. 66, 672; Lindl. Part., Am. ed. 523; 2 Will. Exec. 139; Callaghan v. Hall, 1 S. & R. (Pa.) 245; 1 Maule & S. 412; 2 Bro. C. C. 400; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

The expected profits of a special contract may be reckoned as a part of the damages for a failure to fulfil it, where it appears that such profits would have accrued from the contract itself as the direct and immediate consequence of its fulfilment; Philadelphia, W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 344, 14 L. Ed. 157; Fox v. Harding, 7 Cush. (Mass.) 516; 8 Exch. 401; Hawley v. Corey, 9 Utah 175, 33 Pac. 695; Harter Medicine Co. v. Hopkins, 83 Wis. 309, 53 N. W. 501. But where the profits are such only as were expected to result from other independent bargains actually entered into on the faith of such special contract, or for the purposes of fulfilling it, or are contingent upon future bargains or speculations or states of the market, they are too remote and uncertain to be relied upon as a proper basis of damages; Philadelphia, W. & B. R. Co. v. Howard, 13 How. (U. S.) 307, 344, 14 L. Ed. 157; Bridges v. Stickney, 38 Me. 361; Fox v. Harding, 7 Cush. (Mass.) 516; Masterson v. Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; 13 C. B. 353. Profits may be recovered as damages for the breach of a contract, where they are not uncertain or remote, or where, from the terms of the contract itself or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time the contract was made; Howard v. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814.

See MEASURE OF DAMAGES; PATENT; DIVIDENDS.

A purchaser is entitled to the profits of an estate from the time fixed upon for completing the contract, whether he does or does not take possession; 2 Sugd. Vend. ch. 16, sect. 1, art. 1; Baxter v. Brand, 6 Dana (Ky.) 298; Buchanan v. Lorman, 3 Gill (Md.) 82.

In a late case, the profits to which a patentee is entitled in equity against an infringer are thus classified:

(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits. (b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. Hurlbut v. Schillinger, 130 U. S. 456, 472, 9 Sup. Ct. 584, 32 L. Ed. 1011. (c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him. Elizabeth v. Pav. Co., 97 U. S. 126, 24 L. Ed. 1000. (d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains; Westinghouse Electric & Mfg. Co. v. Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653.

Under what circumstances a participation in profits will make one a partner in a trade or adventure, see PARTNERSHIP.

PROGRESSION. That state of a business which is neither the commencement nor the end. Some act done after the matter has commenced and before it is completed. Plowd. 343. See CONSUMMATION; INCEPTION.

PROHIBITIO DE VASTO DIRECTA PARTI. A judicial writ which was formerly addressed to a tenant, prohibiting him from waste pending suit. Reg. Jud. 21.

PROHIBITION. Forbidden to do; inhibition; interdiction. Talbott v. Casualty Co., 74 Md. 545, 22 Atl. 395, 13 L. R. A. 584.

In Practice. The name of a writ issued by a superior court, directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. 3 Bla. Com. 112; Viner, Abr.; 2 H. Bla. 533; Re Fassett, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087; Alexander v. Crollott, 199 U. S. 580, 26 Sup. Ct. 161, 50 L. Ed. 317; it will lie to an inferior court

which has taken jurisdiction of a suit against a foreign state; 17 Q. B. 196, 215.

The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed; Bull. N. P. 219; or when by the exercise of its jurisdiction, the inferior court would defeat a legal right; 2 Chitty, Pr. 355; or to prevent a judge from granting a new trial after expiration of the trial term; State v. Walls, 113 Mo. 42, 20 S. W. 883.

A writ of prohibition is a civil remedy given in a civil action, even when instituted to arrest a criminal prosecution; Farnsworth v. Montana, 129 U. S. 104, 9 Sup. Ct. 253, 32 L. Ed. 616; and only lies in case of the unlawful exercise of judicial functions; Fleming v. Com'rs, 31 W. Va. 617, 8 S. E. 267; State v. Gary, 33 Wis. 93; People v. Marine Court, 36 Barb. (N. Y.) 341.

The writ of prohibition issues only in cases of extreme necessity, and before it can be granted, it must appear that the party aggrieved has applied in vain for redress; and it is never allowed except in cases of usurpation or abuse of power, and not then unless other existing remedies are inadequate to afford relief, or no other remedy exists; Ensign Mfg. Co. v. Carroll, 30 W. Va. 532, 4 S. E. 782. When a writ of error or appeal furnishes a complete and effective remedy, a writ of prohibition will not be issued; Mastin v. Sloan, 98 Mo. 252, 11 S. W. 558; Turner v. Forsyth, 78 Ga. 683, 3 S. E. 649; Nelms v. Vaughan, 84 Va. 696, 5 S. E. 704. Prohibition will not issue after judgment and sentence unless want of jurisdiction appears on the face of the proceedings, but before judgment the supreme court can examine not simply the process and pleadings of record, but also the facts and evidence upon which action was taken; Re Cooper, 143 U. S. 472, 513, 12 Sup. Ct. 453, 36 L. Ed. 232.

A writ of prohibition will not be issued to restrain a district court from taking jurisdiction of a petition of the owner of a barge for the benefit of the limited liability act; Re Engles, 146 U. S. 357, 13 Sup. Ct. 281, 36 L. Ed. 1004.

When a party aggrieved by a judgment has an appeal to the supreme court which becomes inefficacious through his neglect, a writ of prohibition will not issue to prevent the enforcement of the judgment; Re Cooper, 143 U. S. 472, 513, 12 Sup. Ct. 453, 36 L. Ed. 232. If it appear that the thing sought to be prohibited has been done, a writ of error will be dismissed; Jones v. Montague, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913.

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." Re Rice, 155 U. S. 402, 15 Sup. Ct. 149, 39 L. Ed. 198, followed in The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; Alexander v. Crollott, 199 U. S. 580, 26 Sup. Ct. 161, 50 L. Ed. 317.

The term *prohibition* is also applied to the interdiction of making and of selling or giving away, intoxicating liquors, either absolutely or for other than medicinal, scientific, and sacramental purposes. See LIQUOR LAWS.

PROHIBITIVE IMPEDIMENTS. Those impediments to a marriage which are only followed by a punishment but do not render the marriage null. Bowyer, Mod. Civ. Law 44.

PROJET (Fr.). **In International Law.** The draft of a proposed treaty or convention. Projet de loi,—a bill in a legislative body.

PROLES (Lat.). Progeny; such issue as proceeds from a lawful marriage; and, in its enlarged sense, it signifies any children.

PROLETARIUS. In Civil Law. One who had no property to be taxed, and paid a tax only on account of his children (*proles*); a person of mean or common extraction. The word has become, in French, *prolétaire* signifying one of the common people; and in English proletariat.

PROLICIDE (Lat. *proles*, offspring, *cædere*, to kill). **In Medical Jurisprudence.** The destruction of the human offspring. Jurists divide the subject into *fœticide*, or the destruction of the *fœtus in utero*, and *injanticide*, or the destruction of the new-born infant. Ryan, Med. Jur. 137.

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence. This will be rejected as impertinent. 7 Price 278, n.

PROLOCUTOR. In Ecclesiastical Law. The president or chairman of a convocation.

The speaker of the house of lords is called the prolocutor. The office belongs to the lord chancellor by prescription; 3 Steph. Com. 347.

PROLONGATION. Time added to the duration of something. See GIVING TIME.

PROLYTÆ (Lat.). **In Roman Law.** The term used to denominate students of law during the fifth and last year of their stud-

ies. They were left during this year very much to their own direction, and took the name prolytæ, *omnino soluti*. They studied chiefly the Code and the imperial constitutions. See Dig. Pref. Prim. Const. 2; Calvinus, Lex.

PROMATERTERA (Lat.). Great maternal aunt; the sister of one's grandmother. Inst. 3. 6. 3; Dig. 38. 10. 10. 14.

PROMISE. An engagement by which the promisor contracts with another to perform or do something to the advantage of the latter.

The declaration of any party to an agreement, so far as relates to anything to be done or forborne on his part, is called a promise. Except in the case of simultaneous declaration, a promise is regularly either the acceptance of an offer or an offer accepted. Where the promise is embodied in a deed, there is an apparent anomaly. Pollock, Contr. 2, 7.

Within the statute of frauds a promise to pay the debt of another is an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, continues liable. Dillaby v. Wilcox, 60 Conn. 71, 22 Atl. 491, 13 L. R. A. 643, 25 Am. St. Rep. 299.

When an oral promise is made, all that is said at the time in relation to it must be considered; if, therefore, a man promises to pay all he owes, accompanied by a denial that he owes anything, no action will lie to enforce such a promise; Porter v. McClure, 15 Wend. (N. Y.) 187.

Strictly speaking a promise is not a representation; the failure to make it good may give a cause of action, but it is not a false representation, which will authorize the rescission of a contract; Cunyus v. Guenther, 96 Ala. 564, 11 South. 649.

And when the promise is conditional, the condition must be performed before it becomes of binding force; Scouton v. Eislord, 7 Johns. (N. Y.) 36. See 16 Harv. L. Rev. 319; CONDITION; CONTRACTS; THIRD PERSON, CONTRACTS FOR THE BENEFIT OF.

PROMISE OF MARRIAGE. A contract mutually entered into by a man and a woman that they will marry each other.

Every marriage is necessarily preceded by an express or implied contract of this description, as a wedding cannot be agreed upon and celebrated at one and the same instant; Addison, Contr. 1196.

When a man and a woman agree to marry and subsequently either one refuses, the other may bring suit for damages, such suits being called breach of promise suits. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise as cognizable by the temporal courts; 20 Q. B. D. 494, 505.

A promise of marriage is not to be likened to an actual marriage. The latter is not a contract, but a legal relation; while the former is an executory contract in the strict sense of the term, and governed in general by the ordinary law of contracts, though it has certain peculiarities of its own. As in other contracts, the parties must be *sui juris*. If, therefore, the man or the woman be an infant, or labor under any other legal disability, he or she will not be bound by a promise of marriage; but if one of the parties be an infant and the other be an adult, the promise will be binding upon the latter; Stra. 937; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Warwick v. Cooper, 5 Sneed (Tenn.) 659; McConkey v. Barnes, 42 Ill. App. 511. A promise made during infancy may be ratified after the infant attains majority. An English statute requires a new and distinct contract, after majority, in order to bind the infant on his promise to marry after he comes of age; but a new contract may be inferred from continued acceptance of the engagement; L. R. 5 C. P. 410. Neither does it follow that a promise of marriage is not binding because the parties to the promise cannot form a valid marriage; they may be competent to *contract* though not competent to *marry*.

There must be a legal and valid consideration; but as there are always mutual promises, they are a sufficient consideration for each other. There must be a meeting of the minds of the parties, *i. e.* a request or proposition on the one side, and an assent on the other. If the communications between the parties are verbal, the only questions which usually arise relate to evidence. The very words or time or manner of the promise need not be proved, but it may be inferred from the conduct of the parties, and from the circumstances which usually attend an engagement to marry: as, visiting, the understanding of friends and relations, preparations for marriage, and the reception of the man by the woman's family as a suitor; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Moritz v. Melhorn, 13 Pa. 331; 2 C. & P. 553; Southard v. Rexford, 6 Cow. (N. Y.) 254; Waters v. Bristol, 26 Conn. 398; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726. But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand; Schoul. Husb. & W. § 43. Therefore a promise cannot be inferred from devoted attention, frequent visits, and apparently exclusive attention; Homan v. Earle, 53 N. Y. 267; nor from mere presents or letters not to the point; see Com. v. Walton, 2 Brewst. (Pa.) 487;

[1891] 2 Q. B. 534; nor from the plaintiff's wedding preparations, unknown to the defendant; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Walmsley v. Robinson, 63 Ill. 41, 14 Am. Rep. 111; nor from the woman's unexplained possession of an engagement ring; Com. v. Walton, 2 Brewst. (Pa.) 487.

Under the law allowing parties to an action to testify, a promise of marriage cannot be inferred from the mere proof of circumstances such as usually attend an engagement to marry. In the absence of fraud, there must be proof of an actual contract; a meeting of minds of the two parties. Courtship alone or mere intention to marry is not enough. Thorough acquaintance with character, habits, and disposition is essential in order to enter into such a contract intelligently, and an opportunity must be allowed to form the acquaintance which is required, without raising the inference of a contract; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125. Mere courtship is not an agreement to marry; Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Walmsley v. Robinson, 63 Ill. 41, 14 Am. Rep. 111.

When the parties are at a distance from each other, and the offer is made by letter, it will be presumed to continue for a reasonable time for the consideration of the party addressed; and if accepted within a reasonable time, and before it is expressly revoked, the contract is then complete; 1 Pars. Contr. 84. No particular form of words is necessary; Homan v. Earle, 53 N. Y. 267.

A promise of marriage is not within the third clause of the fourth section of the statute of frauds relating to agreements made upon consideration of marriage; but if not to be performed within a year, it has been held to be within the fifth clause, and must, therefore, be in writing in order to be binding; 1 Ld. Raym. 387; Short v. Stotts, 58 Ind. 29; Derby v. Phelps, 2 N. H. 515. But the later cases are inclined to construe the statute so as not to affect promises to marry; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Clark v. Pendleton, 20 Conn. 495; the marriage may be performed within a year, and that is enough. See Blackburn v. Mann, 85 Ill. 222.

If no time be fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period, considering the circumstances of the age, pecuniary means, etc., of the contracting parties, and either party may call upon the other to fulfil the engagement, and in case of default may bring an action for damages. If both lie by for an unreasonable period, and do not treat the contract as continuing, it will be deemed to be abandoned by mutual consent. If the parties are somewhat advanced in years, and the marriage is appointed to take place at a remote period of time, the contract would be voidable at the option of either party, as in restraint of marriage; Addison, Contr. 678.

On a promise to marry within a reasonable time, a plea that the defendant, after the promise and before the breach, became afflicted with occasional bleeding from the lungs and therefore incapable of marriage without great danger to his life, and therefore unfit for the married state, of which plaintiff had notice, was held bad in a much considered case in the Exchequer Chamber; E. B. & E. 746.

The fact that the plaintiff consented to a two years' postponement of the wedding-day does not relieve the defendant from his promise; Nearing v. Van Fleet, 71 Hun 137, 24 N. Y. Supp. 531.

Upon a refusal by one party to marry, an action lies at once, although the time set for the marriage has not come; Leake, Contr. 752; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; so if a party puts it out of his power to perform his promise of marriage; Sheahan v. Barry, 27 Mich. 217; 15 M. & W. 189. An action lies when one party has given notice that he will not fulfil his promise, although the time for fulfilment has not arrived; L. R. 8 C. P. 167; or has ceased his attentions; Lemke v. Franzenburg (Ia.) 141 N. W. 332; see BREACH; no demand nor tender of performance is necessary before bringing suit; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346. A refusal to fulfil the contract may be as well manifested by acts as by words. After the lapse of a reasonable time, if one party, without excuse, neglects or refuses to fulfil his promise, the other may consider this a breach and sue; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.

The defences which may be made to an action for a breach of promise of marriage are, of course, various. If either party has been convicted of an infamous crime, or has sustained a bad reputation generally, and the other was ignorant of it at the time of the engagement, or if the woman has committed fornication, and this was unknown at the time to the man who promised to marry her, or if the woman prove unchaste subsequently; Von Storch v. Griffin, 77 Pa. 504; Sprague v. Craig, 51 Ill. 288; or if the woman is deeply involved in debt at the time of the engagement, and the fact is kept secret from her intended husband; Add. Contr. 680; but see E. B. & E. 796; or if false representations are made by the woman, or by her friends in collusion with her, as to her circumstances and situation in life and the amount of her fortune and marriage portion, any of these will constitute a good defence; 1 C. & P. 350, 529; Berry v. Bakeman, 44 Me. 164; 1 C. & K. 463; Morgan v. Yarborough, 5 La. Ann. 316; Butler v. Eschleman, 18 Ill. 44. But it has been held not to be a defence that the plaintiff at the time of the engagement was under an engagement

to marry another person, unless the prior engagement was fraudulently concealed; E. B. & E. 796. But see 2 Pars. Contr. 550. And the defendant's pre-engagement would be no defence; Schoul. Husb. & W. § 48. It is not justification of a breach of promise to marry a woman, to show that she has been heard to use obscene language; 8 Can. L. J. 426; or is unchaste (if the man knew it); Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; or that the plaintiff had negro blood in her veins; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373; and where marriage between cousins is not forbidden by statute, such relationship will not mitigate or excuse a breach of promise to marry; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

A bare offer of marriage is not a defence to a prosecution for seduction; it must be accepted; State v. Wise, 32 Or. 280, 50 Pac. 800; but the contrary was held in Com. v. Wright (Ky.) 27 S. W. 815, which is said to be the only case sustaining that view; 57 Alb. L. J. 51. The general rule is undoubtedly that nothing short of actual marriage is a bar; State v. Thompson, 79 Ia. 703, 45 N. W. 293; State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362; People v. Samonset, 97 Cal. 448, 32 Pac. 520.

If after the engagement either party is guilty of gross misconduct, inconsistent with the character which he or she was fairly presumed to possess, the other party will be released; 4 Esp. 256; but mutual improprieties and lewdness between the parties will not be allowed to bar the action or to go in mitigation or aggravation of damages; Johnson v. Smith, 3 Pittsb. 184; or excuse the performance of the contract; Powell v. Moeller, 107 Mo. 471, 18 S. W. 884. If the engagement is made without any agreement respecting the woman's property, and she afterwards disposes of any considerable portion of it without her intended husband's knowledge and consent, or if she insist upon having her property settled to her own separate use, it is said that this will justify him in breaking off the engagement; Add. Contr. 1201. So, if the situation and position of either of the parties as regards his or her fitness for the marriage relation is materially and permanently altered for the worse (whether with or without the fault of such party) after the engagement, this will release the other party. Thus, if one of the parties is attacked by blindness, or by an incurable disease, or any malady calculated permanently to impair and weaken the constitution, this will dispense with the performance of the contract on the part of the other party; Add. Contr. 1199; Pothier, Tr. du Mar. no. 1, 60, 61, 63. (In 1 Abb. App. Dec. 282, it was held that evidence that the plaintiff drank intoxicating liquors to excess was not admissible as a defence.) Whether it will also constitute a defence for the party afflicted, is a question of much difficulty. In 1 E. B. & E. 746, 765, where it appeared that the defendant since the engagement had become afflicted with consumption, whereby he was rendered incapable of marriage without great danger of his life, it was held, by six judges against five, that this constituted no defence; though it seemed to be agreed that it would have been a good defence for the other party.

It is a defence that the woman had become a confined invalid, but only after a reasonable waiting; Travis v. Schnebly, 68 Wash. 1, 122 Pac. 316, 40 L. R. A. (N. S.) 585, Ann. Cas. 1913E, 914; or has contracted a venereal disease after the promise, or before it, and it was unknown to the other party; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. Rep. 166; or that such disease, supposed to be cured, had broken out again; Gardner v. Arnett (Ky.) 50 S. W. 840; or that the condition of both parties had changed so that marriage would endanger their life or health; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581; that the woman was unnecessarily operated on, rendering her incapable of childbearing; Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283; or that she had tuberculosis; Lemke v. Franzenburg (Ia.) 141 N. W. 332; but ill health of the woman, known to the man at the time of the engagement, is no defence; *id.*

The common opinion that an agreement to marry between persons incapable of forming a valid marriage is necessarily void, is erroneous. If the disability pertains only to one of the parties, and the other party was ignorant of it at the time of the engagement, it will constitute no defence for the former. Thus, if a man who already has a wife living makes a promise of marriage to another woman who is ignorant of the former marriage, he will be liable in damages for a breach of his promise, although a performance is impossible; Leake, Contr. 597; 2 C. & P. 553; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336. Otherwise, if the woman knew, at the time the engagement was entered into, that the man was married; Noice v. Brown, 39 N. J. L. 133, 23 Am. Rep. 213; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Carter v. Rinker, 174 Fed. 882; or had reason to know; *id.* Knowledge that the man was married, obtained by the woman subsequently to the engagement to marry, is not a defence, but may go in mitigation of damages; Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706.

In an action for breach of promise of marriage, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part,

or it is made apparent that they have been actuated by improper motives; 1 C. B. N. S. 660; Waters v. Bristol, 26 Conn. 398. And if the defendant has undertaken to rest his defence, in whole or in part, on the general bad character or the criminal conduct of the plaintiff, and fails altogether in the proof, the jury may take this into consideration as enhancing the damages; Southard v. Rexford, 6 Cow. (N. Y.) 254; Davis v. Slagle, 27 Mo. 600.

Loss of opportunity during the engagement to contract marriage with another is an element of damage; Hiveley v. Gollnick (Minn.) 144 N. W. 213.

A very large discretion is given to the jury as to damages; Pollock, Torts 184; and damages are often given which are, in fact, exemplary; L. R. 1 C. P. 331. The amount awarded is usually estimated according to plaintiff's loss of reputation, wealth, social position, and prospects in life, as well as the endurance of mortification, pain, or disgrace; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598; Wilbur v. Johnson, 58 Mo. 600; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

Where such an action is brought by a woman, she may prove, in aggravation of damages, that the defendant, under color of a promise of marriage, has seduced her; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Leavitt v. Cutler, 37 Wis. 46; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; L. R. 1 C. P. 331; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908. But see, *contra*, Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159, commented on in Baldy v. Stratton, 11 Pa. 316; Perkins v. Hersey, 1 R. I. 493. And misconduct, showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages; Button v. McCauley, 1 Abb. Prac. (N. Y.) 282. The defendant may show that his failure to marry the plaintiff proceeded from opposition by his mother to the marriage; Johnson v. Jenkins, 24 N. Y. 252; or that he was afflicted with an incurable disease at the time of his breach of the promise to marry, in mitigation of damages; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199. Evidence that the general character of the plaintiff for chastity previously to the engagement was bad, is admissible in mitigation of damages; Van Storch v. Griffin, 71 Pa. 240; Cole v. Holliday, 4 Mo. App. 94; so is indelicate conduct (not criminal) of plaintiff before the promise was made; Palmer v. Andrews, 7 Wend. (N. Y.) 142. Evidence of the defendant's financial standing is admissible: Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 453; so of his social position; Schoul. Husb. & W. § 49.

An action for breach of promise of marriage lies against a decedent's estate, where the father of the woman, learning that she was pregnant, killed the promisor; Johnson v. Levy, 122 La. 118, 47 South. 422, 16 Ann. Cas. 978.

See Schoul. Husb. & W. § 40; Maccola, Breach of Promise; Bishop, M. & D. ch. xi; BETROTHMENT; WEDDING.

PROMISEE. A person to whom a promise has been made.

As to promises made for the benefit of third persons, see THIRD PERSON.

PROMISES. When a defendant has been arrested, he is frequently induced to make confession in consequence of promises made to him that if he will tell the truth he will be either discharged or favored; in such a case, evidence of the confession cannot be received, because, being obtained by the flattery of hope, it comes in so questionable a shape, when it is to be considered evidence of guilt, that no credit ought to be given to it; Com. v. Chabbock, 1 Mass. 144; 1 Leach 299. This is the principle; but what amounts to a promise is not so easily defined. See CONFESSION.

PROMISOR. One who makes a promise.

The promisor is bound to fulfil his promise, unless it is contrary to law, as a promise to steal or to commit an assault and battery; when the fulfilment is prevented by the act of God, as where one has agreed to teach another drawing and he loses his sight, so that he cannot teach it; when the promisee prevents the promisor from doing what he agreed to do; when the promisor has been discharged from his promise by the promisee; when the promise has been made without a sufficient consideration; and perhaps in some other cases.

PROMISSORY NOTE. A written promise to pay a certain sum of money, at a future time, unconditionally. Brenzer v. Wightman, 7 W. & S. (Pa.) 264; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462; Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492.

An unconditional written promise, signed by the maker, to pay absolutely and at all events, a sum certain in money, either to the bearer or to a person therein designated or his order. Benj. Chalm. Bills § 271.

By the Negotiable Instruments Act it is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order to bearer.

A promissory note differs from a mere acknowledgment of a debt without any promise to pay, as when the debtor gives his creditor an I O U. See 15 M. & W. 23. But see Cummings v. Freeman, 2 Humphr. (Tenn.) 143; Fleming v. Burge, 6 Ala. 373. In its form it usually contains a promise to pay,

at a time therein expressed, a sum of money to a certain person therein named or to his order, for value received. It is dated and signed by the maker. It is never under seal; Merritt v. Cole, 9 Hun (N. Y.) 98; even when made by a corporation; Steele v. Mfg. Co., 15 Wend. (N. Y.) 265. But in L. R. 3 Ch. Ap. 758, it was held that a "debenture" under a corporate seal was provable against the company by the indorsee, free from equities between the payee and the corporation, and, *semble*, that it was a promissory note. In Mackay v. Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881, it was held that a paper seal of a corporation on an instrument in the form of a promissory note should be regarded as "mere excess." No particular form of words is necessary; but there must be an intention to make a note; see 15 M. & W. 29; Benj. Chalm. Bills 274; and it should amount in legal effect to an absolute promise to pay money; Strickland v. Holbrooke, 75 Cal. 268, 17 Pac. 204.

By the Negotiable Instruments Act, the negotiability of an instrument is not affected by the fact that it is not dated or bears a seal or it does not specify the value given.

He who makes this promise is called the *maker*, and he to whom it is made is the payee; 3 Kent 46. A writing in the form of a note payable to the maker's order, becomes a note by indorsement; Miller v. Weeks, 22 Pa. 89. A note payable to the maker's order, and indorsed by him in blank, is, in legal effect, a note payable to bearer and is transferable by delivery; Jones v. Shapera, 57 Fed. 457, 6 C. C. A. 423.

Although a promissory note in its original shape bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one; for then it is an order by the indorser of the note upon the maker to pay the indorsee. The indorser is as it were the drawer; the maker, the acceptor; and the indorsee, the payee; 4 Burr. 669; 4 Term 148; 3 Burr. 1224.

Most of the rules applicable to bills of exchange equally affect promissory notes.

There are two principal qualities essential to the validity of a note: *first*, that it be payable at all events, and not dependent on any contingency; Cushman v. Haynes, 20 Pick. (Mass.) 132; nor payable out of any particular fund; Stamps v. Graves, 11 N. C. 102; U. S. v. Bank, 5 How. (U. S.) 382. By the Negotiable Instruments Act the promise or order to pay must be unconditional and such promise is unconditional, though there is an indication of a particular fund out of which reimbursement is to be made, or a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. *Second*, it is required that it be for the payment of money only; M'Cormick v. Trotter, 10 S. & R. (Pa.) 94; Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773; Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162; Collins v. Lincoln, 11 Vt. 268 (though statutes in some states have made notes payable in merchandise negotiable); that is, in whatever is legal tender at the place of payment; 2 Ames, Bills 828; and not in bank-notes; though it has been held differently; Judah v. Harris, 19 Johns. (N. Y.) 144. The rule on this subject is said to be more strict in England than here, but to have been relaxed there in 2 Q. B. Div. 194. It is said that the tendency here is to use the term money in a very wide sense; Benj. Chalm. Bills, 2d Am. ed. 10. By the Negotiable Instruments Act, the instrument must be payable in money and it is immaterial that a particular kind of current money is designated.

A promissory note payable to order or bearer passes by indorsement, and although a chose in action, the holder may bring suit on it in his own name. Although a simple contract, a sufficient consideration is implied from the nature of the instrument. See 5 Com. Dig. 133, n., 151, 472; 4 B. & C. 235; 1 C. & M. 16. It has been urged that, upon principle, negotiable instruments are contracts binding by their own force, and therefore not requiring any consideration; Langd. Contr. § 49. When the back of a note is covered by various indorsements, an assignment of the note, written on a piece of paper pasted to the note, will pass the legal title.

By the Negotiable Instruments Act, one who puts his name on the back of an instrument prior to or at the time of delivery becomes an endorser; Rockfield v. Bank, 77 Ohio, 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847.

See INDORSEMENT; ALLONGE.

A negotiable instrument payable to bearer, by custom of trade, passes from hand to hand by delivery, and the holder for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect in title in the person from whom he took it; [1891] 1 Ch. 270.

As to whether a stipulation in an instrument, otherwise in the form of a promissory note, for the payment of an attorney's fee for the collection of the note in case of dishonor renders the instrument non-negotiable, see BILLS OF EXCHANGE.

A promissory note on the face of which, across one end, is written an agreement that the note will be renewed at maturity, is not negotiable; Citizens N. Bk. v. Piollet, 126 Pa. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860; nor is one indorsed "without recourse"; De Hass v. Roberts, 59 Fed 853.

A promissory note does not discharge the debt for which it is given unless such be the agreement of the parties; it only operates to extend the period for the payment of the debt; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125.

PROMOTERS. Those who, in popular and penal actions, prosecute offenders in their own name and the king's.

Persons or corporations at whose instance private bills are introduced into and passed through parliament. Especially those who press forward bills for the taking of land for railways and other public purposes, who are then called promoters of the undertaking.

Persons who assist in organizing joint stock companies or corporations. Mozl. & W.

It has been said to be a term usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence; 28 W. R. 351. One who does an act with reference to the formation of a company or in aid of its organization, is, as regards that act, a promoter of the company. Lloyd, Corp. Liab. for Acts of Prom. 17. It applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not; Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 Pac. 600. See Bosher v. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

Promoters stand in a relation of trust and confidence to the intended company, and are bound to exercise *uberrima fides;* Lloyd Corp. Liab. 18; Densmore Oil Co. v. Densmore, 64 Pa. 43; L. R. 6 Ch. Div. 372; their acts are carefully scrutinized; L. R. 3 App. Cas. 1218; they are precluded from a secret advantage over the other stockholders; Densmore Oil Co. v. Densmore, 64 Pa. 43.

The relation of promoters to the company has been considered as similar to that of a trustee to a beneficiary; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; 6 Ch. Div. 371; or of an agent to a principal; *id.;* or as analogous to that of partners; Densmore Oil Co. v. Densmore, 64 Pa. 43; Smith v. Warden, 86 Mo. 382; Witmer v. Schlatter, 2 Rawle (Pa.) 359; *contra*, Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; or to be rather that of agency; Gillett v. R. Co., 55 Mo. 315, 17 Am. Rep. 653; promoters may, in fact, be partners. It has also been held that their relation towards each other is that of principal and agent; each is liable for such contracts as he authorizes; Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826.

Promoters are personally liable on contracts made by them for the intended company when the latter proves abortive; L. R. 2 C. P. 174; and also for subscriptions paid in to an abortive company, and that without any deduction for expenses incurred; Beach, Priv. Corp. 159; 3 B. & C. 814.

A promoter is not liable *ex contractu* to a person who has been induced by his fraud to take shares in a company, but he may be liable *ex delicto;* 2 E. & B. 476. Promoters are liable in damages to subscribers whose subscriptions are obtained by fraud; Paddock v. Fletcher, 42 Vt. 389; Miller v. Barber, 66 N. Y. 558; a bill in equity lies to recover back money which a person has been induced, through fraud, to invest in a bubble; 2 P. Wms. 153. As against a person acting as promoter, the corporation is entitled to the full benefit of all acts done and contracts made by him while acting in that capacity; and the promoter, as between himself and the corporation, is entitled to no secret profits; he may not purchase property for the corporation, and then sell the same to the corporation at an advance; Simons v. Min. Co., 61 Pa. 202, 100 Am. Dec. 628; 5 Ch. Div. 73, 395; s. c. in the House of Lords, 3 App. Cas. 1218. Where one has already purchased a certain property at a good bargain, it is no fraud to organize a company and sell the property to it at an advance; Thomp. Liab. of Off. 222. See 1 Ch. Div. 182; Dorris v. French, 4 Hun (N. Y.) 292. But if at the time of making the sale he occupies towards the corporation a position of trust, as promoter or otherwise, it would seem that he should not be allowed to sell at an exorbitant price; 16 Am. L. Rev. 289; but see Densmore Oil Co. v. Densmore, 64 Pa. 43; and he should faithfully state to the company all material facts relating to the property which would influence it in deciding as to the purchase; Thomp. Liab. of Off. 219; L. R. 5 Eq. 464. See 2 Lind. Part. 580.

Where a promoter acts as the agent of the company, if he is under no special duty to purchase the land in question for the corporation, he may sell his own land to it, or buy any other land, and sell at a profit, provided he do so fairly, but it must appear that the company had an independent board of directors, who could exercise their own discretion in the purchase of the property; 3 App. Cas. 1218; 23 Can. Sup. Ct. 644; Plaquemines T. F. Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; he must disclose his interest in the property; 3 App. Cas. 1218; Burbank v. Dennis, 101 Cal. 94, 35 Pac. 444; he must state truly all the material facts; 3 App. Cas. 1218; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149. A promoter who acts as a mere agent for the purchase of the property cannot retain a secret profit out of the transaction; 11 Ch. D. 918; 4 C. P. D. 396; Chandler v. Bacon, 30 Fed. 538; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am.

St. Rep. 498; but a profit made with the knowledge and assent of all the members of the corporation may be retained; 14 Ch. D. 390. But where a promoter deals with the corporation at arm's length, he may make such profit as he can; 2 Hare 461.

The remedy for the corporation is either to rescind the contract, if no equities intervene to prevent, or to call upon the promoter to account for his unlawful profit; 4 Russ. 562; Getty v. Devlin, 54 N. Y. 403.

If promoters are guilty of any misrepresentation of facts or suppression of truth in relation to the property or their personal interest in the proposed sale, the company would be entitled to set aside the transaction or recover compensation for any loss which it has suffered; Dickerman v. Trust Co., 176 U. S. 181, 204, 20 Sup. Ct. 311, 44 L. Ed. 423, citing 5 Ch. Div. 73; 11 *id.* 918.

Where the promoters have the power of selecting directors who are to represent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made through promoters under these circumstances will not bind the company unless it was a fair and honest bargain; Dickerman v. Trust Co., 176 U. S. 181, 204, citing L. R. 5 Ch. Div. 73; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; Simons v. Min. Co., 61 Pa. 202, 100 Am. Dec. 628. They are liable to the corporation or its creditors for the difference between the price which they received for such property from the corporation and the price at which they purchased it, without regard to its actual value; Cent. Trust Co. v. Land Co., 116 Fed. 743; Bosher v. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

A subordinate fraud practiced by some of the promoters of a corporation upon some of their associates was held a matter wholly between them and the syndicate, which gave rise to no corporate right of action, in the absence of innocent incorporators or stockholders; Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. But fraud in the purchase of property which is to be conveyed to a corporation composed partly of those purchasing the property and partly of others may become operative against the corporation itself, and give it a right to maintain an action against some or all of those guilty of the fraud, to protect the innocent stockholders who bought in ignorance thereof; Davis v. Las Ovas Co., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426, where it was said: "The distinction between a case in which all of the owners of the property and all of the members of the buying corporation are the same persons and participate in the profit realized, and the case here presented, is fully recognized in Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025, as well as in Phosphate Co. v. Erlanger, 5 Ch. Div. 73, and in the well considered opinion of Judge Severens in Yeiser v. Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724. There was no error in cancelling the shares issued to the plaintiffs in error for promotion of the corporation. They and the other members of the syndicate received the shares upon the assumption that they had in good faith served the corporation in the procurement of the property. Obviously appellants were serving themselves, to the detriment of the corporation and innocent subscribers to its stock. In such a situation the corporation may recover the shares."

There is some difference of opinion in regard to the time when one becomes a promoter within the meaning of the rule. Some cases hold that he is chargeable with a trust when he enters upon the execution of the scheme which is intended to result in the transfer of the property to a company to be organized and controlled by him. All, however, agree that he comes within the rule when he begins to organize the company, and that, from that time, he is bound to deal openly and fairly, and in such a way as that those having independent charge of the company, as well as those who are induced to become subscribers to its stock, may be fully advised of the relation he bears to the property which he proposes to sell; Yeiser v. Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724, citing South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; Hebgen v. Koehler, 97 Wis. 313, 72 N. W. 745; Densmore Oil Co. v. Densmore, 64 Pa. 43; Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. Rep. 159; Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498.

A promoter though he purport to act on behalf of a projected corporation cannot bind it by acts performed before it came into existence; Weatherford, M. W. & N. W. Ry. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; also Perry v. R. Co., 44 Ark. 383; Davis v. Creamery Ass'n, 63 Mo. App. 477; Long v. Bank, 8 Utah 104, 29 Pac. 878; Arapahoe Inv. Co. v. Platt, 5 Colo. App. 515, 39 Pac. 584; Schreyer v. Mills Co., 29 Or. 1, 43 Pac. 719. It has been said in one case, Oakes v. Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544, that this rule does not apply to a private corporation. The rule does not apply when there was a *de facto* corporation in existence when the acts were performed; Wood v. Whelen, 93 Ill. 153; or when the charter provides that the company shall be liable; Hill v. Gould, 129 Mo. 106, 30 S. W. 181; Munson v. R. Co., 103 N. Y. 59, 8 N. E. 355. "Except as a fiction, therefore, this doctrine that

a company can be bound before it is formed, and enters upon its corporate life '*cum onere*,' must be regarded as unfounded in principle. . . . It is discredited in England and has not been followed (as far as can be ascertained) since the decision in 2 Macq. H. of L. 393. The American authorities repudiate it." Lloyd, Corp. Liab. for Acts of Prom. 42, citing 5 H. L. 605. The fact that all the stockholders were promoters and entered into the contract, does not make it binding upon the company when formed; Battelle v. Pav. Co., 37 Minn. 89, 33 N. W. 327; Little Rock & Ft. S. R. Co. v. Perry, 37 Ark. 164; but see Paxton v. Min. Co., 2 Nev. 257. A corporation cannot, by ratification, become liable on a contract made by its promoters before it came into existence; L. R. 2 C. P. 175; L. R. 9 C. P. 503; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; *contra*, Stanton v. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; Paxton C. Co. v. Bank, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; Hill v. Gould, 129 Mo. 106, 30 S. W. 181; such ratification, if binding, would date back to the original agreement; Stanton v. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110. It has been held that the company may "adopt" the original contract and thus become liable under it; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; Munson v. R. Co., 103 N. Y. 59, 8 N. E. 355; Penn M. Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; but see Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; Western S. & M. Co. v. Cousley, 72 Ill. 551. But adoption is, in effect, the making of a new contract on the same terms as the old; L. R. 33 Ch. Div. 16; McArthur v. Print. Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653. It has been held that estoppel will constitute a ground of liability; Grape Sugar & V. Mfg. Co. v. Small, 40 Md. 395; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.

Where a promoter has contracted for something to be performed after incorporation, the company, if it accept performance, with knowledge of the facts, is liable; Penn M. Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; L. R. 38 Ch. Div. 156; Oakes v. Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544. Where the performance is partly before and partly after incorporation, the company may, by acceptance, render itself liable; McArthur v. Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; but see Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837, where services were rendered, under different contracts, before and after incorporation, and a recovery was allowed for the latter and not for the former.

A vote of the directors (under a clause in the articles of association) that the promoter's preliminary expenses be paid, was held not a ground of recovery; L. R. 9 C. P. 503; but see Stanton v. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; and a vote of the directors that "the agreement of purchase be ratified" was held not to bind the corporation; L. R. 16 Ch. Div. 125.

A recovery for work done before incorporation, at the request of a promoter, has been allowed on the ground of a *quasi*-contractual obligation; Grier v. H., H. & Co., 13 N. Y. Supp. 583; but see New York & N. H. R Co. v. Ketchum, 27 Conn. 170; Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; L. R. 9 C. P. 503; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837. See Keener, Quasi-Contracts.

Ratification may be express, or may be implied from the voluntary acceptance of the benefit of the contract, whereby an estoppel is worked. See Despatch Line of Packets v. Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Fister v. La Rue, 15 Barb. (N. Y.) 323. See, also, 7 Ch. Div. 368; L. R. 2 C. P. 174. A corporation cannot enforce a subscription to shares made before its formation on the faith of certain promises of its promoters, without fulfilling the promises; Burrows v. Smith, 10 N. Y. 550.

"Both the English and American decisions recognize the possibility of a new contract between the corporation when organized and the third person, the broad line of distinction between the cases being the manner in which such contract can be made out; the English courts taking the position that acts of the corporation which are clearly attributable to the erroneous belief on its part that it is liable on the original contract cannot be received as evidence of a new contract, particularly when coupled with the further fact that direct negotiations between the third party and the corporation cannot be shown. The American courts, on the other hand, receive as evidence of a new contract all acts indicating an intent by the corporation to receive the benefits of the original contract." 19 Harv. L. Rev. 1042, an article by H. S. Richards.

As to whether a subscriber to the stock of a corporation not yet formed can, after its formation, rescind his subscription on the ground of the promoter's fraud, see 36 Am. L. Rev. 855, by A. C. Ritchie, maintaining the affirmation, and a criticism of his view in 16 Harv. L. Rev. 380.

In a number of jurisdictions the agreement between the promoter and a third person is regarded as an open offer to the corporation, which it may accept when organized and thus create a new contract between the third person and the corporation; 19 Harv. L. Rev. 104, citing Smith v. Parker, 148 Ind. 127,

45 N. E. 770; Penn. M. Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22; Holyoke Envelope Co. v. Envelope Co., 182 Mass. 171, 65 N. E. 54; Weatherford, M. W. & N. W. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; Wall v. Smelting Co., 20 Utah 474, 59 Pac. 399; Pratt v. Match Co., 89 Wis. 406, 62 N. W. 84. Other courts have held that a corporation may be estopped to deny that it is bound by the contract made by the promoter; Blood v. Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Grape S. & V. Mfg. Co. v. Small, 40 Md. 395.

When a solvent trader converts his business into a limited liability company, complying with all the statutory requirements, the court will not go behind the transaction and decide that the company is not validly constituted on account of the nonfulfilment of conditions which are not found in the company's acts; [1897] A. C. 22. This case sustains the validity of what are known in England as "one man companies."

See Alger, Promoters; Keener, Quasi-Contracts; PROSPECTUS.

PROMPT. Quick, sudden, or precipitate. One who is ready is said to be prepared at the moment; one who is prompt is said to be prepared beforehand. Tobias v. Lissberger, 105 N. Y. 412, 12 N. E. 13, 59 Am. Rep. 509.

PROMULGATION. The order given to cause a law to be executed, and to make it public; it differs from publication 1 Bla. Com. 45; Stat. 6 Hen. VI. c. 4.

In modern practice, it is usually by publishing one or more volumes of the laws and circulating them among public officials and selling them. As to the practice in England at various times, see Record Com. in 7 Sel. Essays in Anglo-Amer. L. H. 168.

With regard to trade, unless previous notice can be brought home to the party charged with violating their provisions, laws are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. The Cotton Planter, 1 Paine 23, Fed. Cas. No. 3,270.

The appointment of a jury commission and the drawing of a jury by it, under a law which has not been promulgated, are void; State v. Bruno, 48 La. Ann. 1481, 21 South. 30.

As to the rules of a railway company it means made known; brought to the attention of the service affected thereby, so that a servant is bound to take notice; Wooden v. R. Co., 18 N. Y. Supp. 768.

Formerly promulgation meant introducing a bill to the senate; Aust. Jur. Lect. 28.

See STATUTE.

PROMUTUUM (Lat.). **In Civil Law.** A *quasi*-contract, by which he who receives a certain sum of money, or a certain quantity of fungible things, which have been paid to him through mistake, contracts towards the payer the obligation of returning him as much. Pothier, *de l'Usure*, pt. 3, s. 1, a. 1.

This contract is called *promutuum*, because it has much resemblance to that of *mutuum*. This resemblance consists in this: *first*, that in both a sum of money or some fungible things are required; *second*, that in both there must be a transfer of the property in the thing; *third*, that in both there must be returned the same amount or quantity of the thing received. But, though there is this general resemblance between the two, the *mutuum* differs essentially from the *promutuum*. The former is the actual contract of the parties, made expressly, but the latter is a *quasi*-contract, which is the effect of an error or mistake. 1 Bouvier, Inst. n. 1125.

PRONEPOS (Lat.). Great-grandson.

PRONEPTIS (Lat.). A niece's daughter. A great-granddaughter. Ainsworth, Dict.

PRONOUN. The use of "his" in a charge may be generic, covering male as well as female witnesses; Wilmette v. Brachle, 110 Ill. App. 356, affirmed 209 Ill. 621, 71 N. E. 41.

PRONURUS (Lat.). The wife of a great-grandson.

PROOF. The conviction or persuasion of the mind of a judge or jury, by the exhibition of evidence, of the reality of a fact alleged. Thus, *to prove* is to determine or persuade that a thing does or does not exist; 8 Toullier, n. 2; Ayliffe, Parerg. 442; 2 Phil. Ev. 44, n. a; Steph. Ev. 62; 1 Greenl. Ev. § 1; Schloss v. His Creditors, 31 Cal. 203; Perry v. R. Co., 36 Ia. 106. Proof is the perfection of evidence; for without evidence there is no proof, although there may be evidence which does not amount to proof: for example, if a man is found murdered at a spot where another has been seen walking but a short time before, this fact will be *evidence* to show that the latter was the murderer, but, standing alone, will be very far from *proof* of it.

Ayliffe defines *judicial proof* to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods: first, by proper arguments, such as conjectures, presumptions, indicia, and other adminicular ways and means; secondly, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayliffe, Parerg. 442; Aso & M. Inst. b. 3, t. 7.

PROOF OF DEATH. See Loss.

PROOF OF LOSS. See Loss.

PROOF OF SPIRITS. Testing the strength of alcoholic spirits, also the degree of strength; as high proof, first proof, sec-

ond, third, and fourth proofs. In the internal revenue law it is used in the sense of degree of strength. Louisville P. W. Co. v. Collector, 49 Fed. 561, 1 C. C. A. 371, 6 U. S. App. 53.

PROPER. That which is essential, suitable, adapted, and correct.

Congress is authorized, by art. 1, s. 8, of the constitution of the United States, "to make all laws which shall be necessary and *proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution of the United States, in any department or officer thereof."

PROPER LAW OF CONTRACT. See LEX LOCI.

PROPERTY. The right and interest which a man has in lands and chattels to the exclusion of others. Morrison v. Semple, 6 Binn. (Pa.) 98; Soulard v. U. S., 4 Pet. (U. S.) 511, 7 L. Ed. 938; Jackson v. Housel, 17 Johns. (N. Y.) 283; 11 East 290, 518.

The sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. 2 Bla. Com. 2. The right to possess, use, enjoy, and dispose of a thing. Babcock v. Buffalo, 1 Sheld. 317, affirmed 56 N. Y. 268; which is in itself valuable; Jones v. Vanzandt, 4 McLean 603, Fed. Cas. No. 7,503. The free use and enjoyment by a person of all his acquisitions, without any control or diminution, save only by the law of the land. Stevens v. State, 2 Ark. 291, 35 Am. Dec. 72; People v. Barondess, 61 Hun 571, 16 N. Y. Supp. 436. The right of a person over a thing (*in rem*) indefinite in point of user. Austin's Lectures.

Literally taken the word is *nomen generalissimum*, but is not always so used. As ordinarily used it means the thing possessed, but it may include the right to use and enjoy it. The more comprehensive meaning is presumed to have been intended by the use of such a word in a constitution; Wells-Fargo & Co. v. Jersey City, 207 Fed. 871.

That which is peculiar or proper to any person; that which belongs exclusively to one; the first meaning of the word from which it is derived—*proprius*—is one's own. Drone, Copyr. 6.

A vested right of action is property in the same sense that tangible things are property; Pritchard v. Norton, 106 U. S. 132, 1 Sup. Ct. 102, 27 L. Ed. 104. It is a thing owned, that to which a person has or may have a legal title; Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389, 3 Am. Rep. 711. See Barclay v. Plant, 50 Ala. 509; Primm v. Belleville, 59 Ill. 142; 11 East 290.

In the treaty by which Louisiana was acquired, property comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed; Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908.

Property, in the strict legal sense, is an aggregate of rights which are guaranteed and protected by the government, and, in the ordinary sense, indicates the thing itself, rather than the rights attached to it; Fulton Light, Heat & Power Co. v. State, 65 Misc. Rep. 263, 121 N. Y. Supp. 536, affirmed *id.*, 138 App. Div. 931, 123 N. Y. Supp. 1117.

The term "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments; Caro v. R. Co., 46 N. Y. Super. Ct. 138; it includes money; Washington Co. v. Weld Co., 12 Colo. 152, 20 Pac. 273; credits; Dillingham v. Ins. Co., 120 Tenn. 302, 108 S. W. 1148, 16 L. R. A. (N. S.) 220; a chose in action; Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197; a mining claim; Sullivan v. Min. Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214; a debt; Knebelkamp v. Fogg, 55 Ill. App. 563; Fontana v. Tel. Co., 83 Fed. 824; a ferry franchise; Conway v. Taylor, 1 Black (U. S.) 603, 17 L. Ed. 191; Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809; the reciprocal rights of the wife to the society, protection, and support of her husband, and his right to her society and services in his household may be regarded as the property of the respective parties; Jaynes v. Jaynes, 39 Hun (N. Y.) 40; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545.

The following have been held to be property: A certificate of membership in the Board of Trade; Jones v. Fisher, 116 Ill. 68, 4 N. E. 255; a common law action; Dunlap v. R. Co., 50 Mich. 470, 15 N. W. 555; the right to recover damages from a common carrier for breach of contract; Justis v. R. Co., 12 Cal. App. 639, 108 Pac. 328; the office of a professor of a chartered university who can be removed only for cause; Com. v. Phillips, 1 Del. Co. Rep. (Pa.) 41; a man's right to his calling; Butchers' Union S. H. & L. S. L. Co. v. Slaughter-House Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; People v. Rosenberg, 59 Misc. 342, 112 N. Y. Supp. 316; the right to labor; Jones v. Leslie, 61 Wash. 107, 112 Pac. 81, Ann. Cas. 1912B, 1158; the right to labor or to practice a profession; Gleason v. Thaw, 185 Fed. 345, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894; the privilege and capacity to exercise the rights common to every man; Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076; that dominion or indefinite right which one may lawfully exercise over particular objects, and, generally, to the exclusion of all others; Rigney v. Chicago, 102 Ill. 64; a liquor tax certificate; Bachmann-Bechtel B. Co. v. Gehl, 154 App. Div. 849, 139 N. Y. Supp. 807; quotations from Stock Exchanges; Hunt v. Cotton Exch., 205 U. S.

322, 27 Sup. Ct. 529, 51 L. Ed. 821; McDearmott Commission Co. v. Board of Trade, 146 Fed. 961, 77 C. C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759; an option for the purchase of a manufacturing plant; Haskins v. Ryan, 75 N. J. Eq. 330, 78 Atl. 566; the perpetual and exclusive right granted by Governor Dongan in 1686 to the freeholders of East Hampton to purchase Montauk Point from the Indians; Pharaoh v. Benson, 69 Misc. Rep. 241, 126 N. Y. Supp. 1035; a fixed contract right under Spanish law to acquire land; Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; franchises of a public corporation; Willcox v. Gas Co., 212 U. S. 19, 44, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; a franchise to build a water works and use the streets for that purpose; Adams v. Bullock, 94 Miss. 27, 47 South. 527, 19 Ann. Cas. 165; all rights in real and personal property, and easements, franchises and incorporeal hereditaments; Metropolitan City R. Co. v. R. Co., 87 Ill. 317; a secret code or system of a mercantile company, containing the cost and selling price of its merchandize, for use of its salesmen; Simmons H. Co. v. Waibel, 1 S. D. 488, 47 N. W. 814, 11 L. R. A. 267, 36 Am. St. Rep. 755.

A person has no property nor vested interest in any rule of the common law; Pacific Tel. Co. v. Oregon, 223 U. S. 150, 32 Sup. Ct. 224, 56 L. Ed. 377; nor in a liquor license; Sprayberry v. Atlanta (Ga.) 13 S. E. 197; nor in a mere idea unprotected by statute or contract; Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436; nor in a coffin in which a corpse has, with the consent of all persons having a pecuniary interest in it, been buried; Guthrie v. Weaver, 1 Mo. App. 136. Debts have been said not to be the "property" of the debtor; Dibert v. D'Arcy, 248 Mo. 617, 154 S. W. 1116.

The domestic services of a wife and her companionship possess none of the attributes of property; Billingsley v. R. Co., 84 Ark. 617, 107 S. W. 173, 120 Am. St. Rep. 95.

All things are not the subject of property; the sea, the air, and the like cannot be appropriated; every one may enjoy them, but he has no exclusive right in them. When things are fully our own, or when all others are excluded from meddling with them or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases: so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat. liv. prél. tit. 3; Pothier, *des Choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 1 C. & M. 39; Mayo v. Carrington, 4 Call (Va.) 472, 2 Am. Dec. 580; 6 Bingh. 630.

See Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Thompson v. R. Co., 130 N. Y. 360, 29 N. E. 264, where easements of light and air and ingress and egress to buildings were held to be property.

The ownership of property implies its use in the prosecution of any legitimate business which is not a nuisance in itself; In re Hong Wah, 82 Fed. 623.

Property is said to be real and personal property. See those titles.

Dicey (Confl. Laws, Moore's ed. 72) treats of property as consisting of movables and immovables, but says that this "does not square with the distinction known to English lawyers between *things real*, or real property, and *things personal*, or personal property." Movables are equivalent to personal property with the omission of chattels real; immovables are equivalent to realty, with the addition of chattels real or leaseholds. Law is concerned, not with things but with rights over, or in reference to property.

It is also said to be, when it relates to goods and chattels, *absolute* or *qualified*. Absolute property is that which is our own without any qualification whatever: as, when a man is the owner of a watch, a book, or other inanimate thing, or of a horse, a sheep, or other animal which never had its natural liberty in a wild state.

Qualified property consists in the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power; as, a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost his property is gone, unless the animals go *animo revertendi;* 2 Bla. Com. 396; Wallis v. Mease, 3 Binn. (Pa.) 546; but a whale, harpooned, but not connected with a boat by line, is vested in the crew that harpooned it, and not in one which afterwards followed and captured it; Ghen v. Rich, 8 Fed. 159; when killed and marked, it belongs to the person who killed it; Taber v. Jenny, 1 Sprague 315, Fed. Cas. No. 13,720.

But property in personal goods may be absolute or qualified without any relation to the nature of the subject-matter, but simply because more persons than one have an interest in it, or because the right of property is separated from the possession. A bailee of goods, though not the owner, has a qualified property in them; while the owner has the absolute property. See BAILEE; BAILMENT.

Personal property is further divided into property in possession, and property or choses in action. See CHOSE IN ACTION.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like.

In a strict legal sense, land is not property, but the subject of property. The term property, although in common parlance applied to a tract of land or a chattel, in its legal signification means only the right of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing. Wynehamer v. People, 13 N. Y. 378; 1 Bla. Com. 186; 2 Austin, Jurispr. 817. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference takes, *pro tanto*, the owner's property. The right of using a thing indefinitely is an essential quality of absolute property, without which absolute property can have no legal existence. Use is the real side of property. This right of user necessarily includes the right and power of excluding others from the land; Walker v. R. Co., 103 Mass. 14, 4 Am. Rep. 509. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's property. If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right, takes property, although the owner may still have left to him valuable rights in the article of a more limited and circumscribed nature; Eaton v. R. Co., 51 N. H. 512, 12 Am. Rep. 147.

Property is lost by the act of man by—*first, alienation;* but in order to do this the owner must have a legal capacity to make a contract; *second*, by the voluntary abandonment of the thing; but unless the abandonment be purely voluntary the title to the property is not lost: as, if things be thrown into the sea to save the ship, the right is not lost; Pothier, n. 270; 3 Toullier, n. 346. But even a voluntary abandonment does not deprive the former owner from taking possession of the thing abandoned at any time before another takes possession of it.

It is lost *by operation of law—first*, by the forced sale, under a lawful process, of the property of a debtor to satisfy a judgment, sentence, or decree rendered against him, to compel him to fulfil his obligations; *second*, by confiscation, or sentence of a criminal court; *third*, by prescription; *fourth*, by civil death; *fifth*, by capture by a public enemy. It is lost *by the act of God*, as in the case of the death of slaves or animals, or in the total destruction of a thing: for example, if a house be swallowed up by an opening in the earth during an earthquake.

It is proper to observe that, in some cases, the moment that the owner loses his possession he also loses his property or right in the thing; animals *feræ naturæ*, as mentioned above, belong to the owner only while he retains the possession of them. But, in general, the loss of possession does not impair the right of property, for the owner may recover it within a certain time allowed by law. Bouvier, Inst.

Referring to the historical development of the law relating to chattels, it is said that possession is prima facie evidence of ownership. The man with the better right to possession has "the property." This better right to possession was the only form of property, either of lands or chattels, known to the early common law. 3 Holdsw. Hist. E. L. 281.

See STOCK; SITUS; TAXATION; ATTACHMENT; GARNISHMENT.

PROPINQUITY (Lat.). Kindred; parentage. See AFFINITY; CONSANGUINITY; NEXT OF KIN.

PROPIOR SOBRINA, PROPIOR SOBRINO (Lat.). The son or daughter of a great-uncle or great-aunt on the father's or mother's side. Calvinus, Lex.

PROPIOS, PROPRIOS. In Spanish Law. Certain portions of ground laid off and reserved when a town was founded in Spanish America, as the inalienable property of the town, for the purpose of erecting public buildings, markets, etc., or to be used in any other way, under the direction of the municipality, for the advancement of the revenues or the prosperity of the place. Strother v. Lucas, 12 Pet. (U. S.) 442, 9 L. Ed. 1137.

PROPONENT. In Ecclesiastical Law. One who propounds a thing; as, "the party proponent doth allege and propound." 6 Eccl. 356, n. Often used of one who offers a will for probate.

PROPORTUM. Intent or meaning. Cowell.

PROPOSAL. An offer. A formal offer to perform some undertaking, stating the time and manner of performance and price demanded, or one or more of these particulars, either directly or by implied or direct reference to some announcement requesting such an offer. See Eppes v. R. Co., 35 Ala. 33. A proposal of this character is not to be considered as subject to different rules from any other offer; Poll. Contr. 13. See OFFER.

PROPOSITUS (Lat.). The person proposed. In making genealogical tables, the person whose relations it is desired to find out is called the *propositus*.

PROPOUND. To offer; to propose; as, the *onus probandi* in every case lies upon the party who propounds a will. 1 Curt. Eccl. 637; 6 Eccl. 417.

PROPRES. In French Law. The term *propres* or *biens propres* is used to denote that property which has come to an individual from his relations, either in a direct line, ascending or descending, or from a collateral line, whether the same have come by operation of law or by devise. *Propres* is used in opposition to *acquêts*. Pothier, *Des Propres;* 2 Burge, Confl. of Law 61.

PROPRIA PERSONA (Lat. in his own person). It is a rule in pleading that pleas to the jurisdiction of the court must be plead *in propria persona*, because if pleaded by attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction. Lawes, Pl. 91.

An appearance may be *in propria persona*, and need not be by attorney.

PROPRIETARY. In its strict sense, this word signifies one who is master of his actions, and who has the free disposition of his property. During the colonial government of Pennsylvania, William Penn was called the proprietary.

Belonging to ownership; as proprietary rights. Ferguson v. Arthur, 117 U. S. 487, 6 Sup. Ct. 861, 29 L. Ed. 979.

PROPRIETATE PROBANDA. See DE PROPRIETATE PROBANDA.

PROPRIETOR. The owner.

One who has the legal right or exclusive title to anything. In many instances it is synonymous with owner. Turner v. Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262. A receiver is not a proprietor; Dillingham v. Blake (Tex.) 32 S. W. 77.

PROPRIO VIGORE (Lat.). By its own force and vigor: an expression frequently used in construction. A phrase is said to have a certain meaning *proprio vigore*.

PROPTER AFFECTUM (Lat.). For or on account of some affection or prejudice. See CHALLENGE.

PROPTER DEFECTUM (Lat.). On account of or for some defect. See CHALLENGE; ESCHEAT.

PROPTER DELICTUM (Lat.). For or on account of crime. See CHALLENGE; ESCHEAT.

PROPTER HONORIS RESPECTUM. On account of respect or honor of rank. See CHALLENGE.

PROROGATION. Putting off to another time. It is generally applied to the British parliament, and means the continuance of it from one time to another; it differs from adjournment, which is a continuance of it from one day to another in the same session. 1 Bla. Com. 186. After prorogation all pending bills fall.

In Civil Law. The giving time to do a thing beyond the term prefixed. Dig. 2. 14. 27. 1. See PROLONGATION.

PROSCRIBED. In Civil Law. Among the Romans, a man was said to be proscribed when a reward was offered for his head; but the term was more usually applied to those who were sentenced to some punishment which carried with it the consequences of civil death. Code 9. 49.

PROSECUTION (Lat. *prosequor*, to follow after). **In Criminal Law.** The means adopted to bring a supposed offender to justice and punishment by due course of law. See State v. Williams, 34 La. Ann. 1198.

Prosecutions are carried on in the name of the government, and have for their principal object the security and happiness of the people in general. Hawk. Pl. Cr. b. 2, c. 25, s. 3; Bac. Abr. *Indictment* (A 3).

In England, the modes most usually employed to carry them on are—by indictment; 1 Chitty, Cr. L. 132; presentment of a grand jury; *id.* 133; coroner's inquest; *id.* 134; and by an information. In this country, the modes are—by indictment, by presentment, by information, and by complaint, which see. See POSTULATIO; MALICIOUS PROSECUTION.

PROSECUTOR. One who prosecutes another for a crime in the name of the government.

The *public* prosecutor is an officer appointed by the government to prosecute all offences: he is the attorney-general or his deputy.

A *private* prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

Every man may become a prosecutor; but no man is bound, except in some few of the more enormous offences, as treason, to be one; but if the prosecutor should compound a felony he will be guilty of a crime. The prosecutor has an inducement to prosecute, because he cannot, in many cases, have any civil remedy until he has done his duty to society by an endeavor to bring the offender to justice. If a prosecutor act from proper motives, he will not be responsible to the party in damages though he was mistaken in his suspicions; but if, from a motive of revenge, he institute a criminal prosecution without any reasonable foundation, he may be punished by being mulcted in damages, in an action for a malicious prosecution (*q. v.*).

In theory of law in England, any member of the community can prosecute a criminal. In felony, it is the duty of a person injured in person or property to prosecute, or to give information to the police; but there is no such duty in misdemeanors. The police may act as they see fit. By acts in 1879 and 1884, a public prosecutor is provided who insti-

tutes and carries on prosecutions in any court under the supervision of the attorney-general. He may take a case out of the hands of a private prosecutor or of the police. The vast bulk of prosecutions are by private prosecutors.

In State v. Tighe, 27 Mont. 327, 71 Pac. 3 (a capital case), the court upheld the practice of private counsel acting for prosecutors, saying that it had existed in Montana for forty years. Milburn, J., dissented on the ground that the private prosecutor represents vengeance, while the state's attorney represents justice. The practice exists in many states; see State v. Bartlett, 55 Me. 200; Keyes v. State, 122 Ind. 527, 23 N. E. 1097. It does not exist in Massachusetts, Michigan and Wisconsin.

In Pennsylvania, a defendant is not bound to plead to an indictment, where there is a private prosecutor, until his name shall have been indorsed on the indictment as such, and on acquittal of the defendant, in all cases except where the charge is for a felony, the jury may direct that he shall pay the costs. See 1 Chitty, Cr. Law 110; Haught v. Com., 2 Va. Cas. 3; The King v. Lukens, 1 Dall. (U. S.) 5; Allen v. Com., 2 Bibb (Ky.) 210; U. S. v. Mundel, 6 Call (Va.) 245, Fed. Cas. No. 15,834; Bish. Cr. Pro. 691; DISTRICT ATTORNEY OF THE UNITED STATES; INFORMER.

PROSECUTOR OF THE PLEAS. The title of the prosecuting officer in each county in New Jersey and one or two other states. The term is used in the same sense as district attorney in other states.

PROSOCER (Lat.). A father-in-law's father; grandfather of wife. Vicat, Voc. Jur.

PROSOCERUS (Lat.). A wife's grandmother.

PROSPECTIVE (Lat. *prospicio*, to look forward). That which is applicable to the future: it is used in opposition to retrospective. See RETROSPECTIVE.

PROSPECTUS. A prospectus of an intended company ought not to omit actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence the mind of the reader; for if he is thereby deceived into becoming an allottee of shares and suffers loss he may proceed against those who have misled him. The proper purpose of a prospectus of an intended company is held to be only to invite persons to become original shareholders or allottees of shares in the company. When it has performed this office, it is exhausted; Peek v. Gurney, L. R. 6 H. L. 377; but a purchaser of shares from an original allottee may maintain an action for misrepresentations contained in a prospectus, if he can show that it was intended by those issuing it to be, and was, communicated to him prior to his purchase of shares; [1896] 1 Q. B. 372; such an intention may be inferred if the prospectus was circulated after all its shares had been allotted, particularly if they were taken up by the promoters themselves. See [1892] 3 Ch. 566; 17 Ch. D. 467.

The doctrine of Peek v. Gurney is considered by Judge Thompson (Corp. § 1471) as "destitute of any foundation in reason and opposed to the common opinions of justice and business morality." It is not followed in this country, where it is held that it is sufficient if the prospectus was issued to influence the public, and the plaintiff saw it and was induced thereby to purchase shares; *id.*

A prospectus set forth that a tramway company had the right to use steam power as well as horses; the directors believed the statement to be true, but it was not; it was held that the officers of the company were not liable for deceit; Derry v. Peek, L. R. 14 App. Cas. 337. This decision was overruled in England by an act of 1890.

If a director of a company knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts tending to deceive the community, and to induce the public to buy the stock in the market, he is responsible to those who are injured thereby; Morgan v. Skiddy, 62 N. Y. 319.

A letter intended to be used to promote the sale of bonds of a trust company is a representation to all persons to whom it is shown; Nash v. Ins. & Trust Co., 159 Mass. 437, 34 N. E. 625.

A prospectus is admissible in evidence in an action at law by a company against its promoters for secret profits; Simons v. Min. Co., 61 Pa. 202, 100 Am. Dec. 628. See Thomp. Liab. of Off. 309.

A statement in a prospectus of the purpose for which money is wanted, is a material statement of fact, and if untrue may be ground for an action of deceit; 29 Ch. Div. 459.

A prospectus of a new company, so far as it alleges facts concerning the position and prospects of the undertaking, is a representation to all persons who may apply for shares therein, but not to subsequent transferees of shares; L. R. 6 H. L. 377; but it may be as to the latter, if actively used to induce the purchase of shares; [1896] 1 Q. B. 372; Poll. Torts 284. The material question as to a prospectus is, "Was there or was there not misrepresentation in point of fact?" *id.*

By the Companies (Consolidation) Act 1908, every prospectus must contain particulars respecting the memorandum of association, the shares, the directors, the subscribers to the memorandum of association, the vendors to the company, payments in respect to preliminary expenses and disbursements and the dates and parties to material con-

tracts. Parties cannot contract themselves out of the act; [1906] 75 L. J. C. 450; [1906] 2 Ch. 129; if a prospectus contains untrue statements, or material omissions, any subscriber for shares may avoid his contract and the court will not enquire into the exact importance which he attached to each separate statement; [1906] A. C. 24; but see [1910] 1 Ch. 630. He also has an action of deceit against every director or promoter, or person named in the prospectus as about to become a director, or who has authorized the issue of the prospectus. The defendant will not be liable if he had reasonable ground to believe that the statement was true, or that it was a correct statement from a public official document, or from the report of an expert whom he had reasonable ground to believe was competent; Odgers, C. L. 1401.

See Alger, Promoters; DECEIT; MISREPRESENTATION; PROMOTERS.

PROSTITUTION. The common lewdness of a woman for gain. The act of permitting a common and indiscriminate sexual intercourse for gain. Com. v. Cook, 12 Metc. (Mass.) 97.

The act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire. State v. Gibson, 108 Mo. 575, 18 S. W. 1109. See State v. Stoyell, 54 Me. 24, 89 Am. Dec. 716; Haygood v. State, 98 Ala. 61, 13 South. 325.

The act of permitting illicit intercourse for hire, an indiscriminate intercourse or what is deemed public prostitution. U. S. v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543.

By the word in its most general sense is understood the act of setting one's self to sale, or of devoting to infamous purposes what is in one's power: as, the prostitution of talents or abilities; the prostitution of the press, etc. Carpenter v. People, 8 Barb. (N. Y.) 610.

In all well-regulated communities this has been considered a heinous offence, for which the woman may be punished; and the keeper of a house of prostitution may be indicted for keeping a common nuisance.

A landlord cannot recover for the use and occupation of a house let for the purpose of prostitution; 1 B. & P. 340, n. It is not a crime to let rooms to prostitutes for quiet and decent occupation, nor to permit a house to be visited by disreputable people, if they visit it for innocent and proper purposes; State v. Smith, 15 R. I. 24, 22 Atl. 1119.

The object of the provisions of the immigration acts of 1907 and 1910, providing for the deportation of prostitutes, was to prevent the introduction and keeping in this country of women of the prohibited class; and even if a woman married to a citizen might be permitted to enter if she does not belong to that class, yet if she is found violating the statute by being in a house of prostitution, she becomes subject to deportation, notwithstanding her marriage to a citizen; Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

June 25, 1910, congress passed the white slave traffic act forbidding the transportation of women for the purpose of prostitution. It was held constitutional; Paulsen v. U. S., 199 Fed. 423, 118 C. C. A. 97. See WHITE SLAVE ACT; BAWDY-HOUSE.

See Flexner, Prostitution in Europe; Kneeland, Commercialized Prostitution in New York City; PROCURATION; WHITE SLAVE.

In a figurative sense, it signifies the bad use which a corrupt judge makes of the law, by making it subservient to his interest: as, the prostitution of the law, the prostitution of justice.

PROTECTION. In Mercantile Law. The name of a document generally given by notaries public to sailors and other persons going abroad, in which is certified that the bearer therein named is a citizen of the United States.

In Governmental Law. That benefit or safety which the government affords to the citizens.

In English Law. A privilege granted by the king to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him. Of these protections there are several kinds. Fitzh. N. B. 65.

PROTECTION ORDERS. Orders granted by the court upon the application of a wife living apart from her husband to protect her property. Brett, Com. 988.

PROTECTION OF THE LAWS. See EQUAL PROTECTION OF THE LAWS.

PROTECTOR OF THE SETTLEMENT. By the English Fines and Recoveries Act, 1833, no disposition by a person who is tenant in tail under a settlement shall be effectual to bar any person but those claiming by force of the entail, unless it is made with the consent of the "Protector of the Settlement." In the absence of any express provision in the settlement appointing another person, the person who is the owner of the first beneficial estate of freehold, legal or equitable, or for years determinable on a life or lives prior to the estate tail, shall be the Protector. The settlor may appoint any person or persons *in esse* (not exceeding three) to act as Protector; 1 Steph. Com. 388.

PROTECTION, WRIT OF. A federal court has power to protect a litigant therein from seizure of his person by state authorities while in attendance upon the trial of his

case, whether upon process or in the exercise of the police power of the state without process, where necessary for the protection of its own jurisdiction, and where the threatened act must rest for its justification upon a proceeding the validity of which is the very matter it is called upon to determine. In such case the federal court has power to grant protection to enable the party to come into the state, remain during the trial, and depart therefrom in the custody and under the protection of the United States marshal and without interference with his personal liberty by the officers or agents of the state; Chanler v. Sherman, 162 Fed. 19, 88 C. C. A. 673, 22 L. R. A. (N. S.) 992.

PROTECTORATE. A protectorate is a state which has transferred the management of its more important international affairs to a stronger state. 1 Opp. 144; Salmond, Juris. 210. It implies only a partial loss of sovereignty, so that the protected state still retains a position in the family of nations. Moreover, the protected state remains so far independent of its protector that it is not obliged to be a party to a war carried on by the protector against a third state, nor are treaties concluded by the protector *ipso facto* binding upon the protected state; 1 Opp. 145-146.

Treaties of protection are treaties in the nature of unequal alliance, from which they are chiefly distinguished by a garrison being kept within the protected state; Twiss, Rights of Nations § 247. The rights of sovereignty must be exercised by the protected state *de facto* as well as *de jure*, else it will become a mere dependence of the governing power. See Halleck, Int. L. 69; 1 Kent, Gould's ed. *23.

The character of a protectorate will depend upon the nature of the treaty by which it is established. As exercised, however, by a European power over a smaller civilized state, it differs from the relation which links an Eastern protected state with a European country; a German protectorate inclines to the assumption of more full control than a British.

Formerly protected nations were said to retain their independence and internal sovereignty, placing their foreign relations under a stronger country. It is believed that all the states represented at the Berlin Conference in 1885, except Great Britain, maintained that a Protectorate includes the right of administering justice over the subjects of a protected state. See Hall, For. Jur. of the British Crown.

PROTEST. In Contracts. A notarial act, made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchange, etc.

A formal notarial certificate attesting the dishonor of a bill of exchange or promissory note. Benj. Chalm. Bills, art. 176.

There are two kinds of protest, namely, protest for non-acceptance, and protest for non-payment. There is also a species of protest common in England, which is called protest for better security. A similar provision is to be found in the Negotiable Instruments Act.

Protest for non-acceptance or non-payment, when duly made and accompanied by notice to all the parties to the bill or note, has the effect of making all of them responsible to the holder for the amount of the bill or note, together with damages, etc.; 3 Kent 63; Byles, Bills 273, 394; Chitty, Bills 278; Com. Dig. *Merchant* (F 8, 9, 10); Bac. Abr. *Merchant*, etc. (M 7). Protest for better security may be made when the acceptor of a bill fails, becomes insolvent, or in any other way gives the holder just reason to suppose it will not be paid. It seems to be of doubtful utility, except that it gives the drawer of a bill on a foreign country an opportunity of availing himself of any attachment law there in force; 1 Ld. Raym. 745.

The protest is a formal paper signed and sealed by a notary wherein he certifies that on the day of its date he presented the original bill attached thereunto, or a copy (a description of the bill is enough; Dennistoun v. Stewart, 17 How. [U. S.] 606, 15 L. Ed. 228), to the acceptor, or the original note to the maker thereof, and demanded payment, or acceptance, which was refused, for reasons given in the protest, and that thereupon he protests against the drawer and indorsers thereof for exchange, re-exchange, damages, costs, and interest. See Benj. Chalm. Bills, art. 176; 2 Ames, Bills & N. 863. It is usual, also, for the notary to serve notices of the protest on all the parties to the bill. The notice contains a description of the bill, including its date and amount, the fact of demand and refusal, and that the holder looks to the person notified for payment. A waiver of notice of protest by an accommodation endorser 18 months after maturity of the note with full knowledge that demand had not been made or notice of protest given, is binding without a new consideration; Burgettstown Nat. Bk. v. Nill, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079, 110 Am. St. Rep. 554, 5 Ann. Cas. 476; notice of protest to a drawer who executed an assignment for the benefit of creditors is sufficient to bind the estate in the hands of the assignee; Moreland's Adm'r v. Bank, 114 Ky. 577, 71 S. W. 520, 61 L. R. A. 900, 102 Am. St. Rep. 293.

Protest of foreign bills is proof of demand and refusal to pay or accept; Bryden v.

Taylor, 2 H. & J. (Md.) 399, 3 Am. Dec. 554; Nicholls v. Webb, 8 Wheat. (U. S.) 333, 5 L. Ed. 628. Protest is said to be part of the constitution of a foreign bill; and the form is governed by the *lex loci contractus;* Bank of Rochester v. Gray, 2 Hill (N. Y.) 227; Tickner v. Roberts, 11 La. 14, 30 Am. Dec. 706; Townsley v. Sumrall, 2 Pet. (U. S.) 179, 180, 7 L. Ed. 386. Story, Bills 176 (by the place where the protest is made; Benj. Chalm. Bills, art. 180). A protest must be made by a notary public or other person authorized to act as such; Benj. Chalm. Bills, art. 177; but it has been held that the duties of a notary cannot be performed by a clerk or deputy; Ocean Nat. Bank v. Williams, 102 Mass. 141. Inland bills and promissory notes need not be protested; Bailey v. Dozier, 6 How. (U. S.) 23, 12 L. Ed. 328; see Presbrey v. Thomas, 1 App. D. C. 171; but the term protest, as applied to inland bills of exchange, includes only the steps necessary to charge the drawer and indorser; Wood River Bank v. Bank, 36 Neb. 744, 55 N. W. 239. Protest is unnecessary to fix the liability of an indorser on a non-negotiable instrument; Kampmann v. Williams, 70 Tex. 568, 8 S. W. 310.

By the Negotiable Instruments Act a foreign bill, if dishonored by non-acceptance, or, after acceptance, by non-payment, must be protested; if not, the drawer and endorsers are discharged. The protest must be annexed to the bill, or must contain a copy thereof, under the hand and seal of the notary making it, and must specify the time and place of presentment, the fact and manner thereof, the cause or reason for protesting the bill, and the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. Protest may be made by a notary; or it may be by any respectable resident of the place of dishonor, in the presence of two or more credible witnesses.

Protest must be made on the day of dishonor, but is dispensed with by any circumstances which would dispense with notice of dishonor. See PRESENTMENT. It must be at the place of dishonor, except that when a bill drawn at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. After protest for non-acceptance a bill may be protested for non-payment.

Where the acceptor has been adjudged bankrupt or insolvent, or has assigned for creditors, before the bill matures, it may be protested for better security against the drawer and indorsers.

If a bill is lost or destroyed, or wrongly detained from the person entitled to hold it, protest may be on a copy or written particulars thereof.

Where a defendant negligently caused an original note to be protested after he had received a renewal note, the maker of the note can recover in tort for the damage to his credit; State Mutual Life Ass'n v. Baldwin, 116 Ga. 855, 43 S. E. 262.

See ACCEPTANCE; BILLS OF EXCHANGE; NOTICE OF DISHONOR; PRESENTMENT.

In Legislation. A declaration made by one or more members of a legislative body that they do not agree with some act or resolution of the body: it is usual to add the reasons which the protestants have for such a dissent.

See 2 Redlich, Proc. in H. of C. 233, as to protest in the House of Lords.

In Maritime Law. A writing, attested by a justice of the peace, a notary public, or a consul, made and verified by the master of a vessel, stating the severity of a voyage by which a ship has suffered, and showing that it was not owing to the neglect or misconduct of the master. See Richette v. Stewart, 1 Dall. 317, 1 L. Ed. 154; Fleming v. Ins. Co., 3 W. & S. (Pa.) 144, 38 Am. Dec. 747. It cannot be made by a notary except under the *lex mercatoria*, or by statute; Patterson v. Ins. Co., 3 Harr. & J. (Md.) 71, 5 Am. Dec. 419.

The protest is not, in general, evidence for the master of the vessel or his owners in the English or American courts; yet it is often proper evidence against them; Abb. Sh., 13th ed. 457.

PROTEST, PAYMENT UNDER. Internal revenue taxes paid voluntarily cannot be recovered back, and payments, with knowledge and without compulsion, are voluntary; Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432. A person who without the compulsion of legal process, or duress of goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by mere protest, either in writing or oral, change its character from a voluntary to an involuntary payment. The payment overcomes and nullifies the protest; 4 Wait. Act. & Def. 493. Where an illegal tax is paid under protest to one having authority to enforce its collection, it is an involuntary payment and may be recovered back; Lauman v. Des Moines, 29 Ia. 310; First Nat. Bk. of Sturgis v. Watkins, 21 Mich. 483; but see Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512.

A mere apprehension of legal proceedings to collect a tax is not sufficient to make the payment compulsory; there must be an immediate power or authority to institute them; In re Stratton's Estate, 46 Md. 552.

An action will not lie to recover money voluntarily paid to redeem land sold upon a void tax judgment when the party mak-

ing the payment has at the time full knowledge of the character of the sale and all the facts affecting its validity; Shane v. St. Paul, 26 Minn. 543, 6 N. W. 349.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude the plaintiff from recovering them back; 2 B. & C. 729; 2 B. & A. 562. Where money is paid under an illegal demand, *colore officii*, the payment can never be voluntary; 8 Exch. 625.

Where a railway company exacted from a carrier more than they charged to other carriers in breach of the acts of parliament, it was held that sums thus exacted could be recovered back; 7 M. & G. 253. Where a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, he is entitled to recover back the excess; L. R. 4 H. L. C. 249.

The object of the protest is to take from the payment its voluntary character; it serves as evidence that the payment was not voluntary, and in order to be efficacious there must be actual coercion, duress, or fraud, presently existing, or the payment will be voluntary in spite of the protest; Flower v. Lance, 59 N. Y. 603; Emmons v. Scudder, 115 Mass. 367. Whether actual protest, in case of the payment of money illegally demanded by a public officer is a condition precedent to a recovery by the party paying the money is not clearly settled; 4 Wait, Act. & Def. 495. Where the person demanding the money has notice of the illegality of the demand, a protest is not necessary, but otherwise it is necessary; Meek v. McClure, 49 Cal. 624.

When duties are paid in order to get possession of the goods, a protest made within ten days after the ascertainment and liquidation of the duties is sufficient; Saltonstall v. Birtwell, 164 U. S. 54, 17 Sup. Ct. 19, 41 L. Ed. 348, where the statutes on the subject are examined.

The rule that money paid on account of an unlawful demand, voluntarily and with knowledge of all the facts, cannot be recovered back unless paid under protest or to emancipate the property from an actual and existing duress, does not prevent the recovery of money paid on an illegal demand reluctantly by one without ability to regain possession of his property except by making such payment; The John Francis, 184 Fed. 746.

Neither a statute imposing a tax, nor execution thereunder, nor a mere demand for payment is treated as duress. It does not necessarily follow that there will be a levy on goods; or if there is a levy, the citizen, to avoid the consequences may pay the money, regain his property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that, where the franchise tax is not paid by a given date, a penalty of twenty-five per cent. shall be incurred, the license of the company cancelled, and the right to sue be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary, but compulsory, and may be recovered back; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510.

Where excessive customs duties are paid under a mistake of law and without protest the payment is voluntary and there can be no recovery; Gulbenkian v. U. S., 186 Fed. 133, 108 C. C. A. 245.

After dispute, plaintiff paid tolls to a navigation company whose charter only authorized the collection of reasonable tolls; held that, although the tolls were unreasonable, the excess cannot be recovered back, since no formal protest was made; Monongahela Nav. Co. v. Wood, 194 Pa. 47, 45 Atl. 73. "A party cannot avoid the legal consequences of his acts by protesting, at the time he does them, that he does not intend to subject himself to such consequences;" U. S. v. Lamont, 155 U. S. 310, 15 Sup. Ct. 97, 36 L. Ed. 160, per White, J. Where a life insurance company reduced the amount payable to its members and a member paid assessments at the reduced rate for more than two years under protest, it was held they were voluntary and could not be recovered back; Lippincott v. Supreme Council A. L. H., 130 Fed. 483.

Money paid to a collector under protest, to enable a vessel to clear on the schedule, is paid involuntarily, and, if illegally paid, can be recovered; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013; where an inheritance tax was paid under protest that it was illegal and with notice that suit will be brought to recover, it is a sufficient foundation for such suit; Herold v. Kahn, 159 Fed. 608, 86 C. C. A. 598.

The owner of a cargo of sugar brought from the Philippine Islands, who voluntarily paid the duty assessed thereon *as imported merchandise*, without objection or protest, cannot maintain an action to recover the same on the ground that the sugar was not *imported* and the duty was therefore unlawfully exacted; Flint, Eddy & American Trading Co. v. Bidwell, 123 Fed. 200.

See note in 36 L. R. A. (N. S.) 476, on recovery back of taxes, etc.; TAX.

PROTESTANDO. See PROTESTATION.

PROTESTANT. It includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope. Tappan, Appeal of, 52 Conn. 418. See Hale v. Everett, 53 N. H. 57, 16 Am. Rep. 82.

PROTESTATION. In Pleading. The indirect affirmation or denial, by means of the word protesting (in the Latin form of pleadings, *protestando*), of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. See 3 Bla. Com. 311.

The exclusion of a conclusion. Co. Litt. 124.

"A saving to the party who takes it from being concluded by any matter alleged, or objected against him on the other side, *upon which he cannot take issue;*" 2 Wms. Saund. 103. "It is a safeguard, which keeps the party from being concluded by the plea he is to make, *if the issue be found for him;*" Co. Litt. 124, *b*.

Its object was to secure to the party making it the benefit of a positive affirmation or denial in case of success in the action, so far as to prevent the conclusion that the fact was admitted to be true as stated by the opposite party, and at the same time to avoid the objection of duplicity to which a direct affirmation or denial would expose the pleading; Briggs v. Dorr, 19 Johns. (N. Y.) 96; 2 Saund. 103; Com. Dig. *Pleader* (N). Matter which is the ground of the suit upon which issue could be taken could not be protested; Plowd. 276; Snider v. Croy, 2 Johns. (N. Y.) 227. But see 2 Wms. Saund. 103, n. Protestations are no longer allowed; 3 Bla. Com. 312; and were generally an unnecessary form; 3 Lev. 125.

It is of two sorts: 1. When a man pleads anything which he dares not directly affirm, or cannot plead for fear of making his plea double; 2. When a person is to answer two matters, and yet by law he can only plead to one of them, then in the beginning of his plea he may say, *protesting, or not acknowledging such part* of the matter to be true, and adds, "but for plea in this behalf, &c." By this means he is not concluded by any of the rest of the matter which he has by protestation so denied, but may at another time take issue upon it; 2 Wms. Saund. 103.

The common form of making protestations was as follows: "because protesting that," etc., excluding such matters of the adversary's pleading as are intended to be excluded in the protestando, if it be matter of fact; or, if it be against the legal sufficiency of his pleading, "because protesting that the plea by him above pleaded in bar" (or by way of reply, or rejoiner, etc., as the case might be) "is wholly insufficient in law." See, generally, 1 Chitty, Pl. 534; Com. Dig. *Pleader* (N); Steph. Pl. 235.

In Practice. An asseveration made by taking God to witness. A protestation is a form of asseveration which approaches very nearly to an oath. Wolffius, Inst. § 375.

PROTHONOTARY. The title given to officers who officiate as principal clerks of some courts. Viner, Abr.

It is used in Pennsylvania in all courts other than the orphans' courts.

In ecclesiastical law, the name of prothonotary is given to an officer of the court of Rome. He is so called because he is the *first notary*,—the Greek word πρῶτος signifying *primus*, or first. These notaries have pre-eminence over the other notaries, and are put in the rank of prelates. There are twelve of them. Dalloz, *Dict. de Jur.*

PROTOCOL. A record or register. Among the Romans, *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabelliones. Nov. 44.

In France the minutes of notarial acts were formerly transcribed on registers, which were called protocols. Toullier, *Dr. Civ. Fr.* liv. 3, t. 3, c. 6, s. 1, n. 413.

By the German law it signifies the minutes of any transaction. Encyc. Amer. In the latter sense the word has of late been received into international law. *Id.*

In International Law it is a diplomatic expression which signifies the register on which the deliberations of a conference, etc., are inscribed, whence the word comes to signify the deliberations themselves. 1 Halleck, Int. L. 298, note.

It is used to indicate a preliminary treaty, as the instrument of August 12, 1898, entered into between the United States and Spain.

PROTOCOLO. In Spanish Law. The original draft of an instrument which remains in the possession of the notary. White, New Recop. l. 3, t. 7, c. 5, § 2.

PROTUTOR (Lat.). **In Civil Law.** He who, not being the tutor of a pupil or minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not.

He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible with the tutor.

PROUT PATET PER RECORDUM (Lat.). As appears by the record. This phrase is frequently used in pleading; as, for example, in debt on a judgment or other matter of record, unless when it is stated as an inducement, it is requisite, after showing the matter of record, to refer to it by the *prout patet per recordum*. 1 Chitty, Pl. *356; Philpot v. McArthur, 10 Me. 127.

PROVER. In Old English Law. One who undertakes to prove a crime against another. 28 Edw. I.; 5 Hen. IV. One who, being indicted and arraigned for treason or felony,

confesses before plea pleaded, and accuses his accomplices to obtain pardon; state's evidence. 4 Bla. Com. *330. To prove. Law Fr. & Lat. Dict.; Britton, c. 22.

PROVIDED. The word always expresses a condition, unless it appears from the context to be the intent of the parties that it shall constitute a covenant; Rich v. Atwater, 16 Conn. 419; but it has been held that, though it is apt to create a condition, it does not necessarily do so; it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause; Chapin v. Harris, 8 Allen (Mass.) 596. The word is often used as a conjunction to an independent paragraph; Georgia R. & B. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377.

Provided always may introduce a condition, limitation, or covenant, according to circumstances; Heaston v. Board of Com'rs, 20 Ind. 403.

See PROVISO.

PROVINCE. Sometimes this signifies the district into which a country has been divided: as, the province of Canterbury, in England; the province of Languedoc, in France. Sometimes it means a dependency or colony: as, the province of New Brunswick. It is sometimes used figuratively to signify power or authority: as, it is the province of the court to judge of the law, that of the jury to decide on the facts.

PROVINCIAL CONSTITUTIONS. The decrees of provincial synods held under divers archbishops of Canterbury.

PROVINCIALE OF LYNDWOOD. An annotated collection of the Accepted Constitutions of the Church of England, by William Lyndwood, Dean of the Arches in the reign of Henry V. Stubbs, Canon Law.

PROVISION. In Common Law. The property which a drawer of a bill of exchange places in the hands of a drawee: as, for example, by remittances, or when the drawee is indebted to the drawer when the bill becomes due, provision is said to have been made. Acceptance always presumes a provision. See *Code de Comm.* art. 115–117.

In French Law. An allowance granted by a judge to a party for his support,—which is to be paid before there is a definite judgment. In a civil case, for example, it is an allowance made to a wife who is separated from her husband. Dalloz, Dict.

PROVISIONAL INJUNCTION. Sometimes, though not correctly, used for interlocutory injunction.

PROVISIONAL REMEDY. One provided for present need, or for the occasion, that is, one adapted to meet a particular exigency. McCarthy v. McCarthy, 54 How. Pr. (N. Y.) 100.

PROVISIONAL SEIZURE. In Louisiana. A term which signifies nearly the same as attachment of property.

By the Code of Practice, plaintiff may, in certain cases, obtain the provisional seizure of the property which he holds in pledge, or on which he has a privilege (*q. v.*), in order to secure a payment of his claim. Provisional seizure may be ordered: *First*, in executory proceedings, when the plaintiff sues on a title importing confession of judgment; *second*, when a lessor prays for the seizure of furniture or property used in the house, or attached to the real estate which he has leased; *third*, when a seaman, or other person, employed on board of a ship or water craft, navigating within the state, or person having furnished materials for or made repairs to such ship or water craft, prays that the same may be seized, and prevented from departing, until he has been paid the amount of his claim; *fourth*, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt, when the property is abandoned, or in cases where the owner of the thing is unknown or absent. See Nolte v. His Creditors, 6 Mart. N. S. (La.) 168.

PROVISIONS. Food for man; victuals.

Corn on the ear in the shuck is provisions within the meaning of a constitutional provision with reference to exemptions; Cochran v. Harvey, 88 Ga. 352, 14 S. E. 580; Atkinson v. Gatcher, 23 Ark. 103; but the word does not include a milch cow; Wilson v. McMillan, 80 Ga. 733, 6 S. E. 182; nor cotton; Butler v. Shiver, 79 Ga. 172, 4 S. E. 115. It has been held to mean only articles of food; Crooke v. Slack, 20 Wend. (N. Y.) 177. The sale of unwholesome provisions is a misdemeanor; 2 East, Pl. Cr. 822; 3 Maule & S. 10; 4 Camp. 10. And the rule is that the seller impliedly warrants that they are wholesome; 3 Bla. Com. 166. See ADULTERATION; GROCERIES; SALE; WARRANTY; FOOD AND DRUG ACTS.

In Early English Law. A term used in the reign of Henry III. to designate enactments of the King in Council, perhaps less solemn than statutes. Thus, "the Provisions of Merton." The term "statutes" was a later term, with a changed conception of the solemnity of a statute.

The term "statute" is one that cannot easily be defined. It came into use in Edward I.'s reign, supplanting "provisions," which is characteristic of Henry III.'s reign, which had supplanted "assize," characteristic of the reigns of Henry II., Richard and John. Maitland, 2 Sel. Essays in Anglo-Am. Leg. Hist. 80.

Provisions of Oxford were legislative provisions (1258) forbidding the Chancellor to issue writs, other than those "of course" without the approval of the executive council, as well as the king.

PROVISO. A clause inserted in an act of the legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect.

A limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. Voorhees v. Jackson, 10 Pet. (U. S.) 471, 9 L. Ed. 490; Stockton v. Weber, 98 Cal. 433, 33 Pac. 332.

The general purpose of a proviso is to except the clause covered by it from the provisions of a statute; Deitch v. Staub, 115 Fed. 309, 53 C. C. A. 137; or to qualify the operation of the statute; Georgia R. & Bank. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377. See Ryan v. Carter, 93 U. S. 83, 23 L. Ed. 807. But while this is its primary purpose, it may have a general application; U. S. v. G. Falk & Bros., 204 U. S. 143, 27 Sup. Ct. 191, 51 L. Ed. 411. It might sometimes mean additional legislation; Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

It always implies a condition, unless subsequent words change it to a covenant; Rich v. Atwater, 16 Conn. 419; but when a proviso contains the mutual words of the parties to a deed, it amounts to a covenant; 2 Co. 72; Cro. Eliz. 242; Moore 707.

Ordinarily in statutes it is to be strictly construed and confined to what precedes it, but it may, if necessary, be extended to the entire act; Carter, Webster & Co. v. U. S., 143 Fed. 256, 74 C. C. A. 394; a proviso in one paragraph of a tariff act may be applied to other provisions also; U. S. v. Dry Goods Co., 156 Fed. 940, 84 C. C. A. 440.

A proviso differs from an exception; 1 B. & Ald. 99. An exception *excmpts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something that would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse; Plowd. 361; 1 Saund. 234 *a;* Lilly, Reg., and the cases there cited. The natural presumption from a proviso is, that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso; 5 Q. B. D. 173. See, generally, Bac. Abr. *Conditions* (A); Com. Dig. *Conditions* (A 1), (A 2); Dwarris, Stat. 660; PROVIDED.

The proper use of provisoes in drafting acts is explained by Coode on Legislative Construction, printed as an appendix to Purdon's Pennsylvania Digest. He considers that the abuse of the proviso is universal, and doubts if it need ever be employed in drafting acts. The early, and, as he thinks, the correct use, is by way of taking special cases out of general enactments and *providing for them.* The courts have generally assumed that such was the proper mode of using a proviso. It is incorrectly used to introduce mere exceptions to the operation of the enactment where no special provision is made for the exception; these are better expressed as exceptions. If a general provision is merely to be negatived in some particular, the negative should be expressed in immediate contact with the general words. Sometimes a proviso introduces several stages of consecutive operation, which would be better expressed by "and." It is impossible to deduce any general rule from the doctrines laid down by the courts in the multitude of adjudicated cases.

Trial by proviso. A trial at the instance of a defendant in a case in which the plaintiff, after issue joined, does not proceed to trial when by the practice of the court he ought to have done so. The defendant may take out a *venire facias* to the sheriff, which hath in it these words, *Proviso quod*, etc., provided that if the plaintiff shall take out any writ to that purpose, the sheriff shall summon but one jury on them both. Jacob; Old Nat. Brev. 159.

PROVISOR. He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision. Jacob; 25 Edw. III. One nominated by the pope to a benefice before it became void, in prejudice of the right of the true patron. 4 Bla. Com. 111*.

PROVISORS, STATUTE OF. A statute passed in 25 Edw. III. forbidding the Pope to nominate to benefices, and declaring that the election of bishops and other dignitaries should be free, and all rights of patrons preserved. Taswell-Langmead, Engl. Constit. Hist. 322. See PRÆMUNIRE.

PROVOCATION. The act of inciting another to do something.

Provocation simply, unaccompanied by a crime or misdemeanor, does not justify the person provoked to commit an assault and battery. In cases of homicide it may reduce the offence from murder to manslaughter; but not if the provocation is by mere words, however exasperating; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. But when the provocation is given for the purpose of justifying or excusing an intended murder, and the party provoked is killed, it is no justification; Whart. Cr. L. 457. See Honesty v. Com., 81 Va. 298.

The unjust provocation by a wife of her husband, in consequence of which she suffers from his ill usage, will bar her divorce on the ground of the husband's cruelty; her

remedy in such cases is to change her manners; 2 Lee 172; 1 Hagg. Cons. 155.

PROVOKE. To excite; to stimulate; to arouse. State v. Warner, 34 Conn. 279. See PROVOCATION.

PROVOST. A title given to the chief of some corporations or societies.

The chief officer of certain colleges, *e. g.* of the University of Pennsylvania.

The chief dignitary of a cathedral or collegiate church. In France, this title was formerly given to some presiding judges.

PROVOST MARSHAL. An officer appointed by some general officer commanding a body or force of troops, for police duty, or for the general maintenance of order and the repression of all offences in connection with military occupation. He or his assistants may, at any time, arrest and detain for trial, persons subject to military law committing offences, and may carry into execution any punishments to be inflicted in pursuance of a court martial.

PROXENETÆ (Lat.). **In Civil Law.** Among the Romans these were persons whose functions somewhat resembled those of the brokers of modern commercial nations. Dig. 50. 14. 3; Domat, l. 1, t. 17, § 1, art. 1.

PROXIMATE. In its legal sense, closeness of causal connection. Menger v. Laur, 55 N. J. L. 205, 26 Atl. 180, 20 L. R. A. 61.

PROXIMATE CAUSE. That which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The proximate cause is that which is nearest in the order of responsible causation; Butcher v. R. Co., 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519; Lutz v. R. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819. That which stands next in causation to the effect, not necessarily in time or space but in causal relation; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. See Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; CAUSA PROXIMA NON REMOTA SPECTATUR; NEGLIGENCE.

PROXIMITY (Lat.). Kindred between two persons. Dig. 38. 16. 8.

PROXY (contracted from procuracy, procurator). A person appointed in the place of another, to represent him.

The wife of a director cannot act as his proxy; State v. Perkins, 90 Mo. App. 603; nor can another so act; Craig Medicine Co. v. Bank, 59 Hun 561, 14 N. Y. Supp. 16.

The instrument by which a person is appointed so to act.

The right of voting at an election of an incorporated company by proxy is not a general right, and the party claiming it must show a special authority for that purpose; Ang. & A. Corp. § 128; Com. v. Bringhurst, 103 Pa. 134; McKee v. Savings Co., 122 Ia. 731, 98 N. W. 609; but in Walker v. Johnson, 17 App. D. C. 144, it was held that a long continued and unbroken practice of voting by proxy will have the effect of a by-law.

At common law it was allowable only by the peers of England, and that is said to be in virtue of a special permission of the king; Philips v. Wickham, 1 Paige (N. Y.) 590; by standing order in 1868, the house agreed to discontinue the practice, and resolved that two days' notice must be given of a motion of suspension of the standing order. The practice may therefore be regarded as in abeyance; May, Parl. Pr. 370.

Where there was no clause in the act of incorporation empowering the members to vote by proxy, but a by-law provided that the shareholders may so vote, it was held, in view of this by-law, that a vote given by proxy should have been received; State v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162. The court did not say how they would have decided had there been no such by-law, but drew a clear distinction between public and moneyed corporations. A by-law prohibiting voting by proxy has been held unreasonable and invalid; People's Home Sav. Bk. v. San Francisco, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147. In Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33, it was held that it required legislative sanction before any corporation could make a by-law authorizing members to vote by proxy. So, also, in Brown v. Com., 3 Grant, Cas. (Pa.) 209. See 2 Kent 294; In re Barker, 6 Wend. (N. Y.) 509. Stockholders of national banks may vote by proxy, but no officer, clerk, teller, or bookkeeper of a bank may act as proxy; R. S. § 5144; many of the states have passed statutes regulating the right to vote by proxy.

A vote by the proxy binds the stockholder, whether exercised in his interest or not, to the same extent as if the vote had been cast in person; Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723; Synnott v. Loan Ass'n, 117 Fed. 379, 54 C. C. A. 553.

Where a proxy was to A, "or in his absense to B," and B acted, though A was present, the act was upheld, no stockholder having objected, and all stockholders having "ratified in a formal way" the act of B; Com. v. Roydhouse, 233 Pa. 234, 82 Atl. 74.

A power of attorney, irrevocable for ten years, executed by joint owners of stock, is not against public policy, nor within an act providing that every proxy shall be revocable at the pleasure of the person issuing it; Hey v. Dolphin, 92 Hun 230, 36 N. Y. Supp. 627; and a by-law providing that no proxy should be voted by any one not a stockholder of the corporation is invalid under an act providing generally that stockholders may be represented by proxies; People's Home Sav. Bk. v. San Francisco, 104

Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147.

In England, a stockholder who holds a proxy from another stockholder, and votes at a corporate meeting by a show of hands, counts as one person, without regard to the number of proxies he has; [1897] 1 Ch. 1; 52 L. T. N. S. 846; 101 L. T. J. 327; a contrary view is supported in 22 Law Mag. & Rev. 46; but if proxies are held by non-members, every such has one vote (*semble*); [1897] 1 Ch. 1. It is said that proxyholders cannot demand a poll; 3 Q. B. D. 442.

A stockholder is not estopped by the act of his proxy from questioning the validity of a meeting, because he was appointed only to act at a lawful meeting; Columbia N. Bk. v. Mathews, 85 Fed. 934, 29 C. C. A. 491; but he is estopped as respects any irregularity which his presence would have waived; *id.* A stockholder is bound by his proxy's act at a meeting unless he exercises the most active diligence in repudiating the same; Synnott v. Loan Ass'n, 117 Fed. 379, 54 C. C. A. 553.

See VOTING TRUST; MEETING; STOCKHOLDER; ELECTIONS IN CORPORATIONS.

In Ecclesiastical Law. A judicial proctor, or one who is appointed to manage another man's law concerns is called a proxy. Ayliffe, Parerg.

An annual payment made by the parochial clergy to the bishop, etc., on visitations. Tomlins, Law Dict.

In Rhode Island and Connecticut the name of an election or day of voting for officers of government. Webst. Dict.

PRUDENCE. That degree of care required by the exigencies or circumstances under which it is to be exercised. Cronk v. R. Co., 3 S. D. 93, 52 N. W. 420. See NEGLIGENCE.

PRUDHOMMES, PRODES HOMMES. This word was used in early Norman times, and before, in a general sense to signify freeholders or respectable burgesses; sometimes a special body of such persons acting as magistrates or judges. Black Book of Adm. IV, 186. There were prudhommes of the sea; of merchants; of the corporation of Barcelona; and of the gild of coopers. Usually two sat. See, generally, *id.* III.

PRYK. A kind of service of tenure. It signified an old-fashioned spur with one point only, which the tenant, holding land by this tenure, was to find for the king. Blount.

PSEUDOGRAPH. False writing.

PUBERTY. In Civil Law. The age at which a child becomes capable of contracting marriage. It is in boys fourteen, and in girls twelve years. Ayliffe, Pand. 63; Toullier, *Dr. Civ. Fr.* tom. 5, p. 100; Inst. 1, 22; Dig. 1. 7. 40. 1; Code 5. 60. 3; 1 Bla. Com. 436. See INFANT.

PUBLIC. The whole body politic, or all the citizens of the state. The inhabitants of a particular place.

This term is sometimes joined to other terms, to designate those things which have a relation to the public: as, a public officer, a public road, a public passage, a public house.

A distinction has been made between the terms *public* and *general:* they are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large, portion of the community. Greenl. Ev. § 128.

When the public interest and its rights conflict with those of an individual, the latter must yield. Co. Litt. 181. See EMINENT DOMAIN.

PUBLIC ACTS. Acts which concern the whole community and of which courts of law are bound to take judicial notice.

A land patent granted by a sister state is a public act. Lassly v. Fontaine, 4 Hen. & M. (Va.) 146, 4 Am. Dec. 510.

See JUDICIAL NOTICE. As to giving full faith and credit to the public acts of a state, see FOREIGN JUDGMENTS.

PUBLIC ADMINISTRATOR. Statutes providing for an official to administer upon the property of intestates in certain cases have been passed in California and some other states. See Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453. PUBLIC TRUSTEE.

PUBLIC AMUSEMENT. See PLACE OF AMUSEMENT; THEATRE; NEGLIGENCE.

PUBLIC BUILDING. One of which the possession and use, as well as the property in it, are in the public. State v. Troth, 34 N. J. L. 383. A home for defective children was held not a public building; [1901] 1 Q. B. 668.

PUBLIC CHAPELS. Chapels of ease. See CHAPEL.

PUBLIC CHARACTER. An individual who asks for and desires public recognition. A statesman, author, artist, or inventor who does so may be said to have surrendered his right of protection against the publication of his portrait; Corliss v. E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283. See INJUNCTION; PRIVACY; LIBEL.

PUBLIC CHARITY. A charity which is so general and indefinite in its objects as to be of common and public benefit. Saltonstall v. Sanders, 11 Allen (Mass.) 456. It would be almost impossible to say what charities are public and what private in their nature; 2 Atk. 87. A devise to the poor of a parish is a public charity; *id.* An incorporated library association, the object of which is the diffusion of public knowledge and the acquirement of the arts and sciences, and the

revenues and income of which are devoted exclusively to such objects and purposes, is an institution of purely public charity under a statute exempting such institutions from taxation; Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253; as is an orphan asylum which restricts its inmates to children of a specified religion; Burd Orphan Asylum v. School Dist., 90 Pa. 21. See CHARITABLE USE.

PUBLIC CORPORATION. See CORPORATIONS.

PUBLIC DEBT. That which is due or owing by the government.

The Constitution of the United States provides, art. 6, s. 1, that "all debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation." The fourteenth amendment provides that "the validity of the public debt of the United States authorized by law, including debts incurred for the payment of pensions and bounties for the services in suppressing insurrection or rebellion shall not be questioned." See FUNDING SYSTEM.

PUBLIC DOCUMENTS. The publications printed by order of congress or either house thereof. McCall v. U. S., 1 Dak. 328, 46 N. W. 608. In an action involving a title to swamp lands the official correspondence and reports of public officers of the United States relating to swamp lands and published by the authority of the legislature are public documents which the court may consult even if not made formal proof in the case; Kirby v. Lewis, 39 Fed. 66.

The term was considered in 5 App. Cas. H. L. 613, not to be taken in the sense of the whole world. The books of a manor are public in the sense that they concern all the world interested in the manor. So of entries in a corporation book of a corporate matter. But it must be a public document and the entry must be made by a public officer and so that all persons concerned may have access to it afterwards.

In many of the states tax returns are made by law public documents and open to inspection; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

PUBLIC ENEMY. This word, used in the singular number, designates a nation at war with the United States, and includes every member of such nation. Vattel 3, c. 5, § 70.

To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy; 2 Marsh. Ins. 508; 3 Esp. 131, 132; State v. Moore, 74 Mo. 413, 41 Am. Rep. 322.

A common carrier is exempt from responsibility whenever a loss has been occasioned to the goods in his charge by the act of a public enemy; but the burden of proof lies on him to show that the loss was so occasioned; Murphy v. Staton, 3 Munf. (Va.) 239; Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398; Edw. Bailm. 547; 2 Bail. 157. See COMMON CARRIER.

In the late rebellion, the federal troops were a public enemy, against whose acts a common carrier within the confederate lines did not insure. Southern Exp. Co. v. Womack, 1 Heisk. (Tenn.) 256.

PUBLIC FUNDS. Where a county treasurer deposited the public funds in a bank to his credit as such, and the bank failed, held that they were earmarked and the county could recover, in preference to general depositors; Watts v. Board of Com'rs, 21 Okl. 231, 95 Pac. 771, 16 L. R. A. (N. S.) 918.

See FUNDING SYSTEM.

PUBLIC GRANT. See FRANCHISE; CORPORATION; LANDS, PUBLIC.

PUBLIC HEALTH. See ADULTERATION; POLICE POWER; HEALTH; QUARANTINE.

PUBLIC HIGHWAY. One under the control of and kept by the public, established by regular proceedings for the purpose, or generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities and for the maintenance of which they are responsible. State v. Gross, 119 N. C. 868, 26 S. E. 91. It includes roads, streets, alleys, and lanes, laid out or erected as such by the public, or dedicated or abandoned to the public by the owner; Patterson v. Munyan, 93 Cal. 128, 29 Pac. 250. A railroad is a public highway; Venable v. R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; but not a road on paper; In re Youghiogheny Bridge, 182 Pa. 618, 38 Atl. 478; nor, it is said, is a turnpike; Buncombe Turnpike Co. v. Baxter, 32 N. C. 222.

See HIGHWAY; RATES.

PUBLIC HOSPITALS. Hospitals which appeal to the public for voluntary contributions, or those which are supported by compulsory contributions in the form of a rate.

PUBLIC HOUSE. A house kept for the entertainment of all who come lawfully and pay regularly. Com. v. Cuncannon, 3 Brewst. (Pa.) 344. It does not include a boarding-house; *id.*; but under a statute, a store-house in the country is included in this term; Huffman v. State, 29 Ala. 40; and a barber shop; Moore v. State, 30 *id.* 550; and a broker's office; Wilson v. State, 31 *id.* 371. A room to which persons generally are permitted to resort, to play cards, though not every one has access to it, is a public gambling-house. See many cases collected in 22 Alb. L. J. 24, and Abb. Dic.

In England it applied to a licensed place where liquor is sold. The keeper of a public house is bound to serve any person who presents ready money; 2 Q. B. Div. 136.

PUBLIC INTEREST. If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms; Cooley, Const. Lim. 746.

Business affected with a public interest: 1. Where the business is one, the following of which is not of right but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommodation of a business special use is allowed to be made of public property or of a public easement. 4. Where special privileges are granted in consideration of some special return to be made to the public; *id.*

It brings it within the police power, but does not place it beyond the taxing power; Flint v. Stone Tracy Co., 220 U. S. 140, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

See RATES.

As to the publication of matter of public interest, see LIBEL; PRIVILEGED COMMUNICATION.

PUBLIC LANDS. Such lands as are subject to sale or other disposition by the United States, under general laws. Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Bardon v. R. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806. See LANDS, PUBLIC.

PUBLIC MEETING. See ASSEMBLY; UNLAWFUL ASSEMBLY.

PUBLIC MONEY. As used in the United States statutes, the money of the federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. It does not include money in the hands of the marshals and other officers of the courts, held to await the judgment of the court. Branch v. U. S., 12 Ct. Cl. 281. See PUBLIC FUNDS.

PUBLIC OFFICE. Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. State v. Brennan, 49 Ohio St. 33, 29 N. E. 593.

Where a board of public officials is a continuing body, as is the case of the state board of election in Indiana, a suit will be continued against the successors in office of those who cease to be members of the board; Marshall v. Dye, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. ——; Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070.

See OFFICER.

PUBLIC PASSAGE. A right to pass over a body of water. This term is synonymous with public highway, with this difference: by the latter is understood a right to pass over the land of another; by the former is meant the right of going over the water which is on another's land. Carth. 193; Hamm. N. P. 195. See PASSAGE.

PUBLIC PEACE. "That invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." Redfield, J., in State v. Benedict, 11 Vt. 236, 34 Am. Dec. 688. See PEACE.

PUBLIC PLACE. Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look. Steph. Cr. L. 115. Under a statute against gaming, a steamboat carrying passengers and freight is a public place; Coleman v. State, 13 Ala. 602; so is an infirmary; Flake v. State, 19 *id.* 551; so is a shoemaker's shop into which many went, but a few were excluded during the gaming; Campbell v. State, 17 *id.* 369; but a secluded place on a mountain, some distance from a roadway and in a dense thicket, is not; Gerrells v. State (Tex.) 26 S. W. 394. Under statutes against indecent exposure, a public omnibus is a public place; 3 C. & K. 360; so is a urinal in a public park; L. R. 1 C. C. 282; and a part of the sea beach, visible from inhabited houses; 2 Campb. 89. See many cases cited in 22 Alb. L. J. 24, and Abb. Dict. See PUBLIC HOUSE; PLACE.

PUBLIC POLICY. That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. 4 H. L. Cas. 1; Greenh. Pub. Pol. 2. It has been designated by Burroughs, J., as "an unruly horse pursuing us, and when once you get astride of it you never know where it will carry you." 2 Bingh. 229.

"Public policy is a variable quantity; it must and does vary with the habits, capacities, and opportunities of the public." 36 Ch. Div. 359.

Public policy is manifested by public acts, legislative and judicial, and not by private opinion, however eminent; Giant-Powder Co. v. R. Co., 42 Fed. 470, 8 L. R. A. 700. See POLICE POWER; STATUTE; CONSTITUTIONAL. It is said to be determined from legislative declarations, or, in their absence, from judicial decisions; Picket Pub. Co. v. Com'rs, 36 Mont. 188, 92 Pac. 524, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986.

As to public policy in the law of contracts, see VOID CONTRACTS.

PUBLIC PURPOSE. As employed to denote the objects for which taxes may be levied, it has no relation to the urgency of the public need or to the extent of the public benefit which is to follow. It is on the other hand merely a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest, or liberality. People v. Township Board, 20 Mich. 452, 4 Am. Rep. 400. See EMINENT DOMAIN; TAX.

PUBLIC RECORDS. See RECORD.

PUBLIC SALE. See SALE; AUCTION.

PUBLIC SCHOOLS. Common schools. Jenkins v. Andover, 103 Mass. 97. See SCHOOLS.

PUBLIC SERVICE CORPORATION. The supplying of municipalities and their citizens with such public utilities as gas, water, electric light and communication for public and private use, by the municipal corporation or by private capital, is the performance of a public duty and the property so used is charged with a public trust. Such property cannot be sold without statutory authority; Dillon, Mun. Corp. § 991, 1102; Cumberland Tel. & Tel. Co. v. Evansville, 127 Fed. 187; South Pasadena v. Land & Water Co., 152 Cal. 579, 93 Pac. 490. In the absence of statutory authority, a private corporation supplying water to a city cannot lease its property, franchise and contracts to another corporation; New Albany Waterworks v. Banking Co., 122 Fed. 776, 58 C. C. A. 576; this rule does not prevent a transfer thereof to the municipality; Indianapolis v. C. Gas Trust Co., 144 Fed. 640, 75 C. C. A. 442.

Such a corporation has a duty to perform to every private consumer (of water) independently of any contract duty it owes to the municipality. For a breach of this duty the company may be held liable in tort by the aggrieved member of the public, though he was not a party to the contract between the city and the water company; Freeman v. Gas Light & Water Co., 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917; Westfield G. & M. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033. A customer may enjoin a company from furnishing water for the supply of railroad locomotives and the generation of motive power, when that would disenable it from furnishing an adequate supply for domestic and other purposes for which the plant was established; Boonton v. Water Co., 69 N. J. Eq. 23, 61 Atl. 390; he has a right to service under the most favorable conditions; Rice v. R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84.

The rights of such corporations as defined in the franchise cannot be modified by the by-laws of the public service corporation, and so far as such by-laws are inconsistent with the provisions of the franchise, they will be held void; Bourke v. Water Co., 84 Vt. 121, 78 Atl. 715, 33 L. R. A. (N. S.) 1015. Such a company must serve without discrimination all persons who pay the established rates and comply with the reasonable regulations of the company; Watauga Water Co. v. Wolf, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841; American Waterworks Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; Haugen v. Light & Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424; Olmsted v. Morris Aqueduct, 47 N. J. L. 311; Rushville v. Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. A water company is a quasi public corporation, and by the acceptance of its franchise is bound to supply all persons along the line of its mains without discrimination and at uniform rates; Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

They may discontinue service for non-payment; State v. Board, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581. It has been held that the consumer may be required to pay the expenses of service connections; Gleason v. Waukesha Co., 103 Wis. 225, 79 N. W. 249.

It will be presumed that local rates fixed by a state statute, or by a state railroad commission, under the authority of such a statute, are reasonable; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

In Pennsylvania public service corporations are entitled to look for a rate of return, if their property will earn it, not less than the legal rate of interest; a system of charges that yields no more income than is fairly requisite to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts and pay a fair profit to the owners of the property is not unreasonable; Pennsylvania R. Co. v. Philadelphia Co., 220 Pa. 100, 68 Atl. 676, 15 L. R. A. (N. S.) 108.

An electric street railway company is a public service corporation and has both public and private duties; the operation of its cars is the former, and any harm done thereby is *damnum absque injuria*, but the selection of a site for its power house and the generation of power is a thing with which the public has no concern, and as to that the company stands on the footing of an individual, and if it creates a nuisance it is liable; Townsend v. R. & L. Co., 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558.

See POND; PUBLIC UTILITIES; RATES; GAS; WATER COMPANIES; RAILROADS; Wyman, Public Serv. Corp.

PUBLIC SHIP. See SHIPS OF WAR.

PUBLIC SQUARE. In its popular import, the phrase refers almost exclusively to ground occupied by a courthouse and owned by a county. Logansport v. Dunn, 8 Ind. 378; but it may be used as synonymous with park; Church of Hoboken v. Council of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696. See PARK.

As to the right of a municipality to prohibit lecturing, preaching, etc., in public squares, see LIBERTY OF SPEECH; POLICE POWER; PROCESSION.

PUBLIC STATUTES. See STATUTE.

PUBLIC, TRUE, AND NOTORIOUS. The old form by which charges in the *allegations* in the ecclesiastical courts were described at the end of each particular.

PUBLIC TRUST. See TRUST.

PUBLIC TRUSTEE. An act of 1906 referring to England and Wales provides for the appointment of a public trustee to administer estates of small value, to act as custodian trustee, or as ordinary trustee or judicial trustee, or to administer the property of a convict under the Forfeiture Act. The Consolidated Fund is made liable to make good all sums required to discharge any liability which the public trustee, if he were a private trustee, would be personally liable to discharge. His fees are fixed by the treasury with the sanction of the Lord Chancellor. He may employ solicitors, bankers, accountants, brokers and such other persons as he may consider necessary, and in doing so may take into consideration—subject to the interests of the trust—the wishes of the creator of the trust, the other trustees (if any) and the beneficiaries. The accounts of any trust are, on the application of any trustee or beneficiary, to be audited by such solicitor or public accountant as may be agreed by the applicant and the trustees, in default of agreement by the public trustee or some person appointed by him. The act took effect January 1, 1908. See Lewin, Trusts, 12th ed., where they are said to be a corporation sole with the right of perpetual succession.

PUBLIC USE. Under Eminent Domain. Implies the use of many, or by the public. It may be limited to the inhabitants of a small or restricted locality, but must be in common, and not for a particular individual. Lewis, Em. Dom. c. 7; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659. It arises when the sovereign power is essential to an enterprise, and is for that reason therein exercised; Bound v. R. Co., 50 Fed. 312. See EMINENT DOMAIN.

PUBLIC UTILITIES. A municipal corporation may supply water for city purposes and for its inhabitants; Comstock v. Syracuse, 5 N. Y. Supp. 874; furnish electricity for its citizens; Hequembourg v. Dunkirk, 49 Hun, 550, 2 N. Y. Supp. 447; build and operate a rapid transit railway, wholly within its limits; Sun P. & P. Ass'n v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; and lease and operate such system in connection with another system, to secure a unified system of transportation; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241; operate a natural gas system for its use and the use of the inhabitants; State v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; build a convention hall; Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066; furnish ice to citizens in connection with its waterworks; Holton v. Camilla, 134 Ga. 560, 6 S. E. 472, 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199; construct public wharves on navigable rivers; Burlington v. R. Co., 82 Vt. 5, 71 Atl. 826; erect an artistic memorial monument; Parsons v. Van Wyck, 56 App. Div. 329, 67 N. Y. Supp. 1054.

But it cannot build an opera house; Brooks v. Brooklyn, 146 Ia. 136, 124 N. W. 868, 26 L. R. A. (N. S.) 425; nor manufacture bricks; Attorney General v. Detroit, 150 Mich. 310, 113 N. W. 1107, 121 Am. St. Rep. 625; nor deal in coal and wood; Opinion of Justices, 182 Mass. 605, 66 N. E. 25; nor carry on a plumbing business; Keen v. Waycross, 101 Ga. 588, 29 S. E. 42.

PUBLIC WORSHIP. A negro preacher who interrupted another preacher and began a harangue, but claiming in good faith the superior right to preach in that church, was not guilty of disturbing public worship; Woodall v. State, 4 Ga. App. 783, 62 S. E. 485.

PUBLICAN. In Civil Law. A farmer of the public revenue; one who held a lease of some property from the public treasury. Dig. 39, 4. 1. 1; 39. 4. 12. 3; 39. 4. 13.

PUBLICATION. The act by which a thing is made public.

It differs from promulgation, which see; and see, also, Toullier, *Dr. Civ. Fr.* titre *Préliminaire*, n. 59, for the difference in the meaning of these two words.

Publication has different meanings. When applied to a law it signifies the rendering public the existence of the law; when it relates to the opening of the depositions taken in a case in chancery, it means that liberty is given to the officer in whose custody the depositions of witnesses in a cause are lodged, either by consent of parties, or by the rules or orders of the court, to show the depositions openly, and to give out copies of them; Pract. Reg. 297; Blake, Ch. Pr. 143. And when spoken of a will it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will; 3 Atk. 161; Small v. Small, 4 Greenl. (Me.) 220, 16 Am.

Dec. 253; Appeal of Barnet, 3 Rawle (Pa.) 15; Com. Dig. *Estates by Devise* (E 2). See Com. Dig. *Chancery* (Q). As to the publication of an award, see Hunt v. Wilson, 6 N. H. 36.

Some of the state constitutions provide that general laws shall not take effect till published. The mode of publication is for the legislature to determine. A general law printed in a volume of private laws was held to have been *published;* In re Boyle, 9 Wis. 264; but an unauthorized publication is no publication; Clark v. Janesville, 10 Wis. 136. In Pennsylvania, where the constitution did not require publication, it was held to be necessary before an act could be operative; but nevertheless that publication in the legislative journals was sufficient, and that neglect to publish an act in the pamphlet laws did not invalidate the act; Peterman v. Huling, 31 Pa. 432. An inaccuracy in the publication of a statute which does not change its substance or legal effect, will not invalidate the publication; Smith v. Hoyt, 14 Wisc. 252; a joint resolution of a general nature must be published; State v. Board, 4 Kan. 261. See Cooley, Const. Lim. 189; PROMULGATION.

See COPYRIGHT; PATENT; NEWSPAPER; LIBERTY OF THE PRESS.

A commercial agency book is a publication; Ladd v. Oxnard, 75 Fed. 703.

In a contract for the sale of a serial publication, the word intends the completion of the series; 49 Can. L. J. 161. See LIBEL.

PUBLICI JURIS. Of public right.

PUBLICIANA (Lat.). **In Civil Law.** The name of an action introduced by the prætor Publicius, the object of which was to recover a thing which had been lost. Inst. 4. 6. 4; Dig. 6. 2. 1. 16 et 17. Its effects were similar to those of our action of trover.

PUBLICITY. The doing of a thing in the view of all persons who chose to be present.

The law requires that courts should be open to the public: there can therefore be no secret tribunal, except the grand jury (*q. v.*); and all judgments are required to be given in public. See OPEN COURT.

Publicity must be given to the acts of the legislature before they can be in force; but in general their being recorded in a certain public office is evidence of their publicity. See PUBLICATION.

PUBLISH. Primarily it means to make known. State v. Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62.

PUBLISHER. One who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.

The publisher of a libel is responsible as if he were the author of it, and it is immaterial whether he has any knowledge of its contents or not; 9 Co. 59; Odger, L. & Sl. 125, 166, 432; Hawk. Pl. Cr. c. 73, § 10; Dexter v. Spear, 4 Mas. 115, Fed. Cas. No. 3,867; and it is no justification to him that the name of the author accompanies the libel; Dole v. Lyon, 10 Johns. (N. Y.) 447, 6 Am. Dec. 346; 2 Mood. & R. 312.

See LIBEL; PUBLICATION.

PUDICITY. Chastity; the abstaining from all unlawful carnal commerce or connection. A married woman or a widow may defend her pudicity as a maid may her virginity. See CHASTITY; RAPE.

PUDZELD. In Old English Law. To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 *a*. The same as *Woodgeld*.

PUEBLO. In its original signification, it means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement, or village, as well as to a regularly organized municipality. Trenouth v. San Francisco, 100 U. S. 251, 25 L. Ed. 626.

PUER (Lat. a boy; a child). In its enlarged sense this word signifies a child of either sex; though in its restrained meaning it is applied to a boy only.

A case once arose which turned upon this question, whether a daughter could take lands under the description of *puer;* and it was decided by two judges against one that she was entitled; Dy. 337 *b*. In another case, it was ruled the other way; Hob. 33.

PUERILITY. In Civil Law. A condition which commenced at the age of seven years, the end of the age of infancy, and lasted till the age of puberty,—that is, in females till the accomplishment of twelve years, and in males till the age of fourteen years fully accomplished. Ayliffe, Pand. 63.

The ancient Roman lawyers divided puerility into *proximus infantiæ*, as it approached infancy, and *proximus pubertati*, as it became nearer to puberty. 6 Toullier, n. 100.

PUERITIA (Lat.). **In Civil Law.** Age from seven to fourteen. 4 Bla. Com. 22. The age from birth to fourteen years in the male, or twelve in the female. Calvinus, Lex. The age from birth to seventeen. Vicat, Voc. Jur.

PUFFER. A person employed by the owner of property which is sold at auction to bid it up, who does so accordingly, for the purpose of raising the price upon *bona fide* bidders.

This is a fraud, which, at the option of the purchaser, invalidates the sale; 3 Madd. 112; 2 Kent 423; 2 Bro. C. C. 326; Steele v. Ellmaker, 11 S. & R. (Pa.) 89; Moncrieff v.

Goldsborough, 4 H. & McH. (Md.) 282, 1 Am. Dec. 407. See AUCTION; BIDDER; BY BIDDER.

PUIS DARREIN CONTINUANCE (L. Fr. since last continuance). **In Pleading.** A plea which is put in after issue joined, for the purpose of introducing new matter, or matter which has come to the knowledge of the party pleading it subsequently to such joinder.

This plea waives all other pleas and admits the plaintiff's cause of action; Ripley v. Leverenz, 183 Ill. 519, 56 N. E. 166. Under it the defendant may show anything after suit begun to prove that the plaintiff ought not to recover, such as a release by former recovery, or satisfaction; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271. A release after suit begun, should be so pleaded, but it is said that an action on the case is an exception; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915.

See CONTINUANCE; PLEA.

PUISNE (L. Fr.). Younger; junior. Associate. *Puisne* judge, an associate judge; not the chief justice.

PULLMAN CAR. See SLEEPING CAR.

PUNCTUALITY. As a general rule, a railroad company is liable to damage accruing to a passenger for a negligent failure on its part to run its trains according to the company's time tables; but there must be proof of negligence. Neither time table nor advertisement is a warrant of punctuality. Whart. Negl. § 662.

The publication of the time table cannot amount to less than this, viz.: a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done, by the use of due care and skill, to accomplish that result; Gordon v. R. R., 52 N. H. 596, 13 Am. Rep. 97. See also 5 E. & B. 860. The company is undoubtedly liable for any want of punctuality which they could have avoided by the use of due care and skill; nor can they excuse a want of conformity to the time table for any cause, the existence of which was known to them, or ought to have been known to them, at the time of publishing the table; Gordon v. R. R., 52 N. H. 596, 13 Am. Rep. 97. See 8 E. L. & Eq. 362; Sears v. R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780, where a ship was held liable for the loss of perishable goods for failure to sail at the advertised time. Time-tables may amount to an offer of a contract to all persons who apply as passengers; but whether punctuality is in fact guaranteed depends on the facts of each case; Leake, Contr. 12. In Ang. Carriers 527 *a*, it is said that time tables are in the nature of a special contract, so that any deviation from them renders the company liable. But it does not appear that the cases go so far.

PUNCTUATION. The division of a written or printed instrument by means of points, such as the comma, semicolon, and the like.

Courts of law in construing statutes and deeds must read them with such punctuation as will give effect to the whole; 4 Term 65.

In construing deeds, it is said that no regard is to be had to punctuation, and although stops are sometimes used, they are not to be regarded in the construction of the instrument; 3 Washb. R. P. 397. See O'Brien v. Brice, 21 W. Va. 707. Punctuation is not allowed to throw light on printed statutes in England; 24 Beav. 330; nor to interfere with the natural and usual meaning of the language employed; O'Brien v. Brice, 21 W. Va. 704.

In an act of parliament there are no such things as brackets, any more than there are such things as stops; 24 Q. B. D. 478.

Punctuation may be considered in determining the meaning of a contract, when it is doubtful; Com. v. Kelley, 177 Mass. 221, 58 N. E. 691.

Where a comma after a word in a statute, if any force were attached to it, would give the section containing it broader scope than it would otherwise have, it was held that that circumstance should not have a controlling influence. Punctuation is no part of the statute; Hammock v. Trust Co., 105 U. S. 77, 26 L. Ed. 1111; in construing statutes, courts will disregard punctuation; or, if need be, repunctuate, to render the true meaning of the statute; Hamilton v. The R. B. Hamilton, 16 Ohio St. 432, approved in Hammock v. Trust Co., 105 U. S. 77, 26 L. Ed. 1111; President &c. v. Ruse, 14 C. L. R. (Australia) 224; State v. Brodigan, 34 Nev. 486, 125 Pac. 699; In re Gyger's Estate, 65 Pa. 311; Cushing v. Worrick, 9 Gray (Mass.) 385. It may shed some light on the construction of statutes, but the court will read them with such stops as will give effect to the whole; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; it is not decisive of the meaning; Ford v. Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590. In New York it is part of a statute as passed and as appears on the roll as filed with the secretary of state; Tyrrell v. New York, 159 N. Y. 239, 53 N. E. 1111. Punctuation is a fallible standard in statutes, but commas in the description of a boundary line may be considered; Northern Pac. R. Co. v. U. S., 227 U. S. 356, 33 Sup. Ct. 368, 57 L. Ed. 544.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first ascertain the meaning from

the four corners of the instrument; Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. Ed. 624.

Lord St. Leonards said: "In wills and deeds you do not ordinarily find any stops; but the court reads them as if they were properly punctuated;" 2 Dr. & War. 98.

Judges in the later cases have been influenced in construing wills by the punctuation of the original document: 2 M. & G. 679; 26 Beav. 81; 24 L. J. Ch. 523; but see 1 Mer. 651, where Sir William Grant refused to resort to punctuation as an aid to construction. See, also, Arcularius v. Sweet, 25 Barb. (N. Y.) 405; 16 Can. L. J. 183.

Quotation marks are punctuation; State v. Banfield, 43 Or. 287, 72 Pac. 1093. So are "ditto" marks; Hughes v. Powers, 99 Tenn. 480, 42 S. W. 1.

PUNISHABLE. Liable to punishment. Com. v. Pemberton, 118 Mass. 36. See In re Mills, 135 U. S. 266, 10 Sup. Ct. 762, 34 L. Ed. 107.

PUNISHMENT. In Criminal Law. Some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, or for the omission of the performance of an act required by law, by the judgment and command of some lawful court.

The penalty for the transgression of the law. Whart.; People v. Court of Sessions, 8 N. Y. Crim. R. 355.

"The infliction of pain in vengeance of crime." Dr. Johnson.

The right of society to punish is derived, by Beccaria, Mably, and some others, from a supposed agreement which the persons who composed the primitive societies entered into, in order to keep order, and, indeed, the very existence of the state. According to others, it is the interest and duty of man to live in society; to defend his right, society may exert this principle, in order to support itself; and this it may do whenever the acts punishable would endanger the safety of the whole. And Bentham is of opinion that the foundation of this right is laid in public utility or necessity. Delinquents are public enemies, and they must be disarmed and prevented from doing evil, or society would be destroyed. But, if the social compact has never existed, says Livingston, its end must have been the preservation of the natural rights of the members; and therefore the effects of this fiction are the same with those of the theory which takes abstract justice as the foundation of the right to punish; for this justice, if well considered, is that which assures to each member of the state the free exercise of his rights. And if it should be found that utility, the last source from which the right to punish is derived, is so intimately united to justice that it is inseparable from it in the practice of law, it will follow that every system founded on one of these principles must be supported by the other.

The proper end of human punishment is not the satisfaction of justice, but the prevention of crime; Paley.

The end of punishment, therefore, is neither to torment sensible beings nor undo a crime already committed, nor yet recall the past, nor reverse the crime. It is to punish the criminal for doing some injury to society; to repair the wrong done to society or to a private individual, and to amend his life for the future, and by his example to prevent others from committing like offences. The chief end of punishment is by punishing the crime and preventing the doing of it again; and that by means of fines, imprisonment, hard labor, moral and physical treatment, and new habits formed. The infliction of pain for its own sake is now condemned by all enlightened governments, statesmen, and philanthropists; 16 L. Mag. & Rev. 99.

The main objects of penal justice are laid down by Bentham: example, reformation, incapacitation, satisfaction for the person injured, economy to the public. He further says that all our forms of punishment should be put to these five tests and should be subjected most especially to all except the last.

To attain their social end, punishments should be *exemplary*, or capable of intimidating those who might be tempted to imitate the guilty; *reformatory*, or such as should improve the condition of the convicts; *personal*, or such as are at least calculated to wound the feelings or affect the rights of the relations of the guilty; *divisible*, or capable of being graduated and proportioned to the offence and the circumstances of each case; *reparable*, on account of the fallibility of human justice.

Punishments are either corporal or not corporal. The former are—death, which is usually denominated capital punishment; imprisonment, which is either with or without labor, see PENITENTIARY; whipping, in some states; and banishment.

The punishments which are not corporal are—fines, forfeitures; suspension or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office; compulsion to remove nuisances.

The object of punishment is to reform the offender, to deter him and others from committing like offences, and to protect society. See 4 Bla. Com. 7; Whart. Cr. L. 3, 4, 7; Rutherforth, Inst. b. 1, c. 18. A state may provide for a severer punishment for a second than for a first offence, provided it is dealt out to all alike; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301.

The constitution of the United States, Amendments, art. 8, forbids the infliction of cruel and unusual punishments. This applies only to acts of congress and to the fed-

eral courts; James v. Com., 12 S. & R. (Pa.) 220; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; and does not apply to the states; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450 (Field, Harlan, and Brewer, JJ., dissenting). Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the federal constitution; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519.

A state statute which provides for the punishment of death by electricity, and which is held by the state courts not to inflict a cruel and unusual punishment, does not abridge the privileges or immunities of a convict under the federal constitution; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971.

What punishment is suited to a specified offence must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may possibly be unlawful because it is so manifestly out of all proportion to the offence as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become unusual; Cooley, Const. 401. So, for example, is the punishment of depriving a native of China of his hair; 18 Am. L. Reg. 676. Whipping, as a punishment for stealing mules, is not contrary to this provision; Garcia v. Territory, 1 N. M. 415. In New York, where a general law created a crime and fixed the maximum of its punishment, a special statute operating only in localities, or upon particular individuals, whereby, for no perceptible reason, the same identical crime, which consists in the violation of a statute applicable to the whole state, can therein or in those persons be punished with double the severity that it can be elsewhere in the same state, is within the prohibition of section five of article one of the constitution of the state as to "cruel and unusual punishments"; In re Bayard, 61 How. Pr. (N. Y.) 294; State v. Whitaker, 48 La. Ann. 527, 19 South. 457, 35 L. R. A. 562.

Sentence for a term not exceeding that prescribed by the statute cannot be regarded as a cruel or unusual punishment; Jackson v. U. S., 102 Fed. 473, 42 C. C. A. 452. Sterilization by means of vasectomy is not a cruel or unusual punishment; State v. Feilen, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418.

Requiring one who has embezzled over $500,000 of state funds to pay a fine equal to the amount of the embezzlement or suffer life imprisonment is a cruel and unusual punishment where the accused cannot pay it; State v. Ross, 55 Or. 450, 104 Pac. 596, 106 Pac. 1022, 42 L. R. A. (N. S.) 601, 613.

See INFAMY; INFAMOUS CRIME; JEOPARDY; CAPITAL PUNISHMENT; PRISONER; SENTENCE; PARDON; ELECTROCUTION; HANGING; CRUEL AND UNUSUAL PUNISHMENT; CUMULATIVE SENTENCES; VASECTOMY.

PUNITIVE DAMAGES. See MEASURE OF DAMAGES.

PUPIL. **In Civil Law.** One who is in his or her minority. See Dig. 1. 7; 26. 7. 1. 2; 50. 16. 239; Code 6. 30. 18. One who is in ward or guardianship. See SCHOOLS; ASSAULT; BATTERY; CORRECTION.

PUPILLARIS SUBSTITUTIO (Lat.). **In Civil Law.** The nomination of another besides his son as pupil to succeed, if the son should not be able or inclined to accept the inheritance, or should die before he came of age to make a testament.

If the child survived the age of puberty, though he made no testament, the substitute had no right of succession. See Bell, Dict. *Substitution;* Dig. 28. 6.

PUPILLARITY. **In Civil Law.** That age of a person's life which included infancy and puerility.

PUR. A corruption of the French word *par*, by or for. It is frequently used in old French law phrases; as *pur autre vie.* It is also used in the composition of words: as, purparty, purlieu, purview.

PUR AUTRE VIE (old French, *for another's life*). See ESTATE PUR AUTRE VIE.

PUR FAIRE PROCLAMER. An ancient writ addressed to the mayor or bailiff of a city or town, requiring him to make proclamation concerning nuisances, etc. Fitz. Nat. B. 392.

PURCHASE. A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. 2 Washb. R. Prop., 5th ed. *401; Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 568; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516. A title by purchase is one that is vested in a person by his own act or agreement; 2 Bla. Comm. 241. A title by devise is a title by purchase; Allen v. Bland, 134 Ind. 78, 33 N. E. 774.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its more limited sense, purchase is applied only to such acquisitions of lands as are obtained by way of bargain and sale for money or some other valuable consideration; Cruise, Dig. tit. 30, §§ 1–4; Hurst v. Dippo, 1 Dall. (U. S.) 20, 1 L. Ed. 19. See Grant v. Bennett, 96 Ill. 535. In common parlance, purchase signifies the buying of real estate and of goods and chattels.

PURCHASE-MONEY. The consideration which is agreed to be paid by the purchaser of a thing in money. See Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 568. As to vendor's lien, see LIEN. See APPLICATION OF PURCHASE-MONEY.

PURCHASE FOR VALUE, IN GOOD FAITH AND WITHOUT NOTICE. The protection given to such purchaser means that from the relation subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their legal rights, liabilities and remedies; 2 Pomeroy, Eq. Jur. § 738. It is of the essence of the doctrine that equity does not intend to pass upon and decide the merits of the two litigant parties; it does not decide that the title of the defendant is valid, and, therefore, intrinsically better than that of the plaintiff; on the contrary, the protection given by way of defence theoretically assumes that the title of the purchaser is really defective as against that of his opponent; a court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations. If a plaintiff, holding some equitable right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable right or interest, the court in like manner refuses to aid the plaintiff and leaves him to whatever rights would be recognized and reliefs granted by a court of law. The doctrine is not in any sense a rule of property. Whenever the relations between litigants are of such a nature and the suit is of such a kind that equity is called upon to decide the merits of the controversy and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defence of *bona fide* purchaser as effectual and conclusive. See 2 Pomeroy, Eq. Jur. § 739.

In the leading case of Phillips v. Phillips, 4 D., F. & J. 208, Lord Westbury classified as follows the cases in which purchase for value would bar equitable relief: 1. When an application is made to the auxiliary jurisdiction of the court. 2. Where one who purchased an equitable interest in property, without notice of a prior equitable incumbrance of the plaintiff, has subsequently got in the outstanding legal title. This was the doctrine of *tabula in naufragio*. 3. When a plaintiff seeks to charge a purchaser with "an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud, or to correct it for mistake." On the other hand, to a bill invoking the concurrent or exclusive jurisdiction of equity against a subsequent equitable incumbrancer, purchase for value without notice would be no defense.

Prof. Ames (Lectures on Legal History, 253) points out that one common case of protection to a purchaser is where one buys a legal title from a misconducting trustee without notice of the trust, and that this does not come within any of these classes, and that the discrimination in the third class between an equity and an equitable estate is an unfortunate one. He states the doctrine as follows: "A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. In all other cases the circumstance of innocent purchase is a fact of no legal significance."

In cases where the rule of priority in time would otherwise decide the rights of adverse equitable claimants, it sometimes happens that the later incumbrancer subsequently acquires the outstanding legal title; but it has long been decided that a later incumbrancer could derive no advantage from a long outstanding term got in with notice of the prior equity. This is called the *tabula in naufragio* doctrine. Prof. Ames points out that it may fairly be said that that doctrine survives only in the unjust and much-criticized English rule of tacking.

He sums up the discussion of the general doctrine as follows: "The purchaser of any right, in its nature transmissible, whether a right *in rem* or a right *in personam*, acquires the right free from all equities of which he had no notice at the time of its acquisition. This proposition, it is hoped, will find favor with the reader in point of legal principle. It can hardly fail to commend itself on the score of justice and mercantile convenience."

Prof. Langdell (Summary of Equity Pleading) has discussed the subject, but somewhat from the standpoint of equity pleading. See, also, Bispham, Equity.

To constitute one a purchaser for value, without notice, the whole consideration must be actually paid before notice, and it is not enough that the consideration was secured to be paid. American Vulcanized Fibre Co. v. Taylor (Del.) 87 Atl. 1025.

PURCHASER. A buyer; a vendee. A mortgagee or a conditional vendee is not a purchaser; Campbell Printing Press & Mfg. Co. v. Dyer, 46 Neb. 830, 65 N. W. 904.

See SALE; PARTIES; CONTRACTS.

PURE FOOD LAWS. See FOOD AND DRUG ACTS.

PURE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or, when thus contracted, the condition has been performed. Pothier, Obl. n. 176.

PURE PLEA. One which relies wholly on some matter *dehors* the bill, as, for example, a plea of a release on a settled account.

Pleas not pure are so called in contradistinction to pure pleas; they are sometimes also denominated negative pleas. 4 Bouvier, Inst. n. 4275.

PURGATION (Lat. *purgo*, from *purum* and *ago*, to make clean). The clearing one's self of an offence charged, by denying the guilt on oath or affirmation.

Canonical purgation was the act of justifying one's self, when accused of some offence, in the presence of a number of persons worthy of credit, generally twelve, who would swear they believe the accused. See COMPURGATOR; WAGER OF LAW.

Vulgar purgations consisted in superstitious trials by hot and cold water, by fire, by hot irons, by battel, by corsned, etc.

See OATH PURGATORY.

PURGE. See CONTEMPT.

PURGING A TORT. Is like the ratification of a wrongful act by a person who has power of himself to lawfully do the act. But, unlike ratification, the purging of the tort may take place even after commencement of the action. 1 Brod. & B. 282.

PURLIEU. In English Law. A space of land near a forest, known by certain boundaries, which was formerly part of a forest, but which has been separated from it.

The history of purlieus is this. Henry II., on taking possession of the throne, manifested so great a taste for forests that he enlarged the old ones wherever he could, and by this means enclosed many estates which had no outlet to the public roads; forests increased in this way until the reign of king John, when the public reclamations were so great that much of this land was disforested,—that is, no longer had the privileges of the forests—and the land thus separated bore the name of purlieu. See FOREST LAWS.

PURPART. The same as purparty. Cent. Dict.

PURPARTY. That part of an estate which, having been held in common by parceners, is by partition allotted to any of them. To make purparty is to divide and sever the lands which fall to parceners. Old, N. B. 11. Formerly *pourparty*. See Jacob. The word *purpart* is commonly used to indicate a part of an estate in any connection.

PURPORT. In Pleading. The substance of a writing as it appears on the face of it to the eye that reads it. It differs from tenor. 2 Russ. Cr. 365; 1 East 179.

PURPOSELY. Intentionally; designedly. Fahnestock v. State, 23 Ind. 231.

PURPRESTURE. An enclosure by a private individual of a part of a common or public domain.

An inclosure by a private person of a part of that which belongs to, and ought to be open and free to the enjoyment of the public at large. Attorney General v. Booming Co., 34 Mich. 472; Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498. 28 Am. St. Rep. 276. See People v. R. Co., 76 Cal. 156, 18 Pac. 141.

In early times, an encroachment on the forest. 1 Holdsw. Hist. E. L. 342.

According to Lord Coke, purpresture is a close or enclosure, that is, when one encroaches or makes several to himself that which ought to be in common to many: as, if an individual were to build between high and low water mark on the side of a public river. In England this is a nuisance, and in cases of this kind an injunction will be granted, on *ex parte* affidavits, to restrain such a purpresture and nuisance; Co. 2d Inst. 28. And see Skene, *Pourpresture;* Glanville, lib. 9, ch. 11, p. 239, note; Spelman, Gloss. *Purprestura;* Hale, *de Port. Mar.;* Hargrave, Law Tracts 84; 2 Anstr. 606; Bisph. Eq. 443; Callis, Sew. 174; Rawle, Exmoor Forest.

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books, in which everything on board is inserted, as well the names of mariners as the articles of merchandise shipped. Roccius, Ins. note.

By statute pursers in the navy are now called paymasters. R. S. § 1383.

PURSUE. To execute or carry out. Co. Litt. 52 *a*.

PURSUER. The name by which the complainant or plaintiff is known in the ecclesiastical courts. 3 Eccl. 350.

PURVIEW. That part of an act of the legislature which begins with the words, "Be it enacted," etc., and ends before the repealing clause. Cooke 330; Payne v. Conner, 3 Bibb (Ky.) 181.

According to Cowell, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It always implies a condition.

PUT. In Pleading. To select; to demand: as, "the said C D puts himself upon the country;" that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law. Gould, Pl. c. 6, part 1, § 19.

PUT OFF. To postpone. In a bargain for the sale of goods, it may mean to postpone

its completion or to procure a resale of the goods to a third person. 11 Ex. 302.

PUTATIVE. Reputed to be that which is not. The word is frequently used: as, putative father, putative marriage, putative wife, and the like. And Toullier, tome 7, n. 29, uses the words putative owner, *proprietaire putatif*. Lord Kames uses the same expression. Princ. of Eq. 391.

PUTATIVE FATHER. The reputed father.

This term is usually applied to the father of a bastard child.

The putative father is bound to support his children; and is entitled to the guardianship and care of them in preference to all persons but the mother; Com. v. Anderson, 1 Ashm. (Pa.) 55. And see 1 B. & Ald. 491; 1 C. & P. 268; 1 Ball & B. 1.

PUTATIVE MARRIAGE. A marriage which is forbidden but which has been contracted in good faith and ignorance of the impediment on the part of at least one of the contracting parties.

Three circumstances must concur to constitute this species of marriage. There must be *bona fides*. One of the parties at least must have been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during his or her life, because if he became aware of it he was bound to separate himself from his wife. The marriage must be duly solemnized. The marriage must have been considered lawful in the estimation of the parties or of that party who alleges the *bona fides*.

A marriage in which these three circumstances concur, although null and void, will have the effect of entitling the wife, if she be in good faith, to enforce the rights of property which would have been competent to her if the marriage had been valid, and of rendering the children of such marriage legitimate.

This species of marriage was not recognized by the civil law: it was introduced by the canon law. It is unknown to the law of the United States, and in England and Ireland. In France it has been adopted by the Code Civil, art. 201, 202. In Scotland the question has not been settled. Burge, Confl. Laws 151.

PUTS AND CALLS. As used in a board of brokers, a "put" is defined to be a privilege of delivering or not delivering the grain, and a "call" is a privilege of calling or not calling for the grain. Pixley v. Boynton, 79 Ill. 353. See OPTION.

PUTTING IN FEAR. These words are used in the definition of a robbery from the person: the offence must have been committed by *putting in fear* the person robbed. Co. 3d Inst. 68; 4 Bla. Com. 243.

This is the circumstance which distinguishes robbery from all other larcenies. But what force must be used or what kind of fears excited are questions very proper for discussion. The goods must be taken *against the will* of the possessor.

There must either be a putting in fear or actual violence, though both need not be positively shown, for the former will be inferred from the latter, and the latter is sufficiently implied in the former. For example, when a man is suddenly knocked down, and robbed while he is senseless, there is no fear, yet in consequence of the violence, it is presumed; 2 East, Pl. Cr. 711; Com. v. Snelling, 4 Binn. (Pa.) 379; U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494.

In an indictment for robbery, at common law, it is not necessary to allege a putting in fear in addition to the allegation of force and violence; Com. v. Humphries, 7 Mass. 242; Com. v. Clifford, 8 Cush. (Mass.) 217.

PYROMANIA. An irresistible propensity to burn property.

Pyromania always occurs in young subjects, and is supposed to be connected with disordered menstruation, or that physiological evolution which attends the transition from youth to manhood. See MANIA.

PYX, TRIAL OF THE. Under the British Coinage Acts this occurs annually at Goldsmiths' Hall. The coins of the realm are assayed and weighed by a jury of goldsmiths over which the King's Remembrancer is usually appointed by the treasury to preside. Formerly the specimen coins put into the Pyx or box were produced at Westminster, from the treasure-house of the Abbey, where the Pyx was kept; the duty of presiding at the trial belonged to the office of the Remembrancer.

See Remembrances of Sir F. Pollock.

Q

Q. C. An abbreviation of Queen's Counsel. See BARRISTER.

QUACK. One who, without sufficient knowledge, study, or previous preparation, undertakes to practice medicine or surgery, under the pretence that he possesses secrets in those arts.

To call a regular physician a quack is actionable. A quack is criminally answerable for his unskillful practice, and also civilly to his patient in certain cases. See MALPRACTICE; PHYSICIAN.

QUADRAGESMS. Part V of the Year Books of 40–50 Edw. III. are so known.

QUADRANS (Lat.). **In Civil Law.** The fourth part of the whole. Hence the heir *ex quadrante;* that is to say, of the fourth part of the whole.

QUADRIPARTITE (Lat.). Having four parts, or divided into four parts: as, this indenture quadripartite, made between A B, of the one part, C D, of the second part, E F, of the third part, and G H, of the fourth part.

QUADRIPARTITUS. The name of an Anglo-Latin legal treatise. The two extant books were completed in 1114. The compiler was a secular clerk who entered into relations with the archbishop of York; his name is unknown. See Brunner, Sources of English Law in 2 Sel. Essays in Anglo-Amer. L. H. 8.

QUADROON. A person who is descended from a white person and another person who has an equal mixture of the European and African blood. State v. Davis, 2 Bail. (S. C.) 558. See MULATTO; NEGRO.

QUADRUPLATORES. Informers among the Romans, who, if their information were followed by conviction, had the fourth part of the confiscated goods for their trouble.

QUADRUPLICATION. In Pleading. A pleading in admiralty, third in order after a replication; now obsolete. Formerly this word was used instead of surrebutter. 1 Brown, Civ. Law. 469, n.

QUÆ EST EADEM (Lat. which is the same). A clause containing a statement that the trespass, or other fact mentioned in the plea, is the same as that laid in the declaration, where from the circumstances there is an apparent difference between the two. 1 Chitty, Pl. *582; Gould, Pl. c. 3, § 79, 80; Watson v. Joslyn, 29 Vt. 455.

The form is as follows: "which are the same assaulting, beating, and ill-treating, the said John, in the said declaration mentioned, and whereof the said John hath above thereof complained against the said James." See 1 Saund. 14, 208, n. 2; 2 *id.* 5 a., n. 3; Arch. Civ. Pl. 217; Com. Dig. *Pleader* (E 31); Cro. Jac. 372.

QUÆ PLURA. A writ which lay where an inquisition had been taken by an escheator of lands, etc. of which a man, died seised, and all the land was supposed not to be found by the office or inquisition; it was to inquire of "what more" lands or tenements the party dies seised. Reg. Orig. 293.

QUÆRE (Lat.). Query: noun and verb. A word frequently used to denote that an inquiry ought to be made of a doubtful thing. 2 Lilly, Abr. 406. Commonly used in the syllabi of the reported cases, to mark points of law considered doubtful.

QUÆRENS NON INVENIT PLEGIUM (Lat.). The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *si A fecerit B securum de clamore suo prosequendo,* when the plaintiff has neglected to find sufficient security. Fitz. N. B. 38.

QUÆSTIO. In Roman Law. A sort of commission (*ad quærendum*) to inquire into some criminal matter given to a magistrate or citizen, who was called *quæsitor* or *quæstor,* who made report thereon to the senate or the people, as the one or the other appointed him. In progress of time he was empowered (with the assistance of a counsel) to adjudge the case; and the tribunal thus constituted was called *quæstio.*

This special tribunal continued in use until the end of the Roman republic, although it was resorted to, during the last times of the republic, only in extraordinary cases.

The manner in which they were constituted was this. If the matter to be inquired of was within the jurisdiction of the comitia, the senate, on the demand of the consul, or of a tribune, or of one of its members, declared by a decree that there was cause to prosecute a citizen. Then the consul *ex auctoritate senatus* asked the people *in comitia (rogabat)* to enact this decree into a law. The comitia adopted it, either simply or with amendment, or they rejected it.

The increase of population and of crimes rendered this method, which was tardy at best, onerous, and even impracticable. In the year A. U. C. 604, or 149 B. C., under the consulship of Censorinus and Manilius, the tribune Calpurnius Piso procured the passage of a law establishing a *questio perpetua,* to take cognizance of the crime of extortion committed by Roman magistrates against strangers *de pecuniis repetundis.* Cicero, Brut. 27; *de Off.* ii. 21; *in Verr.* iv. 25.

Many such tribunals were afterwards established, such as *Quæstiones de majestate, de ambitu, de peculatu, de vi, de sodalitiis,* etc. Each was composed of a certain number of judges taken from the senators, and presided over by a prætor, although he might delegate his authority to a public officer, who was called *judex quæstionis.* These tribunals continued a year only; for the meaning of the word *perpetuus* is *non interruptus,* not interrupted during the term of its appointed duration.

The establishment of these *quæstiones* deprived the comitia of their criminal jurisdiction, except for the crime of treason; they were, in fact, the depositories of the judicial power during the sixth and

seventh centuries of the Roman republic, the last of which was remarkable for civil dissensions and replete with great public transactions. Without some knowledge of the constitution of the *Quæstio perpetua*, it is impossible to understand the forensic speeches of Cicero, or even the political history of that age. But when Julius Cæsar, as dictator, sat for the trial of Ligarius, the ancient constitution of the republic was, in fact, destroyed, and the criminal tribunals, which had existed in more or less vigor and purity until then, existed no longer but in name. Under Augustus, the concentration of the triple power of the consuls, pro-consuls, and tribunes in his person transferred to him, as of course, all judicial powers and authorities.

QUÆSTOR (Lat.). The name of a magistrate of ancient Rome.

QUÆSTORES CLASSICI (Lat.). **In Roman Law.** Officers entrusted with the care of the public money.

Their duties consisted in making the necessary payments from the *ærarium*, and receiving the public revenues. Of both they had to keep correct accounts in their *tabulæ publicæ*. Demands which any one might have on the *ærarium*, and outstanding debts were likewise registered by them. Fines to be paid to the public treasury were registered and exacted by them. They were likewise to provide proper accommodations for foreign ambassadors and such persons as were connected with the republic by ties of public hospitality. Lastly, they were charged with the care of the burials and monuments of distinguished men, the expenses for which had been decreed by the senate to be paid by the treasury. Their number at first was confined to two; but this was afterwards increased as the empire became extended. There were questors of cities and of provinces, and questors of the army; the latter were in fact paymasters.

QUÆSTORES PARRICIDII (Lat.). **In Roman Law.** Public accusers, two in number, who conducted the accusation of persons guilty of murder or any other capital offence, and carried the sentence into execution. They ceased to be appointed at an early period. Smith, Dict. Gr. & Rom. Antiq.

QUALE JUS. A judicial writ, which lay where a man of religion had judgment to recover land before execution was made of the judgment.

QUALIFICATION. The endowment or acquirement which renders eligible to place or position. Hyde v. State, 52 Miss. 672; State v. Seay, 64 Mo. 89, 27 Am. Rep. 206. It relates to the fitness or capacity of a party for a particular pursuit or profession; Cummings v. Missouri, 4 Wall. (U. S.) 319, 18 L. Ed. 356. It has been held not only to imply the presence of every requisite demanded, but the absence of every disqualification imposed. Hall v. Hostetter, 17 B. Monr. (Ky.) 786.

As to qualification shares, see DIRECTORS.

QUALIFIED ELECTOR. A person who is legally qualified to vote. Sanford v. Prentice, 28 Wis. 358. See QUALIFIED VOTER.

QUALIFIED FEE. One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and *his heirs on the part of his father* affords an example of this species of estate. Littleton § 254; 2 Bla. Com. 109. See BASE FEE.

QUALIFIED INDORSEMENT. See INDORSEMENT.

QUALIFIED OATH. See OATH.

QUALIFIED PROPERTY. Property not in its nature permanent, but which may sometimes subsist and at other times not subsist. A defeasible and precarious ownership, which lasts as long as the thing is in actual use and occupation. 2 Bla. Com. 391, 395*; 2 Kent 347.

Any ownership not absolute.

QUALIFIED VOTER. A person qualified to vote generally. In re House Bill No. 166, 9 Colo. 629, 21 Pac. 474; or, it may mean a person qualified and actually voting. Carroll Co. v. Smith, 111 U. S. 565, 28 L. Ed. 517.

QUALIFY. To become qualified or fit for any office or employment. To take the necessary steps to prepare one's self for an appointment: as, to take an oath to discharge the duties of an office, to give the bond required of an executor, etc.

It is held synonymous with probate in a statute authorizing probate judges to qualify wills by receiving the evidence of witnesses, etc. Bent v. Thompson, 5 N. M. 408, 23 Pac. 238.

QUALITY. Of Persons. The state of condition of a person.

Two contrary qualities cannot be in the same person at the same time. Dig. 41. 10. 4. Every one is presumed to know the quality of the person with whom he is contracting. In the United States the people are all upon an equality in their civil rights.

In Pleading. That which distinguishes one thing from another of the same kind.

It is, in general, necessary, when the declaration alleges an injury to the goods and chattels, or any contract relating to them, that the quality should be stated; and it is also essential, in an action for the recovery of real estate, that its quality should be shown: as, whether it consists of houses, lands, or other hereditaments, whether the lands are meadow, pasture, or arable, etc. The same rule requires that in an action for an injury to real property, the quality should be shown; Steph. Pl. 214, 215. See, as to the various qualities, Ayliffe, Pand [60].

It is often allowable to omit from the indictment, and it is seldom necessary to prove with precision, allegations of quality, or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, if the charge is of a felonious assault with a staff, and the proof is of such an assault with a stone, or if a wound, alleged to have been given with a sword, is proved to have been inflicted by an axe, or if a pistol is stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material, the charge is substantially proved, and no variance occurs: 5 C. & P. 128; 9 *id.* 525, 548.

QUAMDIU SE BENE GESSERIT (Lat. as long as he shall behave himself well). A clause inserted in commissions, when such instruments were written in Latin, to signify the tenure by which the officer held his office.

By the British Act of Settlement (1700) the commissions of the judges were so established; before then they held their office *durante bene placito*, during the king's will.

QUANDO ACCIDERINT (Lat. when they fall in). When a defendant, executor, or administrator pleads *plene administravit*, the plaintiff may pray to have judgment of assets *quando acciderint;* Bull. N. P. 169; Bac. Abr. *Executor* (M). A similar judgment may be taken at the plaintiff's election, in an action against an heir, on a plea of *riens perdescent*, instead of taking issue on the plea. In either of these cases if assets afterwards come to the hands of the executor or heir a *scire facias* must be sued out before execution can issue, or there may be an action of debt, suggesting a *devastavit;* 2 Bouv. Inst. 3708. It is also sometimes termed a judgment *of assets in futuro.*

By taking a judgment in this form the plaintiff admits that the defendant has fully administered to that time; 1 Pet. C. C. 442, n.; and therefore the plaintiff will not be allowed to give evidence of effects come to defendant's hands before the judgment. For this reason the *scire facias* on a judgment of assets *quando acciderint* must only pray execution of such assets as have come to the defendant's hands since the former judgment, and if it pray judgment of assets generally, it cannot be supported. See 2 Com. Dig. *Pleader* (2 D 9).

QUANTI MINORIS (Lat.). The name of a particular action in Louisiana. An action *quanti minoris* is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale.

QUANTITY. In Pleading. That which is susceptible of measure.

It is a general rule that, when the declaration alleges an injury to goods and chattels, or any contract relating to them, their quantity should be stated; Gould, Pl. § 35. And in actions for the recovery of real estate the quantity of the land should be specified; 11 Co. 25 *b*, 55 *a;* 1 East 441; 13 *id.* 102; Steph. Pl., Andr. ed. § 163.

QUANTITY OF ESTATE. Its time of continuance, or degree of interest, as in fee, during life, or for years. See ESTATE.

QUANTUM DAMNIFICATUS (Lat.). **In Equity Practice.** An issue directed by a court of equity to be tried in a court of law, to ascertain by a trial before a jury the amount of damages suffered by the non-performance of some collateral undertaking which a penalty has been given to secure. When such damages have thus been ascertained, the court will grant relief upon their payment. 4 Bouvier, Inst. n. 3913.

QUANTUM MERUIT (Lat.). **In Pleading.** As much as he has deserved.

When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit.* 2 Bla. Com. 162, 163; 1 Viner, Abr. 346. See Thomas v. Coal Co., 43 Mo. App. 653.

When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit; Clark v. Smith, 14 Johns. (N. Y.) 326; Algeo v. Algeo, 10 S. & R. (Pa.) 236; Ans. Contr. 278; Newcomb v. Ins. Co., 51 Fed. 725. But see Bank of Columbia v. Patterson, 7 Cra. (U. S.) 299, 3 L. Ed. 351; Stark. 277; Holt, N. P. 236; Linningdale v. Livingston, 10 Johns. (N. Y.) 36; 5 M. & W. 114; 4 C. & P. 93; 1 Ad. & E. 333; Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132.

See COMMON COUNTS.

QUANTUM VALEBAT (Lat. as much as it was worth). When goods are sold without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth.

The plaintiff may, in such case, suggest in his declaration that the defendant promised to pay him as much as the said goods were worth, and then aver that they were worth so much, which the defendant has refused to pay. See the authorities cited under the article QUANTUM MERUIT.

QUARANTINE. In Maritime Law. The space of forty days, or less, during which the crew of a ship or vessel coming from a port or place infected or supposed to be infected with disease are required to remain on board after their arrival, before they can be permitted to land. It was probably established by the Venetians in 1484. Baker, Quar. 3. In England it is governed by 6 George IV. c. 78, and the Public Health Act of 1875. Ships of war are bound, equally with merchant ships, to respect municipal quarantine regulations.

By act of congress of April 29, 1878, ch. 66, vessels from foreign ports where contagious and other diseases exist, are forbidden to enter the United States, excepting subject to certain regulations prescribed.

The object of the quarantine is to ascertain whether the crew are infected or not. To break the quarantine without legal authority is a misdemeanor; 1 Russ. Cr. 133.

Quarantine regulations made by the states are sustainable as the exercise of the police power; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276. The detention and disinfection of immigrants by order of a state board of health, with the purpose of preventing infectious disease, is not a regulation of foreign commerce by a state, within the meaning of the constitution; Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276.

In cases of insurance of ships, the insurer is responsible when the insurance extends to her being moored in port twenty-four hours in safety, if before the twenty-four hours are expired she is ordered to perform quarantine, and any accident contemplated by the policy occur; 1 Marsh. Ins. 264. Where a ship was prevented from complying with her charter party by quarantine regulations, it was held that this was "restraint of princes or rulers and people"; The Progreso, 3 U. S. App. 147, 50 Fed. 835, 2 C. C. A. 45; Clyde C. S. S. Co. v. S. S. Co., 169 Fed. 275, 94 C. C. A. 551. Lay days do not begin to run until a ship is out of quarantine; Maclachlan, Merch. Shipping 598.

An act of congress of February 2, 1903, authorizes the secretary of agriculture to establish regulations concerning the exportation and transportation of live stock from any place in the United States where he may have reason to believe that pleuropneumonia or other contagious diseases exist, into and through ony state, etc., and to foreign countries, which regulations have the force of laws; also, regulations to prevent the introduction or dissemination of any contagious, infectious or communicable disease of animals from a foreign country into the United States or from one state, etc., to another; and to seize, quarantine and dispose of infected hay, straw, etc., or meats, hides, or other products.

The act of congress of Feb. 15, 1893, granting additional quarantine powers and imposing additional duties upon the marine hospital service, did not contemplate the overthrow of the existing state quarantine systems and the abrogation of the power over the subject of health and quarantine practised by the states, because the enactment of state laws on those subjects would, in particular instances, affect interstate and foreign commerce; Compagnie Francaise de Navigation à Vapeur v. Board of Health, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209.

An unconstitutional burden on interstate commerce is not imposed by an act (Colorado) prohibiting the importation of cattle from certain sections between April 1 and November 1, unless first kept for ninety days at some place near the prohibited section, or unless a certificate of freedom from contagious disease has been obtained from the state veterinary sanitary board; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; nor an act giving the live stock sanitary commission authority to prohibit the importation of cattle into the state on the ground that infectious disease had broken out among the cattle of such other state; Smith v. R. Co., 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847; an act authorizing the governor of a state, when he has reason to believe there is an epidemic infectious disease of sheep in localities outside the state, to investigate the matter, and, if he finds the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper, is within the police power and is not in violation of the constitution or a regulation of interstate commerce; Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820, affirming 7 Idaho 1, 59 Pac. 933, 52 L. R. A. 78, 97 Am. St. Rep. 234.

A Louisiana statute empowering a board of health to exclude healthy persons from an infected locality, is valid and extends to persons seeking to enter the infected district whether they come from within or without the state; Compagnie Francaise de Navigation à Vapeur v. Board of Health, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209.

State quarantine regulations established by the governor of the state on the recommendation of a live stock sanitary commission are a proper exercise of the police power of the state; Smith v. R. Co., 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847.

The purpose of quarantine regulations against diseases is to limit its spread to the fewest possible number of persons by isolating persons already afflicted or exposed from all others, as far as possible. Where not

exceeding nine persons were supposed to have died from bubonic plague and no living persons were known to have contracted the disease, a regulation establishing a general quarantine district covering twelve blocks with more than 10,000 inhabitants, which prohibits persons from entering or leaving the district, but permits free intercourse in the district, cannot be upheld as a reasonable regulation; its effect must necessarily be to facilitate the spread of the disease among all persons confined in the district; Jew Ho v. Williamson, 103 Fed. 10.

The act of congress providing for the regulation of animal industry is limited to cases where the animal in question has an infectious or contagious disease, and the Secretary of Agriculture has no authority to prohibit the taking of a horse out of a quarantine district without first having it inspected and regardless of whether it was diseased or had been exposed to disease; U. S. v. Hoover, 133 Fed. 950.

Where sound cattle had been destroyed by a state live stock sanitary commission, as diseased cattle, the remedy of the owner is against the commissioners individually, and not against the state; Shipman v. State, etc., Com., 115 Mich. 488, 73 N. W. 817.

See Baker, Quarantine; 47 Am. St. Rep. 540, note; 25 Am. L. Rev. 45; FOOD AND DRUGS ACTS; HEALTH; LIVE STOCK.

In Real Property. The space of forty days during which a widow has a right to remain in her late husband's principal mansion immediately after his death. The right of the widow is also called her quarantine.

In some of the states provision has been made by statute securing to the widow this right for a greater or less space of time. See 4 Kent 62; 3 Washb. R. P., 5th ed. *272. Quarantine is a personal right, forfeited, by implication of a law, by second marriage; Co. Litt. 32. See Bacon, Abr. *Dower* (B); Co. Litt. 32 *b*, 34 *b*; Co. 2d. Inst. 16, 17.

See ASSIGNMENT OF DOWER.

QUARE (Lat.). **In Pleading.** Wherefore. This word is used sometimes in the writ in certain actions, but is inadmissible in a material averment in the pleadings, for it is merely interrogatory; and, therefore, when a declaration began with complaining of the defendant, "wherefore with force, etc., he broke and entered" the plaintiff's close, it was considered ill; Bacon, Abr. *Pleas* (B. 5, 4); Gould, Pl. c. 3, § 34.

QUARE CLAUSUM FREGIT. See TRESPASS; TRESPASS QUARE CLAUSUM FREGIT.

QUARE EJECIT INFRA TERMINUM. See EJECTMENT.

QUARE IMPEDIT (Lat. why he hinders). **In English Law.** A real possessory action which can be brought only in the court of common pleas, and lies to recover a presentation when the patron's right is disturbed, or to try a disputed title to an advowson. See DISTURBANCE; 2 Saund. 336 *a*.

QUARE INCUMBRAVIT. Why he incumbered. A writ which lay against a bishop, who, within six months after the vacation of a benefice, conferred it on his clerk, whilst two others were contending at law for the right of presentation, calling upon him to show cause why he had incumbered the church. Reg. Orig. 32.

QUARE OBSTRUXIT (Lat. why he obstructs). The name of a writ formerly used in favor of one who, having a right to pass through his neighbor's grounds, was prevented enjoying such right, because the owner of the grounds had obstructed the way.

QUARREL. A dispute; a difference. In law, particularly in releases, which are taken most strongly against the releasor, when a man releases all quarrel he is said to release all actions, real and personal. 8 Co. 153.

QUARRY. A place whence stones are dug for the purpose of being employed in building, making roads, and the like. In mining law it is said to be an open excavation where the works are visible at the surface. It is said to be derived from *quadratarius*, a stone-cutter or squarer. Bainbr. Mines 2.

When a farm is let with an open quarry, the tenant may, when not restrained by his contract, take out the stone; but he has no right to *open* new quarries. See MINES; WASTE.

QUART. A liquid measure, containing one-fourth part of a gallon.

QUARTER. A measure of length, equal to four inches. See MEASURE.

In the Law of War. The sparing of the life of a fallen or captured enemy on the battlefield. By the end of the seventeenth century quarter became a recognized usage of war. It is forfeited only under exceptional circumstances. 1. In case of absolute and overwhelming necessity, as where a small force is incumbered with a large number of prisoners in a savage and hostile country, and may be justified in killing them for their own self-preservation. 2. Where belligerents violate the laws of war they may be refused quarter. 3. By way of retaliation against an enemy who has denied quarter without a cause. Risley, The Law of War; Spaight, War Rights on Land, 88–95.

In former times it was considered justifiable to refuse quarter to the garrison of a fortress carried by assault, especially when a weak garrison held out against greatly superior numbers, the justification being that the attempted defense of an indefensible place involved an unnecessary loss of life to the capturing party. But this rule is now obsolete.

Art. 23 (d) of the Convention Concerning the Laws and Customs of War on Land,

adopted at The Hague in 1899, provides that belligerents are forbidden to declare that no quarter shall be given.

QUARTER DAYS. The four days of the year on which rent payable quarterly becomes due.

QUARTER DOLLAR. A silver coin of the United States, of the value of twenty-five cents.

Previous to the act of Feb. 21, 1853, c. 79, 10 U. S. Stat. at Large 160, the weight of the quarter-dollar was one hundred and three and one-eighth grains; but coins struck after the passage of that act were of the weight of ninety-six grains. The fineness was not altered by the act cited: of one thousand parts, nine hundred are pure silver and one hundred alloy. By the act of 12th of Feb. 1873, the weight of the quarter-dollar is fixed at one-half that of the half-dollar (twelve and one-half grams); R. S. § 3573; and by act of July 22, 1876, it is made legal tender in all sums public and private not exceeding ten dollars; 1 Supplement R. S. p. 488.

See HALF-DOLLAR; ANNUAL ASSAY; LEGAL TENDER.

QUARTER-EAGLE. A gold coin of the United States, of the value of two and a half dollars. See MONEY; COIN.

QUARTER-SALES. In New York a certain fraction of the purchase-money is often conditioned to be paid back on alienation of the estate; and this fine on alienation is expressed as a tenth-sales, a quarter-sales, etc. Jackson v. Groat, 7 Cow. (N. Y.) 285.

QUARTER SESSIONS. A court bearing this name, mostly invested with the trial of criminals. It takes its name from sitting quarterly, or once in three months. See COURT OF QUARTER SESSIONS.

The English courts of quarter sessions were erected during the reign of Edward III. See stat. 36 Edw. III.; Crabb, Eng. Law 278.

QUARTER-YEAR. In the computation of time, a quarter-year consists of ninety-one days. Co. Litt. 135*b*; 2 Rolle, Abr. 521, l. 40.

QUARTERING. A barbarous punishment formerly inflicted on criminals by tearing them to pieces by means of four horses, one attached to each limb. See HUNG, DRAWN AND QUARTERED.

QUARTERING OF SOLDIERS. Furnishing soldiers with board or lodging or both. The constitution of the United States, Amendm. art. 3, provides that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." See Cooley, Const. Lim., 6th ed. 373; Rawle, Const. 126.

QUARTEROON. One who has had one of his grandparents of the black or African race.

QUARTO DIE POST (Lat. fourth day after). Appearance-day, which is the fourth day inclusive from the return of the writ; and if the person summoned appears on that day, it is sufficient. On this day, also, the court begins to sit for despatch of business. These three days were originally given as an indulgence. 3 Sharsw. Bla. Com. 278*; Tidd, New Pr. 134. But this practice is now altered. 15 & 16 Vict. c. 76. It still obtains in Pennsylvania.

QUASH. **In Practice.** To overthrow or annul.

When proceedings are clearly irregular and void, the courts will quash them, both in civil and criminal cases: for example, when the array is clearly irregular, as, if the jurors have been selected by persons not authorized by law, it will be quashed.

In criminal cases, when an indictment is so defective that no judgment can be given upon it, should the defendant be convicted, the court, upon application, will, in general, quash it: as, if it have no jurisdiction of the offence charged, or when the matter charged is not indictable; 1 Burr. 516, 543; U. S. v. Wardell, 49 Fed. 914. It is in the discretion of the court to quash an indictment or to leave the defendant to a motion in arrest of judgment; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; State v. Miller, 100 N. C. 543, 5 S. E. 925. When the application to quash is made on the part of the defendant, in English practice, the court generally refuses to quash the indictment when it appears some enormous crime has been committed; Comyns, Dig. *Indictment* (H); 3 Term 621; 3 Burr. 1841; Bacon, Abr. *Indictment* (K).

When the application is made on the part of the prosecution, the indictment will be quashed whenever it is defective so that the defendant cannot be convicted, and the prosecution appears to be *bona fide*. If the prosecution be instituted by the attorney-general, he may, in some states, enter a *nolle prosequi*, which has the same effect; 1 Dougl. 239, 240. The application should be made before plea pleaded; Leach 11; 4 How. State Tr. 232; State v. Clark, 4 Idaho 7, 35 Pac. 710; and before the defendant's recognizance has been forfeited; 1 Salk. 380. See CASSETUR BREVE.

QUASI (Lat. as if, almost). A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11. 7. 1. 8. 1. See People v. Bradley, 60 Ill. 402. It is exclusively a term of classification. Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other;

Maine, Anc. Law 332. Civilians use the expressions *quasi-contractus*, *quasi-delictum*, *quasi-possessio*, *quasi-traditio*, etc.

QUASI-AFFINITY. In Civil Law. The affinity which exists between two persons, one of whom has been betrothed to the kindred of the other, but who have never been married. See AFFINITY.

QUASI-CONTRACT. See QUASI-CONTRACTUS.

QUASI-CONTRACTUS (Lat.). In Civil Law. An obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them, or from a voluntary act of one of them.

An obligation springing from voluntary and lawful acts of parties in the absence of any agreement. Howe, Stud. Civ. L. 171.

An obligation which grows out of certain relations between persons whereby they become bound to each other by duties similar to those arising from a contract. Morey, Rom. L. 371.

Quasi-contracts were a well-defined class under the civil law. By the civil code of Louisiana they are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person and sometimes a reciprocal obligation between parties. In *quasi*-contracts the obligation arises not from consent, as in the case of contracts, but from the law or natural equity.

According to Prof. Ames (Lect. on Leg. Hist. 160) the term was not found in the common law, but it has been taken by writers of the common law from the Roman law. It may be considered now as quite domesticated even to the extent of being used as the title of a very valuable common-law textbook: Keener, Quasi-Contract. They are "founded (1) upon a record, (2) upon a statutory, official or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another." Also, at p. 255, they "are really equitable liabilities upon which the law assumes to give a remedy."

In (1890) 44 Ch. D. p. 107, Lindley, L. J., remarks that owing to the unfortunate terminology of our law, . . . the expression "implied contract" has been used not only to denote a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by the civilians *obligationes quasi ex contractu*.

The subject will be found treated in a subtitle of CONTRACT, *supra*. See also CONTRACTUAL OBLIGATION.

It need only be added here that *quasi*-contracts were in the Roman law of almost infinite variety but were divided into five classes:—1. *Negotiorum gestio*, the management of the affairs of another, without authority. 2. *Tutelæ administratio*, the administration of a tutorship. 3. *Rei communis administratio*, or *communio bonorum*, the management of common property. 4. *Hereditatis aditio*, the entering upon an inheritance. 5. *Indebiti solutio*, payment by mistake of money not due. They all have certain general features, as that from their nature each has an affinity with some contract; and persons under disabilities may be affected by them though incapable of contracting.

A common error which should be avoided is the confusion of *quasi*-contracts with implied contracts. The latter are real contracts, differing from express contracts in the nature of the proof by which they are established; but in *quasi*-contracts the essential part of the contract, the agreement or convention, is wanting; Maine, Anc. L. 332. See, generally, Inst. 3. 28; Dig. 3. 5; Ayl. Pand. b. 4, tit. 31; 1 Bro. Civ. L. 386; Poth. Obl. n. 113; Merl. *Rép.* h. t.; Keener, Quasi-Contract; Howe, Stud. Civ. L. Lect. x.; Morey, Rom. Law 371; Sohm, Inst. Rom. Law 315–21; Woodward, Quasi-Contracts (1913).

QUASI-CORPORATIONS. A term applied to those bodies or municipal societies which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suits at law. They may be considered *quasi*-corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons by the common law. See Fourth School Dist. v. Wood, 13 Mass. 192; L. R. 1 H. L. 293; Boone, Corp. § 10.

Among *quasi*-corporations may be ranked counties, and also towns, townships, parishes, hundreds, and other political divisions of counties, which are established without an express charter of incorporation; commissioners of a county, most of the commissions instituted for public use, supervisors of highways, overseers, or guardians of the poor, loan officers of a county, trustees of a school fund, trustees of the poor, school districts, trustees of schools, judges of a court authorized to take bonds to themselves in their official capacity, and the like, who are invested with corporate powers *sub modo* and for a few specified purposes only. The governor of a state has been held a *quasi*-corporation sole; The Governor v. Allen, 8 Humph. (Tenn.) 176; so has a trustee of a friendly society in whom, by statute, property is vested, and by and against whom suits may be brought; see 1 B. & Ald. 157; so of a levee district organized by statute to reclaim land from overflow; Dean v. Leary, 51 Cal. 406;

and fire departments having by statute certain powers and duties which necessarily invest them with a limited capacity to sue and be sued; 1 Sweeny 224. It may be laid down as a general rule that where a body is created by statute possessing powers and duties which involve incidentally a qualified capacity to sue and be sued, such body is to be considered a *quasi*-corporation: *id.*; Dean v. Davis, 51 Cal. 406. See, generally, Ang. & A. Corp. § 24; 13 Am. Dec. 524, note; but not such a body as the general assembly of the Presbyterian church, which has not the capacity to sue and be sued; Com. v. Green, 4 Whart. (Pa.) 531. See CORPORATION; MUNICIPAL CORPORATION; PUBLIC SERVICE CORPORATIONS; PUBLIC UTILITIES; ASSOCIATION.

QUASI-CRIMES. Offences for which some person other than the actual perpetrator is responsible, the perpetrator being presumed to act by command of the responsible party.

Injuries which have been unintentionally caused. See MASTER AND SERVANT.

All offences not crimes or misdemeanors, but which are in the nature of crimes; a class of offences against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties. Wiggins v. Chicago, 68 Ill. 375. See State v. Snure, 29 Minn. 132, 12 N. W. 347.

They have recently increased in number. The name of commercial crimes has been applied to them.

QUASI-DELICT. **In Civil Law.** An act whereby a person, without malice, but by fault, negligence, or imprudence not legally excusable, causes injury to another.

A *quasi*-delict may be public or private; the neglect of the affairs of a community, when it is our duty to attend to them, may be a crime; the neglect of a private matter, under similar circumstances, may be the ground of a civil action. Bowyer, Mod. Civ. Law, c. 43, p. 265.

QUASI-DEPOSIT. A kind of involuntary bailment, which takes place where a person acquires possession of property lawfully, by finding. Story, Bailm. § 85.

QUASI-DERELICT. The condition of a vessel which is not abandoned, but those on board of which are physically incapable of doing anything for their safety. 1 Newb. Adm. 452.

QUASI-ENTAIL. An estate *pur autre vie*, to a man and the heirs of his body.

The interest so granted is not properly an estate tail, but so far in the nature of one that it will go to the heir of the body as special occupant during the life of the *cestui que vie* in the same manner as an estate of inheritance would descend, if limited to the grantee and the heirs of his body.

QUASI-FEE. An estate gained by wrong.

QUASI-OFFENCES. See QUASI-CRIMES.

QUASI-PARTNERS. Partners of lands, goods, or chattels, who are not actual partners, are sometimes so called. Pothier, *de Société* App. n. 184. See PART-OWNERS.

QUASI-PERSONALTY. Things immovable in point of law; though fixed to things real either actually or fictitiously.

QUASI-POSTHUMOUS CHILD. **In Civil Law.** One who, born during the life of his grandfather or other male ascendant, was not his heir at the time he made his testament, but who by the death of his father became his heir in his lifetime. Inst. 2. 13. 2; Dig. 28. 3. 13.

QUASI-PUBLIC CORPORATIONS. Those corporations, which are technically private, but of *quasi-public* character, having in view some public enterprise in which the public are involved, such as railroad companies, etc., Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1 Thomps. Corp. § 22. See CORPORATION; QUASI-CORPORATIONS.

QUASI-PURCHASE. This term is used in the civil law to denote that a thing is to be considered as purchased from the presumed consent of the owner of a thing; as, if a man should consume a cheese, which is in his possession and belonging to another, with an intent to pay the price of it to the owner, the consent of the latter will be presumed, as the cheese would have been spoiled by keeping it longer. Wolff, *Dr. de la Nat.* § 691.

QUASI-REALTY. Things which are fixed in contemplation of law to realty, but movable in themselves, as heirlooms (or limbs of the inheritance), title deeds, court rolls, etc. Whart. Law Lex.

QUASI-TRADITIO (Lat.). **In Civil Law.** A term used to designate that a person is in the use of the property of another, which the latter suffers and does not oppose. *Lec. Elem.* § 396. It also signifies the act by which the right of property is ceded in a thing to a person who is in possession of it; as, if I loan a boat to Paul, and deliver it to him, and afterwards I sell him the boat, it is not requisite that he should deliver the boat to me to be again delivered to him: there is a *quasi*-tradition or delivery.

QUATUOR MARIA. See EXTRA QUATUOR MARIA.

QUATUORVIRI (Lat. four men). **In Roman Law.** Magistrates who had the care and inspection of roads. Dig. 1. 2. 3. 30.

QUAY. A wharf at which to load or land goods. (Sometimes spelled *key*.)

In its enlarged sense the word *quay* means the whole space between the first row of houses of a city, and the sea or river; De Armas v. New Orleans, 5 La. 152, 215. So much of the quay as is requisite for the public use of loading and unloading vessels is public property, and cannot be appropriated

to private use, but the rest may be private property.

A public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; 140 U. S. 654.

QUE ESTATE (*quem statum*, or *which estate*). A plea by which a man prescribes in himself those whose estate he holds. 2 Bla. Com. 270; 18 Viner, Abr. 133-140; Co. Litt. 121 *a*. See 24 L. Q. R. 366.

QUEAN. A worthless woman; a strumpet. The meaning of this word, which is now seldom used, is said not to be well ascertained. 2 Rolle, Abr. 296; Bacon, Abr. *Slander* (U 3).

QUEEN. A woman who is sovereign of a kingdom. The wife of a king.

QUEEN ANNE'S BOUNTY. By stat. 2 & 3 Anne, c. 11, all the revenue of first-fruits and tenths was vested in trustees forever, to form a perpetual fund for the augmentation of poor livings in the established church. 1 Bla. Com. 286; 2 Burn, Eccl. Law 260; [1906] 2 Ch. 513. Numerous acts have since been passed; see 2 Steph. Com. 603.

QUEEN CONSORT. The wife of a reigning king. 1 Bla. Com. 218. She is looked upon by the law as a *feme sole*, as to her power of contracting, suing, etc. *Id.* She is in all respects a subject.

QUEEN DOWAGER. The widow of a king. She retains most of the privileges belonging to a queen consort. 1 Bla. Com. 229. If she marries a commoner, she does not lose her regal dignity.

QUEEN-GOLD. A royal revenue belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary fine or offer to the king of ten marks or upwards, in consideration of any grant or privilege conferred by the crown. It is due or record on the recording of the fine. It was last exacted (or proceedings therefor begun) in the reign of Charles I. It became, in effect, extinct at the Restoration, 1660. 1 Bla. Com. 220.

QUEEN REGNANT. She who holds the crown in her own right. She has the same duties and prerogatives, etc., as a king. Stat. 1 Car. I. st. 3, c. 1; 1 Bla. Com. 218.

QUEEN'S ADVOCATE. See ADVOCATE.

QUEEN'S COUNSEL. Barristers appointed as counsel to the crown on the nomination of the lord chancellor, taking precedence over ordinary barristers, and having the privilege of wearing a silk gown as their professional robe. See [1898] App. Cas. 252.

If the sovereign is a king, they are king's counsel. See BARRISTERS; KING'S COUNSEL.

QUEEN'S ENEMIES. A phrase used in bills of lading importing a limitation upon the liability of the ship owner under the contract therein contained.

It includes the enemies of the sovereign of the carrier; 34 L. J. C. P. 14. It does not include the acts of an armed band of depredators; 1 Term 27; or a seizure of goods by a foreign revenue official for a breach of revenue laws; 10 Q. B. 517. It is less extensive in its scope than Restraint of Rulers and Princes (*q. v.*). See PUBLIC ENEMY.

QUEEN'S PROCTOR. A proctor or solicitor representing the crown in the former practice of the courts of probate and divorce. Moz. & W. Law Dict.

QUEEN'S REMEMBRANCER. See REMEMBRANCER.

QUERELA (Lat.). An action preferred in any court of justice. The plaintiff was called *querens*, or complainant, and his brief, complaint, or declaration was called *querela*. Jacob, Law Dict.

QUERELA CORAM REGE ET CONCILIO DISCUTIENDA ET TERMINANDA (Lat.). A writ by which one was called to justify a complaint of a trespass made to the king himself, before the king and his council. Reg. Orig. 124.

QUERELA INOFFICIOSI TESTAMENTI (Lat. complaint of an undutiful or unkind will). **In Civil Law.** A species of action allowed to a child who had been unjustly disinherited, to set aside the will, founded on the presumption of law, in such cases, that the parent was not in his right mind. Calvinus, Lex.; 2 Kent 327. See INOFFICIOUS TESTAMENT.

QUESTION. Something in controversy or which may be the subject of controversy. McFarlane v. Clark, 39 Mich. 45, 33 Am. Rep. 346.

A means sometimes employed, in some countries, by torture, to compel supposed great criminals to disclose their accomplices or to acknowledge their crimes.

This torture is called *question* because, as the unfortunate person accused is made to suffer pain, he is *asked questions* as to his supposed crime or accomplices. This is unknown in the United States. See Pothier, *Procédure Criminelle*, sect. 5, art. 2, § 3. See 4 Bla. Com. 325.

In Evidence. An interrogation put to a witness, requesting him to declare the truth of certain facts as far as he knows them.

Questions are either *general* or *leading*. By a *general* question is meant such a one as requires the witness to state all he knows, without any suggestion being made to him: as, *Who gave the blow?*

A leading question is one which leads the mind of the witness to the answer, or suggests it to him: as, *Did A B give the blow?*

The Romans called a question by which the fact or supposed fact which the inter-

rogator expected or wished to find asserted in and by the answer was made known to the proposed respondent, a *suggestive* interrogation: as, *Is not your name A B?* See LEADING QUESTION.

In Practice. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.

When the doubt or difference arises as to what the law is on a certain state of facts, this is said to be a *legal question;* and when the party demurs, this is to be decided by the court; when it arises as to the truth or falsehood of facts, this is a *question of fact,* and is to be decided by the jury. See JURY.

Proof beyond reasonable question is held synonymous with proof beyond reasonable doubt; Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775.

QUESTUS EST NOBIS. A writ of nuisance, which, by 15 Edw. I., lay against him to whom a house or other thing that caused a nuisance descended or was alienated; whereas, before that statute the action lay only against him who first levied or caused the nuisance to the damage of his neighbor. Cowell.

QUI IMPROVIDE. A *supersedeas* granted where a writ was erroneously sued out or misawarded.

QUI TAM (Lat. who as well). An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth, for example, as for himself. Espinasse, Pen. Act 5, 6; 1 Viner, Abr. 197; 1 Salk. ‡29, n.; Bac. Abr. See INFORMER; 10 Harv. L. Rev. 265.

The action for a penalty is a civil suit; Brophy v. Perth Amboy, 44 N. J. L. 217, reversing State v. Brophy, 43 N. J. L. 589; Waters v. Day, 10 Vt. 487; while the action for a statutory penalty is civil, the information *qui tam* is criminal; Canfield v. Mitchell, 43 Conn. 169; State v. R. Co., 30 Mo. App. 494.

Previous conviction on an indictment for violation of a statute is not necessary to sustain a *qui tam* action or action of debt for the penalty; Agnew v. McElhare, 18 Pa. 484; Meaher v. Chattanooga, 1 Head (Tenn.) 74. Such an action will not lie for a penalty prescribed by Stat. 32 Hen. VIII. for the sale of a pretended title to land; Milsaps v. Johnson, 22 Ga. 105.

QUIA (Lat.). **In Pleading.** Because. This word is considered a term of affirmation. It is sufficiently direct and positive for introducing a material averment. 1 Saund. 117, n. 4; Com. Dig. *Pleader* (C 77).

QUIA EMPTORES (Lat.). A name sometimes given to the English Statute of Westminster 3, 18 Edw. I. c. 1, which prohibited sub-infeudation; so called from its initial words. 2 Bla. Com. 91. It is expressly limited to estates in fee simple. It authorized every free man to sell his lands and tenants, but so that the feoffee should hold them of the same chief lord of the fee and by the same service and custom as his feoffor.

See MANOR; SUB-INFEUDATION; TENURE; ALOD.

QUIA TIMET (Lat. because he fears). A term applied to preventive or anticipatory remedies. According to Lord Coke, "there be six writs of law that may be maintained *quia timet,* before any molestation, distress, or impleading: as, *First,* a man may have his writ or mesne before he be distrained. *Second,* a *warrantia chartæ,* before he be impleaded. *Third,* a *monstraverunt,* before any distress or vexation. *Fourth,* an *audita querela,* before any execution sued. *Fifth,* a *curia claudenda,* before any default of enclosure. *Sixth,* a *ne injuste vexes,* before any distress or molestation. And these are called *brevia anticipantia,* writs of prevention." Co. Litt. 100. And see 7 Bro. P. C. 125.

These writs are generally obsolete. In chancery, when it is contemplated to prevent an expected injury, a bill *quia timet* is filed. See BILL QUIA TIMET.

QUIBBLE. A slight difficulty raised without necessity or propriety; a cavil.

QUICK DESPATCH. A steamer chartered to be discharged with customary "quick despatch" arrived in port, March 8th, was ordered to berth March 10th, and began to discharge March 11th at one o'clock, and completed March 20th at noon; discharged by "sticks" instead of platform scales, and from but one hatch, while there were four to be discharged from. It was held that this was not "customary quick despatch"; Harrison v. Smith, 28 U. S. App. 383, 67 Fed. 354, 14 C. C. A. 656. See DEMURRAGE; LAY DAYS.

QUICK WITH CHILD. See QUICKENING.

QUICKENING. In Medical Jurisprudence. The sensation a mother has of the motion of the child she has conceived.

The period when quickening is first experienced varies from the tenth to the twenty-fifth, but is usually about the sixteenth week from conception; Denman, Midw. 129.

It was formerly supposed that either the child was not alive until the time of quickening, or that it had acquired some new kind of existence that it did not possess before: hence the presumption of law that dates the life of the child from that time.

The child is, in truth, alive from the first moment of conception, and, according to its age and state of development, has different modes of manifesting its life, and, during a

portion of the period of gestation, by its motion. By the growth of the embryo, the womb is enlarged until it becomes of too great a size to be contained in the pelvis, it then rises to the abdomen, when the motion of the fœtus is for the first time felt.

Quickening as indicating a distinct point in the existence of the fœtus has no foundation in physiology; for it arises merely from the relation which the organs of gestation bear to the parts that surround them; it may take place early or late, according to the condition of these different parts, but not from any inherent vitality for the first time manifested by the fœtus.

As life, by law, is said to commence when a woman first becomes quick with child, so procuring an abortion after that period is a misdemeanor. Before this time, formerly the law did not interfere to prevent a pregnant woman convicted of a capital offence from being executed; 2 Hale, Pl. Cr. 413. If, however, the humanity of the law of the present day would not allow a woman to be executed who is, as Blackstone terms it, *privément enceinte*, Com. 129, *i. e.* pregnant, although not quick, it would be but carrying out the same desire to interfere with long-established rules, to hold that the penalty for procuring abortion should also extend to the whole period of pregnancy.

"Quick with child is having conceived; Evans v. People, 49 N. Y. 86; with quick child is where the child has quickened." 8 C. & P. 265; 2 Whar. & St. Med. Jur., 4th ed. III. § 7. See 26 Am. Dec. 60, n.; State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248.

QUID JURIS CLIMAT. A judicial writ issued out of the record of a fine which lay for the grantee of a reversion or remainder, when the particular tenant would not attorn. Cowell.

QUID PRO QUO (Lat. what for what). A term denoting the consideration of a contract. See Co. Litt. 47 *b*; 7 M. & G. 998.

It was used in the fifteenth century to express the equivalent or recompense without which a debt could not be established. Poll. Contr. 178. See, also, Ames, Lect. Leg. Hist., where the phrase is discussed.

QUIDAM (Lat. some one; somebody). A term used to express an unknown person, or one who cannot be named.

A *quidam* is usually described by his features, the color of his hair, his height, clothing, and the like, in any process which may be issued against him. Merlin, *Répert.*

QUIET ENJOYMENT. The name of a covenant in a lease, by which the lessor agrees that the lessee shall peaceably enjoy the premises leased. This covenant goes to the possession, and not to the title; Tobey v. Webster, 3 Johns. (N. Y.) 471. A covenant for quiet enjoyment does not extend as far as a covenant of warranty; Williams Wetherbee, 1 Aik. (Vt.) 233.

The covenant for quiet enjoyment is broken only by an entry, or lawful expulsion from, or some actual disturbance in, the possession; Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; Ham. Cov. 35; Donahoe v. Emery, 9 Metc. (Mass.) 63; Frost v. Earnest, 4 Whart. (Pa.) 86. But the tortious entry of the covenantor, without title, is a breach of the covenant for quiet enjoyment; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376. The covenant for quiet possession in a deed merges all previous representatives as to the possession, and limits the liability growing out of them; Andrus v. Refining Co., 130 U. S. 643, 9 Sup. Ct. 645, 32 L. Ed. 1054.

See COVENANT FOR QUIET ENJOYMENT.

QUIET TITLE. See BILL TO QUIET POSSESSION AND TITLE; BILL QUIA TIMET.

QUIETUS (Lat. freed or acquitted). **In English Law.** A discharge; an acquittance. An instrument by the clerk of the pipe and auditors in the exchequer, as proof of their acquittance or discharge of accountants. Cowell.

Discharge of a judge or attorney-general. 3 Mod. *99.

In American Law. The discharge of an executor by the probate court. Taylor v. Deblois, 4 Mas. 131, Fed. Cas. No. 13,790.

QUINTO EXACTUS (Lat.). **In Old English Law.** The fifth call or last requisition of a defendant sued to outlawry.

QUIT-CLAIM. A form of deed of the nature of a release containing words of grant as well as release. 3 Washb. R. P., 5th ed. 606.

The term is in constant and general use in American law to denote a deed substantially the same as a release in English law. It presupposes a previous or precedent conveyance or a subsisting estate and possession; Thornt. Conv. 44. It is a conveyance at common law, but differs from a release in that it is regarded as an original conveyance, at least in some states; Rogers v. Hillhouse, 3 Conn. 398; Hall's Lessee v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424; Doe v. Reed, 4 Scam. (Ill.) 117, 38 Am. Dec. 124. The operative words are remise, release, and forever quitclaim; Thornt. Conv. 44. Covenants of warranty against incumbrances by the grantor are usually added. See a full article in 12 Cent. L. J. 127; 34 *id.* 174.

The rule that a purchaser by a quitclaim deed is not to be regarded as a *bona fide* purchaser without notice of a prior incumbrance; O'Neal v. Seixas, 85 Ala. 80, 4 South. 745; Huff v. Crawford, 89 Tex. 214, 34 S. W. 606; has no application where the registry laws require the recording of such an incumbrance in order to make it a lien on lands in the hands of a subsequent purchaser; White v. McGarry, 47 Fed. 420. One ac-

cepting a quit-claim deed from his grantor is bound, at his peril, to ascertain what equities, if any, exist against his title; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140; but the receipt of the quit-claim deed does not of itself prevent the grantee from showing that he is a *bona fide* purchaser; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350; U. S. v. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; and the grantee under such deed may be a *bona fide* purchaser under the recording acts; Smith v. McClain, 146 Ind. 77, 45 N. E. 41.

A quit-claim deed conveys only the interest of the grantor at the time of the conveyance; Pleasants v. Blodgett, 39 Neb. 741, 58 N. W. 423, 42 Am. St. Rep. 624; but such a deed is as effectual to divest and transfer a complete title as any other form of conveyance; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. Such a deed from a judgment debtor of land, sold under execution, passes merely the right of redemption and does not relieve the land of dower of the debtor's wife, though she did not reside in the state when the deed was executed; Lynde v. Wakefield, 19 Mont. 23, 47 Pac. 5. A title acquired subsequently to the execution of a quit-claim, with special warranty simply, does not enure to the grantee, and a subsequent purchaser from the grantor is not affected by the recording of the deed executed before the grantor acquired the title; Bennett v. Davis, 90 Me. 457, 38 Atl. 372.

A grantee in a warranty deed whose immediate grantor also took under a warranty deed, is entitled to protection as a *bona fide* purchaser notwithstanding the fact that remotely in the chain of title there exists a quit-claim deed; Sherwood v. Moelle, 36 Fed. 478, 1 L. R. A. 797; Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661; but one who takes a quit-claim deed is presumed to do so with notice of any outstanding equity interest and he therefore knows that he is taking a doubtful title and is put on inquiry concerning it. "The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title;" Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243, per Valentine, J., who is quoted on this point by Brewer, J., in Sherwood v. Moelle, 36 Fed. 478, 1 L. R. A. 797, and referred to as "one of the most painstaking and thoughtful judges I know. He has collected the various authorities."

Under a Massachusetts statute, a quit-claim deed takes precedence over a prior deed, recorded subsequently to the quit-claim, where the grantee in the latter is without notice of the other; Stark v. Boynton, 167 Mass. 443, 45 N. E. 764. A quit-claim deed, duly recorded, is held to be within the protection of a statute providing that deeds shall take effect only on delivery for record; Schott v. Dosh, 49 Neb. 187, 68 N. W. 346, 59 Am. St. Rep. 531; where will be found much learning on the subject of these deeds.

QUIT-RENT. A rent paid by the tenant of the freehold, by which he goes quit and free,—that is, discharged from any other rent. 2 Bla. Com. 42.

In England, quit-rents were rents reserved to the king or a proprietor, on an absolute grant of waste land, for which a price in gross was at first paid, and a mere nominal rent reserved as a feudal acknowledgment of tenure. Inasmuch as no rent of this description can exist in the United States, when a quit-rent is spoken of some other interest must be intended. Marshall v. Conrad, 5 Call (Va.) 364. A perpetual rent reserved on a conveyance in fee-simple is sometimes known by the name of quit-rent in Massachusetts.

See GROUND-RENT; RENT.

It was in England a survival of feudalism. During the Middle Ages the villeins of England gradually commuted their food and labor dues to an annual money payment, which came to be known as a quit-rent, because by it the land was freed of all feudal dues except fealty. It became an annual fixed and heritable charge upon the land and created a socage tenure. At the beginning of the sixteenth century money rents had become general. The feudal notion of land tenure, that the soil belonged to the crown, was carried to the new world. It may be traced in all the early charters. Sometimes it was granted to the proprietors and subinfeudation was permitted. Quit-rents were mentioned in the grants to the Duke of York and in the charter of Georgia. It was a part of the general colonial policy of the British crown. As a means of emphasizing the imperial control its success became of the utmost importance. The system broke down in New England, met opposition in New York and was ineffective in Pennsylvania; in the southern colonies it became firmly rooted. The rent usually varied between 2 shillings and 4 shillings per 100 acres. In Pennsylvania it fell as low as one-half penny per acre, and sometimes the rent was a red rose, a bushel of wheat, or a beaver skin. In all the colonies except Maryland the history of the quit-rent was one of persistent struggle between the governor and the assembly, the former representing the crown or proprietor and the latter the tenants. B. W. Bond, Jr., in 17 Am. Hist. Rev. 496.

QUO ANIMO (Lat. with what intention). The intent; the mind with which a thing has been done: as, the *quo animo* with which the words were spoken may be shown by the proof of conversations of the defendant relating to the original defamation. Kennedy v. Gifford, 19 Wend. (N. Y.) 296.

QUO JURE, WRIT OF. **In English Law.** The name of writ commanding the defendant to show *by what right* he demands common of pasture in the land of the complainant who claims to have a fee in the same. Fitzh. N. B. 299.

QUO MINUS (Lat.). The name of a writ. In England, when the king's debtor is sued in the court of the exchequer, he may sue out a writ of *quo minus*, in which he suggests that he is the king's debtor, and that the defendant has done him the injury or damage complained of, *quo minus sufficiens existit*, by which *he is less able* to pay the king's debt. This was originally requisite in order to give jurisdiction to the court of exchequer; but now this suggestion is a mere form. 3 Bla. Com. 46.

QUO WARRANTO (Lat. by what authority). **In Practice.** The name of a writ (and also of the whole pleading) by which the government commences an action to recover an office or franchise from the person or corporation in possession of it.

The writ commands the sheriff to summon the defendant to appear before the court to which it is returnable, to show (*quo warranto*) *by what authority* he claims the office or franchise. It was a writ of right, a civil remedy to try the mere right to the franchise or office, where the person in possession never had a right to it or has forfeited it by neglect or abuse; 3 Bla. Com. 262, 263.

The action of *quo warranto* was prescribed by the Statute of Gloucester, 6 Edw. I., and is a limitation upon the royal prerogative. Before this statute, the king, by virtue of his prerogative, sent commissions over the kingdom to inquire into the right to all franchises, *quo jure quove nomine illi retinent*, etc.; and, as they were grants from the crown, if those in possession of them could not show a charter, the franchises were seized into the king's hands without any judicial proceeding. Like all other original civil writs, the writ of *quo warranto* issued out of chancery, and was returnable alternatively before the king's bench or justices in eyre; Co. 2d Inst. 277, 494; 2 Term 549.

Originally it was a proceeding of a criminal nature by the attorney general to punish usurpation of office; State v. Lawrence, 38 Mo. 535. This writ fell into disuse and its place was taken at an early date by an information in the nature of a *quo warranto*.

The statute of 9 Anne was passed to make the practice more speedy and effective. The writ could issue by leave of court at the relation of any person or persons desiring to sue or prosecute the same. The law is now chiefly statutory. Statutes referring to "*quo warranto*" are usually held to include information in the nature of *quo warranto;* State v. Gleason, 12 Fla. 190; State v. R. Co., 34 Wis. 197 (so of a state constitution; State v. Inv. Ass'n, 142 Mo. 325, 41 S. W. 916); but it has been held otherwise; State v. Ins. Co., 8 Mo. 330.

An *information in the nature of quo warranto*, though in *form* a criminal; see Robinson v. Jones, 14 Fla. 256; is in *substance* a civil, proceeding, to try the mere right to the franchise or office; 3 Bla. Com. 263; Com. v. County Com'rs, 1 S. & R. (Pa.) 382; 2 Kent 312; Thompson v. People, 23 Wend. (N. Y.) 537, 591; but see People v. R. Co., 13 Ill. 66.

It is a matter of sound discretion to grant or refuse a writ of *quo warranto*, or an information in the nature thereof; Lynch v. Martin, 6 Houst. (Del.) 487; Com. v. Reigart, 14 S. & R. (Pa.) 216; People v. Keeling, 4 Colo. 129; but it has been held that this absolute discretion is only when a mere public right is asserted and that when a private right is involved, as when one is claiming an office, he is entitled to the writ as a matter of right; State v. Burnett, 2 Ala. 140; but when the information has been allowed to be filed, the court has no more power to dispense with the law applicable, or to refuse to enforce it, on the ground that the case is unimportant or impolitic, than in any other case; when the information is filed, all the discretionary power of the court is expended; State v. Brown, 5 R. I. 1.

A statutory election contest and *quo warranto* proceedings are accumulative remedies unless it is otherwise provided by statute; State v. Elliott, 117 Ala. 150, 23 South. 124.

A constitutional provision that the right of trial by jury shall remain inviolate, does not guarantee the right of trial by jury in *quo warranto* proceedings; State v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

If the proceedings refer to the usurpation of the franchises of a municipal corporation, the right to file the information is in the state, at the discretion of the attorney-general; Robinson v. Jones, 14 Fla. 256; see Rice v. Bk., 126 Mass. 300; Gibbs v. Somers Point, 49 N. J. L. 515, 10 Atl. 377; not of citizens; *id.* Individuals cannot take proceedings to dissolve a corporation; Centre & K. T. P. R. Co. v. McConaby, 16 S. & R. (Pa.) 144; but in regard to the election of a corporate officer, the writ may issue at the suit of the attorney-general or of any person interested; State v. Turnpike Co., 21 N. J. L. 9; Murphy v. Bank, 20 Pa. 415; but a private citizen must have some interest; State v. Vail, 53 Mo. 97. See Chicago v. People, 80 Ill. 496; State v. Martin, 46 Conn. 479. A stock-holder, whose votes were wrongly rejected at a corporate election, is the proper party to institute proceedings of *quo warranto* against the officers who claimed to have been elected, though the petitioner was at the same time elected to an office and his title was in dispute; Com. v. Stevens, 168 Pa. 582, 32 Atl. 111. The attorney-general may act without leave of court; Com. v. Walter,

83 Pa. 105, 24 Am. Rep. 154; Atty. Gen. v. R. Co., 38 N. J. L. 282; State v. Gleason, 12 Fla. 190; but a private relator may not; Com. v. Arrison, 15 S. & R. (Pa.) 127, 16 Am. Dec. 531. Leave is granted on a petition or motion with affidavits, upon which a rule to show cause is granted; People v. Waite, 70 Ill. 25. The writ lies against the corporate body, if it is to restrain a usurpation; Miller v. Ins. Co., 50 Mo. 56; or enforce a forfeiture; State v. Barron, 57 N. H. 498; but if it is to inquire whether a corporation has been legally organized, the writ lies against the individuals; People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 34. Whether a corporation *de facto* is also one *de jure* can be determined only in *quo warranto;* Samuels v. Drainage Com'rs, 125 Ill. 536, 17 N. E. 829. Corporators and corporate officers need not be made parties; New Orleans D. R. Co. v. Louisiana, 180 U. S. 320, 21 Sup. Ct. 378, 45 L. Ed. 550.

In New York a statutory action in the nature of a *quo warranto* has been substituted. Code Civ. Proc. § 1983. This is a civil writ of legal, not equitable, cognizance; People v. Clute, 52 N. Y. 576. So in other states it is subject to the rules strictly applicable to civil proceedings; State v. Price, 50 Ala. 568; State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265. The terms "*quo warranto*" and "information in the nature of a *quo warranto*" are synonymous; State v. R. Co., 34 Wisc. 197; *contra*, State v. Stone, 25 Mo. 555; State v. Johnson, 26 Ark. 281.

Although *quo warranto* proceedings will lie against a municipal corporation in this country, yet they are seldom employed. See a case in State v. Bradford, 32 Vt. 50; and see State v. Miller, 66 Mo. 328; State v. Cahaba, 30 Ala. 66. They will lie against members of a city council; Com. v. Allen, 70 Pa. 465; People v. Hall, 80 N. Y. 117; State v. Gray, 23 Neb. 365, 36 N. W. 577; *contra*, Wyatt v. Buell, 47 Cal. 624; State v. Tomlinson, 20 Kan. 692; school trustees; Renwick v. Hall, 84 Ill. 162; a sheriff; People v. Mayworm, 5 Mich. 146; Com. v. Walter, 83 Pa. 105, 24 Am. Rep. 154; a lieutenant-governor; State v. Gleason, 12 Fla. 265; a governor; Attorney General v. Barstow, 4 Wisc. 567; a judge of probate; People v. Heaton, 77 N. C. 18; a mayor; People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312; an elector of president of the United States, proceedings being taken in the name of the United States; State v. Bowen, 8 S. C. 400; a major-general of militia; State v. Brown, 5 R. I. 1; so of other militia officers; Com. v. Small, 26 Pa. 31; State v. Utter, 14 N. J. L. 84; but see State v. Wadkins, 1 Rich. (S. C.) 42; superintendent of the poor; Taggart v. James, 73 Mich. 234, 41 N. W. 426; but not against a policeman; Atty. Gen. v. Cain, 84 Mich. 223, 47 N. W. 484. There must first be a user of the office; People v. Callaghan, 83 Ill. 128; 5 T. R. 85; but taking the oath; *id.;* or exercising its functions without taking the oath; Hyde v. State, 52 Miss. 665; is enough.

The writ lies to test the validity of a dramshop license; Martens v. People, 186 Ill. 314, 57 N. E. 871; *contra*, Hargett v. Bell, 134 N. C. 394, 46 S. E. 749; but not against the sheriff for a failure to suppress a mob; State v. McLain, 58 Ohio St. 313, 50 N. E. 907; nor in the name of a state at the relation of a private person to dissolve a corporation or seize its franchise; 7 N. J. L. J. 82.

Mandamus will not lie to compel the Attorney-General to give leave to begin *quo warranto* proceedings, a discretion being entrusted to him in such matters; People v. Healy, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603; if he refuses, one claiming election to an office may by leave of court bring *quo warranto* by his own relation; State v. Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573.

Quo warranto lies against a corporation to determine whether there has been a misuser or a nonuser of corporate franchises, or whether the corporation has usurped franchises never granted to it; but does not lie to test the legality of any act of the corporation; State v. Road Co., 37 Mo. App. 496.

Quo warranto is the only direct and adequate remedy for trying title to public office. The review of an election to public office by *certiorari* may determine collateral questions respecting validity of laws or ordinances, but can have no effect as a bar in a subsequent information in the nature of a *quo warranto.* The validity of proceedings for the election of a minor officer such as janitor of a court-house, may be reviewed on *certiorari.* An incumbent cannot proceed in *quo warranto* against one not in possession of the office, he must await the attack of his adversary; State v. Board, 58 N. J. L. 340, 33 Atl. 737.

Pleadings in *quo warranto* are anomalous. In ordinary legal proceedings, the plaintiff, whether he be the state or a person, is bound to show a case against the defendant. But in an information of *quo warranto*, as well as in the writ for which it is substituted, the order is reversed. The state is not bound to show anything, but the defendant is bound to show that he has a right to the franchise or office in question; and if he fail to show authority, judgment must be given against him; 4 Burr. 2146, 2127; Ang. & A. Corp. 636. To the writ of *quo warranto* the defendant simply pleaded his charter, which was a full answer to the writ; just as before the statute of Edward I. the production of the charter to the king's commissioners was full authority for the possession of the franchise or office. But to an information of *quo warranto* the plea of the defendant consists of his charter, with an *absque hoc*

denying that he usurped the franchise, and concludes with a verification. The plea is in *form* a special traverse, but in *substance* it is not such. The information was originally a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise; therefore the information charged usurpation, and the defendant was compelled to deny the usurpation, as well as to show his charter, which he did in the form of an *absque hoc* to his plea. But when the proceeding ceased to be criminal, and, like the writ of *quo warranto*, was applied to the mere purpose of trying the civil right to the franchise, the *absque hoc* denying the usurpation became immaterial, though it is still retained in the forms; 4 Cow. (N. Y.) 106, with full and learned note. In Coke's Entries 351, there is a plea to an information of *quo warranto* without the *absque hoc*. The *absque hoc*, being immaterial, should not be answered by the replication, as it must always be in a special traverse; but the charter, in the first part of the plea, though occupying the place of an inducement, must be denied by the replication, its existence and character being the sole question in controversy upon which the legality of the acts of the corporation turns; Gilb. Ev. 6, 145; 10 Mod. 111, 296.

Until the statute 32 Geo. III. c. 58, the defendant could not plead double in an information of *quo warranto* to forfeit an office or franchise; 1 P. Wms. 220; People v. Richardson, 4 Cow. (N. Y.) 113; State v. Roe, 26 N. J. L. 215.

In information of *quo warranto* there are two forms of judgment. When it is against an officer or against individuals, the judgment is *ouster;* but when it is against a corporation by its corporate name, the judgment was *ouster* and *seizure*. In the first case, there being no franchise forfeited, there is none to seize; in the last case, there is; consequently the franchise is seized; 2 Kent 312, and note; 2 Term 521, 550. The judgment is ouster and dissolution; People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 34; but there may be a judgment of ouster of a particular franchise, and not of the whole charter; People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33. See as to the judgment, State v. Bradford, 32 Vt. 50; People v. Richardson, 4 Cow. (N. Y.) 120. By such judgment of ouster and seizure the franchises are not destroyed, but exist in the hands of the state; but the corporation was destroyed, and ceased to be the owner or possessor of lands or goods, or rights or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the state. But, later, it has been held that the judgment must be confined to seizure of the franchises; if it be extended to seizure of the property, so far it is erroneous; State Bk. v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

After judgment of ouster in *quo warranto*, a *de jure* officer may recover the emoluments of the office, less the reasonable expenses incurred in earning the same, where the *de facto* officer entered the office in good faith and under color of title; Albright v. Sandoval, 216 U. S. 331, 30 Sup. Ct. 318, 54 L. Ed. 502.

Quo warranto lies against a corporation to determine its right to exercise its franchises, but not to divest it of the ownership of property, unless acquired by a usurpation of the rights of the state; State v. R. Co., 50 Ohio St. 239, 33 N. E. 1051. See SCIRE FACIAS.

The principle of forfeiture is that the franchise is a trust; and all the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. And the corporate powers must be construed strictly, and must be exercised in the manner and in the forms and by the agents prescribed in the charter; 2 Kent 298, 299; 1 Bla. Com, 485; People v. Trustees of College, 5 Wend. (N. Y.) 211; Chesapeake & O. Canal Co. v. R. Co., 4 Gill & J. (Md.) 121.

Cases of forfeiture may be divided into two great classes. *Cases of perversion:* as where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant. In such cases, unless the perversion is such as to amount to an *injury to the public* who are interested in the franchise; Cleaver v. Com., 34 Pa. 283; it will not work a forfeiture. *Cases of usurpation:* as, where a corporation exercises a power which it has no right to exercise. In such cases the cause of forfeiture is not determined by any question of *injury to the public*, but the abuse which will work a forfeiture need not be of any particular measure or extent; 3 Term 216, 246; People v. Turnpike Road, 23 Wend. (N. Y.) 242; State v. Brown, 34 Miss. 688; People v. Ridgley, 21 Ill. 65. See State v. Cahaba, 30 Ala. 66. In case of usurpation of an office or franchise by an individual, it must be of a public nature to be reached by this writ; People v. Ridgley, 21 Ill. 65; State v. Hunton, 28 Vt. 594; State v. Fisher, 28 Vt. 714; Hastings v. R. Co., 9 Cush. (Mass.) 596.

A corporation may in *quo warranto* be subjected to a substantial fine as well as a judgment of ouster; Standard Oil Co. v. Missouri, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936.

By the statute of Anne, an information in the nature of *quo warranto* may by leave of court be applied to disputes between party and party about the right to a corporate office or franchise; State v. Gummersall, 24 N. J. L. 529; Field v. Com., 32 Pa. 478; Lindsey v. Atty. Gen., 33 Miss. 508; People v. Scannell, 7 Cal. 432. And the person at

whose instance the proceeding is instituted is called the *relator;* 3 Bla. Com. 264. The court will not give leave to private informers to use the king's name and suit to call in question the validity of a franchise, when such persons apply under very unfavorable circumstances; 4 Burr. 2123. As to where the burden falls of showing the lawful or unlawful character of a franchise or right, see Com. v. Bk., 28 Pa. 383; People v. Mayworm, 5 Mich. 146; People v. Toll-Road Co., 100 Cal. 87, 34 Pac. 522.

The information, it is said, may be filed after the expiration of the term of office; Burton v. Patton, 47 N. C. 124, 62 Am. Dec. 194; but see High, Extr. Leg. Rem. § 633.

As to the right to maintain such proceedings for the vindication of a private right, see State R. Commission v. People, 44 Colo. 345, 98 Pac. 7, 22 L. R. A. (N. S.) 810. As to the right to trial by jury, see State v. Cobb, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639.

QUOAD HOC (Lat. as to this). A term frequently used to signify, *e. g., as to the thing named*, the law is so and so.

QUOD BILLA CASSETUR. See BILLA CASSETUR; CASSETUR BREVE.

QUOD CLERICI BENEFICIATI DE CANCELLARIA. A writ to exempt a clerk of the chancery from the contribution towards the proctors of the clergy in parliament, etc. Reg. Orig. 261.

QUOD COMPUTET (Lat. that he account). The name of an interlocutory judgment in an action of account-render; also the name of a decree in the case of creditors' bills against executors or administrators. Such a decree directs the master to take the accounts between the deceased and all his creditors, to cause the creditors, upon due and public notice, to come before him to prove their debts, at a certain place and within a limited period, and also directs the master to take an account of all personal estate of the deceased in the hands of the executor or administrator; Story, Eq. Jur. § 548. See JUDGMENT; ACCOUNT; CAPIAS AD COMPUTANDUM.

QUOD CUM (Lat.). **In Pleading.** For that whereas. A form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim; as, assumpsit and case. Hardr. 1; 2 Show. 180.

This form is not allowable to introduce the matter which constitutes the gravamen of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely. Hence in those actions, as trespass *vi et armis*, in which the complaint is stated without matter of inducement, *quod cum* cannot be properly used; 2 Bulstr. 214. But its improper use is cured by verdict; Horton v. Monk, 1 P. A. Browne (Pa.) 68; Comyns, Dig. *Pleader* (C 86).

QUOD EI DEFORCEAT (Lat.). The name of a writ given by stat. Westm. 2, 13 Edw. I. c. 4, to the owners of a particular estate, as for life, in dower, by the curtesy, or in fee-tail, who are barred of the right of possession by a recovery had against them through their default or non-appearance in a possessory action; by which the right was restored to him who had been thus unwarily deforced by his own default. 3 Bla. Com. 193.

QUOD PERMITTAT (Lat.). **In English Law.** That he permit. The name of a writ which lies for the heir of him who is disseised of his common of pasture against the heir of the disseisor, he being dead. *Termes de la Ley.*

QUOD PERMITTAT PROSTERNERE (Lat. that he give leave to demolish). **In English Law.** The name of a writ which commands the defendant to permit the plaintiff to abate the nuisance of which complaint is made, or otherwise to appear in court and to show cause why he will not. On proof of the facts, the plaintiff is entitled to have judgment to abate the nuisance and to recover damages. This proceeding, on account of its tediousness and expense, has given way to a special action on the case.

QUOD PERSONA NEC PREBENDARIUS. A writ which lay for spiritual persons, distrained in their spiritual possessions for payment of a fifteenth with the rest of the parish. Fitz. Nat. Brev. 391.

QUOD PROSTRAVIT (Lat.). The name of a judgment upon an indictment for a nuisance, that the defendant do abate such nuisance.

QUOD RECUPERET. See JUDGMENT QUOD RECUPERET.

QUORUM. Used substantively, quorum signifies the number of persons belonging to a legislative assembly, a corporation, society, or other body, required to transact business. A quorum is such a number of the officers or members of any body as is competent by law or constitution to transact business. Snider v. Rinehart, 18 Colo. 18, 31 Pac. 716. There is a difference between an act done by a definite number of persons, and one performed by an indefinite number; in the first case a majority is required to constitute a quorum, unless the law expressly directs that another number may make one; in the latter case any number who may be present may act, the majority of those present having, as in other cases, the right to act; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; 9 B. & C. 856; Horton v. Baptist Church, 34 Vt. 316.

It has been said that there are two rules as to quorum in legislative bodies: one, where the quorum is fixed by the power creating

the body, in which case a majority of the specified quorum may transact business; the other, where the quorum is not fixed by such power, in which case the general rule is that a quorum is a majority of all the members; Cleveland Cotton Mills v. Co. Com'rs, 108 N. C. 678, 13 S. E. 271; Cush. Elect. § 247.

In England where the articles of a company provide that the business of a corporation shall be conducted by not less than a specified number of directors, the words are mandatory, and at least the specified number must join in the performance of any act; 16 Ch. D. 681.

In a private corporation a majority of the directors must be present to constitute a quorum, unless the charter, a valid by-law, or a usage provides a different number; 3 Thomps. Corp. § 3913; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; but when a quorum is present a majority may act; Foster v. Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Wells v. Rubber Co., 19 N. J. Eq. 402. It is settled that those stockholders who attend a duly called stockholders' meeting may transact the business of that meeting although a majority in interest or number are not present; 1 Cook, St. & Stockh. § 607. Where a meeting is composed of an indefinite number of persons like stockholders, that is the rule; but where a definite number is involved, as directors, a majority must be present; Craig v. Church, 88 Pa. 42, 32 Am. Rep. 417.

Where articles of association did not prescribe the number of directors necessary for a quorum, it was held that the number who usually transacted the business constituted a quorum; L. R. 4 Eq. 233. A single shareholder was held not to constitute a meeting; 2 Q. B. Div. 26; at least two persons are necessary to make a corporate meeting; 46 L. J. 104. Where one stockholder, holding also proxies of the three remaining stockholders, held a meeting and voted and elected officers, the meeting was held invalid; W. N. [1877] 223. But see MEETINGS. When an authority is confided to several persons for a private purpose, all must join in the act, unless otherwise authorized; Gildersleeve v. Board, 17 Abb. Pr. (N. Y.) 201; otherwise if the trust is a continuous public duty; Gildersleeve v. Board, 17 Abb. Pr. (N. Y.) 201. See AUTHORITY; MAJORITY; PLURALITY; MEETINGS; Cook, Stockholders.

The rule of the lower house of congress, that the names of the members present who do not vote shall be noted and counted in determining the presence of a quorum to transact business, is a constitutional mode of ascertaining the presence of a quorum; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321. In such case no quorum is present until such a number convene.

QUORUM, JUSTICES OF THE. The ancient commissions to justices of the peace ran: "*Assignavimus etiam vos et quolibet duos vel plures vestrum* (quorum *aliquem vestrum* A, B, C, D, etc., *unum esse volumus*) *justitiarios nostros ad enquirendum*," etc. We have appointed you and any two or more of you (of whom we wish any one of the following, A, B, C, D, etc., to be one) as our justices, etc. The intention was that only those justices who were learned in the law should be of the *quorum*. They are said to have existed in Massachusetts; see Taylor's Life of Judge Philips 347.

QUOTA. That part which each one is to bear of some expense: as, his quota of this debt; that is, his proportion of such debt.

QUOTATION. In Practice. The allegation of some authority or case, or passage of some law, in support of a position which it is desired to establish.

The transcript of a part of a book or writing from a book or paper into another.

If the quotation is fair, and not so extensive as to extract the whole value or the most valuable part of an author, it will not be a violation of the copyright. It is mostly difficult to define what is a fair quotation. When the quotation is unfair, an injunction will lie to restrain the publication. See 17 Ves. 424; 1 Bell, Com. 121.

"That part of a work of one author found in another," observed Lord Ellenborough, "is not of itself piracy, or sufficient to support an action; a man may adopt part of the work of another; he may so make use of another's labors for the promotion of science and the benefit of the public." 1 Camp. 94. See Curtis, Copyr. 242; 3 Myl. & C. 737; 17 Ves. 422; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; 2 Beav. 6; ABRIDGMENT; COPYRIGHT; PIRACY.

See MARKET QUOTATION; PROPERTY.

QUOTIENT VERDICT. See VERDICT.

QUOUSQUE. A Latin adverb, which signifies how long, how far, until.

In old conveyances it is used as a word of limitation; 10 Co. 41.

In practice, it is the name of an execution which is to have force until the defendant shall do a certain thing. Of this kind is the *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken into execution, and he is imprisoned *until* he shall satisfy the execution; 3 Bouvier, Inst. n. 3371.

R

R.; R. ET I. Rex (or Regina); Rex (or Regina) and Imperator (or Imperatrix). King (or queen); king (or queen) and emperor (or empress). Abbreviations of the titles of the British sovereign.

RACE. The term primarily means an ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source. A tribal or national stock, a division or subdivision of one of the great racial stocks of mankind distinguished by minor peculiarities. The word "race" connotes descent; In re Halladjian, 174 Fed. 834.

RACE DISTINCTIONS. See NEGRO.

RACING. See HORSE RACE.

RACK. An engine with which to torture a supposed criminal, in order to extort a confession of his supposed crime and the names of his supposed accomplices.

RACK RENT. In English Law. The full extended value of land left by lease, payable by a tenant for life or years. Wood, Inst. 192.

RADIOTELEGRAPHY. See WIRELESS TELEGRAPH.

RADIUS. A straight line drawn from the centre of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the centre and the circumference. State v. Berard, 40 La. Ann. 174, 3 South. 463.

An act prohibiting private markets within a radius of six squares of any public market was held to mean six squares measured on city streets; State v. Barthe, 41 La. Ann. 46, 6 South. 531.

A contract not to practise dentistry within a radius of ten miles was held a valid contract not to practise within ten miles of the centre point of the village; Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64.

RADOUR. In French Law. A term including the repairs made to a ship, and a fresh supply of furniture and victuals, munitions, and other provisions required for the voyage. Pardessus, n. 602.

RAFFLE. A kind of lottery. A raffle may be described as a species of "adventure or hazard," but has been held not to be a lottery. State v. Pinchback, 2 Mills (S. C.) 128. See LOTTERY.

RAFT. See LOGS.

RAGMAN'S-ROLL, or RAGIMUND'S ROLL. A roll, called from one Ragimund, or *Ragimont*, a legate in Scotland, who, summoning all the beneficed clergymen in that kingdom, caused them on oath to give in the true value of their benefices, according to which they were afterwards taxed by the court of Rome. Whart. Law Lex.

RAILROAD. A road graded and having rails of iron or other material for the wheels of railroad cars to run upon.

In their modern form, railroads are usually owned by corporations; Denver & S. R. Co. v. R. Co., 2 Colo. 673. But a private individual may construct and work a railroad if he can obtain a right of way by purchase; Appeal of McCandless, 70 Pa. 210; L. R. 4 H. L. 171; Bank of Middlebury v. Edgerton, 30 Vt. 182.

Railroads were once regarded as public highways upon which private individuals might place their cars, to be drawn by the company; Com. v. R. Co., 12 Gray (Mass.) 180; Trunick v. Smith, 63 Pa. 18. A land grant conditioned that the road should be a public highway for the government, free of toll, applied only to the tracks; Lake Superior & M. R. Co. v. U. S., 93 U. S. 442, 23 L. Ed. 965.

Railroad and railway are ordinarily interchangeable terms; Gyger v. R. Co., 136 Pa. 96, 20 Atl. 399; Old Colony Trust Co. v. Rapid T. Co., 192 Pa. 596, 44 Atl. 319; State v. Brin, 30 Minn. 522, 16 N. W. 406; Massachusetts L. & T. Co. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46; where a summons was against a railroad company and a judgment was entered against a railway, it was held immaterial; Chicago & I. A. L. R. Co. v. Johnston, 89 Ind. 88; so in Georgia P. R. Co. v. Propst, 83 Ala. 518, 3 South. 764. But in Munkers v. R. Co., 60 Mo. 334, railway was held to mean the rails when laid, and railroad the highway in which the railway is laid.

A railroad and a street railway are also held to be distinct and different things; Louisville & P. R. Co. v. R. Co., 2 Duv. (Ky.) 175. Whether "railroad" in a statute includes street railways depends upon the general intent of the act and the circumstances. There is probably no rule of law on the subject. See article in 33 Amer. L. Rev. 465. Thus an act forbidding the obstruction of a railroad track applies to both; Carr v. R. R., 74 Ga. 78; so does an act giving powers to railroad companies to enter into operating contracts; Chicago v. Evans, 24 Ill. 52; and an act authorizing the lease of one railroad to another; Hestonville, M. & F. P. R. Co. v. Philadelphia, 89 Pa. 210; and an act giving a right of action against any railroad for death by negligence; Johnson's Adm'r v. Ry. Co., 10 Bush (Ky.) 231; and an act relating to crossing the tracks of a railroad; Louisville & N. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279, 62 Am. St. Rep. 116; but a constitutional clause forbidding the merger of

competing railroads was held not to apply to street railways; Gyger v. R. Co., 136 Pa. 96, 20 Atl. 399; and so of an act giving a mechanic's lien upon a "railroad or other structure;" Front St. C. R. Co. v. Johnson, 2 Wash. St. 115, 25 Pac. 1084, 11 L. R. A. 693 (*contra*, 3 Mo. App. 559); and an early act (1857) giving a penal action against railroad companies for demanding fares in excess of the amount allowed by law; Moneypenny v. R. Co., 4 Abb. Pr. N. S. (N. Y.) 357; and an act giving a laborer's lien upon a railroad or other structure and the land upon which it is erected; Front St. C. R. Co. v. Johnson, 2 Wash. St. 112, 25 Pac. 1084, 11 L. R. A 693. A passenger railway in Fairmount Park, Philadelphia, where there are no streets but only country roads, is not a street passenger railway within the constitution of the state which requires local consent for building; Philadelphia v. McManes, 175 Pa. 33, 34 Atl. 331.

A railroad company is defined as an association of men who engage in the business of hauling passengers and freight; In re Ferguson Contracting Co., 183 Fed. 882. Neither a logging road; Ellington v. Lumber Co., 93 Ga. 53, 19 S. E. 21; McKivergan v. Lumber Co., 124 Wis. 60, 102 N. W. 332; nor a road of rails used only in the construction of a railroad; Beeson v. Busenbark, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839; nor a construction train; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840; come within the legal conception.

A railroad corporation is a person within the meaning of the 14th amendment; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

A railroad company is a *quasi*-public corporation and owes certain duties to the public; Chicago, M. & St. R. Co. v. Ry. Co., 27 U. S. App. 1, 61 Fed. 993, 9 C. C. A. 659. In Georgia R. & Bank Co. v. Smith, 128 U. S. 182, 9 Sup. Ct. 47, 32 L. Ed. 377. it was said that a railroad company is a private corporation though its uses are public. In Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, it was said that a railroad is a public highway and is created for public purposes.

The duty arising from the ownership of the franchise of a railroad is merely to meet the public requirements, and where the traffic is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned; State v. Jack, 145 Fed. 281, 76 C. C. A. 165.

The charter of a public railroad requires the grant of the supreme legislative authority of the state; it is usually made to a private corporation, but sometimes upon a public one, where the stock is owned and the company controlled by the state; Redf. Railw. 17; Bradley v. R. Co., 21 Conn. 304; Turnpike Co. v. Wallace, 8 Watts (Pa.) 316. It is sometimes by special act, but now, more commonly, under general laws. A railroad may be chartered by act of congress; Union P. R. Co. v. Lincoln Co., 1 Dill. 314, Fed. Cas. No. 14,378. If created by two states, it is a corporation of each state; Covington & C. B. Co. v. Mayer, 31 Ohio St. 317. See MERGER. Such charter, when conferred upon a private company or a natural person, as may be, is, in the absence of constitutional or statutory provisions to the contrary, irrevocable, and only subject to general legislative control, the same as other persons natural or artificial; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668, 4 L. Ed. 629; 2 Kent 275; Thorpe v. R. Co., 27 Vt. 140, 62 Am. Dec. 625.

The operation of railroads, including the running of trains, is within legislative power; it may be delegated in details to an administrative body. This regulation cannot be exercised by the courts; Honolulu R. T. & L. Co. v. Hawaii, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186; such a body is not a court; Central V. R. Co. v. Redmond, 189 Fed. 683.

See IMPAIRING THE OBLIGATION OF CONTRACTS.

But a company must be held to have accepted its rights, etc., subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, subject to the constitutional guarantee for the protection of its property; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

An act requiring that all regular passenger trains shall stop at all railroad stations and county seats is unconstitutional when its effect is to compel a fast interstate mail train to turn aside from its direct route to a county seat three and a half miles away, the company having provided ample accommodations for travel from such county seat: Illinois Cent. R. Co. v. Illinois, 163 U. S. 143, 16 Sup. Ct. 1096, 41 L. Ed. 107; otherwise, if applicable only to trains running within a state; Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064. An act requiring railroad companies where there is a telegraph office to note on a blackboard in each station whether trains are late, etc., and if so, how late, is constitutional; Pennsylvania Co. v. State, 142 Ind. 428, 41 N. E. 937.

A state statute which requires railroad companies to provide separate accommodations for white and colored persons and makes a passenger who insists upon occupying a coach other than the one set apart for his race, liable to a penalty, does not violate either the thirteenth or the fourteenth amendment; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

Their charters are now usually subject to legislative control, either by virtue of a right reserved in the charter or in general laws subject to which they are organized. In either case legislation is binding upon the com-

pany. But where there is a right to repeal the charter for cause, it cannot be done without inquiry; Baltimore v. R. Co., 1 Abb. (U. S.) 9, Fed. Cas. No. 827. They are subject to the condition that the legislature may protect the people against the exaction of unreasonable charges for the services rendered by it, but under the constitutional guarantee for the protection of its property; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

The power of a municipality to reduce street railway fares is subject to limitations; (1) that there is reasonable need on the part of the public of lower rates; (2) that the rates fixed by the ordinance are not unreasonable in view of all the conditions; Milwaukee Elec. Ry. & L. Co. v. Milwaukee, 87 Fed. 577. See the important case of Cent. T. Co. of New York v. R. Co., 82 Fed. 1, as to the constitutionality of an act regulating fares, and the case *contra*, on the same act, of Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

The *right of way* is generally obtained by the exercise of the right of eminent domain. This can only be done in strict conformity to the charter or grant; 4 Engl. Railw. Cas. 235, 513, 524; State v. R. Co., 6 Gill (Md.) 363. In this country, in many cases, the provisions of the charter enable companies to obtain land by purchase; Hatch v. R. Co., 25 Vt. 49. The company may enter upon lands for the purpose of making preliminary surveys, by legislative permission, without becoming trespassers, and without compensation; Cushman v. Smith, 34 Me. 247; Polly v. R. Co., 9 Barb. (N. Y.) 449; but compensation must be made or secured before the permanent occupation of the lands. See Graham v. R. Co., 27 Ind. 260, 89 Am. Dec. 498. A company may not take land for speculation, or to prevent competition; Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137. It may make any use of the land acquired for the right of way, which contributes to the safe and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands; Elyton L. Co. v. R. Co., 95 Ala. 631, 10 South. 270. See EMINENT DOMAIN. The right of way of a railroad is the entire strip or tract it owns or is entitled to use for railroad purposes, and not any specific or limited part thereof upon which its main track or other specified improvements are located; St. Louis, K. C. & C. R. Co. v. R. Co., 217 U. S. 253, 30 Sup. Ct. 510, 54 L. Ed. 752; *id.*, 152 Fed. 849, 81 C. C. A. 643. It has been said to be an easement; Louisville & N. R. Co. v. Maxey, 139 Ga. 541, 77 S. E. 801; Mahar v. R. Co., 174 Mich. 138, 140 N. W. 535.

In construing the nature of the estate or interest condemned by railways under the various eminent domain statutes, the American courts arrive at three different results: (1) That the right acquired is an absolute fee; (2) that it is a fee conditioned on the continuance of the user, with a reversionary interest over on abandonment; and (3) that it is essentially like an easement in gross; Prather v. Tel. Co., 89 Ind. 501; Currie v. Transit Co., 66 N. J. Eq. 313, 58 Atl. 308, 105 Am. St. Rep. 647; Pittsburgh, Ft. W. & C. R. Co. v. Peet, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467.

Where by condemnation proceedings a railroad company acquired the right to enter upon and occupy the plaintiff's land for railway purposes, and later granted to the defendant the privilege of erecting poles and wires on its right of way for purposes not primarily concerning the railway business, it was held that the plaintiff could maintain trespass against the defendant telephone company; Pittock v. Tel. Co., 31 Pa. Super. Ct. 589; 20 H. L. R. 501.

Railroad corporations possess the powers conferred upon them by charter and such as are fairly incidental thereto; and they cannot, except with the consent of the state, disenable themselves from the discharge of their functions, duties, and obligations. The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public, or contracts beyond the scope of its powers, cannot be rendered enforcible by the doctrine of estoppel; but where the subject-matter is not foreign to the purposes of its creation, a contract embracing whatever may be fairly regarded as incidental to the things authorized, ought not, unless expressly prohibited, to be held to be *ultra vires;* Texas & P. R. Co. v. Gentry, 163 U. S. 364, 16 Sup. Ct. 1104, 41 L. Ed. 186.

The construction and operation of a part of its road proves an acceptance of its charter where no particular mode of acceptance is designated; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581.

The company may lay their road across a highway, but not without making compensation to the owner of the fee for the additional servitude thus imposed upon the land; Chase v. R. Co., 26 N. Y. 526; Stetson v. R. Co., 75 Ill. 74; Southern P. R. Co. v. Reed, 41 Cal. 256; 1 Exch. 723.

Steam railroads on highways impose an additional burden thereby and cannot be built without compensation to abutting land-owners; Cox v. R. Co., 48 Ind. 178; Attorney General v. R. Co., 19 N. J. Eq. 386; Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. 544, 17 Atl. 186, 10 Am. St. Rep. 611; *contra*, Taggart v. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Newell v. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Fulton v. Ry. T. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619. In the absence of constitutional provisions, the legislature may authorize the use of streets by a steam or street rail-

road without municipal consent; Atlantic & P. R. Co. v. St. Louis, 66 Mo. 228; Savannah & T. R. Co. v. Savannah, 45 Ga. 602.

The legislature may authorize a railroad to be constructed *under*, as well as *upon*, highways; and when so constructed, the rights of the land-owners are determined upon the same principles as if they were built upon the surface; Baltimore & P. R. Co. v. Reaney, 42 Md. 117. It may also authorize elevated railroads, or railroads built upon structures raised above the highway; Peirce, Railr. 248. See In re New York Elev. R. Co., 70 N. Y. 327; Gilbert Elev. R. Co. v. Kobbe, 70 N. Y. 361; Currier v. R. Co., 6 Blatchf. 487, Fed. Cas. No. 3,493; In re Kings Co. Elev. R. Co., 82 N. Y. 95. But a company incorporated as a street passenger railroad cannot build an elevated railroad over and along the streets of Philadelphia; Com. v. El. Ry. Co., 161 Pa. 409, 29 Atl. 112.

The construction of the road must be within the prescribed limits of the charter. The right of deviation secured by the charter or general laws is lost when the road is once located; Little Miami R. Co. v. Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Morris & E. R. Co. v. R. Co., 31 N. J. L. 205. The location can then be changed only by act of legislature; Mason v. R. Co., 35 Barb. (N. Y.) 373; Mississippi & T. R. Co. v. Devaney, 42 Miss. 555, 2 Am. Rep. 608; Morris & E. R. Co. v. R. Co., 31 N. J. L. 205. Distance, having reference either to the length of the line or to deviation, is to be measured in a straight line through a horizontal plane; 9 Q. B. 76; Barker v. R. Co., 27 Vt. 766. But charters must be taken to allow such discretion in the location of the route as is incident to an ordinary practical survey thereof, with reference to the nature of the country; Southern Min. R. Co. v. Stoddard, 6 Minn. 150 (Gil. 92). A right to build *to* a city named imports a right to extend *within* the city limits; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. Where a location of a terminus was fixed at or near P. it was held that a point a mile and a half from P. was a compliance with the charter; Appeal of Parke, 64 Pa. 137. A deviation from the line specified in the charter will not be permitted; Com. v. R. Co., 27 Pa. 339, 67 Am. Dec. 471; but slight deviations may be allowed; Wood, Ry. 1104. A charter power to change the location of the line in case of any obstacle to the one first selected, will authorize a relocation before, but not after, the line has been constructed; Atkinson v. R. Co., 15 Ohio St. 21. Ordinarily the courts will not interfere with the selection of a route; Hentz v. R. Co., 13 Barb. (N. Y.) 646.

A railroad company constructing its line is bound to do so in a careful manner; and if it is so constructed it is not liable to adjacent property owners; but if it appears that it exceeded its authority, or exercised it negligently, it will become liable; Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370; Woodman v. R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; Slatten v. R. Co., 29 Ia. 153, 4 Am. Rep. 205. So if the injury amounts to taking property, as by the destruction of an easement.

A company cannot build only part of its charter line; People v. R. Co., 126 N. Y. 29, 26 N. E. 961. It cannot abandon a part; G. C. R. Co. v. R. Co., 63 Tex. 529.

Liability for the acts of contractors, subcontractors, and agents. The company are not liable for the act of a contractor or subcontractor, or their agents, if it be not in doing precisely what is contemplated in the contract; 6 M. & W. 499; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

See INDEPENDENT CONTRACTOR.

Railroad companies are liable for the acts of their agents within the range of their employment; and for all acts of their agents within the most extensive range of their charter-powers; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 483, 14 L. Ed. 502; Noyes v. R. Co., 27 Vt. 110; but not for the wilful acts of their agents, out of the range of their employment, unless directed by the company or subsequently adopted by them; Missouri Pac. R. Co. v. Divinney, 66 Kan. 776, 71 Pac. 855.

Railroad companies are liable for any injury accruing to the person or property of another through any want of reasonable care and prudence on the part of their employés.

A railroad company operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings; Curley v. R. Co., 40 La. Ann. 810, 6 South. 103; Gulf, C. & S. F. R. Co. v. Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582; Norfolk & W. R. Co. v. Burge, 84 Va. 63, 4 S. E. 21; Shelby's Adm'r v. R. Co., 85 Ky. 224, 3 S. W. 157.

It is the duty of the company to use on its cars, etc., all the modern improvements in machinery commonly used; Costello v. R. Co., 65 Barb. (N. Y.) 92; Forbes v. R. Co., 76 N. C. 454; Georgia P. R. Co. v. Propst, 83 Ala. 518, 3 South. 764; Metzgar v. R. Co., 76 Ia. 387, 41 N. W. 49, 14 Am. St. Rep. 224.

See SAFETY APPLIANCE ACT.

Railroad companies are not required to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried; or to do more as express carriers than to provide the public at large with reasonable express accommodation. They need not furnish all express companies equal facilities on their passenger trains; St. Louis, I. M. & S. R. Co. v. Exp. Co., 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, Miller and Field, JJ., dissenting; Pfister v. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Ilwaco R. & Nav. Co. v. R. Co., 57 Fed. 673, 6 C. C. A. 495. But

it has been held that they may be compelled to admit the agents of express companies on their trains, with their safes; Alsop v. Exp. Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271. An early case held that a contract giving exclusive privileges to one express company is void; Sanford v. R. Co., 2 Phila. (Pa.) 107; and in Maine a statute provides for equal facilities to all; International Exp. Co. v. Ry., 81 Me. 92, 16 Atl. 370. It may grant to an individual the exclusive privilege of entering station grounds to solicit passengers and baggage; New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; Kates v. Cab Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; or to furnish lunches to passengers on its trains at a given place; Fluker v. R. & B. Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; or to a corporation the exclusive right to supply drawing-room and sleeping cars for the use of passengers; Chicago, St. L. & N. O. R. Co. v. Car Co., 139 U. S. 80, 11 Sup. Ct. 490, 35 L. Ed. 97.

Hackmen have no right without permission to use station property to solicit business; Oregon S. L. R. Co. v. Davidson, 33 Utah 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489; the company may confer the right on whom it chooses; New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; Barney v. Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115; Oregon S. L. R. Co. v. Davidson, 33 Utah 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489; Kates v. Cab Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; [1897] A. C. 479; Donovan v. Penn. Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192; *contra*, Kalamazoo H. & B. Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693; Indianapolis U. R. Co. v. Dohn, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274; Cravens v. Rodgers, 101 Mo. 249, 14 S. W. 106; State v. Reed, 76 Miss. 211, 24 South. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528; McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15. See notes in 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489, and 13 L. R. A. 848; but a hackman employed by a passenger must be admitted to the station; Godbout v. Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; Griswold v. Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302.

The carrier's contract to transport and deliver freight imposes on it the obligation to transport the freight safely and promptly to the point of destination and then to deliver the same to the consignee; Chicago, R. I. & P. R. Co. v. King, 104 Ark. 215, 148 S. W. 1035; who is bound to receive it when tendered at the proper place, though there may be delay; Higgins v. Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

A carrier is not required to keep a car equipment sufficiently extensive to meet the maximum output of freight offered by shippers for transportation at any time of the year, but is only required to furnish car facilities to shippers to meet a demand, adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year; Montana, W. & S. R. Co. v. Morley, 198 Fed. 991. A carrier is not required to provide in advance for an unexpected and unprecedented rush of business. It will be excused for delay in shipping or receiving goods for shipment until such emergency is removed; St. Louis S. W. R. Co. v. Clay Co., 77 Ark. 357, 92 S. W. 531.

See EXPRESS COMPANIES; FACILITIES; INTERSTATE COMMERCE COMMISSION. See *infra* as to the Hepburn Act.

Since the enactment of the Hepburn Act, it is beyond the power of a state to regulate the delivery of cars for interstate shipments. It was so held as to the reciprocal demurrage law of Minnesota of 1907; Chicago, R. I. & P. R. Co. v. Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; and of Arkansas; St. Louis, I. M. & S. R. v. Edwards, 227 U. S. 265, 33 Sup. Ct. 262, 57 L. Ed. 506.

The exclusive grants to railroad companies are to be strictly construed in favor of the corporation, and liberally expounded in favor of public rights and interests; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Richmond, F. & P. R. Co. v. R. Co., 13 How. (U. S.) 71, 14 L. Ed. 55; Com. v. R. Co., 27 Pa. 339, 67 Am. Dec. 471 (Judge Black's celebrated opinion).

The power to build a railroad includes the power to build switches; Cleveland & P. R. Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84; but all customers have not an equal right to have switches built for them; Butchers' & D. S. Co. v. R. Co., 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252.

Railroad grants of lands by congress are granted *in præsenti*, and take effect upon the section of the land when the road is definitely located, by relation, as of the date of the grant; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767. See Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. When different grants cover the same premises, the earlier takes the title; Oregon Ry. & Nav. Co. v. R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; U. S. v. R. Co., 152 U. S. 284, 14 Sup. Ct. 598, 38 L. Ed. 443. Title does not pass until the act is complied with. Merchants Ex. Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420, 15 U. S. App. 339. See LAND GRANTS.

A company is not liable for injuries to a person who goes into its yard, merely because such yard is a dangerous place, but it

must be shown to be unnecessarily dangerous and that the injury resulted from the negligence of the company; Atchison, T. & S. F. R. Co. v. Whitbeck, 57 Kan. 729, 48 Pac. 16.

Where a number of passengers who have right to take a certain train is in excess of its capacity, the company must exercise the same care and forethought in providing additional cars as it is bound to exercise in relation to its other passengers; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698.

It is the duty of a company to heat its cars in cold weather; Ft. Worth & D. C. R. Co. v. Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677.

When a person (in this case a physician) is, while driving along a public highway, detained for twenty minutes at a grade crossing by the negligent delay of the employés of the railroad company in opening the gates, the company is liable in damages for delay; [1895] 2 Ir. R. 255.

When no legislative prohibition is shown, a company may lease and maintain a summer hotel at its terminus; Jacksonville, M., P. Ry. & N. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

Mandamus will lie to compel a railroad company to operate its road: People v. R. Co., 28 Hun (N. Y.) 543; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428 (though the business be unprofitable; State v. R. Co., 7 Neb. 357; but not where it carries traffic on another line owned by it; People v. R. Co., 103 N. Y. 95, 8 N. E. 369); also to build a bridge; People v. R. Co., 70 N. Y. 569. The remedy for abandonment of a railroad may also be by indictment or by proceedings to forfeit the charter; People v. R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

An agreement whereby a railroad company has the right to run its trains into the depot of another railroad company is not a lease; Chicago, R. I. & P. R. Co. v. R. Co., 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277. See a contract for trackage in Chicago, R. I. & P. R. Co. v. R. Co., 45 Fed. 304.

A state can require a railroad company to establish stations at all villages and boroughs along its lines; Minneapolis & St. L. R. Co v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614.

It is held that the company owes no duty to a trespasser walking on its track except that of ordinary care to prevent his injury after discovering his peril; Texas & P. R. Co. v. Modawell, 151 Fed. 421, 80 C. C. A. 651, 9 L. R. A. (N. S.) 646; the obligation on the part of the company is not pre-existing, but arises at the moment of discovery, and is negative in its nature; Sheehan v. R. Co., 76 Fed. 201, 22 C. C. A. 121, 46 U. S. App. 498; Singleton v. Felton, 101 Fed. 526, 42 C. C. A. 57; Louisville & N. R. Co. v. McClish, 115 Fed. 268, 53 C. C. A. 60; it owes a trespasser no duty to keep a lookout before he is discovered, because he is unlawfully there; St. Louis & S. F. R. Co. v. Bennett, 69 Fed. 525, 16 C. C. A. 300, 32 U. S. App. 621.

It is held that a duty rests upon the company to keep a lookout for live stock on or near the track and to use reasonable, ordinary care to prevent injury to animals; Central of Georgia R. Co. v. Dumas, 131 Ala. 172, 30 South. 867; Robbins v. R. Co., 62 W. Va. 535, 59 S. E. 512; Louisville & N. R. R. Co. v. Kice, 109 Ky. 786, 60 S. W. 705; Harris v. R. Co., 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858; that it is not enough that due care was used after discovering the animals, if by proper care they could have been discovered in time to avert the injury, is held in other cases; Carlton v. R. Co., 104 N. C. 365, 10 S. E. 516; Woodland v. R. Co., 27 Utah 543, 26 Pac. 298; Wasson v. McCook, 70 Mo. App. 393. That the track is fenced is held not to excuse failure to keep a lookout for animals; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

It is held that no duty exists to keep a lookout in places where it is unlawful for animals to be at large; Palmer v. R. Co., 37 Minn. 223, 33 N. W. 707, 5 Am. St. Rep. 839; Ft. Worth & R. G. R. Co. v. Hudgens, 43 Tex. Civ. App. 201, 94 S. W. 378; *contra*, Rockford, R. I. & St. L. R. Co. v. Irish, 72 Ill. 404; Seaboard A. L. R. Co. v. Collier, 118 Ga. 463, 45 S. E. 300. See 24 L. R. A. (N. S.) 858, note.

One who goes to the premises of a railroad company to meet an incoming or to accompany a departing passenger goes there under an implied invitation; Tobin v. R. Co., 59 Me. 183, 8 Am. Rep. 415; McKone v. R. Co., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; Atchison, T. & S. F. R. Co. v. Cogswell, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837; Denver & R. G. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Izlar v. R. Co., 57 S. C. 332, 35 S. E. 583; Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Sullivan v. R. Co., 39 La. Ann. 800, 2 South. 586, 4 Am. St. Rep. 239; Atlantic & B. R. Co. v. Owens, 123 Ga. 393, 51 S. E. 404.

Mere personal discomfort to neighboring property owners because of the location and operation, without negligence, of railroad tracks, depots and side yards, under legislative authority, will not give such owners ground of action against the company, but must be considered a *damnum absque injuria;* St. Louis, S. F. & T. R. Co. v. Shaw, 99 Tex. 559, 92 S. W. 30, 6 L. R. A. (N. S.) 245, 122 Am. St. Rep. 663; Aldrich v. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237. That occupants are disquieted and kept in a state of alarm and apprehension (if it does not result in sickness or physical injury) will give no right of action; Gossett v. R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. Rep. 846. Dis-

comfort caused solely by the growth and increase of travel gives no right of action; Louisville & N. T. Co. v. Lellyett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A. (N. S.) 49. It is said the location and operation upon a public highway may occasion incidental inconvenience to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden upon the soil, his injury is the same in kind as the community in general. Injuries which result from a careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road; and for such injuries there can be no recovery in the absence of a statute entitling the owner to maintain such action; Decker v. R. Co., 133 Ind. 493, 33 N. E. 349. An adjoining proprietor can never be entitled to recover from a railroad company organized under the general railroad law of the state for the depreciation of the rental or sale value of the premises, because of the location of the track in the street, except upon the assumption that the location itself is unlawful. If he owns the soil in the street, the location will be unlawful; but if he does not, he must submit to the incidental losses without redress; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306. Legislative authority is no ground for the commission by a corporation of a private nuisance, for the legislature has no authority to grant such an exemption, but the annoyance, to constitute a nuisance, must be so great as to cause destruction to health or of property value; St. Louis, S. F. & T. R. Co. v. Shaw, 99 Tex. 559, 92 S. W. 30, 6 L. R. A. (N. S.) 245, 122 Am. St. Rep. 663.

As to injuries to property caused by blasting, see BLASTING.

In Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 318, 2 Sup. Ct. 719, 27 L. Ed. 739, it was held that legislative grants of privileges or powers to corporate bodies, like a railroad company, to bring its tracks and construct its works within a city, confer no license to use them in disregard of the private rights of others and with immunity for their invasion; here an engine house and repair shop were erected by legislative authority on land adjoining a place of worship, and it was held that the church could recover damages in a court of law and that equity would interfere and restrain the nuisance. In this case it was not shown that there was negligence in the operation of the company's business, but it was said that no permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 318, 2 Sup. Ct. 719, 27 L. Ed. 739, citing Fish v. Dodge, 4 Den. (N. Y.) 312, 47 Am. Dec. 254; and see Cogswell v. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701, which is said to be nearly, if not exactly, on all fours with Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 318, 2 Sup. Ct. 719, 27 L. Ed. 739; and also Cogswell v. R. Co., 103 N. Y. 10.

A state acting through an administrative body may require a railroad company to make track connections; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; but such a body cannot compel a company to build branch lines, connect roads lying at a distance from each other, or make connections at every point, regardless of necessity; and an order of a railroad commission, requiring a railroad company to expend money and use its property in a specified manner, is not a mere administrative order, but is a taking of property. To be valid there must be more than mere notice and opportunity to be heard. The order itself must be justified by public necessity and not unreasonable or arbitrary; State v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863.

Neither a railroad, nor any part of its property, is subject to levy under execution, unless by statute. See East Alabama R. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; Youngman v. R. Co., 65 Pa. 278; Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435. See LEASE.

As to 999-year leases, see REVERSION.

As to running trains on time, see PUNCTUALITY.

Congress has passed laws affecting interstate commerce and relating to hours of service, safety appliances on railroads, and employers' liability, as to which see the various titles.

STREET RAILWAYS. As to the difference between street and steam railways, see *supra.*

When a railway is laid in a street, to facilitate its use by the public, it is a street railway; Nichols v. R. Co., 87 Mich. 371, 49 N. W. 538, 16 L. R. A. 371, so, if confined within the limits of a city and to be used exclusively under the streets; In re New York Dist. R. Co., 107 N. Y. 52, 14 N. E. 187. It makes no difference whether it be on, above, or below the surface; *id.;* see *supra;* or what kind of motor power it uses; Williams v. R. Co., 41 Fed. 556. The difference between street railroads and steam railroads lies in their use and not in their motive power; Massachusetts L. & T. Co. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46.

Street railroads belong to the surface of an open highway. They must conform to the grade of the highway. A street railway has been said to be one which is used expressly for the transportation of passengers,

and which stops its cars at frequent intervals to take on passengers. Halsey v. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Du Bois T. P. R. Co. v. R. Co., 149 Pa. 1, 24 Atl. 179. But the carriage of freight is now commonly allowed.

The right to permit their construction or refuse consent, is often vested in the local authorities. A city cannot, without legislative authority, grant the right to build a street railway; Des Moines St. R. R. Co. v. R. Co., 73 Ia. 513, 33 N. W. 610, 35 N. W. 602; Chicago v. Evans, 24 Ill. 52; Atlantic & P. R. Co. v. St. Louis, 66 Mo. 228; Covington St. Ry. Co. v. Covington, 9 Bush (Ky.) 127. See People's Railroad v. R. R., 10 Wall. (U. S.) 38, 19 L. Ed. 844. But the power to open and improve streets has been held to confer such authority; State v. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361; so of a power to regulate and improve streets and regulate vehicles thereon; Brown v. Duplessis, 14 La. Ann. 842. It is also held that it cannot grant an exclusive right without legislative authority; Jackson Co. Horse R. Co. v. Ry. Co., 24 Fed. 306; New Orleans City & L. R. Co. v. New Orleans, 44 La. Ann. 748, 11 South. 77; which must be express: Booth, Rys. § 17. Where the authority is express, it cannot be delegated; State v. Bell, 34 Ohio St. 194.

A city cannot grant to individuals the exclusive right to lay tracks; Heath v. Ry. Co., 61 Ia. 11, 15 N. W. 573; State v. Trenton, 36 N. J. L. 79; Coleman v. R. Co., 38 N. Y. 201; *contra*, Henderson v. Ry. Co., 7 Utah 199, 26 Pac. 286.

Ordinarily, and apart from constitutional or statutory provisions, a second company may be authorized to lay additional tracks; Oakland R. Co. v. R. Co., 45 Cal. 365, 13 Am. Rep. 181; Koch v. Ry. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377.

It is held that the local authorities, when their consent to building a street railway is required by law, may impose any conditions they choose; Detroit v. Ry. Co., 37 Mich. 558; Plymouth Tp. v. Ry., 168 Pa. 181, 32 Atl. 19; but it has been also held that if the conditions imposed by the local authorities relate to matters over which the legislature has entire control, the acts of the legislature cannot be affected by the local authorities; In re Kings Co. Elev. R. Co., 105 N. Y. 97, 13 N. E. 18. The legislature may impose conditions other than, and in addition to, those prescribed by the constitution, and the local authorities may prescribe conditions additional to both the constitutional and statutory provisions on the subject; In re Thirty-Fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172. Where a municipality has the right to control the use of its streets, its action is not subject to judicial control; Hogencamp v. R. Co., 17 N. J. Eq. 83; Forman v. R. Co., 40 La. Ann. 446, 4 South. 246; Booth, Rys. § 40.

Where local authorities have granted a right to construct a street railway, they cannot, without the consent of the company and in the absence of a reserved right so to do, impose additional obligations; Electric Ry. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 567; as, the use of iron poles instead of wooden poles; *id.*; or requiring the railway company to pave and keep in repair a portion of the street outside of the tracks; Western P. & S. Co. v. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462.

The consent of the local authorities once given and accepted and acted upon, cannot be revoked; Asheville St. Ry. Co. v. Asheville, 109 N. C. 688, 14 S. E. 316; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; unless reserved; Medford & C. R. Co. v. Somerville, 111 Mass. 232.

The use of its tracks by a railway company may be temporarily interrupted by municipal authorities, when necessary for the purpose of repairs on the streets; Kirby v. R. Co., 48 Md. 168, 30 Am. Rep. 455; Philadelphia & G. F. P. R. R. Co. v. Philadelphia, 11 Phila. (Pa.) 358; Middlesex R. Co. v. Wakefield, 103 Mass. 262.

Where a route has been established under the direction of the local authorities, the company cannot change the location so fixed without a new consent for that purpose; In re South Beach Ry. Co., 53 Hun 131, 6 N. Y. Supp. 172. The local authorities may permit the tracks to be relaid on another part of the street; Hoyle v. R. Co., 23 La. Ann. 535; and may compel a change where it has reserved the right so to do; West Philadelphia Passenger Ry. Co. v. Philadelphia, 10 Phila. (Pa.) 70. A railway company may adopt any gauge for its track which it sees fit and afterwards change the same, in the absence of anything to the contrary; Millvale v. Ry. Co., 131 Pa. 1, 18 Atl. 993, 7 L. R. A. 369; and it may ordinarily adopt any kind of rails and change the same from time to time; Trenton v. R. Co. (N. J.) 19 Atl. 263; but the rails used must be such as not to interfere with the use of the street by the public; Easton S. E. & W. E. P. Ry. Co. v. Easton, 133 Pa. 505, 19 Atl. 486, 19 Am. St. Rep. 658.

A city cannot grant the use of its streets to so many companies as to impair its public use; Grand Rapids St. R. Co. v. Ry. Co., 48 Mich. 433, 12 N. W. 643. It cannot, ordinarily, grant the right to build in a city park; New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 478; Jacksonville v. Ry. Co., 67 Ill. 540. But see People v. R. Co., 76 Cal. 156, 18 Pac. 141; Philadelphia v. McManes, 175 Pa. 33, 34 Atl. 331; PARK.

The legislature, unless forbidden by the constitution, may grant a right to lay a street railway in a street; People's Passenger R. Co. of Memphis v. R. Co., 10 Wall.

(U. S.) 38, 19 L. Ed. 844; Paterson & P. H. R. Co. v. Paterson, 24 N. J. Eq. 158.

Many cases hold that a street railway is not a new servitude on the street, for which the owners of abutting lands are entitled to compensation; Phillips v. R. Co., 89 Kan. 835, 133 Pac. 429; Baker v. R. Co., 130 Ala. 474, 30 South. 464; Barsaloux v. Chicago, 245 Ill. 598, 92 N. E. 525; Stein v. Ry. Co., 132 Ky. 322, 116 S. W. 733; Paterson & P. H. R. Co. v. Paterson, 24 N. J. Eq. 158; Hodges v. R. Co., 58 Md. 603; Grand Rapids & I. R. R. Co. v. Heisel, 38 Mich. 66, 31 Am. Rep. 306; Hobart v. R. Co., 27 Wis. 194, 9 Am. Rep. 461; Elliott v. R. Co., 32 Conn. 579; Attorney General v. R. Co., 125 Mass. 515, 28 Am. Rep. 264; *contra*, Jaynes v. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; and their consent to the construction of such railways is not necessary; but see an able dissenting opinion, Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007. It has been held that the abutting owner may recover where the tracks were laid next the curb; Cincinnati & S. G. A. St. R. Co. v. Cumminsville, 14 Ohio St. 523.

It is held that this is so even if steam motors are used in propelling the cars; Briggs v. R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Newell v. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; or electricity; Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; Koch v. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Taggart v. St. Ry. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205. But as to whether the use of steam on street railways imposes an additional servitude, the weight of judicial opinion is said to be very nearly evenly balanced; Booth, Rys. § 86.

The substitution of cable propulsion for horse power was held to impose no new servitude on the street; People v. Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174; In re Third Ave. Ry. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124; Lorie v. Ry. Co., 32 Fed. 270.

In New York it is held that street railways impose an additional burden on the streets; Craig v. R. Co., 39 N. Y. 404; Fobes v. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; unless the fee of the soil of the street is vested in the city; Chenango B. Co. v. Bridge Co., 27 N. Y. 108; but even then the abutting owner has a right of action if access to his property is cut off; Rasch v. R. Co., 198 N. Y. 385, 91 N. E. 785, 36 L. R. A. (N. S.) 645; Reining v. Ry. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133.

An elevated railroad is an additional burden on the highway; Koch v. Ry. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Story v. R. Co., 90 N. Y. 123, 43 Am. Rep. 146; American Bank Note Co. v. R. Co., 129 N. Y. 252, 29 N. E. 302; De Geofroy v. R. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; In re Opinion of the Justices, 208 Mass. 603, 94 N. E. 849. Their structures are incompatible with the free and unobstructed use of the street and abutting property owners are entitled to an injunction unless their rights have been properly acquired by the company and they have received compensation therefor. See Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Reining v. Ry. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; Kane v. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Hughes v. Ry. Co., 130 N. Y. 14, 28 N. E. 765; Fobes v. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453. Though not owning the soil of the street, they have easements of light, air, and access therein; Hughes v. Ry. Co., 130 N. Y. 14, 28 N. E. 765; Story v. Ry. Co., 90 N. Y. 122, 43 Am. Rep. 146.

Non-abutting property owners are not entitled to damages by reason of the use of a street by an elevated railway; Mooney v. R. Co., 16 Daly (N. Y.) 145; Ottinger v. R. Co., 18 N. Y. Supp. 238.

An elevated railway in New York which has not acquired the right from abutting proprietors is a continuous trespass upon their property which gives rise to a separate cause of action at law for damages. See Pappenheim v. R. Co., 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486. Equity will prevent the continuance of trespass by including as damages injuries permanently resulting from the interference of easement with light, air, and access. An abutting owner has a right of action for the pollution of air by smoke.

Constructing an elevated railroad on pillars in a public street is held not to constitute a new servitude or an unlawful use of the street; Morris v. Traction Co., 143 Ala. 246, 38 South. 834; *contra*, Muhlker v. R. Co., 173 N. Y. 549, 66 N. E. 558; Calumet & C. C. & D. Co. v. Morawetz, 195 Ill. 398, 63 N. E. 165.

Constructing a subway under the surface of streets is an additional servitude, so that compensation must be made for the property actually taken and for injury done to the remainder; In re Board of Rapid Transit R. Com'rs, 197 N. Y. 81, 90 N. E. 456. The owner of the soil may recover damages from the construction of a railroad on a street dedicated by him for ordinary street purposes; Jarrett Lbr. Corp. v. Christopher, 65 Fla. 379, 61 South. 831.

In Pennsylvania a street railway on a country road in a township is an additional burden on the highway and cannot be constructed without the consent of abutting property owners, though it is otherwise as to the streets of a city or borough; Pennsylvania R. R. v. P. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659.

An electric street railway between cities and towns for the transportation of passengers, merchandise, and baggage imposes an

additional servitude on the highway; Chicago & N. W. R. Co. v. R. Co., 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. Rep. 136; *contra*, Mordhurst v. Traction Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222, 2 Ann. Cas. 967.

It is said that equity will not relieve an abutting property owner but will leave him to his remedy at law; D. M. Osborne v. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155. But the rule appears to be otherwise in Pennsylvania. See Pennsylvania R. R. v. P. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659.

See HIGHWAYS.

Abutting owners have sufficient interest in the streets to entitle them to question the validity of a franchise to construct, and operate a street railway system thereon; Specht v. R. Co. (N. J.) 68 Atl. 785; such an owner may enjoin the laying of a railway track on the street in front of his premises, where it is about to be laid without authority of law; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181; but it has also been held that the validity of an ordinance granting the use of the streets for telegraph and telephone lines (attacked on the ground that it imposes an additional burden on the street and also grants an exclusive franchise) will not be inquired into in behalf of private citizens who do not suffer injuries not inflicted upon the general body of citizens; Patton v. Chattanooga, 108 Tenn. 197, 65 S. W. 414.

Ordinarily, a franchise to build a street railway is not exclusive; Grand Rapids St. R. Co. v. R. Co., 48 Mich. 433, 12 N. W. 643.

Ordinarily street railways have no right of eminent domain.

In Reeves v. Traction Co., 152 Pa. 163, 25 Atl. 516, the court seemed to consider that the right to build a passenger railway carries with it, at least in the absence of specific denial, the right from time to time, to operate it by new methods, but the point was not decided. An ordinance permitting the building of a horsecar railway covers an electric railway; Hudson R. Tel. Co. v. Ry. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838.

The erection of trolley poles in the middle of the street does not entitle the abutting owners to compensation; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859. Where electric railways are authorized the authority extends to the necessary and proper apparatus for operating them; Lockhart v. Ry. Co., 139 Pa. 419. 21 Atl. 26; including poles and wires; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859. But where this right encroaches on property rights of an abutting owner it should be so exercised by the company as to minimize the inconveniences and danger to such rights; Paterson Ry. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

Poles must be so placed as not to interfere with the rights of ingress and egress to abutting property; Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; stringing a wire along the street twenty feet above the surface is no interference with the right to light and air; Paterson Ry. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788. See POLES; WIRES.

If a street railway is constructed and operated without lawful authority, it is a nuisance; Larimer & L. St. Ry. Co. v. Ry. Co., 137 Pa. 533, 20 Atl. 570; Denver & S. Ry. Co. v. Ry. Co., 2 Colo. 673; Nichols v. Ry. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; and a railroad company cannot grant to an individual a right to operate a railroad for his private purposes over a part of its line which it does not use; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307.

Where the use of a street is unlawful, an injunction will lie at the suit of an abutting owner; Roberts v. Easton, 19 Ohio St. 78; *contra*, State v. Ry. Co., 16 R. I. 533, 18 Atl. 161; Glaessner v. Brew. Ass'n, 100 Mo. 508, 13 S. W. 707; McCartney v. R. Co., 112 Ill. 611; or at the suit of a duly authorized public officer; Coast Line R. Co. v. Cohen, 50 Ga. 451; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307; a company so operating a steam road may be indicted for a nuisance; Com. v. R. Co., 14 Gray (Mass.) 93; and, by analogy, a street railway; Booth, Rys. § 4.

A municipality can maintain proceedings in the nature of *quo warranto* to oust a street railway company of its franchises for non-user; State v. R. Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742.

A right or permit from a municipality to construct a street railway on a given street, is not a part of the company's franchise, but is property, and is an incorporeal right; Metropolitan City Ry. Co. v. R. Co., 87 Ill. 317.

Street railway companies are subject to regulation by statutes and by ordinances under the police power; Booth, Rys., § 221; such as ordinances regulating the speed of cars; Robertson v. R. Co., 84 Mo. 119; Hanlon v. R. Co., 129 Mass. 310; requiring cars to stop at designated places; Citizens' St. Ry. v. Steen, 42 Ark. 321; requiring the watering of tracks; City & S. R. Co. v. Savannah, 77 Ga. 731, 4 Am. St. Rep. 106; forbidding the use of sand upon tracks; Dry Dock, E. B. & B. R. Co. v. New York, 47 Hun (N. Y.) 221.

The legislature can compel an interchange of transfers between two street railways that are independently owned and operated; District of Columbia v. Traction Co., 41 Wash. L. Rep. 766.

Where a railway company has not built all the line specified in its charter and has abandoned a part of what it had built its charter is subject to forfeiture; People v. R. Co., 126 N. Y. 29, 26 N. E. 961; G. C. R. Co. v. R. Co., 63 Tex. 529.

A street railway company owns the structure laid by it in the highway, and has a superior right to the space covered by its

track; Peirce, Railr. 252. See Com. v. Temple, 14 Gray (Mass.) 69; Adolph v. R. Co., 76 N. Y. 530. The public, on foot or in carriages, may cross its tracks, and travel on the spaces covered by it, and even incidentally drive ordinary carriages on the rails. But a person driving a carriage on the track should leave it without retarding the cars; Adolph v. R. Co., 76 N. Y. 530; Chicago W. D. R. Co. v. Bert, 69 Ill. 388. It is also held that an electric street railway company has a common right in the highway with other travellers, not a superior right, and they must be so managed as not unnecessarily to interfere with the like rights of others; Laufer v. Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533. But its rails cannot be used by other competing common carriers driving railway or other carriages, without special legislative authority; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Camden H. R. Co. v. Coach Co., 31 N. J. Eq. 525; Central City H. R. Co. v. R. Co., 81 Ill. 523.

A street railway company has the use of tracks which it maintains under a claim of right, though not actually used by it; Pennsylvania Steel Co. v. Ry. Co., 191 Fed. 216.

A company may remove snow from its track to another part of the street, but in so doing, it must avoid unnecessary injury to the owners of property; Short v. R. Co., 50 Md. 73, 33 Am. Rep. 298.

When an electric street railway car is stopping at a crossing, it should not run its car in an opposite direction on the other track without warning pedestrians; Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; Driscoll v. Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; *contra*, Scott v. R. Co., 61 Hun 627, 16 N. Y. Supp. 350; but one who crosses a street behind a moving car at a place which is not a regular crossing, is bound to look for cars on the other track; Thompson v. R. Co., 145 N. Y. 196, 39 N. E. 709; though it is held that a passenger alighting from a car has a right to presume that the other track will be kept clear; Chicago City Ry. Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; Dobert v. Ry. Co., 91 Hun 28, 36 N. Y. Supp. 105; but it is also held that it is a question of ordinary care; Buzby v. Traction Co., 126 Pa. 559, 17 Atl. 895, 12 Am. St. Rep. 919. Where a passenger alights from a car on a double track trolley line, it is the duty of the company to regulate the speed of its cars and to give such warning of their approach as will reasonably protect the passenger from injury; Cincinnati St. Ry. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276.

That an injury was caused by a street car running at a greater rate of speed than that prescribed by a municipal ordinance is held in some cases to establish negligence *per se;* Weber v. Ry. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; Moore v. Transit Co., 194 Mo. 1, 92 S. W. 390; to constitute negligence as a matter of law; San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50, 71 S. W. 565; Anniston El. & G. Co. v. Elwell, 144 Ala. 317, 42 South. 45; Chicago & E. I. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318; Tacoma Ry. & P. Co. v. Hays, 110 Fed. 496, 49 C. C. A. 115. It is evidence of negligence and admissible as such; Atlanta Consol. St. Ry. Co. v. Foster, 108 Ga. 223, 33 S. E. 886; Davis v. Traction Co., 141 N. C. 134, 53 S. E. 617; Cogswell v. Ry. Co., 5 Wash. 46, 31 Pac. 411; Huerzeler v. R. Co., 139 N. Y. 490, 34 N. E. 1101; Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Baltimore City Passenger Ry. Co. v. McDonnell, 43 Md. 534; such a fact is admissible, not as evidence of negligence, but as a fact to be considered by the jury from which they may infer negligence; Creavin v. Ry. Co., 176 Mass. 529, 57 N. E. 994; Wall v. Ry. Co., 12 Mont. 44, 29 Pac. 721; Hall v. Ry. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726. But such a fact has been held to be in itself no evidence of negligence; Ford's Adm'r v. City Ry., 124 Ky. 488, 99 S. W. 355, 8 L. R. A. (N. S.) 1093, 124 Am. St. Rep. 412.

See Depot; Fence; Rates; Interstate Commerce Commission; Common Carrier; Passenger; Baggage; Grade Crossing; Railroad Commissioners; Lateral Railroads; Station.

RAILROAD-AID BONDS. See Bond.

RAILROAD COMMISSIONERS. Officers appointed in various states for the supervision of the construction and operation of railroads.

A suit against railroad commissioners to restrain the enforcement of rates, as unjust, is not a suit against the state; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

RAILROAD PROPERTY. The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail. It includes the road bed, right of way, tracks, bridges, stations, rolling stock, and such like property. Lands owned and held for sale, or other disposition for profit, and in no way connected with the use or operation of the railroad, are not railroad property in the sense mentioned, but are property of the company independently of its functions and duties as a common carrier. Northern Pac. R. Co. v. Walker, 47 Fed. 681.

See Railroad.

RAILROAD RELIEF FUNDS. A term applied to funds raised by periodical contributions of corporation employees, or by them jointly with the corporation, for the purpose of providing relief to the employees in case of injury, and the payment of money to their

families in case of death, in the service. They are usually managed jointly by the corporation and representatives of the employees, the business facilities being furnished by the corporation, which usually guarantees the funds and undertakes to make good deficiencies. Their management usually constitutes a department of the corporation business. They have been instituted in England and in some of the largest railroad systems in the United States. Compulsory contribution to funds for charitable, financial, etc., purposes, is forbidden in some states. In Massachusetts, acts provide for such societies for employees of railroad, street railroad, and steamboat companies.

Members are usually required to contract that the acceptance of relief benefits from the fund in case of injury or death shall operate as a release to the company of all rights of action for damages for injury or death made by, or on behalf of, the member or his legal representatives. Such contracts are sustained as defences to actions for personal injuries; Eckman v. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Maine v. R. Co., 109 Ia. 260, 70 N. W. 630, 80 N. W. 315; Shaver v. Pennsylvania Co., 71 Fed. 931; Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423; O'Neil v. Iron Co., 63 Mich. 690, 30 N. W. 688; Martin v. R. Co., 41 Fed. 125; State v. R. Co., 36 Fed. 655; 9 Q. B. Div. 357; L. R. 3 Q. B. 555.

A provision in a relief agreement that the acceptance of benefits shall bar a suit for damages for personal injury is not contrary to public policy; Hamilton v. R. Co., 118 Fed. 92; Shaver v. Pennsylvania Co., 71 Fed. 931; Day v. R. Co., 179 Fed. 26, 102 C. C. A. 654; *contra*, State v. Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; Barden v. R. Co., 152 N. C. 318, 67 S. E. 971.

A contract by which, if the member or his representatives accept benefits, he or they thereby release all rights of action against the company, for damages for injury, etc., is valid; and when the injured party after the right of action has arisen accepts the benefits, he is merely settling for the past; Johnson v. R. R., 163 Pa. 133, 29 Atl. 854. See Reese v. R. Co., 233 Pa. 363, 82 Atl. 461.

But it was held that where, under such a contract, the widow of a member accepted a benefit upon her husband's death, and personally released the fund and the company, the contract of the husband did not waive a right of action, and that neither the contract nor the widow's receipt of the benefit discharged her right of action; Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120. In Miller v. Ry. Co., 65 Fed. 308, the court, on a demurrer to such a defence, upheld the demurrer and held the contract and release void, and expressed its surprise at finding that several courts of unquestionable dignity and authority had sustained such defences. This case was affirmed on appeal, though not quite on such broad ground as was taken below; Chicago, B. & Q. R. Co. v. Miller, 76 Fed. 439, 22 C. C. A. 264.

Where a widow had collected part of the benefits and then was defeated in an action on that ground, still she could recover the residue of the relief benefits; Chicago, B. & Q. R. Co. v. Bigley, 1 Neb. (Unof.) 225, 95 N. W. 344; Chicago, B. & Q. R. Co. v. Healy, 76 Neb. 783, 107 N. W. 1005, 111 N. W. 598, 10 L. R. A. (N. S.) 198, 124 Am. St. Rep. 830; *contra*, Snyder v. R. Co., 237 Pa. 620, 85 Atl. 991.

Disability means inability to perform such labor as the injured person was engaged in at the time of his injury or similar labor which would enable him to earn wages equally remunerative; Chicago, B. & Q. R. Co. v. Olsen, 70 Neb. 570, 99 N. W. 847.

The federal Employers' Liability Act of April 22, 1908, provides that a carrier's liability for injuries to an employé is not released by his acceptance of benefits from the relief department, but the amount received must be deducted from amount of recovery. This applies to a contract made before the act was passed; Atlantic Coast Line R. Co. v. Finn, 195 Fed. 685, 117 C. C. A. 1.

A rule of a railway relief department which provides that all claims of beneficiaries shall be submitted to the superintendent, with the right of appeal to an advisory committee whose decision shall be final, does not bar the holder of a claim which has been rejected by such committee from the right of action in the courts; Baltimore & O. R. Co. v. Stankard, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745.

An Ohio act which provides that no railroad company shall require any stipulation with any person in or about to enter its employ, whereby such person agrees to waive any right of action against the company for personal injuries, and that all such agreements shall be void, is in violation of the fourteenth amendment to the federal constitution as taking away liberty of contract; Shaver v. Pennsylvania Co., 71 Fed. 931.

A railroad company maintaining a relief department is not thereby engaging in the insurance business, and an agreement by an employé that he will accept benefits from the fund in discharge of any claim for personal injuries is not invalid on that ground; King v. R. Co., 157 N. C. 44, 72 S. E. 801.

RAILROAD STATION. See STATION.

RAILWAY COMMISSIONERS. A body of three commissioners appointed under the English regulation of railways act, 1873, principally to enforce the provisions of the railway and canal traffic act, 1854, by compelling railway and canal companies to give reasonable facilities for traffic, to abstain from giving unreasonable preference to any com-

pany or person, and to forward through traffic at through rates.

RAIN-WATER. The water which naturally falls from the clouds.

No one has a right to build his house so as to cause the rain-water to fall over his neighbor's land; 1 Rolle, Abr. 107; 1 Stra. 643; Fortesc. 212; Bacon, Abr. *Action on the Case* (F); 5 Co. 101; unless he has acquired a right by a grant or prescription.

When the land remains in a state of nature, said a learned writer, and by the natural descent the rain-water would descend from the superior estate over the lower, the latter is necessarily subject to receive such water; 1 *Lois des Batiments* 15, 16. See 2 Rolle 140.

RAINY DAYS. Where a charter party (a cargo of wheat) provided that rainy days should not be counted as lay days, it excludes only rainy days on which, with reference to the facilities of the port in the way of covered docks, etc., the cargo could not be safely landed; Kerr v. Schwaner, 177 Fed. 659, 101 C. C. A. 285.

RAISE. To create. A use may be raised; *i. e.* a use may be created. 1 Spence, Eq. Jur. 449.

When a child has reached the age of twenty-one years, he is *raised;* Shoemaker v. Stobaugh, 59 Ind. 598.

RAISE REVENUE. Is to collect revenue, not necessarily to increase the amount; Perry Co. v. R. Co., 58 Ala. 546. Authority to raise money for prosecuting and defending suits only authorizes raising money by taxation and not by borrowing; Wells v. Salina, 119 N. Y. 280, *a*, 23 N. E. 870, 7 L. R. A. 759.

RANGE. A word used in the land-laws of the United States to designate the order of the location of public lands. In patents from the United States to individuals for public lands, they are described as being within a certain range.

RANGER. An officer of the forest to prevent trespassers and to drive the beasts of the forest out of the disafforested land into the forest. Their duties were limited to districts outside the forest known as purlieus.

RANK. The order or place in which officers are placed in the army and navy, in relation to others.

It is a maxim that officers of an inferior rank are bound to obey all the lawful commands of their superiors, and are justified for such obedience.

Rank is often used to express something different from *office.* It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position in reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the army; Wood v. U. S., 15 Ct. Cl. 159.

Military Rank is that character or quality bestowed on military persons which marks their station and confers eligibility to exercise command in the service. It is divided into grades which mark the different positions and powers of the different classes of persons possessing it; Army Reg. 1895. It is generally held by virtue of office in a regiment &c., but may be conferred independently of office. In each grade, date of commission &c., determines precedence. The determination by the legislative or executive branch as to the relations among officers is binding on the judicial department; De Celis's Adm'r v. U. S., 13 Ct. Cl. 117. Command is exercised by virtue of *office* and special assignment. Without orders an officer cannot put himself on duty except under Art. of War 22 (to quell an affray in his own or another corps, &c.), or Art. of War 122 (providing that where different corps come together the officer highest in rank shall command the whole). See Davis, Mil. Law. 560.

A Vice Admiral ranks with a Lieut. General; Rear Admiral with Major General; Commodore (abolished from the active list March 3, 1899) with Brig. General; Captain with Colonel; Commander with Lieut. Colonel; Lieut. Commander with Major; Lieutenant with Captain; Lieutenant (junior grade) with First Lieutenant; Ensign with Second Lieutenant. See R. S. § 1466. Officers of the Marine Corps are on a similar footing as those of similar grades in the army; R. S. § 1603. Precedence between officers in each branch is according to the dates of commissions; Op. A. G. Oct. 7, 1905.

The distinction between rank and office is more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different.

In some cases, officers of the line have a rank assigned to them different from the title of their office. Selections are usually made from among officers whose rank is raised to a higher degree by the service assigned to them, but the new *rank* does not confer a new *office.*

In the army, all officers, except chaplains, are paid according to their rank; in the navy, the pay of staff officers does not depend upon their rank; and there rank only determines matter of precedence, etc., among officers.

Grade is a step or degree in either office or rank. See Wood v. U. S., 15 Ct. Cl. 151.

RANSOM. A redemption for money or other consideration of that which is taken in war. 8 Term 277.

The custom of ransom of prisoners of war, which superseded slavery, has given place to the exchange of prisoners; Risley,

Law of War 127. See PRISONERS OF WAR; RANSOM BILL.

RANSOM BILL. A contract for payment of ransom of a captured vessel, with stipulations of safe conduct if she pursue a certain course and arrive at a certain time. If found out of time or course, the safe conduct is void; Wheat. Int. L. 107. Payment cannot be enforced in England, during the war, by an action on the contract, but can in this country; 1 Kent 104; Phillips v. McCall, 4 Wash. C. C. 141, Fed. Cas. No. 11,104; Maisonnaire v. Keating, 2 Gall. 325, Fed. Cas. No. 8,978

In England the imprisoned hostage may bring an action, based on the ransom bill for which he is hostage, for the recovery of his freedom, and thus indirect payment of the debt be compelled. Hall, Int. L. § 151.

By the general maritime law ransoms are allowed and the master of a ship may bind the whole cargo as well as the ship, by his contract for ransom; 3 C. Rob. 240. They were formerly prohibited in England, but now the queen in council may make rules for prohibiting or allowing them, under the act of 1864.

Ransoms have never been prohibited by the United States; Goodrich v. Gordon 15 Johns. (N. Y.) 6; nor by the other nations, except England; 1 Kent 112.

A belligerent may deliver up neutral property on ransoms as well as enemy's property; per Story, J., in Maisonnaire v. Keating, 2 Gall. 325, Fed. Cas. No. 8,978, where the subject of ransom is discussed.

A ransom strictly speaking is not a repurchase of the captured property, it is rather a repurchase of the actual right of the captors at the time, be it what it may, or, more properly, it is a relinquishment of all the interest or benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal. There seems to be no legal difference between the case of a ransom of the property of an enemy and of a neutral, for if the property be neutral and yet there be probable cause of capture, or if the delinquency be such that the penalty of confiscation might be justly applied, there can be no intrinsic difficulty in supporting a contract by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid or agreed to be paid by the captured; 3 Phil. Int. L. 645.

In the absence of stipulation, if the ransomed vessel be lost, the contract is still binding; but usually there is a clause excepting loss on the high seas, but not by stranding; 2 Halleck, Int. L., 331. Should the captor vessel, with ransom bill or hostage on board, be itself captured by the other belligerent, the ransom bill need not be paid. 2 Opp. § 195.

RAPE (Lat. *rapere*, to seize with violence). The carnal knowledge of a woman by a man forcibly and unlawfully against her will. Russ. Cr. L. 904.

The statute of Westminster 2, c. 34, defines the crime to be where "a man do ravish a woman, married, maid, or other, *where she did not consent neither before nor after*." And this statute definition has been adopted in several very recent cases. Addenda to 1 Den. Cr. Cas.; 1 Bell, Cr. Cas. 63, 71.

Much difficulty has arisen in defining the meaning of *carnal knowledge*, and different opinions have been entertained,—some judges having supposed that penetration alone is sufficient, while others deemed emission an essential ingredient in the crime; Hawk. Pl. Cr. b. 1, c. 41, s. 3; 12 Co. 37; 1 Hale, Pl. Cr. 638; 2 Chitty, Cr. Law 810. *Penetration* is the act of inserting the penis into the female organs of generation. 9 C. & P. 118. It was once held that in order to commit the crime of rape it is requisite that the penetration should be such as to rupture the hymen; 5 C. & P. 321. But this case has since been expressly overruled; 2 Mood. Cr. Cas. 90; 9 C. & P. 752; Whart. Cr. L. 554. In the United States in modern times the better opinion seems to be that both penetration and emission are not necessary; Pennsylvania v. Sullivan, Add. (Pa.) 143; 3 Greenl. Ev. § 410; 2 Bish. N. Cr. Law § 1131; Taylor v. State, 111 Ind. 279, 12 N. E. 400; Comstock v. State, 14 Neb. 205, 15 N. W. 355; State v. Burton, 1 Houst. Cr. Cas. (Del.) 363; Ellis v. State, 25 Fla. 702, 6 South. 768; *contra*, Williams v. State, 14 Ohio 222, 45 Am. Dec. 536; but later cases in that state intimated that if the question were new, the decision would be the other way; Blackburn v. State, 22 Ohio St. 102; Noble v. State, 22 Ohio St. 541. See State v. Hargrave, 65 N. C. 466. Slight penetration has been held to be sufficient; Brown v. State, 76 Ga. 623. By statute in England carnal knowledge is completely proved by proof of penetration; 9 Geo. IV. c. 31, § 18. Statutes to the same effect have been passed in some of the states; but these statutes have been thought to be merely declaratory of the common law; 3 Greenl. Ev. § 210. See, on this subject, 1 Hale, Pl. Cr. 628; 1 East, Pl. Cr. 437; 1 Chitty, Med. Jur 386; 1 Russ. Cr. Law 860. By 24 & 25 Vict. the slightest penetration is sufficient. It is to be remarked, also, that very slight evidence may be sufficient to induce a jury to believe there was emission; Pennsylvania v. Sullivan, Add. (Pa.) 143; 2 Const. 351; 1 Beck, Med. Jur. 140; 4 Chitty, Bla. Com. 213, note 8. See [1891] 2 Q. B. 149. In Scotland, emission is not requisite; 1 Swint. 93. See EMISSION.

By the term *man* in this definition is meant a male of the human species, of the age of fourteen years and upwards; for an infant under fourteen years is presumed by law incapable of committing this offence; Whart. Cr. L. 551; 1 Hale, Pl. Cr. 631; 8

C. & P. 738; McKinny v. State, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140. It cannot be shown that he was physically competent; 9 C. & P. 118. But this presumption has been held by some authorities not to be conclusive, but capable of removal by proof; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36. But not only can an infant under fourteen years, if of sufficient mischievous discretion, but even a woman may be guilty as principal in the second degree; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586. And such infant can be convicted of an indecent assault; Odgers, C. L. 316. And the husband of a woman may be a principal in the second degree of a rape committed upon his wife; as, where he held her while his servant committed the rape; 1 Hargr. St. Tr. 388. See People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; 2 Bish. N. Cr. L. § 1135.

Drunkenness is no excuse for rape; nor can it excuse or mitigate an assault with intent to commit a rape; State v. Carter, 98 Mo. 176, 11 S. W. 624.

The knowledge of the woman's person must be *forcibly and against her will;* and if her consent has not been voluntarily and freely given (when she has the power to consent), the offence will be complete, nor will any subsequent acquiescence on her part do away the guilt of the ravisher. A consent obtained from a woman by actual violence, by duress or threats of murder, or by the administration of stupefying drugs, is not such a consent as will shield the offender or turn his crime into adultery or fornication; and if the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner, though the liquor was given only for the purpose of exciting her, it is a rape; 1 Den. Cr. Cas. 89; 1 C. & K. 746; 12 Cox, C. C. 311; or if the woman be asleep; 14 Cox, 114. Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, does not amount to a rape; 8 C. & P. 265, 286; 1 C. & K. 415. But there can be no doubt that the party is liable in such case to be indicted for an assault.

The injured party cannot condone the crime of rape by excusing or forgiving the guilty party; Com. v. Slattery, 147 Mass. 423, 18 N. E. 399; or by marrying him; State v. Bartlett, 127 Ia. 689, 104 N. W. 285.

If a man has intercourse with a woman by pretending that he is performing a medical operation upon her, it is rape; 2 Q. B. D. 410. There must be an actual resistance of the will on the part of the woman; 19 L. J. M. C. 174; 1 Den. C. C. 580; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283; and it has been held that this must be shown beyond a reasonable doubt; Huber v. State, 126 Ind. 185, 25 N. E. 904. If it appear that the intercourse was effected without her consent, the crime of rape is proved, although no positive resistance by her is shown; Mings v. Com., 85 Va. 638, 8 S. E. 474. Some authorities have held that the woman's resistance is not sufficient to render the crime rape, if finally she consent through fear, duress, or fraud, and that it must appear that she showed the utmost reluctance and resistance; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349. But this is not the general rule, the better opinion being that a consent obtained by fear of personal violence is no consent—and though a man puts no hand on a woman, yet if, by the array of physical force, he so overpowers her mind that she dares not resist, he is guilty of rape; 2 Bish. Cr. L. § 1125; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 860. The offence of rape is complete where prosecutrix is rendered unconscious in consequence of the assault and violence; State v. Reid, 39 Minn. 277, 39 N. W. 796. It has been said that consent during any part of the act will prevent its being rape; Brown v. People, 36 Mich. 203; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 860; but Bishop takes the view that after the offence has been completed by penetration, no subsequent consent is of any avail to relieve the man from the charge of rape; 2 Bish. N. Cr. L. § 1122. A written statement by the prosecutrix on a trial for rape cannot be used to contradict her where she admits making it, but testifies that she did so under compulsion and that it is false; State v. Baker, 136 Mo. 74, 37 S. W. 810.

The matrimonial consent of the wife cannot be retracted; and, therefore, her husband cannot be guilty of a rape on her, as his act is not *unlawful.* But he may be guilty if he procure or assist another to do the act; State v. Haines, 51 La. Ann. 731, 25 South. 372, 44 L. R. A. 837.

As a child under ten years of age is incapable in law to give her consent, it follows that the offence may be committed on such a child whether she consent or not. See stat. 18 Eliz. c. 7, s. 4.

There is a recent trend in legislation in this country in the direction of raising the age of consent. This has resulted from a very active agitation on the subject largely promoted by the societies for the prevention of cruelty to children and persons who devote themselves especially to the promotion of social purity. In most of the states there are statutes, some of which are extremely drastic. The age of consent is made twelve years in Kentucky, Louisiana, Virginia; fourteen years in Alabama, Illinois, Indiana, South Carolina, Wisconsin; fifteen years in Texas; sixteen years in Arkansas, Minnesota, Montana, Oregon, Pennsylvania; eighteen years in Delaware, Colorado, Florida, Kansas, Missouri, Nebraska (chaste female, otherwise fifteen), Tennessee (chaste female, otherwise twelve), Washington, and

Wyoming. See Kerr's Wharton's Cr. L. § 682.

By act of congress of March 4, 1909, it is 16 years on the high seas or on any waters within the maritime jurisdiction of the United States and out of the jurisdiction of any state, or out of the jurisdiction of any state on board any United States vessel; or on registered vessels on the Great Lakes, and on lands under the exclusive jurisdiction of the United States.

In England (act of 1888) carnal knowledge of a girl under 13 with or without consent is a felony; between 13 and 16, a misdemeanor; it is a defence that the prisoner had reasonable cause to believe that the girl was above 16. One who has such carnal knowledge, without her consent, can also be convicted of rape.

Belief that the girl was over the consent age is not a defence; People v. Ratz, 115 Cal. 132, 46 Pac. 915; State v. Sherman, 106 Ia. 684, 77 N. W. 461; nor such belief after using reasonable care to ascertain her age; Manning v. State, 43 Tex. Cr. R. 302, 65 S. W. 920, 96 Am. St. Rep. 873. Such belief cannot be used by the jury in mitigation of punishment; Smith v. State, 44 Tex. Cr. R. 137, 68 S. W. 995, 100 Am. St. Rep. 849. Want of knowledge is no defence; People v. Griffin, 117 Cal. 583, 49 Pac. 711, 59 Am. St. Rep. 216; nor the fact that the girl was large for her age and was strong; State v. Bailor, 104 Ia. 1, 73 N. W. 344.

Her relations with other men cannot be shown as tending to prove want of chastity; People v. Currie, 14 Cal. App. 69, 111 Pac. 108; nor that she made no complaint; Levy v. Territory, 13 Ariz. 425, 115 Pac. 415.

It has been questioned whether rape was a felony at common law, or was made one by a statute in the reign of Edward I. The benefit of clergy was first taken away by a statute of Elizabeth.

The proofs on the person of the woman of the commission of rape may be completely wanting; the relaxed condition of the vulva and vagina in women who have borne children, or who have experienced frequent connections, frequently precludes the appearance of the signs of violence.

Signs of implanted venereal disease may be found, and in young girls and virgins the indications of a recently ruptured hymen are to be looked for.

See 1 Beck, Med. Jur. c. 12; Merlin, *Répert. Viol.;* Biessy, *Manuel Médico-Légal*, etc., 149; Parent-Duchatellet, *De la Prostitution*, etc., c. 3, § 5; 2 Bish. N. Cr. L. ch. xxxvi; McClain, Cr. L.; 2 Witth. & Beck. 415–477; 80 Am. Dec. 361, note; CARNALLY KNEW.

In English Law. A division of a county found only in Sussex, and intermediate between a county and a hundred. Vinogradoff, Engl. Soc. 97.

RAPE OF THE FOREST. Trespass committed in a forest by violence. Cowell.

RAPINE. The felonious taking of another man's personal property, openly and by violence, against his will. The civilians define rapine to be the taking with violence the movable property of another, with the fraudulent intent to appropriate it to one's own use. *Lecç. El. Dr. Rom.* § 1071.

RAPPORT À SUCCESSION (Fr.; similar to *hotchpot*). **In Louisiana.** The reunion to the mass of the succession of the things given by the deceased ancestor to his heir, in order that the whole may be divided among the co-heirs.

The obligation to make the rapport has a triple foundation. *First*, it is to be presumed that the deceased intended, in making an advancement, to give only a portion of the inheritance. *Second*, it establishes the equality of a division, at least, with regard to the children of the same parent, who all have an equal right to the succession. *Third*, it preserves in families that harmony which is always disturbed by unjust favors to one who has only an equal right. Dalloz, Dict. See ADVANCEMENT; COLLATION; HOTCHPOT.

RATABLE ESTATE. Within the meaning of a tax law, taxable estate. Marshfield v. Middlesex, 55 Vt. 545.

RATABLE PROPERTY. Property in its quality and nature capable of being rated, *i. e.* appraised, assessed. 10 B. & S. 323; Coventry Co. v. Assessors, 16 R. I. 240, 14 Atl. 877.

RATE. A public valuation or assessment of every man's estate; or the ascertaining how much tax every one shall pay. See Pow. Mortg.; McWhorter v. Benson, 1 Hopk. Ch. (N. Y.) 37.

RATE OF EXCHANGE. In Commercial Law. The price at which a bill drawn in one country upon another may be sold in the former.

RATES. The effect of the commerce clause of the federal constitution and of the interstate commerce act must always be considered in the treatment of rates. That branch of the subject will be found under INTERSTATE COMMERCE COMMISSION, but some cases are here given.

State control over rates has been exercised as follows: *Bridges;* Canada Southern Ry. Co. v. Bridge Co., 8 Fed. 190. See Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. *Ferries;* Chosen Freeholders of Hudson Co. v. State, 24 N. J. L. 718, where the charter subjected the ferry company to such regulations as might be fixed by law. *Boom Companies;* West Branch Lumbermen's Exch. v. Fisher, 150 Pa. 475, 24 Atl. 735; Henry v. Roberts, 50 Fed. 902. *Gas Companies;* Madison v. Gas & El. Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 9 Ann. Cas. 819; Toledo v. Gas Co., 5 Ohio C. C. 557, 3 O. C. D. 273 (natural gas); State v. Gas L. & C. Co., 34

Ohio St. 572, 32 Am. Rep. 390. See 27 Am. L. Reg. 286. *Mills for Grinding;* State v. Edwards, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528; West v. Rawson, 40 W. Va. 480, 21 S. E. 1019. *Railroads;* Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; Burlington, C. R. & N. Ry. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477; State v. R. Co., 22 Neb. 313, 35 N. W. 118; In re Senate Bill No. 69, 15 Colo. 601, 26 Pac. 157; Ames v. Ry. Co., 64 Fed. 165 (where the company was incorporated by an act of congress). *Railways, Street;* Sternberg v. State, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570 (by ordinance); Buffalo E. S. R. Co. v. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284. *Stock Yards;* see Cotting v. Stock-Yards Co., 82 Fed. 850. *Telegraphs;* Leavell v. Tel. Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798. *Telephones;* Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Central U. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Id., 118 Ind. 598, 20 N. E. 145. See St. Louis v. Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; Cumberland Tel. & Tel. Co. v R. Commission of Louisiana, 156 Fed. 823; Home Tel. & Tel. Co. v. Los Angeles, 155 Fed. 554. *Water;* Spring Valley W. Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173. *Warehouses;* for grain, etc., requiring them to keep insured for the benefit of its owner of grain stores; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. *Electric Light Companies;* Armour Packing Co. v. Illuminating Co., 115 App. Div. 51, 100 N. Y. Supp. 605.

This power cannot be delegated to private persons or corporations; Attorney General v. R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112; Stimson v. Booming Co., 100 Mich. 350, 59 N. W. 142. An act fixing minimum rates for railroad freight and passenger fares does not apply to the transportation of messengers and freight of express companies; Texas Exp. Co. v. R. Co., 6 Fed. 426.

The authority of a city under a street railway charter to fix the rates of fare thereon is exhausted by fixing such rates in an ordinance granting it the use of the streets; Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

The right to regulate railroad rates is one of the powers of the state, inherent in every sovereignty, to be exercised by the legislature at its pleasure and one legislature cannot, by a charter granted to a railroad company though for a valuable consideration, confer on such railroad company the right to charge rates which shall be beyond the control of subsequent legislatures; Laurel Fork & S. H. R. Co. v. Transp. Co., 25 W. Va. 324; it rests upon the police power; In re Arkansas Rate Cases, 187 Fed. 290. A state may regulate in the absence of congressional action; Louisville & N. R. Co. v. R. Commission of Alabama, 208 Fed. 35.

A state requiring connecting lines to receive and carry all freight coming from their connections at rates fixed by the railroad commission is not an unlawful violation of liberty of contract; Texas & P. Ry. Co. v. Bigham (Tex.) 47 S. W. 814.

The equal protection of the laws is not denied to a railroad company by a constitutional provision which prohibits it from charging more for a shorter than for a longer haul except by permission of a railroad commission; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298.

The power to determine what compensation a public service corporation, as a telephone company, may charge for its service is a legislative and not a judicial function; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; Knoxville v. Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. Whether existing rates are reasonable is a judicial question; Madison v. Gas & Electric Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 9 Ann. Cas. 819; Covington & L. T. R. Co. v. Sanford, 20 S. W. 1031, 14 Ky. L. Rep. 689 (a turnpike company); or whether they are so unreasonably low as to deprive the carrier of its property without compensation and therefore without due process of law; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. A state may authorize its railroad commission to reduce, as unreasonable, a joint through rate agreed upon by two or more railroad companies and apportion the same among the companies; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151.

The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body; Atlantic Coast Line R. Co. v. Com., 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Honolulu Rapid Transit & L. Co. v. Hawaii, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186. The state may create a commission and give it the power of regulating rates and the judiciary will only interfere with such commission when it appears that it has clearly transcended its powers; Grand Trunk Ry. Co. v. R. Com., 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. —. The state may delegate its power to regulate charges of common carriers to a municipal corporation; Chicago Union T. Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; but a county board of supervisors could not delegate its power to fix rates by entering into a contract that the question of charges should be referred, though, after a decision under the reference, it could adopt the rates fixed with the same effect as if they had been fixed by it in the beginning; San Francisco Gas Light Co. v. Dunn, 62 Cal. 580. An order of a railroad commission fixing rates is a legislative act under its delegated power. It has the same force as if made by the legislature; Grand Trunk

R. Co. v. Ind. R. R. Comm., 221 U. S. 400, 31 Sup. Ct. 537, 55 L. Ed. 786; within the meaning of the contract clause of the constitution it is a law passed by the state; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788. But as such an order had full legislative effect, a provision of a contract which had previously become subject to legislative operation could not be asserted against its operation; Louisville & N. R. Co. v. Garrett, 231 U. S. 318, 34 Sup. Ct. 48, 58 L. Ed. —.

Every legislative rate case presents three questions of prime importance: Reasonable value of the plant; probable effect of the reduced rate upon the net income; deductions from gross receipts as a fund to preserve the plant from depreciation; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466.

A statute regulating railroad rates does not impair the obligation of contracts unless the effect is to take from the company all the profits; Beardsley v. R. Co., 162 N. Y. 230, 56 N. E. 488.

"Reasonable" rates must be based upon the "fair value of the property being used by it for the convenience of the public"; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, where evidence was taken at the trial as to the investments and earnings of the railroad company, and the court said: "The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. . . . . He has a right to charge for each separate service that which is a reasonable compensation therefor; and the legislature may not deny him such reasonable compensation and may not interfere simply because, out of the multitude of his transactions, the amount of his profits is large."

A state may prescribe what shall be reasonable charges for intrastate transportation. The Commerce Act expressly leaves it with the states; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. This is a legislative and not a judicial act, and the legislature may act directly or, in the absence of constitutional restriction, commit the authority to a subordinate body; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. —. Such rates are presumptively valid, but the company is entitled to have the question of whether they are confiscatory determined in judicial proceedings. And while a state may double or treble damages upon a carrier for overcharging, it cannot impose a fixed amount as liquidated damages in every case, regardless of, and in many cases many times in excess of, the actual damages; Missouri Pac. R. Co. v. Tucker, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. 1507.

The Supreme Court does not sit as a board of review to substitute its judgment for that of the state. The question is whether the state rates are confiscatory. Where a carrier does both interstate and intrastate business, in order to determine whether intrastate rates offer a fair return, the value of the property therein employed and the rates prescribed must be considered separately, and profits and losses on interstate business cannot be offset. Property of the carrier not used in the transportation business cannot be included in the valuation as a basis for rate making; and it cannot be filed as such basis at a price above other similar property solely because it is used as a railroad, and increases in value over cost cannot be allowed over the normal increase of other similar property. There should be proper deductions for depreciation; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

The Missouri acts establishing maximum rates, wholly intrastate, are not unconstitutional. Such acts will not be declared confiscatory, in the absence of clear and convincing proof as to the value of the property used by the carrier and on which returns are based. General evidence as to assessed valuations, without showing the method of appraisement, are insufficient. The values of property used in interstate and intrastate business cannot be established by an apportionment based on the gross revenue received from each class. One person attacking an act as confiscatory cannot rely on the fact that it deprives others of their property without due process of law; Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571.

An order of a state railroad commission prescribing maximum freight rates on intrastate traffic will not be declared confiscatory when there is no proof of the value of the company's property within the state or of the receipts from its intrastate traffic or the value of that part of its property affected by the order; Wood v. Vandalia R. Co., 231 U. S. 1, 34 Sup. Ct. 7, 58 L. Ed. —.

Stockholders are not the only persons to be considered; if the establishment of new lines of transportation should cause a diminution in the tolls collected, that, in itself, is not a sufficient reason why the corporation maintaining the road should be allowed to maintain rates that would be unjust to those who use its property. It is not necessary that all corporations exacting tolls should be placed upon the same footing as regards rates; Covington & L. T. R. Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560.

The right to contest rates as confiscatory is not impaired by putting the rates into effect; Allen v. R. Co., 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. Equity should hesitate to interfere by injunction before the rates go into operation and a fair test has been made; and where, in an action brought before the rate took effect, the complainant

failed to sustain the burden of showing clearly that a rate act was confiscatory, the bill should be dismissed without prejudice to bringing another action after the rate goes into effect if it then proves to be confiscatory; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034.

Failure, in a state statute establishing a railroad commission, to provide for an appeal from its orders, does not deny to the carrier access to the courts; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. —.

The only mode of judicial relief is by suit against the governmental authority that established the rates or is charged with the duty of enforcing them; In re Engelhard & Sons Co., 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. —.

Although the determination of whether a railway rate prescribed by a state statute is so low as to be confiscatory involves a question of fact, its solution raises a federal question over which the federal court has jurisdiction as one arising under the constitution of the United States; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

A statute requiring railroads to issue mileage books at certain rates does not impair the obligation of the contract in a previous law allowing a certain company to regulate its charges, since this grant is subject to the common-law rule that charges must be reasonable and the legislature can declare what is reasonable; Dillon v. R. Co., 19 Misc. 116, 43 N. Y. Supp. 320. *Contra*, Attorney General v. R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

As to classification affecting lines less than fifty miles in length, see Knott v. R. Co., 230 U. S. 512, 33 Sup. Ct. 983, 57 L. Ed. 1596. Electric lines and street railways may be excepted from railroad rates; *id.*

Where a carrier by mistake charged less for an interstate shipment of freight than the rate scheduled in accordance with the Interstate Commerce Act, the carrier may recover the sum due him under the act, for any contract at variance with the schedule rate is void; Louisiana R. & Nav. Co. v. Holly, 127 La. 615, 53 South. 882.

The right of a municipality to prescribe rates for distributing water to its inhabitants is not an exercise of the taxing power, but merely fixing the price of a commodity; Preston v. Board, 117 Mich. 589, 76 N. W. 92. It is a rightful exaction as compensation for the use of the water, and the obligation of one using the water is one of contract; St. Louis Brewing Ass'n v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; under which he is obliged to pay for the water according to the published terms and conditions; Rieker v. Lancaster, 7 Pa. Super. Ct. 149.

A water company is a quasi public corporation and by the acceptance of its franchises is obliged to supply all persons along the line of its mains without discrimination and at uniform rates; Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; but the maximum rates which it is allowed to charge under its charter are not binding on consumers if discriminating and unreasonable; *id.* But where the city water works were extended to an outlying section of the city to serve persons living in summer cottages for a part of the year only, the city could lawfully charge a higher rate for water so furnished than in the centre of the city, notwithstanding that the construction of the works was a public use to be paid for by taxation; Souther v. Gloucester, 187 Mass. 552, 73 N. E. 558, 69 L. R. A. 309; and the placing of water meters in supplying pipes to some but not all of the buildings of a city is not a violation of a statute requiring the establishment of a uniform scale of water rates; Frothingham v. Bensen, 20 Misc. 132, 44 N. Y. Supp. 879.

In determining what is a fair rate to be charged for water the actual present value of the property and not its cost is to be taken as the basis; San Diego L. & T. Co. v. Jasper, 89 Fed. 274.

Under a constitutional provision reserving to the legislature the power to regulate by its own act or through the instrumentality of a municipality the rates to be charged by a water company supplying such municipality with water, the exercise of the power does not impair the obligation of a contract between the company and the city for higher rates, where the company was created and the contract made subsequent to the adoption of the constitution; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170, affirming Tampa v. Waterworks Co., 45 Fla. 600, 34 South. 631.

A gas company cannot discriminate by charging higher rates for gas used for lighting than for heating; Baily v. Gas-Fuel Co., 193 Pa. 175, 44 Atl. 251.

The regulation of prices to be charged consumers by gas companies is not one of the general powers of municipal government and in order to its exercise must be expressly delegated or fairly implied from some express power granted; Mills v. Chicago, 127 Fed. 731.

The courts may determine whether rates of a gas company established by statute or municipal ordinance are reasonable, but they have no power to fix such rates; People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406.

The rates charged by a gas company having the right to charge reasonable rates will be presumed to be such in the absence of proof to the contrary; Noblesville v. Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.

In the absence of a statute, a gas company

may fix its own rates, subject to common-law limitations and municipal regulations in its charter; Madison v. Gas & El. Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 9 Ann. Cas. 819; so of an electric light company; Snell v. El. Light Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341.

Where a public service corporation has a monopoly (furnishing gas in a large city), its "good-will" cannot be considered as an element in ascertaining the value of the property. Its franchises are property, and where the state has permitted it to capitalize them, their value at the time of such capitalization, but not their increased value, should be included in the value of the property. The value of the property should be determined at the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value. Franchises, where the state has permitted them to be capitalized, may be included at their valuation at the time of such capitalization, but not their increased value; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034.

Under a statute authorizing the consolidation of gas companies and the issue of capital stock to the amount of the aggregate value of the property, franchises, etc., of the consolidated company, it has no contract right to charge such a rate as to pay in perpetuity a return on the original capitalization without regard to depreciation; In re Rebecchi, 51 Misc. 327, 100 N. Y. Supp. 335.

An act regulating the price of gas is not unconstitutional, as impairing the right of contract, provided the rate is not so low as to deprive the stockholders of the right to a reasonable profit on the actual value of the plant and property; Richman v. Gas Co., 186 N. Y. 209, 78 N. E. 871.

A municipal ordinance authorizing a natural gas company to charge certain monthly or annual rates does not authorize the company to exact a meter rate from one person alone if it is substantially higher than the flat rate charged to other customers, but the mere requirement that one consumer shall pay by the meter rate, while others pay by the flat rate, is not a violation of equal protection of the laws; Indiana N. & I. Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761.

Where a statute fixing the maximum rates for gas was attacked by the gas company as unconstitutional, the consumers were entitled to a continuance of the service on a payment of the rates so prescribed until determination of the constitutional question, the constitutionality of the statute being presumed until a judicial determination to the contrary; Richman v. Gas Co., 114 App. Div. 216, 100 N. Y. Supp. 81, *id.*, 186 N. Y. 209, 78 N. E. 871.

The power of a state legislature to regulate telephone rates is plenary notwithstanding the instruments are patented; Central Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; after the company has accepted an ordinance imposing limitations of rates, it is estopped to deny its validity on the ground of unreasonableness; Charles Simons Sons Co. v. Tel. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

The police power of the state to regulate street car fares does not give the legislature power to violate a charter contract fixing them; Indianapolis v. Trust Co., 83 Fed. 529, 27 C. C. A. 580.

An act of legislature limiting the fares of a street railroad company to three cents does not impair the obligation of any contract made with the city when the company took possession of the streets, as the city has no power to determine such fares as against the legislature; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

An ordinance, legally adopted, providing that a street railway company shall not exceed a five cent fare, gives the company, upon accepting it, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company; Detroit v. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

An act merely fixing the maximum rate of toll to be charged by a turnpike does not constitute a contract between the state and the turnpike company, so as to deprive the state of its power thereafter to modify or regulate the rates; Covington & L. T. R. Co. v. Sanford, 20 S. W. 1031, 14 Ky. Law Rep. 689; but the right to regulate tolls on a railroad may be granted to the company by the legislature, so as to render an attempt by a succeeding legislature to fix the rates an impairment of a contract within the federal constitution; Pingree v. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

Rates charged on a turnpike must be established by the company where there is no law or valid usage to the contrary; Wayne P. Co. v. Bosworth, 91 Ind. 210.

Where a steamship company made a lower rate to those merchants who would not ship by a rival line, it was held there was no illegal discrimination, since the concession was offered to all who would conform to the condition; Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712. It is held not illegal to make reductions to large customers as such; as transportation in large and small quantities does not involve the same amount of trouble and expense; 4 Nev. & M. 7; 4 C. B. N. S. 366; Silkman v. Board, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827 (a water company); *contra*, Scofield v. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; to charge lower proportionate rates upon long press messages

than upon ordinary short commercial messages; Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, affirming *id.* 58 Neb. 192, 78 N. W. 519; or for hauling coal to a manufacturing company than to a coal dealer; Hoover v. R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43; or for the transportation of ten or more persons at a rate less than to a single individual for a like transportation on the same trip; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; or to charge a higher rate to persons paying their fare on the train than to those purchasing tickets at the place provided for that purpose; Wilsey v. R. Co., 83 Ky. 511; or to charge a higher freight rate on live stock than on dressed meat and packing house products; Interstate Commerce Commission v. R. Co., 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705. Railroads may not discriminate against the people of any one state, but are not necessarily bound to give the same rates to the people of all the states as the kind and amount and cost of business vary in the several states; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

The charging or receiving a greater compensation for the shorter than for the longer haul is only forbidden when both are under substantially similar circumstances and conditions; Interstate Commerce Commission v. R. Co., 50 Fed. 295; Behlmer v. R. Co., 71 *id.* 835; and competition in transportation does not prevent substantially similar circumstances and conditions; Louisville & N. R. Co. v. Com., 104 Ky. 226, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541 (this suit involved the construction of a state statute including a long and short haul provision similar to that in the act of congress to regulate commerce); but the right of the carrier to take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions was recognized; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309; and allowed; East Tennessee, Va. & G. R. Co. v. Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719, where it was held that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstances and conditions described in the statute (reversing East Tennessee, Va. & G. R. Co. v. Commission, 99 Fed. 52, 39 C. C. A. 413); Interstate Commerce Commission v. R. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; Behlmer v. R. Co., 71 Fed. 835; Interstate Commerce Commission v. R. Co., 73 Fed. 409; Interstate Commerce Commission v. R. Co., 209 U. S. 108, 28 Sup. Ct. 493, 52 L. Ed. 705. Ocean competition may constitute a dissimilar condition; and circumstances and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic; Texas & P. Ry. Co. v. Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the interstate commerce act against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions; Interstate Commerce Commission v. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047.

Where a railroad company charged one coal company less for transportation than it charged the plaintiffs, it was not a justification that it was done in consideration of the coal company selling coal to the railroad company for its own use at a certain price and of the compromise and settlement of a claim of the coal company against the railroad company; Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 896, 149 U. S. 680.

In the absence of congressional legislation, public service corporations are amenable to common law rules of the state of the forum relative to discrimination in rates for interstate service; Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, affirming *id.* 58 Neb. 192, 78 N. W. 519.

See INTERSTATE COMMERCE COMMISSION; REBATE.

RATIFICATION. An agreement to adopt an act performed by another for us.

Express ratifications are those made in express and direct terms of assent. *Implied* ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use.

Ratification of a contract implies an existing person on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. McArthur v. Print. Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653.

A party from whom a contract has been wrung by duress must disclaim it on the recovery of freedom, subsequent recognition is the equivalent of ratification; Sternback v. Friedman, 23 Misc. Rep. 173, 50 N. Y. Supp. 1025.

A ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and it must be made with knowledge of the material facts; Western N. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470.

Where there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; Chamberlain v. McClurg, 8 W. & S. (Pa.) 36. The ratification of the sign-

ing of a bond by an obligor whose signature has been forged, does not render him liable thereon, there being no new consideration; McHugh v. Schuylkill Co., 67 Pa. 391, 5 Am. Rep. 445; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Pollock, Contr. 114. But if a contract be merely against conscience, then if a party, being fully informed of all the circumstances of it and objections to it, voluntarily confirms it, his ratification will stand; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106.

As to the ratification of a contract made or an act done by a person claiming to act as the agent, and as to the creation of an agency by the ratification of acts previously done, see PRINCIPAL AND AGENT.

As to ratification of treaties, see TREATY.

RATIHABITION. Confirmation; approbation of a contract; ratification.

RATIO (Lat.). A reason; a cause; a reckoning of an account.

RATIONABILIBUS DIVISIS, WRIT DE. See DE RATIONALIBUS DEVISIS.

RATIONABILIS PARS BONORUM. See DE RATIONABILE PARTE BONORUM; REASONABLE PART.

RATIONE TENURÆ. By reason of tenure.

RATTENING. The offence on the part of members of a trades union, of causing the tools, clothes, or other property of a workman to be taken away or hidden, in order to compel him to join the union or cease working. 38 & 39 Vict. c. 86.

RAVINE. A long, deep, and narrow hollow, worn by a stream or torrent of water; a long, deep, and narrow hollow or pass through the mountains. Long v. Boone Co., 36 Ia. 60.

RAVISHED. In Pleading. A technical word necessary in an indictment for rape. No other word or circumlocution will answer. The defendant should be charged with having "*feloniously ravished*" the prosecutrix, or woman, mentioned in the indictment; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 6); Hawk. Pl. Cr. 2, c. 25, s. 26; Cro. Car. 37; Co. Litt. 184, n. p; Co. 2d Inst. 180; 1 East, Pl. Cr. 447. The words "feloniously did ravish and carnally know" imply that the act was done forcibly and against the will of the woman; Harman v. Com., 12 S. & R. (Pa.) 70. See 3 Chitty, Cr. L. 812.

RAVISHMENT. In Criminal Law. An unlawful taking of a woman, or of an heir in ward. Rape, which see.

RAVISHMENT OF WARD. In English Law. The marriage of an infant ward without the consent of the guardian. It is punishable by statute Westminster 2, c. 35.

RE. FA. LO. See REFALO.

READING. The act of pronouncing aloud, or of acquiring by actual inspection, a knowledge of the contents of a writing or of a printed document.

When a person signs or executes a paper, it will be presumed that it has been read to him; see Pacific Guano Co. v. Anglin, 82 Ala. 496, 1 South. 852; New York L. Ins. Co. v. Fletcher, 117 U. S. 532, 6 Sup. Ct. 837, 29 L. Ed. 934; Pennsylvania R. Co. v. Shay, 82 Pa. 203; but this presumption may be rebutted.

See SIGNATURE.

In the case of a blind testator, if the will was not read to him, it cannot be sustained; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141. When the testator was blind and there are any circumstances giving reasonable ground for suspicion of fraud or imposition, the burden is on those who support the will to show that it was read to him; Davis v. Rogers, 1 Houst. (Del.) 44.

Where one who cannot read or write is disqualified for jury service, the words mean that he must be able to do so in the English language; Wright v. State, 12 Tex. App. 167.

READY. Prepared. The words, "I will be ready to," are held to imply a covenant. 1 Rolle, Abr. 519, pl. 8.

READY AND WILLING. Implies capacity to act as well as disposition. 11 L. J. Ex. 322. See 5 Bing. N. C. 399; TOUT TEMPS PRIST.

READY MONEY. A bequest of ready money includes cash at the banker's, whether balance on current account, or a deposit, or withdrawable after notice; 12 L. J. Ch. 385; 27 *id.* 797; but not unreceived dividends on stock; 18 L. J. Ch. 401; nor money in the hands of a sales-master; 9 Ir. Eq. Rep. 398; but it has been held that a debt would pass under a bequest of ready money. 23 L. J. Ch. 496.

REAL. At Common Law. A term which is applied to land in its most enlarged signification. *Real security*, therefore, means the security of mortgages or other incumbrances affecting lands. 2 Atk. 806; s. c. 2 Ves. Sen. 547.

In Civil Law. That which relates to a *thing*, whether it be movable or immovable, lands or goods: thus, a real injury is one which is done to a thing, as a trespass to property, whether it be real or personal in the common-law sense. A real statute is one which relates to a thing, in contradistinction to such as relate to a person.

REAL ACTION. IN CIVIL LAW. One by which a person seeks to recover his property which is in the possession of another. Dig. 50. 16. 16. It is to be brought against the person who has possession.

AT COMMON LAW. One brought for the specific recovery of lands, tenements, or hereditaments. Stephen, Pl. 3.

They are *droitural* when they are based

upon the right of property, and *possessory* when based upon the right of possession. They are either writs of right; writs of entry upon disseisin (which lie in the per, the per et cui, or the post), intrusion, or alienation; writs ancestral possessory, as mort d'ancestor, aiel, besaiel, cossinage, or nuper obiit. Com. Dig. *Actions* (D 2). The former class was divided into *droitural*, founded upon demandant's own seisin, and *ancestral droitural* upon the demandant's claim in respect of a mere right descended to him from an ancestor. Possessory actions were divided in the same way—as to the demandant's own seisin and as to that of his ancestor.

These actions were always local, and were to be brought in the country where the land lay; Bracton 189, 414. They are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process,—a much more expeditious method of trying titles being since introduced by other actions, personal and mixed. See Stearns; Booth, Real Act.; Bac. Abr. *Actions;* Com. Dig. *Actions;* 3 Bla. Com. 118; ACTION.

REAL ASSETS. See ASSETS.

REAL CHATTELS. See CHATTEL.

REAL CONTRACT. A contract respecting real property. 3 Rep. 22 *a*.

In Civil Law. Those contracts which require the interposition of a thing (*res*) as the subject of them. See CONTRACT.

REAL COVENANT. A covenant whereby a man binds himself to pass a real thing, as lands or tenements; as, a covenant to levy a fine, etc. Shepp. Touchst. 161; Fitzh. N. B. 145; Co. Litt. 384 *b*.

A covenant, the obligation of which is so connected with the realty that he who has the latter is either entitled to the benefit of or liable to perform the other. 2 Bla. Com. 304, Coleridge's note; Stearns, Real Act. 134; 4 Kent 472.

A covenant by which the covenantor binds his heirs. 2 Bla. Com. 304.

Those by which a single covenantor undertakes the performance of the covenant. It frequently happens that each one of several covenantors binds himself to perform singly the whole undertaking. The words commonly used for this purpose are "severally," "each of us." Still more commonly the undertaking is both joint and several.

It is the nature of the interest, and not the form of the covenant, which determines its character in this respect; Calvert v. Bradley, 16 How. (U. S.) 580, 14 L. Ed. 1066; Capen v. Barrows, 1 Gray (Mass.) 376.

Very considerable confusion exists among the authorities in the use of the term real covenants. The definition of Blackstone which determines the character of covenants from the insertion or noninsertion of the word "heir" by the covenantor, is pretty generally rejected. Of the other definitions, that which makes a real covenant an obligation to pass realty is the most ancient. The second definition is that now ordinarily understood when the term "real covenant" is employed. The benefit of such covenants will always run with the land and can be enforced by any vendee, no matter how remote. The burden, however, will not run with the land so as to be capable of enforcement unless there be privity either of contract or estate between the plaintiff and the defendant; Spencer's Case, 1 Sm. L. C. 115. These covenants are of various kinds. Some are used in lieu of the ancient warranty. Of these the most common are covenants of warranty, both general and special, covenants of seisin, that the vendor has a good right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance. Wms. R. P. 447. In regard to all these, it may be said that in England the right of action passes to and vests in the party in whose time the substantial breach occurs, and who ultimately sustains injury: Rawle, Cov. 324. In the United States, however, the covenants for seisin, for right to convey, and against incumbrances are usually construed to be broken as soon as made and cannot enure to the advantage of subsequent grantees. Covenants of warranty and for quiet enjoyment are, however, prospective, and no breach occurs until eviction, actual or constructive; *id.* 313. See COVENANT, and the various titles thereunder.

Other real covenants now in use are as follows: either *to preserve the inheritance*, as to keep in repair; 9 B. & C. 505; Norman v. Wells, 17 Wend. (N. Y.) 148; Pollard v. Shaaffer, 1 Dall. (U. S.) 210, 1 L. Ed. 104; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; 38 E. L. & E. 462; to keep buildings insured, and reinstate them if burned; 5 B. & Ald. 1; Thomas' Adm'rs v. Vonkapff's Ex'rs, 6 Gill & J. (Md.) 372; *to continue the relation of landlord and tenant*, as to pay rent; Herbaugh v. Zentmyer, 2 Rawle (Pa.) 159; Hurst v. Rodney, 1 Wash. C. C. 375, Fed. Cas. No. 6,937; to do suit to the lessor's mill; 5 Co. 18; 1 B. & C. 410; to grind the tenant's corn; Dunbar v. Jumper, 2 Yeates (Pa.) 74; for the renewal of leases; Moore 159; or *to protect the tenant in his enjoyment of the premises*, as to warrant and defend, never to claim or assert title; Fairbanks v. Williamson, 7 Greenl. (Me.) 97; Trull v. Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; to release suit and service; Co. Litt. 384 *b;* to produce title-deeds in defence of the grantee's title; Dig. tit. xxxii. c. 27, § 99; 1 S. & S. 449; to supply water to the premises; 4 B. & Ald. 266; to draw water off from a mill-pond; Morse v. Aldrich, 19 Pick. (Mass.) 449; not to establish another mill on the same stream; Norman v. Wells, 17 Wend. (N. Y.) 136; not to erect buildings on adjacent land; Trustees of Watertown v. Cowen, 4 Paige, Ch. (N. Y.) 510;

to use the land in a specified manner; 13 Sim. 228; generally to create or preserve easements for the benefit of the land granted; Keteltas v. Penfold, 4 E. D. Sm. (N. Y.) 122; Weyman's Ex'rs v. Ringold, 1 Bradf. (N. Y.) 40. See 2 Greenl. Ev. § 240; 2 Washb. R. P. 648; Spencer's Case, 1 Sm. L. C. 115.

REAL EFFECTS. Real property. 1 Cowp. 307. See EFFECTS; REAL PROPERTY.

REAL ESTATE. Landed property. See LAND; REAL PROPERTY.

REAL ESTATE BROKER. One who engages in the purchase and sale of real estate as a business, and holds himself out to the public in that character and capacity. Chadwick v. Collins, 26 Pa. 138.

Where a broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale; Lunney v. Healey, 56 Neb. 313, 76 N. W. 558, 44 L. R. A. 593; Condict v. Cowdrey, 139 N. Y. 273, 34 N. E. 781; Middleton v. Thompson, 163 Pa. 112, 29 Atl. 796; Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258; Donohue v. Padden, 93 Wis. 20, 66 N. W. 804; Carpenter v. Rynders, 52 Mo. 278; Phelps v. Prusch, 83 Cal. 628, 23 Pac. 1111; Hungerford v. Hicks, 39 Conn. 259; Wilson v. Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; Cassady v. Seeley, 69 Ia. 509, 29 N. W. 432.

In order to entitle a broker to commissions, there must be an actual sale, vesting a right to the purchase money in the vendor and transferring the right of property to the purchaser; Ormsby v. Graham, 123 Ia. 202, 98 N. W. 724, where a consummated sale is defined to be one consummated by such a contract as will be enforced by the courts, if enforcement be demanded.

If the purchaser is unable to complete the sale and is obliged to pay a forfeit for his default, the broker can recover no share of such forfeit money, as his commission; Kimberly v. Henderson, 29 Md. 515; and so where a part of the purchase price has been paid and the purchaser is unable to pay the residue; Riggs v. Turnbull, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783.

Although the broker has spent time and money in finding a buyer, yet if he fails or abandons his effort or his authority is duly terminated, he earns no commission although he may have actually helped to bring about a sale subsequently made and to parties introduced by him, unless the broker's sale fails by the fault of the principal or he capriciously changes his mind, or the title is defective; Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Muldoon v. Muldoon, 133 Mass. 110; Rockwell v. Newton, 44 Conn. 337; or because of certain erroneous representations of the owner; Dotson v. Milliken, 209 U. S. 237, 28 Sup. Ct. 489, 52 L. Ed. 768.

A broker did not lose his commissions for procuring a mortgage loan where it failed because the lender demanded an indemnity bond against liens, the time for filing which had elapsed, and refused to accept a cash deposit with written evidence that no liens existed; Silberberg v. Chipman, 42 Colo. 20, 93 Pac. 1130, 15 L. R. A. (N. S.) 187.

A statute providing that contracts with brokers for the sale of land must be in writing and subscribed by the parties is constitutional, and means no more than an extension of the statute of frauds; Covey v. Henry, 71 Neb. 118, 98 N. W. 434; under a like statute it was held that, where there was no writing, a broker who had rendered services could not recover commissions; Leimbach v. Regner, 70 N. J. L. 608, 57 Atl. 138; to the same effect, Jamison v. Hyde, 141 Cal. 109, 74 Pac. 695; Marshall v. Trerise, 33 Mont. 28, 81 Pac. 400.

Authority to close a binding contract must be sufficiently conferred; Weatherhead v. Ettinger, 78 Ohio St. 104, 84 N. E. 598, 17 L. R. A. (N. S.) 210. Instructions to sell if he can, and for certain price, is not authority to make a binding contract; Morris v. Ruddy, 20 N. J. Eq. 236; nor is a letter stating what he would sell for; Gilbert v. Baxter, 71 Ia. 327, 32 N. W. 364; Simmons v. Kramer, 88 Va. 411, 13 S. E. 902; nor leaving a list of property with a broker; Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286. But it is held in England that instructions to a broker to sell property, with an agreement to pay a commission, authorized the broker to make a binding contract and sign it; [1900] 2 Ch. 267.

Where the contract with the agent stipulates a definite time within which the agent may sell, it gives the agent the exclusive right to sell within the time and the principal cannot revoke the agency; Levy v. Rothe, 17 Misc. Rep. 402, 39 N. Y. Supp. 1057; Green v. Cole, 127 Mo. 587, 30 S. W. 135. The broker takes the chance of the owner making a sale himself; Gilbert v. Coons, 37 Ill. App. 448; Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731; and in the absence of bad faith the owner may, after the broker's time limit has expired, sell to a customer introduced by the broker within the time limit; Page v. Griffin, 71 Mo. App. 524; Neal v. Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153; for a higher price; Decker v. Klingman, 149 Mich. 96, 112 N. W. 727; or a lower price; Loxley v. Studebaker, 75 N. J. L. 599, 68 Atl. 98; Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328.

If, after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so and the seller fairly and in good faith has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions because the pur-

chaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts; Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441, which was followed in Crowe v. Trickey, 204 U. S. 228, 27 Sup. Ct. 275, 51 L. Ed. 454 (in the New York case the agent's authority was revoked in bad faith before the completion of the sale); Donovan v. Weed, 182 N. Y. 43, 74 N. E. 563; Kelly v. Marshall, 172 Pa. 396, 33 Atl. 690; Fultz v. Wimer, 34 Kan. 576, 9 Pac. 316; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Ropes v. Rosenfeld's Sons, 145 Cal. 679, 79 Pac. 354; [1907] 2 Ir. Rep. 212.

Where two brokers endeavor to sell the property to the same person, who afterwards buys it, that agent earns the commission who was the efficient and procuring cause of the sale; Votaw v. McKeever, 76 Kan. 870, 92 Pac. 1120; Jennings v. Trummer, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680.

REAL EVIDENCE. Evidence of which any object belonging to the class of *things* is the source, *persons* also being included in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses; or *reported*, where its existence is related to us by others. Chamb. Best, Ev. 16.

REAL LAW. At Common Law. A popular term used to denote such parts of the system of common law as concern or relate to real property.

In Civil Law. A law which relates to specific property, whether movable or immovable.

If real law in any given case relate to immovable property, it is limited in its operation to the territory within which that property is situate, real estate being, both by the common and continental laws, subject exclusively to the laws of the government within whose territory it is situate; Story, Confl. L. 426. See LEX REI SITÆ.

REAL PROPERTY. Land, and generally whatever is erected or growing upon or affixed to land. Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10. Also rights issuing out of, annexed to, and exercisable within or about the same. Annexations made by a stranger to the soil of another without his consent become the property of the owner of the soil; Britton, bk. 2, ch. 2, sec. 6, p. 856; 2 Kent 334; Simpkins v. Rogers, 15 Ill. 397; Webster v. Potter, 105 Mass. 414; Bass v. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711. When annexations are made by the owner of the soil with the materials of another, so long as the identity of the original materials can be proved, the right of the original owner is not lost; White v. Twitchell, 25 Vt. 620, 60 Am. Dec. 294; Cochran v. Flint, 57 N. H. 514. Such property has the quality of passing on the death of the owner to the heir and not the executor. It may either be corporeal or incorporeal. See Will. Real Pr. 12.

In respect to property, *real* and *personal* correspond very nearly with *immovables* and *movables* of the civil law. By the latter "biens" is a general term for property; and these are classified into movable and immovable, and the latter are subdivided into corporeal and incorporeal. Guyot, *Répert. Biens.*

By immovables the civil law intended property which could not be removed at all, or not without destroying the same, together with such movables as are fixed to the freehold, or have been so fixed and are intended to be again united with it, although at the time severed therefrom. Taylor, Civ. L. 475.

Real property includes also some things not strictly land or rights exercised or engaged in reference thereto—such are offices and dignities, which are so classed because in ancient times such titles were annexed to the ownership of various lands; Wms. R. P. 8. Corodies and annuities are also sometimes classed as real property. Shares of stock in railway and canal companies are in England real property unless made personalty by act of parliament. In the United States they are personalty independent of statutory enactment; 2 Kent 340. Some interests in lands are regarded as personal property, and are governed by the rules relating thereto—such are terms of years of lands. Such interests are known as chattels real; 2 Bla. Com. 386.

Though the term *real*, as applied to property, in distinction from *personal*, is now so familiar, it is one of a somewhat recent introduction. While the feudal law prevailed, the terms in use in its stead were lands, tenements, or hereditaments. These acquired the epithet of *real* from the nature of the remedy applied by law for the recovery of them, as distinguished from that provided in case of injuries, contracts broken, and the like. In the one case the claimant or demandant recovered the *real thing* sued for, —the land itself,—while, ordinarily, in the other he could only recover recompense in the form of pecuniary damages.

The term, it is said, as a means of designation, did not come into general use until after the feudal system had lost its hold, nor till even as late as the commencement of the seventeenth century. One of the earliest cases in which the courts applied the distinctive terms of *real* and *personal* to estates, without any words of explanation, is said to have been that of Wind v. Jekyl, 1 P. Wms. 575; Wms. R. P. 66.

Corporeal hereditaments comprise land and whatever is erected or growing upon or affixed thereto, including whatever is beneath or above the surface, "*usque ad orcum*" as well as "*usque ad cœlum*;" 2 Bla. Com. 17;

Co. Litt. 4 *a*. Houses, trees, growing crops, and other articles fixed to the soil, though usually classed as realty, may under certain circumstances and for certain purposes acquire the character of personalty. Thus if one erect a building on the land of another with the latter's consent, it is the personal estate of the builder and may be levied on by his creditors as such; Ashmun v. Williams, 8 Pick. (Mass.) 402; Merchants' N. Bk. v. Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; see Richards v. Elevator Co., 159 U. S. 483, 16 Sup. Ct. 53, 40 L. Ed. 225; but if he fail to remove it within a reasonable time after being ejected from the land, it becomes a part of the realty; Turner v. Kennedy, 57 Minn. 104, 58 N. W. 823. If it is sold to the owner of the soil, it becomes real property; Oliver v. Brown, 80 Me. 542, 15 Atl. 599. So if a nurseryman plant trees upon land leased for the purpose of growing them for the market, the trees are deemed personalty; Miller v. Baker, 1 Metc. (Mass.) 27; 4 Taunt. 316. So where the owner of land sells growing trees (not in a nursery to be cut by the vendee), they will be deemed to pass as personalty where the contract gives no right to the vendee to allow them to remain upon the land; Claflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; 9 B. & C. 561. But where there is an understanding, express or implied, that the trees may remain upon the land and be cut at the pleasure of the vendee, then the property in the trees is deemed real; Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; Olmstead v. Niles, 7 N. H. 522. So crops, while growing, planted by the owner of the land, are a part of the real estate; but if sold by him when fit for harvesting, they become personalty; 5 B. & C. 829; and a sale of such crops, though not fit for harvest, has been held good as personalty; Craddock v. Riddlesbarger, 2 Dana (Ky.) 206; Stambaugh v. Yeates, 2 Rawle (Pa.) 161. See EMBLEMENTS; MINES AND MINING.

Profits which are the spontaneous fruits of the earth or its permanent fruits are real estate, but the corn and other growth of the earth which are produced annually by labor and industry, called *fructus industriales*, are regarded as personal chattels; Mabry v. Harp, 53 Kan. 398, 36 Pac. 743; O'Donnell v. Brehen, 36 N. J. L. 257.

Turpentine run into boxes in a state to be dipped up is personal property; Branch v. Morrison, 50 N. C. 16, 69 Am. Dec. 770; Richburger v. Rose, 90 Miss. 806, 44 South. 69; so of crude turpentine which has formed on the body of a tree and is usually known as "scrape"; it belongs to the person who has lawfully produced it by cultivation and is property classed with *fructus industriales;* Lewis v. McNatt, 65 N. C. 63.

Rails not set in a fence are no part of the realty; Robertson v. Phillips, 3 G. Greene (Iowa) 220.

A dam is not necessarily real estate. If built by one person on the land of another, with his consent, it would be personal estate; Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85.

Improvement claims are regarded as chattels; McTeer's Lessee v. Buttorff, 4 Yeates (Pa.) 300.

A title deed is a personal chattel, but it is so connected with and essential to the ownership of real estate that it descends with it to the heir; Wilson v. Rybolt, 17 Ind. 391, 79 Am. Dec. 486.

Manure made upon a farm in the usual manner for consumption of its products would be a part of the real estate; while if made from products purchased and brought onto the land by the tenant, as in case of a livery-stable, it would be personal; Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Plumer v. Plumer, 30 N. H. 558. See MANURE.

There are a large number of articles known as fixtures, which, though originally wholly movable and personal in their nature, have acquired, by having been affixed to real estate or applied to use in connection with it, the character of realty. See FIXTURES.

The intention of the parties immediately concerned, who have agreed that property annexed to the soil shall retain its character as personalty, will prevail except as against innocent purchasers without notice, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

The débris of a fire is realty; Guernsey v. Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

Equity will, in many instances, for the sake of enforcing and preserving the rights of parties interested, regard realty as converted into personalty and personalty as converted into realty, although no such change may actually have taken place. So where realty is devised to executors with direction to sell, it is immediately considered as personalty; 1 Bro. C. C. 497; Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. Ed. 460; Appeal of McClure, 72 Pa. 417. So where money is directed to be laid out in lands, it will be deemed realty for purposes of descent even before the purchase; 1 Bro. C. C. 503. But such direction must be imperative, otherwise no such result ensues; 3 Atk. 255; L. R. 7 Eq. 226; Bleight v. Bank, 10 Pa. 131. So realty owned by a partnership will be deemed personalty for the purposes of the partnership; 3 Kent 39; Foster v. Barnes, 81 Pa. 377; Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. Ed. 213; Sigourney v. Munn, 7 Conn. 11. And in Pennsylvania the moment

a corporation has exercised its right to condemn land, conversion takes place.

See PARTNERSHIP; CONVERSION; INCORPOREAL HEREDITAMENTS; LAND TRANSFER; REGISTRATION.

REAL STATUTES. Statutes which have property for their principal object, and do not speak of persons, except in relation to property. Sto. Confl. L. § 13.

REAL THINGS. Things substantial and immovable, and the rights and profits annexed to or issuing out of them. 1 Steph. Com. 167.

REALM. A kingdom; a country. 1 Taunt. 270; 4 Camp. 289; Rose 387.

REALTY. A term sometimes used as a collective noun for real property or estate—more generally to imply that that of which it is spoken is of the nature or character of real property or estate. See REAL PROPERTY.

REAR. The word has been held not necessarily to mean directly behind. Read v. Clarke, 109 Mass. 82.

REASON. That power by which we distinguish truth from falsehood and right from wrong, and by which we are enabled to combine means for the attainment of particular ends. Encyclopédie; Shelf. Lun. Introd. xxvi. *Ratio in jure æquitas integra.*

A man deprived of reason is not, in many cases, criminally responsible for his acts, nor can he enter into any contract.

Reason is called the *soul of the law;* for when the reason ceases the law itself ceases. Co. Litt. 97, 183: 1 Bla. Com. 70: 7 Toullier, n. 566; MAXIMS, *Cessante ratione*, etc.

REASONABLE. Conformable or agreeable to reason; just; rational.

REASONABLE ACT. This term signifies such an act as the law requires. When an act is unnecessary, a party will not be required to perform it as a reasonable act; 9 Price 43; Platt, Cov. 342, 157.

REASONABLE AND PROBABLE CAUSE. In Malicious Prosecution. See that title.

REASONABLE CARE. That care and foresight which men of ordinary prudence are accustomed to employ. Johnson v. R. Co., 6 Duer (N. Y.) 646. It is synonymous with ordinary care; Cronk v. R. Co., 3 S. Dak. 93, 52 N. W. 420; see Levering v. Ins. Co., 42 Mo. 95, 97 Am. Dec. 320; or due care; Butterfield v. R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678. See CARE; DUE CARE; NEGLIGENCE; ORDINARY CARE.

REASONABLE DOUBT. See DOUBT.

REASONABLE EXPECTATION. Within the meaning of the English bankruptcy act of 1883, one who begins business without capital and with a mortgage on all his assets, is held to have contracted his debts without reasonable or probable ground of expectation of being able to pay. 14 Q. B. D. 600.

REASONABLE FACILITIES. See FACILITIES.

REASONABLE PART. The share of a wife and children in a man's personal estate, of which, in early times, they could not be deprived.

REASONABLE PORTION. A power to charge an estate with reasonable portions or fortunes for younger children and for their maintenance and education is sufficiently certain to be capable of execution, and the word reasonable there is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Beatty 318.

REASONABLE QUESTION. See QUESTION.

REASONABLE RATES. See INTERSTATE COMMERCE COMMISSION; RATES.

REASONABLE SKILL. Such skill as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment. Mechanics Bank at Baltimore v. Bank, 6 Metc. 26.

REASONABLE TIME. The English law, which in this respect has been adopted by us, frequently requires things to be done within a reasonable time; but what a reasonable time is, it does not define: *quam longum debet esse rationabile tempus non definitur in lege, sed pendet ex discretione justiciariorum.* Co. Litt. 50.

The question of reasonable time is left to be fixed by circumstances and the usages of business. A bill of exchange must be presented within a reasonable time; Chitty, Bills 197-202. An abandonment must be made within a reasonable time after advice received of the loss; Marsh. Ins. 589.

The commercial code of France fixes a time in both these cases, which varies in proportion to the distance. See *Code de Com.* l. 1, t. 8, s. 1, § 10, art. 160; *id.* l. 5, t. 10, s. 3, art. 373. See NOTICE OF DISHONOR; PROTEST.

Where the facts are admitted or clearly proved, what is a reasonable time is a question of law for the court depending upon all the circumstances of the case; Paine v. R. Co., 118 U. S. 152, 6 Sup. Ct. 1023, 30 L. Ed. 193.

It has been held that where the question of reasonable time is one affected by many different circumstances with respect to which no definite rule of law has been laid down, it is a question for the jury; Loomis v. Supply Co., 81 Conn. 343, 71 Atl. 358 (in a sale). It is a question for the court when by a series of decisions on the same data it has been rendered certain; Hamilton v. Ins. Co., 61 Fed. 379, 9 C. C. A. 530, 22 U. S. App. 164.

REASSURANCE. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from

loss for the insurance he has made: this is called reassurance.

RE-ATTACHMENT. A second attachment of him who has formerly attached and dismissed the court without day, by the not coming of the justices, or some such casualty. Reg. Orig. 35.

REBATE. In Mercantile Law. Discount; the abatement of interest in consequence of prompt payment. An allowance by way of discount or drawback.

The allowance of rebates is a common method by which common carriers discriminate between shippers; the practice is unlawful; and a contract to procure rebates from railroad companies for a shipper is void as being in violation of the provisions of the interstate commerce law; Parks v. Packing Co., 6 Misc. 570, 27 N. Y. Supp. 289.

Rebate, as used in the interstate commerce act and its amendments, refers only to such a discount, reduction or draw-back as creates a discrimination in favor of a particular shipper and against other shippers in like situations, and destroys that equality of treatment which it is the great purpose of the law to enforce; American Sugar Ref. Co. v. R. Co., 207 Fed. 733, 125 C. C. A. 251.

Under the act of Congress of February 4, 1887 (Cullom Act), the standard of comparison was the treatment of other shippers. It was necessary to prove, not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate, or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed; Chicago & A. R. Co. v. U. S., 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551.

An allowance to a packer of a certain sum per car for the use of his plant tracks in hauling his freight to the railroad line, being in the form of a refund of terminal charges, is an illegal rebate under the Elkins Act; Chicago & A. R. Co. v. U. S., 212 U. S. 563, 29 Sup. Ct. 689, 53 L. Ed. 653.

An allowance to a shipper for the use of his private tap line is a rebate and illegal under the Elkins Act; Central Yellow Pine Ass'n v. Ry. Co., 10 Inter-St. Com. Rep. 193, 505; or for elevator service; In re Allowances to Elevators by Union Pac. R. Co., 13 Inter-St. Com. Rep. 498; or for the handling of cars by a shipper within its plant; General Electric Co. v. R. Co., 14 Inter-St. Com. Rep. 237; or for the construction and use by the shipper of a tie hoist; Chesapeake & O. Ry. Co. v. Lumber Co., 174 Fed. 107, 98 C. C. A. 81; but it is also held that a carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; if the amount is reasonable, it is not a prohibited rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor; U. S. v. R. Co., 231 U. S. 274, 34 Sup. Ct. 75, 58 L. Ed. ——.

Where there is a continuous carriage from Kansas City to New York at a concession from the legal rate for part of the carriage, it is a single continuing offense and not a series of offenses, although it is continuously committed in each district through which the goods are transported, at the prohibited rate; Armour Packing Co. v. U. S., 209 U. S. 57, 28 Sup. Ct. 428, 52 L. Ed. 681; and the provision of the Elkins Act, making the offense triable in any Federal district through which such transportation is had, is not in violation of the sixth amendment to the constitution requiring a prosecution to be had in the state or district where the offense is committed; Armour Packing Co. v. U. S., 209 U. S. 57, 28 Sup. Ct. 428, 52 L. Ed. 681. The court within whose jurisdiction a fraudulent scheme is first devised has jurisdiction of the offense, regardless of where the formal contract was executed; Thomas v. U. S., 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720 (under the Elkins Act).

The return to an applicant for life insurance by the agent of a part of his commission is not within a statute forbidding rebates by life insurance companies, so as to avoid the policy; Interstate Life Assur. Co. v. Dalton, 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. (N. S.) 722; *contra*, Heffron v. Daly, 133 Mich. 613, 95 N. W. 714. If the agent rebate against his company's consent, it is not liable to the statutory penalty; Equitable Life Assur. Soc. v. Com., 121 Ky. 543, 89 S. W. 537.

REBEL. A citizen or subject who unjustly and unlawfuly takes up arms against the constituted authorities of the nation, to deprive them of the supreme power, either by resisting their lawful and constitutional orders in some particular matter or to impose on them conditions. Vattel, *Droit des Gens*, liv. 3, § 328. In another sense, it signifies a refusal to obey a superior or the commands of a court.

REBELLION. The taking up arms traitorously against the government. The forcible opposition and resistance to the laws and process lawfully issued.

Insurrection, sedition, rebellion, revolt, and mutiny express action directed against government or authority, while riot has this implication only incidentally, if at all. They express actual and open resistance to authority. Except sedition, which may be secret or open, and often is only of a nature to lead to overt acts. An insurrection goes beyond sedition, in that it is an actual arising against the government. Rebellion goes beyond insurrection in aim, being an attempt

actually to overthrow the government, while an insurrection seeks only some change of minor importance. A rebellion is generally on a larger scale than an insurrection. A revolt has generally the same aim as a rebellion, but it is on a smaller scale. A revolt may be against military government, but is generally like insurrection, sedition, and rebellion against civil government. A mutiny is organized resistance to law in an army or navy, and sometimes a similar act by an individual. The success of a rebellion often dignifies it with the name of a revolution. Cent. Dict.

One who incites, etc., rebellion or insurrection against the United States or gives aid or comfort thereto shall be imprisoned not more than ten years or fined not more than $10, or both; and be incapable of holding office under the United States Cr. Code, § 4.

When a rebellion has broken out in any state, the rebel cruisers may be treated as pirates by the established government, if the rebel government has not been recognized as belligerent by the parent state or by foreign nations; but the right ceases to exist on the recognition of the rebels as belligerents; Miller v. U. S., 11 Wall. (U. S.) 268, 20 L. Ed. 135; Boyd's Wheat. Int. Law 169.

REBELLION, COMMISSION OF. In Old English Practice. A writ issuing out of chancery to compel the defendant to appear.

REBOUTER. To repel or bar. The action of the heir by the warranty of his ancestor is called to rebut or repel.

REBUS SIC STANTIBUS. A name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed. Taylor, Int. L. § 394; 1 Oppenheim, Int. L. 550; Grotius, ch. XVI, § XXV; Vattel B. 2, c. 13, § 200; Hall, Int. L. § 116; Hershey, Int. Pub. L. 319.

The change of government from a monarchy to a republic was treated as not terminating treaties; 5 Moore, Dig. Int. L. 335; nor a successful revolution; *id.* 337; nor an alliance of one of the treaty powers with a third power; *id.* But as the result of the changes in the state of Europe effected by the wars of Napoleon, all the treaties of the United States with European powers were considered as terminated, excepting only one with Spain of 1795; *id.* 338.

REBUT. To contradict; to do away.

REBUTTABLE PRESUMPTION. See PRESUMPTION.

REBUTTAL. See REBUTTING EVIDENCE.

REBUTTER. In Pleading. The name of the defendant's answer to the plaintiff's surrejoinder. It is governed by the same rules as the rejoinder. Comyns, Dig. *Pleader* (K). See PLEADINGS.

REBUTTING EVIDENCE. That evidence which is given by a party in the cause to explain, repel, counteract, or disprove facts given in evidence on the other side. The term rebutting evidence is more particularly applied to that evidence given by the plaintiff to explain or repel the evidence given by the defendant.

It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side; Scott v. Woodward, 2 McCord (S. C.) 161; and the proof of circumstances may be offered to rebut the most positive testimony; Nelson v. U. S., 1 Pet. C. C. 235, Fed. Cas. No. 10,116. It is within the discretion of the court to allow evidence in rebuttal which should have been offered in chief; Simons v. People, 150 Ill. 1019, 36 N. E. 1019.

But there are several rules which exclude all rebutting evidence. A party cannot impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified; Gray v. Gray, 3 Litt. (Ky.) 465; nor can he rebut or contradict what a witness has sworn to which is immaterial to the issue; Smith v. Henry, 2 Bail. (S. C.) 118.

Parties and privies are estopped from contradicting a written instrument by parol proof; but this rule does not apply to strangers; Overseers of Berlin v. Overseers, 10 Johns. (N. Y.) 229. But the parties may prove that before breach the agreement was abandoned, or annulled by a subsequent agreement not in writing; Buel v. Miller, 4 N. H. 196. And when the writing was made by another, as where the log-book stated a desertion, the party affected by it may prove that the entry was false or made by mistake; Orne v. Townsend, 4 Mas. 541, Fed. Cas. No. 10,583. It is within the discretion of a trial court to permit witnesses to be called in rebuttal whose testimony is in support of that given in chief; Kansas City, Ft. S. & M. R. Co. v. McDonald, 51 Fed. 178, 2 C. C. A. 153, 4 U. S. App. 563.

RECALL. In International Law. To deprive a minister of his functions; to supersede him.

Where a mission to a foreign country is terminated by a formal letter of recall, the minister usually delivers a copy thereof to the minister or secretary of foreign affairs, obtains an audience of the sovereign or chief executive, and delivers or exhibits the original of his recall. If he is recalled at the request of the government to which he is accredited, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, it must depend upon circumstances whether a formal letter of recall is to be sent to him or whether he may quit the residence without waiting for it; also as to whether he shall demand or the sovereign

shall grant him an audience of leave; 1 Hall. Int. L. 365. See LETTER OF RECALL; MINISTER.

As to the recall of officials and of judicial decisions, see INITIATIVE, REFERENDUM AND RECALL.

RECALL A JUDGMENT. To reverse a judgment on a matter of fact.

RECAPTION. The act of a person who has been deprived of the custody of another, to which he is legally entitled, by which he regains the peaceable custody of such person; or of the owner of personal or real property who has been deprived of his possession, by which he retakes possession peaceably.

In each of these cases the law allows the recaption of the person or of the property, provided he can do so without occasioning a breach of the peace or an injury to a third person who has not been a party to the wrong. Co. 3d Inst. 134; 2 Rolle, Abr. 565; 3 Bla. Com. 5.

The right of recaption of a person is confined to a husband, in retaking his wife; a parent, his child, of whom he has the custody; a master, his apprentice; and, according to Blackstone, a master, his servant,—but this must be limited to a servant who assents to the recaption: in these cases, the party injured may peaceably enter the house of the wrong-doer, without a demand being first made, the outer door being open, and take and carry away the person wrongfully detained. He may also enter peaceably into the house of a person harboring, who was not concerned in the original abduction; 8 Bingh. 186.

The same principles extend to the right of recaption of personal property. The true owner of goods wrongfully taken may retake them if he can, even from a third party, using (it is said) whatever force is reasonably necessary; Pollock, Torts 361; and may enter, for that purpose, on the first taker's land, but not on a third person's land, unless, it is said, the original taking was felonious, or, perhaps, after the goods have been claimed and the occupier of the land has refused to deliver them up; *id.*

In the recaption of real estate, the owner may, in the absence of the occupier, break open the outer door of a house and take possession; but if in regaining his possession the party be guilty of a forcible entry and breach of the peace, he may be indicted; but the wrong-doer, or person who had no right to the possession, cannot sustain any action for such forcible regaining possession merely; 1 Chitty, Pr. 646. See Cooley; Pollock, Torts.

RECAPTURE. The recovery from the enemy, by a force friendly to the former owner, of a prize by him captured.

It seems incumbent on fellow-citizens, and it is of course equally the duty of allies, to rescue each other from the enemy when there is a reasonable prospect of success; 3 C. Rob. 224.

By R. S. § 4652, if a vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, not having been condemned as prize before recapture, meet and competent salvage shall be awarded, according to the circumstances of each case. If it be United States property, it shall be restored to the United States, and the court shall order the Treasury to pay salvage, costs and expenses. If it belonged to persons residing within or under the protection of the United States, it shall be restored to them upon payment of salvage, etc.; if under any foreign country in amity with the United States, and by the law or usage of such country the property of a citizen of the United States would be restored in like circumstances, it shall be restored upon such terms as the law of such country would require of a United States citizen in like circumstances, otherwise upon the payment of salvage, etc., as the court shall order. The salvage is decreed to the captors. Where there has been no capture there can be no recapture; Oakes v. U. S., 174 U. S. 793, 19 Sup. Ct. 864, 43 L. Ed. 1169.

Salvage is not generally allowed on the recapture of neutral property, unless there be danger of condemnation, or such unjustifiable conduct on the part of the government of the captors as to bring the property into jeopardy; 6 C. Rob. 410; Talbot v. Seeman, 1 Cra. (U. S.) 1, 2 L. Ed. 15. To entitle a party to salvage there must have been actual or constructive capture; but it is sufficient if the property was completely under the dominion of the enemy; 3 C. Rob. 305; it is a recapture if the prize was actually rescued from the grasp of the hostile captor; *id.*; 3 Phill. Int. L. 638. Where the enemy has captured a ship and then abandoned her and she is recaptured, she is to be restored on payment of salvage, but the rate of salvage is discretionary; 6 C. Rob. 273; but if the abandonment be caused by terror of a hostile fleet, it is a recapture; *id.*

The distinction between the recapture of the property of a belligerent and that of a neutral must be carefully observed. In the former case international law decrees that title to the recaptured property vests immediately in the state making the capture, leaving it to the municipal law of that state to decide whether the property shall be restored to the original owners and upon what conditions. In the case of a neutral vessel, recapture can only confer upon the recaptor state the rights which were possessed by the state from which the vessel was recaptured, that is to say, a title subject to the decision of a prize court that the neutral vessel is subject to condemnation. When the courts of the captor state have decided that the vessel would have been subject to condemnation, it then remains for the municipal law

of the state to determine the amount of salvage due by the neutral.

Where a prize is abandoned and brought into court by neutral salvors, a neutral court has jurisdiction to decree salvage, but cannot restore the property to the original owner; neutral nations ought not to inquire into the validity of a capture as between belligerents; McDonough v. Dannery, 3 Dall. (U. S.) 188, 1 L. Ed. 563.

Recapture can be made by a non-commissioned vessel; 3 C. Rob. 229.

In Great Britain prize statutes were formerly passed at the beginning of every war. The Naval Prize Act, 1864, provides that, as between subjects, the right to recover possession is preserved forever, except where the vessel, after capture, has been fitted out by the enemy for war. The right is subject, when the recapture is by a public ship, to the payment of one-eighth salvage or when the recapture is made under circumstances of special difficulty or danger, more than one-eighth, but not exceeding one-fourth. The French rule is to restore a vessel recaptured by a public vessel on the payment of one-thirtieth of the value, if recaptured within twenty-four hours; if after that time, the salvage is one-tenth.

If the prize has been duly condemned and sold to a neutral purchaser by the captors, that title prevails against the original owners and the recaptors, both under the English and American rule. But such condemnation must be in a competent prize court of the belligerents and not one held in neutral territory; 1 C. Rob. 135.

A recaptured vessel may be permitted, under the English act of 1864, to continue her voyage, or be brought in at once for adjudication; in the former case the recaptor does not lose his right to salvage. If she does not return to a port of the kingdom within six months, the recaptor may proceed in the admiralty, for his salvage.

See INFRA PRÆSIDIA; NEUTRALITY; POSTLIMINIUM; PRIZE; SALVAGE.

RECEIPT. A written acknowledgment of payment of money or delivery of chattels.

It is executed by the person to whom the delivery or payment is made, and may be used as evidence against him, on the general principle which allows the admission or declaration of a party to be given in evidence against himself. As an instrument of evidence, the receipt of one person is, in general, inoperative against another, although often useful as a voucher in the private settlement of accounts; and the statutes of some states make receipts for small payments made by executors, etc., evidence of the payment on a settlement of their accounts. And receipts of public officers are sometimes admissible *per se;* State Bank v. Kain, 1 Breese (Ill.) 75. It is essential to a receipt that it acknowledge the payment or delivery referred to; Russ. & R. 227; 7 C. & P. 549. And under the stamp laws a *delivery* or *payment* must be stated; 1 Camp. 499. Also the receipt must, from the nature of the case, be in writing, and must be delivered to the debtor; for a memorandum of payment made by the creditor in his own books is no receipt; 2 B. & Ald. 501, n.; Hunter v. Campbell, 1 Spears (S. C.) 53. See Nelson v. Boland, 37 Mo. 432.

A debtor is not bound to pay unless the creditor is ready and willing to give a receipt; 9 S. C. 248 (So. Africa).

Receipts, effect of. The mere acknowledgment of payment made is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only; Rollins v. Dyer, 16 Me. 475; Johnson v. Johnson, 11 Mass. 363; 1 Perr. & D. 437; Robinett v. Wilson, 8 Gill (Md.) 179; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Danziger v. Hoyt, 46 Hun (N. Y.) 270; Harris v. Hay, 111 Pa. 562, 4 Atl. 715; and is, in general, open to explanation; House v. Low, 2 Johns. (N. Y.) 378; Hogan & Co. v. Reynolds, 8 Ala. 59; Thomas v. Austin, 4 Barb. (N. Y.) 265; St. Louis, Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635; being an exception to the general rule that parol evidence cannot be admitted to contradict or vary a written instrument; Tobey v. Barber, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95. Thus, a party may always show, in explanation of a receipt limited to such acknowledgment, the actual circumstances under which it was made; Putnam v. Lewis, 8 Johns. (N. Y.) 389; *e. g.*, that it was obtained by fraud; Trisler v. Williamson, 4 H. & McH. (Md.) 219, 1 Am. Dec. 396; or given under a mistake; Egleston v. Knickerbacker, 6 Barb. (N. Y.) 458; Whittemore v. Stout's Adm'r, 3 Dana (Ky.) 427; or that, in point of fact, no money was actually paid as stated in it; Davis v. Allen, 3 N. Y. 168; Beach v. Packard, 10 Vt. 96, 33 Am. Dec. 185; State v. Cummiskey, 34 Mo. App. 189; Ditch v. Vollhardt, 82 Ill. 134; but see Hillyer v. Vaughan, 1 J. J. Marsh. (Ky.) 583; or that the medium of remittance on which the receipt was based has failed; Nat. L. Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503; or where it is given by a contractor under an assurance that it is only a receipt for moneys then paid, and would not preclude him from making a claim for extra work; White v. Ellisburgh, 18 App. Div. 514, 45 N. Y. Supp. 1122. A receipt in full for part of an undisputed claim does not prevent recovery of the balance, though given with knowledge and there was no error or fraud; Jones v. Rice, 19 Misc. 357, 43 N. Y. Supp. 491. A receipt is an admission only; Greenl. Ev. 1, 212; 3 B. & Ad. 318; State v. Branch, 112 Mo. 661, 20 S. W. 693; it is but *prima*

facie evidence against the creditor; Whiting v. L. Assur. Soc., 60 Fed. 197, 8 C. C. A. 558, 13 U. S. App. 597; and may be explained, unless executed with the formalities of a deed; Leake, Contr. 901; in law as well as equity; L. R. 6 Ch. 534. As against a stranger thereto, it is incompetent evidence of the payment thereby acknowledged; Ellison v. Albright, 41 Neb. 93, 59 N. W. 703, 29 L. R. A. 737. Mere negligence in signing a receipt without reading it will not conclude the signer or preclude explanation of its contents, particularly if the signing were induced by fraud; Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195, 45 Pac. 590.

Receipts "in full." When, however, we find a receipt acknowledging payment "in full" of a specified debt, or "in full of all accounts" or of "all demands," the instrument is of a much higher and more conclusive character. It does not, indeed, like a release, operate upon the demand itself, extinguishing it by any force or virtue in the receipt, but it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers from such acknowledgment an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum as a final satisfaction; Paige v. Perno, 10 Vt. 491; Reid v. Reid, 13 N. C. 247, 18 Am. Dec. 570; Emrie v. Gilbert, Wright (Ohio) 764; Danziger v. Hoyt, 120 N. Y. 190, 24 N. E. 294. This compromise thus shown by the receipt will often operate to extinguish a demand, although the creditor may be able to show he did not receive all that he justly ought. Papers showing a receipt of money in full satisfaction of a decree appealed from, cannot be varied or contradicted by parol evidence; Bofinger v. Tuyes, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. Ed. 649. See ACCORD AND SATISFACTION.

If the rights of a party are doubtful, are honestly contested, and time is given to allow him to satisfy himself, a receipt in full, though given for less than his just rights, will not be set aside. Thus, in general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud; Holbrook v. Blodget, 5 Vt. 520; 1 Camp. 392; Eve v. Mosely, 2 Strobh. (S. C.) 203; and unless given in ignorance of its purport, or under circumstances constituting duress, it is an acquittance in bar of any further demand; De Arnaud v. U. S., 151 U. S. 483, 14 Sup. Ct. 374, 38 L. Ed. 744. It is held to be a contract and not to be explained; Conant v. Kimball's Estate, 95 Wis. 550, 70 N. W. 74.

But receipts of this character are not wholly exempt from explanation; fraud or misrepresentation may be proved, and so may such mistake as enters into and vitiates the compromise of the demand admitted; 1 Camp. 394; Trisler v. Williamson, 4 H. & McH. (Md.) 219, 1 Am. Dec. 396; Thomas v. Austin, 4 Barb. (N. Y.) 265; 2 C. & P. 44. The evidence in explanation must be clear and full, and addressed to the point that there was not in fact an intended and valid compromise of the demand. For if the compromise was not binding, the receipt in full will not aid it. The receipt only operates as evidence of a compromise which extinguished the claim; Bailey v. Day, 26 Me. 88; Palmerton v. Huxford, 4 Denio (N. Y.) 166; McDowall v. Lemaitre, 2 McCord (S. C.) 320; Lawrence v. Nav. Co., 4 Wash. C. C. 562, Fed. Cas. No. 8,143.

A receipt for a specified amount of money and designated notes executed by a defendant to the plaintiff's intestate may be used as evidence that it was a deposit with the latter and not a payment to him where there is other evidence to the same effect; Northrop v. Knott, 114 Cal. 612, 46 Pac. 599.

Though a receipt in full is presumed to be in full settlement the presumption is not conclusive; Newton's Ex'r v. Field, 98 Ky. 186, 32 S. W. 623; and where it is given for work and labor, a receipt in full for the bill rendered is not conclusive evidence of a final settlement unless it purports to be so; O'Hehir v. Traction Co., 91 Hun 639, 36 N. Y. Supp. 140. Where the question is raised whether the purchase price of an article has been paid notwithstanding a receipt, and there is evidence to the contrary, the question is for the jury; Mosel v. Brewing Co., 2 App. Div. 93, 37 N. Y. Supp. 525; and a jury is not precluded from finding that a receipt in full was not intended to be such by the fact that he who signed it gave no explanation for doing so; Duncan v. Grant, 87 Me. 429, 32 Atl. 1000.

Receipts in deeds. The effect to be given to a receipt for the consideration-money, so frequently inserted in a deed of real property, has been the subject of numerous and conflicting adjudications. The general principle settled by weight of authority is that for the purpose of sustaining the conveyance as against the vendor and his privies the receipt is conclusive: they are estopped to deny that a consideration was paid sufficient to sustain the conveyance; Wilt v. Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Greenvault v. Davis, 4 Hill (N. Y.) 643. But in a subsequent action for the purchase-money or upon any collateral demand, *e. g.* in an action to recover a debt which was in fact paid by the conveyance, or in an action for damages for breach of a covenant in the deed, and the like, the grantor may show that the consideration was not in fact paid—that an additional consideration to that mentioned was agreed for, etc.; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Bullard v. Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; Johnson v. Taylor, 15 N. C. 355; Schillinger v. McCann, 6 Greenl. (Me.) 364;

5 B. & Ald. 606; Saunders v. Hendrix, 5 Ala. 224; Harris v. Harris, 2 Harr. (Del.) 354; Moore v. McKie, 5 Smedes & M. (Miss.) 238; Sparrow v. Smith, 5 Conn. 113; Ayres v. McConnel, 15 Ill. 230; Herbert v. Scofield, 9 N. J. Eq. 492. But there are many contrary cases. See Steele v. Adams, 1 Greenl. (Me.) 2; Maigley v. Hauer, 7 Johns. (N. Y.) 341; Dixon v. Swiggett, 1 Harr. & J. (Md.) 252; Steele v. Worthington, 2 Ohio 182; 1 B. & C. 704. And when the deed is attacked for fraud, or is impeached by creditors as voluntary and therefore void, or when the object is to show the conveyance illegal, the receipt may be explained or contradicted; Den v. Shotwell, 23 N. J. L. 465; Coxe v. Sartwell, 21 Pa. 480; Clapp v. Tirrell, 20 Pick. (Mass.) 247; Kimball v. Fenner, 12 N. H. 248. See ASSUMPSIT; DEED; RECITAL.

With this exception of receipts inserted in a sealed instrument having some other purpose to which the receipt is collateral, a receipt under seal works an absolute estoppel, on the same principles and to the same general extent as other specialties; Spiers v. Clay's Adm'rs, 11 N. C. 22. Thus, where an assignment of seamen's wages bore a sealed receipt for the consideration money, even though the attesting witness testified that no money was paid at the execution of the papers, and defendant offered no evidence of any payment ever having been made, and refused to produce his account with the plaintiff (the assignor), on the trial, it was held that the receipt was conclusive; 2 Taunt. 141. See SEAL; SPECIALTY.

Receipt embodying contract. A receipt may embody a contract; and in this case it is not open to the explanation or contradiction permitted in the case of a simple receipt; Langdon v. Langdon, 4 Gray (Mass.) 186; Tarbell v. Elevator Co., 44 Minn. 471, 47 N. W. 152. An agreement in a receipt is as conclusive as any other paper executed between the parties; Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635. The fact that it embodies an agreement brings it within the rule that all matters resting in parol are merged in the writing. See EVIDENCE. Thus, a receipt which contains a clause amounting to an agreement as to the application to be made of the money paid—as when it is advanced on account of future transactions—is not open to parol evidence inconsistent with it; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Wakefield v. Stedman, 12 Pick. (Mass.) 562. A bill of parcels with prices affixed, rendered by a seller of goods to a purchaser, with a receipt of payment executed at the foot, was held in one case to amount to a contract of sale of the goods, and therefore not open to parol explanation; while in another case a similar bill was held merely a receipt, the bill at the head being deemed only a memorandum to show to what the receipt applied; Harris v. Johnston, 3 Cra. (U. S.) 311, 2 L. Ed. 450; Querry v. White, 1 Bibb (Ky.) 271. A bill of lading, which usually contains words of receipt stating the character, quantity, and condition of the goods as delivered to the carrier, is the subject of a somewhat peculiar rule. It is held that so far as the receipt is concerned it may be explained by parol; Peck v. Mallams, 10 N. Y. 529; 1 Abb. Adm. 209, 397; Hossack v. Moody, 39 Ill. App. 17. But see Benjamin v. Sinclair, 1 Bail. (S. C.) 174.

Receipts given by a landlord to different tenants are not admissible to show the character of the tenancy by a difference in the form of receipts, the receipt being in the one case for one month only and in the other not specifying the time, and the effort being to establish a monthly tenancy; Schneider v. Hill, 19 Misc. 56, 42 N. Y. Supp. 879.

But as respects the agreement to carry and deliver, a receipt is a contract, to be construed, like all other contracts, according to the legal import of its terms, and cannot be varied by parol; Wolfe v. Myers, 3 Sandf. (N. Y.) 7.

In this connection may also be mentioned the receipt customarily given in the New England states, more particularly for goods on which an attachment has been levied. The officer taking the goods often, instead of retaining them in his own manual control, delivers them to some third person, termed the "receiptor," who gives his receipt for them, undertaking to redeliver upon demand. This receipt has in some respects a peculiar force. The receiptor having acknowledged that the goods have been attached cannot afterwards object that no attachment was actually made, or that it was insufficient or illegal; Lyman v. Lyman, 11 Mass. 317; Smith v. Cudworth, 24 Pick. (Mass.) 196. Nor can he deny that the property was that of the debtor, except in mitigation of damages or after redelivery; Wakefield v. Stedman, 12 Pick. (Mass.) 562; Bursley v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423. He may show that the property has been taken from him; Maxwell v. Warner, 11 N. H. 570. And in the absence of fraud, the value of the chattels stated in the receipt is conclusive upon the receiptor; Wakefield v. Stedman, 12 Pick. (Mass.) 562.

Where the payment is made in some particular currency or medium, as doubtful bank bills, a promissory note of another person, etc., clauses are often inserted in receipts specifying the condition in which such mode of payment is accepted. In most states negotiable paper given in payment is presumed to have been accepted on the condition that it shall not work a discharge of the demand unless the paper shall ultimately produce satisfaction; and if an intent to accept it absolutely does not affirmatively appear, the creditor is entitled, in case the paper turned out to him is dishonored, to return it and claim to be paid anew. See PAYMENT. If

the receipt is silent on that subject, it is open to explanation, and the creditor may rebut it by proof that the payment admitted was in fact made by a note, bill, check, bank-notes afterwards ascertained to be counterfeit, or notes of a bank in fact insolvent though not known to be so to the parties, etc.; Murray v. Governeur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Ontario Bank v. Lightbody, 13 Wend. (N. Y.) 101, 27 Am. Dec. 179; Weed v. Snow, 3 McLean 265, Fed. Cas. No. 17,347. But see Robert v. Garnie, 3 Caines (N. Y.) 14; Phillips v. Blake, 1 Metc. (Mass.) 156. But if the agreement of the parties is specified in the receipt, the clause which contains it will bind the parties, as being in the nature of a contract; Glenn v. Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452; Proctor v. Mather, 3 B. Monr. (Ky.) 353. A receipt for a note taken in payment of an account will not, in general, constitute a defence to an action on the account, unless it appears by proof that the creditor agreed to receive the note as payment and take the risk of its being paid; Berry v. Griffin, 10 Md. 27, 69 Am. Dec. 123.

Receipts, uses of. A receipt is often useful as evidence of facts collateral to those stated in it. It proves the payment; and whatever inference may be legally drawn from the fact of the payment described will be supported by the receipt. Thus, receipts for rent for a given term have been held *prima facie* evidence of the payment of all rent previously accrued; Decker v. Livingston, 15 Johns. (N. Y.) 479; Brewer v. Knapp, 1 Pick. (Mass.) 332. And they have been admitted on trial of a writ of right, as showing acts of ownership on the part of him who gave them; 7 C. B. 21. A receipt given by A to B for the price of a horse, afterwards levied on as property of A, but claimed by B, has been admitted as evidence of ownership against the attaching creditor; Obart v. Letson, 17 N. J. L. 78, 34 Am. Dec. 182. A receipt "in full of all accounts," the amount being less than that called for by the accounts of the party giving it, was held in his favor evidence of a mutual settlement of accounts on both sides, and of payment of the balance ascertained to be due after setting off one account against the other; Alvord v. Baker, 9 Wend. (N. Y.) 323. A receipt given by an attorney for securities he was to collect and account for has been held presumptive evidence of the genuineness and justness of the securities; Hair v. Glover, 14 Ala. 500. And a general receipt by an attorney for an evidence of debt then due, is presumed to have been received by him as attorney, for collection; and he must show the contrary to avoid an action for neglect in not collecting; Smedes Ex'rs v. Elmendorf, 3 Johns. (N. Y.) 185.

A receipt signed in the name of a certain person by another person, constitutes no evidence of the receipt of the money by the latter; Perkins v. Tooley, 74 Mich. 220, 41 N. W. 903.

Receipts, larceny and forgery of. A receipt may be the subject of larceny; Brower v. Peabody, 2 Abb. Pr. (N. Y.) 211; or of forgery; 7 C. & P. 459. Punched railroad tickets shown to be receipts to the conductor and vouchers to him for the amount of fare between stations, are receipts within a statute making it larceny to steal any receipt; State v. Wilson, 95 Ia. 341, 64 N. W. 266.

And it is a sufficient "uttering" of a forged receipt to place it in the hands of a person for inspection with intent fraudulently to induce him to make an advance on the faith that the payment mentioned in the spurious receipt has been made; 14 E. L. & Eq. 556. See FORGERY.

See RELEASE.

RECEIPTOR. See RECEIPT.

RECEIVABLE. In a legacy, payable; vested. 29 L. J. Ch. 822; L. R. 6 Eq. 59.

RECEIVER. One who receives money to the use of another to render an account. Story, Eq. Jur. § 446. Receivers were at common law liable to the action of account-render for failure in the latter portion of their duties.

In Equity. A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things, which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant. The remedy of the appointment of a receiver is one of the very oldest in the court of chancery, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction; Bisph. Eq. 606.

He is a ministerial officer of the court; 2 S. & S. 98; Field v. Jones, 11 Ga. 413; Texas & P. Ry. Co. v. Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135 (not a party in a full sense; Youtsey v. Hoffman, 108 Fed. 693); with no powers but those conferred by his order of appointment and the practice of the court; Verplanck v. Ins. Co., 2 Paige, Ch. (N. Y.) 452; which do not extend beyond the jurisdiction of the court which appoints him; Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164 (U. S.) (but see *infra*); appointed on behalf of all parties who may establish rights in the cause; Thom v. Pittard, 62 Fed. 232, 10 C. C. A. 352, 8 U. S. App. 597; on behalf of no particular interest; Pennsylvania Steel Co. v. Ry. Co., 198 Fed. 721, 117 C. C. A. 503; he stands in the shoes of the company; Central Trust Co. of New York v. Ry. Co., 59 Fed. 523; 3 Atk. 564; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 417; and after his appointment neither the owner nor any other party can exercise any acts of ownership over the prop-

erty; 2 S. & S. 96. Neither party is responsible for his acts; Milwaukee & M. R. Co. v. Soutter, 2 Wall. (U. S.) 519, 17 L. Ed. 900. His custody is that of the court, and leaves the right of the parties concerned to be controlled by the ultimate decree of the court; 10 Bank. Reg. 517. A receiver of a railroad is a common carrier under the Federal Hours of Labor Law; U. S. v. Ramsey, 197 Fed. 144, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031.

The appointment of a receiver does not change the title or right of possession of the property, but puts it into his custody for the benefit of the party ultimately entitled; Union Bank v. Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; it does not affect any lien on the property; Pennsylvania Steel Co. v. Ry. Co., 198 Fed. 721, 117 C. C. A. 503; nor does it work a dissolution of the corporation, but only suspends the function of its officers as far as provided in the decree; State v. Ry. Co., 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179.

A court will protect its receiver in the possession and use of franchises and property committed to him; Fidelity Trust & S. V. Co. v. Ry. Co., 53 Fed. 687.

The rule that property in the hands of a receiver is *in custodia legis*, and that interference with such possession without leave of the court is a contempt, is as applicable in the seizure thereof to enforce payment of taxes due the state as in any other case; In re Tyler, 149 U. S, 164, 13 Sup. Ct. 785, 37 L. Ed. 689.

A receiver is an officer of the court which appointed him, and a judgment in another court in a suit affecting the receiver's right of possession, begun without the permission of the court appointing him, is void; Comer v. Felton, 61 Fed. 731, 10 C. C. A. 28, 22 U. S. App. 313. A receiver is not the agent of the corporation nor a substitute for the board of directors. He is but the hand of the court appointing him. His acts are not the acts of the corporation, and his servants are not the servants of the corporation; Memphis & C. R. Co. v. Hoechner, 67 Fed. 456, 14 C. C. A. 469, 31 U. S. App. 644. A decree appointing a receiver is an act of such notoriety that all persons have constructive notice thereof; Memphis & C. R. Co. v. Hoechner, 67 Fed. 456, 14 C. C. A. 469, 31 U. S. App. 644. A receivership is not personal, but continuous, and claims arising against different successive receivers stand on the same footing; State v. Ry. Co., 84 Fed. 67; Phinizy v. R. Co., 62 Fed. 771; he is analogous to a corporation sole; *id.*

A receiver is appointed only in those cases where in the exercise of a sound discretion it appears necessary that some indifferent person should have charge of the property; Ex parte Walker, 25 Ala. 81; only during the pendency of a suit; 1 Atk. 578; 2 Du. 632; except in extreme cases; 2 Atk. 315; Bissell v. Besson, 47 N. J. Eq. 580, 22 Atl. 1077; as when a fund in litigation is in peril; Parkhurst v. Kinsman, 2 Blatch. 78, Fed. Cas. No. 10,760; and *ex parte;* 14 Beav. 423; Sandford v. Sinclair, 8 Paige, Ch. (N. Y.) 373; or before answer; 4 Price 346; Bloodgood v. Clark, 4 Paige, Ch. (N. Y.) 574; in special cases only; and, generally, not till all the parties are before the court; 2 Russ. Ch. 145; 1 Hog. Ir. 93. Ordinarily a receiver will not be appointed on an *ex parte* application; Maish v. Bird, 59 Ia. 307, 13 N. W. 298. The action of the court in the appointment of a receiver is not reviewable on appeal; Crane v. McCoy, 1 Bond. 422, Fed. Cas. No. 3,354; Williamson v. R. Co., 1 Biss. 198, Fed. Cas. No. 17,753; but by the Judicial Code (March 3, 1911) an appeal to the circuit court of appeals lies from an interlocutory decree appointing a receiver; it must be taken in thirty days; it takes precedence in the appellate court; and proceedings below are not stayed unless otherwise ordered by the district court, or the appellate court, or a judge thereof.

The appointment of a receiver is authorized when the party seeking the appointment shows *prima facie* a title reasonably free from doubt, or a lien upon the subject-matter of controversy to which he has a right to resort for the satisfaction of his claim, and that it is in danger of loss from waste, misconduct, or insolvency if the defendant is permitted to retain the possession; Ashurst v. Lehman, 86 Ala. 370, 5 South. 731; Elwood v. Bank, 41 Kan. 475, 21 Pac. 673; Durant v. Crowell, 97 N. C. 367, 2 S. E. 541.

One will not be appointed, except under special circumstances making a strong case, *where a party is already in possession of the property under a legal title;* 19 Ves. 59; 2 Y. & C. 351; as a trustee; 2 Bro. C. C. 158; 1 My. & C. 163; Poythress v. Poythress, 16 Ga. 406; 2 J. & W. 294; an executor; 13 Ves. 266; tenant in common; 2 Dick. Ch. 800; 4 Bro. C. C. 414; 2 S. & S. 142; a mortgagee; Patten v. Transit Co., 4 Abb. Pr. (N. Y.) 235; 13 Ves. 377; 1 J. & W. 176, 627; 1 Hog. Ir. 179; or a mortgagor when the debt is not wholly due; Bank of Ogdensburgh v. Arnold, 5 Paige, Ch. (N. Y.) 38; a director of a corporation in a suit by a stockholder; Hager v. Stevens, 6 N. J. Eq. 374; *where the property is or should be already in the possession of some court,* as during the contestation of a will in the proper court; 2 Atk. 378; 7 Sim. 512; 1 My. & C. 97; but see In re Colvin's Estate, 3 Md. Ch. Dec. 278; when admiralty is the proper forum; Frith v. Crowell, 5 Barb. (N. Y.) 209; or where there is already a receiver; 1 Hog. Ir. 199; Howell v. Ripley, 10 Paige, Ch. (N. Y.) 43; or where a public office is in litigation; Tappan v. Gray, 9 Paige, Ch. (N. Y.) 507; *where the equitable title of the party asking a receiver is incomplete as made out,* as where he has delayed asking for one; 1 Hog. Ir.

118; 1 Donn. Min. Cas. 71; *or where the necessity is not very apparent*, as on account merely of the poverty of an executor; 12 Ves. 4; 18 Beav. 161; pending the removal of a trustee; Poythress v. Poythress, 16 Ga. 406; where a trustee mixes trust-money with his own; Orphan Asylum Soc. v. McCartee, 1 Hopk. Ch. (N. Y.) 429.

A person holding an unliquidated claim against a corporation is not entitled to the appointment of a receiver, which would be a denial of trial by jury; Swan L. & C. Co. v. Frank, 148 U. S. 604, 13 Sup. Ct. 691, 37 L. Ed. 577; Hollins v. Iron Co., 150 U. S. 385, 14 Sup. Ct. 127, 37 L. Ed. 1113; mere insolvency of a corporation does not authorize the appointment of a receiver at the suit of general creditors, but one will be appointed where it is no longer able to proceed with its business; Doe v. Transp. Co., 64 Fed. 928.

A receiver will not be appointed without the consent of the corporation on the application of a mere contract creditor, and especially where he cannot claim a definite sum as due; Leary v. Nav. Co., 82 Fed. 775.

Where the business of a corporation is being mismanaged, a receiver will be appointed at the suit of a stockholder; St. Louis & S. Coal & Min. Co. v. Edwards, 103 Ill. 472; or where there is insolvency and gross mismanagement; U. S. Shipbuilding Co. v. Conklin, 126 Fed. 136, 60 C. C. A. 680.

Where the only indebtedness of an insolvent corporation is to the party bringing the creditor's bill, a receiver is unnecessary; Baltimore & O. Tel. Co. v. Tel. Co., 54 Fed. 50, 4 C. C. A. 184, 8 U. S. App. 340.

It is not necessary that a creditor's claim should first be reduced to judgment; Chicago & S. E. Ry. Co. v. Kenney, 159 Ind. 72, 62 N. E. 26, *contra*, Callahan v. Ice & Ref. Co., 13 Ohio Cir. Ct. 479, 7 O. C. D. 349.

A federal court has no jurisdiction to appoint a receiver for an insolvent corporation at the suit of a simple contract creditor whose demand is not in judgment; and consent of the debtor will not confer jurisdiction; Maxwell v. McDaniels, 184 Fed. 311, 106 C. C. A. 453; that the waiver by the corporation of the objection will confer jurisdiction was held in Pennsylvania Steel Co. v. Ry. Co., 157 Fed. 440; American Can Co. v. Preserving Co., 183 Fed. 96, 105 C. C. A. 388; that the absence of a judgment or other lien does not defeat the court's jurisdiction, see Dodds v. Tunnel Co., 188 Fed. 447. In McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204, it was considered that, independent of statutory authority, insolvency alone is not ground in a federal court for the appointment of a receiver, but the court based its appointment there on a New Jersey act which authorizes a suit by any creditor or stockholder to wind up an insolvent corporation, creating a right which can be enforced in a federal court.

To justify a receiver, some proper final relief in equity must be asked for in the bill. It is not a final relief that a receiver may bring suits; Zuber v. Min. Co., 180 Fed. 625. There must be an imperative necessity for the appointment; Lemker v. Kalberlah, 105 Ill. App. 445; it is a purely ancillary remedy; Vila v. Storage Co., 68 Neb. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59; to prevent irreparable loss; Hayes v. Land Co., 147 Ala. 340, 41 South. 909.

Where a debtor's assets are claimed by various creditors, a creditor may be appointed to collect and preserve them in order to prevent a multiplicity of suits; Hopper v. Morgan (N. J.) 42 Atl. 171.

A receiver was appointed for a water company after a decree had been made depriving it of its privilege to maintain its plant, though there had been no default on the bonds; Farmers' Loan & Trust Co. v. Waterworks Co., 139 Fed. 661; a receiver may be appointed before default, to preserve the property; Farmers' Loan & T. Co. v. Waterworks Co., 139 Fed. 661.

Where a partnership has been dissolved, a receiver will usually be appointed if the property is unsafe in the hands of the partners; Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615. On a bill for dissolution on account of improper conduct of partners, a receiver is almost a matter of course; but where a partnership has expired by limitation and there is no special ground for a receiver one will not ordinarily be appointed; Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615. A receiver will not be appointed to continue the business, except temporarily; Allen v. Hawley, 6 Fla. 164, 63 Am. Dec. 198.

A receiver will be appointed if there is fraud or mismanagement on the part of one partner; or a disagreement between them; or an appropriation of firm property to individual use; or one partner is excluded from the management; or where a liquidating partner is insolvent; Smith, Rec. § 191.

Receivers will be appointed to take charge of trust property when it is in danger, and such appointment is necessary for its preservation; Hatcher v. Massey, 66 Ga. 66; as where the trustee is not responsible; Ellett v. Newman, 92 N. C. 519; or neglects his duties; 4 D. & W. 117; or uses the trust funds on his own account; Albright v. Albright, 91 N. C. 220; or refuses to collect a debt belonging to the estate; L. R. 8 Ch. App. 597; or has failed to obey an order to pay over money of the trust; 54 L. J. Ch. 1130; but ordinarily the remedy will be by the removal of the trustee. The jurisdiction to appoint a receiver exists, but will usually be exercised only in very special cases.

Where a sole trustee is insolvent, a receiver will be appointed; L. R. 1 Ch. App. 325; or where the trustee is poor and of bad habits; 12 Sim. 363.

Equity will appoint a receiver as between co-tenants of real estate in cases of necessity; Low v. Holmes, 17 N. J. Eq. 151; though the cases are rare; as in case of partition suits; Goodale v. Dist. Court, 56 Cal. 32; and where one tenant excludes the other from possession; or is insolvent and refuses to account; or refuses to execute the necessary leases or interferes with the collection of rent; Smith, Rec. § 317.

It is said that equity will more willingly appoint a receiver of a mining property than of ordinary property; High, Recrs. § 606.

A receiver will be appointed for good cause in a suit for specific performance; Galloway v. Campbell, 142 Ind. 324, 41 N. E. 597; Leonard v. Whaley, 91 Hun 304, 36 N. Y. Supp. 147; but see Darusmont v. Patton, 4 Lea (Tenn.) 597. Under special and urgent circumstances, a receiver may be appointed as between lessor and lessee; Chicago & A. O. & M. Co. v. Petroleum Co., 57 Pa. 83.

In Carey v. Carey, 2 Daly (N. Y.) 425, the income of property of the defendant in divorce proceedings was placed in the hands of a receiver to provide for the wants of his family during the divorce litigation and after its termination; so in case of a decree for alimony; Barker v. Dayton, 28 Wis. 367.

A receiver will be appointed to take charge of the estate of a decedent, but "a strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act"; Haines v. Carpenter, 1 Woods 262, Fed. Cas. No. 5,905, affirmed in *id.* 91 U. S. 254, 23 L. Ed. 345. Pending probate proceedings the property will in some cases be protected by the appointment of a receiver; In re Colvin, 3 Md. Ch. 279. In Appeal of Schlecht, 60 Pa. 172, where a will had been admitted to probate and an appeal was pending on an issue to try the validity of the will, a bill for the appointment of a receiver was refused.

A receiver may be appointed in lieu of an executor or administrator, where there has been waste or misappropriation; or such a result is probable; or the executor is insolvent and this is coupled with misapplication; Fairbairn v. Fisher, 57 N. C. 390; but not for poverty alone; *id.;* or where an executor is dead or refuses to act; or where the executor is a non-resident; Smith, Rec. § 301.

A receiver will be appointed as between the vendee and vendor of realty where there is a contract of sale under which possession has been delivered and there is a default in payments, the vendee not being responsible; Smith, Rec. § 315.

The comptroller of the currency has power to appoint a receiver of a national bank, to take possession of its assets, collect its debts, and enforce the personal liability of the stockholders. In cases not within the national bank act, equity has jurisdiction to appoint receivers as in case of other corporations. A receiver of a national bank is an officer and agent of the United States within R. S. § 380, requiring the district attorney to conduct all suits relating to national banks in which the United States or any of its officers or agents are parties; Gibson v. Peters, 150 U. S. 342, 14 Sup. Ct. 134, 37 L. Ed. 1104. The closing of a national bank and the appointment of a receiver transfers the assets of the bank to him; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; he has a reasonable time to elect whether he will take property leased with an option to purchase, or return it; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025.

Generally any stranger to the suit may be appointed receiver. The court will not appoint attorneys and solicitors in the cause; 1 Hog. Ir. 322; masters in chancery; 6 Ves. 427; an officer of the corporation; Hoppock's Ex'rs v. Ramsey, 28 N. J. Eq. 166; Attorney-General v. Bank, 1 Paige, Ch. (N. Y.) 517; though it is sometimes done especially in the case of large railroad systems. There is no general rule about appointing officers of the company as receivers: generally the courts refuse to do so; Ralston v. R. Co., 65 Fed. 557. Counsel for an adverse party cannot act as receiver's counsel, and if he do he will not be paid out of the funds; Farwell v. Tel. Co., 161 Ill. 522, 44 N. E. 891; a public officer charged with the duty of winding up an insolvent corporation may be appointed; Taylor v. Life Ass'n, 3 Fed. 465; so also a mortgagee; 2 Term 238; 9 Ves. 271; a trustee; 3 Ves. 516; but not ordinarily a party in the cause; Benneson v. Bill, 62 Ill. 408.

A receiver may be appointed without notice to the adverse party, though generally this should not be done; Elwood v. Bank, 41 Kan. 475, 21 Pac. 673. It will be done only where the defendant cannot be found or where there is danger of loss or irreparable injury; Smith, Rec. § 5.

The appointment and retention of a receiver cannot be collaterally attacked; Greenawalt v. Wilson, 52 Kan. 109, 34 Pac. 403.

A receiver has no power without the previous direction of the court to incur any expenses, except those absolutely necessary for the preservation and use of the property; Cowdrey v. R. Co., 93 U. S. 352, 23 L. Ed. 950.

He is responsible for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not as of course responsible because there has been an embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required of all

persons who receive compensation for their services; Story, Bailm. § 620; see Kain v. Smith, 80 N. Y. 458; but he is not the agent of an insolvent railroad company, and hence the company is not liable for damages occasioned by his negligence in operating the road; Metz v. R. Co., 58 N. Y. 61, 17 Am. Rep. 201; nor is he personally liable; Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; but he is liable as receiver for loss as a carrier of goods; Paige v. Smith, 99 Mass. 395. It is held that, where an injury results from the fault or misconduct of a receiver, the court may in its discretion either take cognizance of the question of the receiver's liability, and determine it, or permit the aggrieved party to sue at law; Klein v. Jewett, 26 N. J. Eq. 474; Camp v. Barney, 4 Hun (N. Y.) 373.

In a railroad receivership the court will not order the receiver to pay the rental of a leased portion of the road, when he has not received therefrom sufficient to pay such rental, over and above operating expenses, and when the trustee of the leased property has asked the court for its surrender, but has permitted it to remain in the receiver's hands and has not taken possession of it under an order granted by the court; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632.

Receivers are not assignees and are not bound to adopt a lease, but have an option to do so or not; New York, P. & O. R. Co. v. R. Co., 58 Fed. 280; Ames v. R. Co., 60 Fed. 966. A receiver is not compelled to adopt the contracts or leases of the railroad company, but is entitled to a reasonable time to elect, and a court will not order him to pay rental when the income is not sufficient to pay running expenses; U. S. Trust Co. v. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; Seney v. R. Co., 150 U. S. 310, 14 Sup. Ct. 94, 37 L. Ed. 1092. A receiver of an insolvent corporation, who takes possession of a leasehold estate held by the corporation, does not thereby become an assignee of the term, nor liable on the covenants of the lease; Metropolitan L. Ins. Co. v. Sanborn, 34 Misc. 531, 69 N. Y. Supp. 1009; but is liable only for a reasonable rent while in possession; Bell v. Protective League, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. Rep. 481; and in some cases for the rental specified in the lease; Spencer v. Columbian Expo., 163 Ill. 126, 45 N. E. 250. See LEASE.

A receiver of a railroad is entitled to a reasonable time in which to elect whether or not to retain rolling stock formerly obtained by the company on periodical payments. If he retains it, he must pay the contract price; if he retains it for a time and then releases it, he must pay a fair price for its use, which is usually based on the mileage of the cars and is not the stipulated "rental" under the contract; Farmers' L. & T. Co. v. R. Co., 42 Fed. 6.

The receiver of a railroad is not liable for his refusal to carry the plaintiff on a ticket issued by the company before his appointment. The plaintiff has only the right to come in as a general creditor for the price of the ticket; Casey v. R. Co., 15 Wash. 450, 48 Pac. 53.

Freight money paid to a company before the appointment of a receiver does not entitle the company to sue the receiver for refusal to carry the goods; Central Trust Co. v. R. Co., 51 Fed. 15, 16 L. R. A. 90.

Damages accruing during the time a railroad is in the hands of a receiver are part of the operating expenses, payable out of the income, if there is any; if not, out of the *corpus* of the property; Cross v. Evans, 86 Fed. 1, 29 C. C. A. 523; Memphis & C. R. Co. v. Hoechner, 67 Fed. 456, 14 C. C. A. 469, 31 U. S. App. 644.

Equity may order a receiver of a railroad to buy rolling stock when necessary for the continued operation of the road and charge the price as a first lien on the property; Union Trust Co. v. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895.

Separate receivers will not be appointed in two suits against the same railroad company. The existing receivership should be extended; Lloyd v. R. Co., 65 Fed. 351.

A receiver appointed in a federal court is required to manage the property in accordance with the laws of the state wherein it is situate; U. S. Jud. Code § 65.

Where a receiver has been discharged and a railroad turned over to the company, it was held that the company was liable to an action by one who had suffered personal injury by the negligence of the employés while the road was in the hands of the receiver; Texas & P. R. Co. v. Bloom, 60 Fed. 979, 9 C. C. A. 300, 23 U. S. App. 143.

A mortgagee plaintiff at whose instance a receiver has been appointed for a railway cannot be compelled, if expenses of operation and management exceed the value of the property, to make good a deficit, unless the order of appointment was made on that condition, and he is not liable to the employés of the receiver for their wages; Farmers' L. & T. Co. v. R. Co., 31 Or. 237, 48 Pac. 706, 38 L. R. A. 424, 65 Am. St. Rep. 822.

The doctrine of Fosdick v. Schall, 99 U. S. 252, 25 L. Ed. 339 (first suggested by Judge Dillon), is that the income of a railroad company, out of which a mortgage is to be paid, is the net income obtained by deducting from gross earnings what is required for operating expenses, proper equipment, and useful improvements. Every mortgagee impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. Also, that when there is a diversion of income from the payment of current debts to pay fixed charges, thus

increasing the security of the latter, this must be returned to the current debt fund before the mortgagee is paid. This was followed in Burnham v. Bowen, 111 U. S. 781, 4 Sup. Ct. 675, 28 L. Ed. 596, where it was held that a supply claim incurred prior to the receivership was a charge on the income coming into the receiver's hands, as well as that received before his appointment. Such a claim is payable out of the receiver's surplus earnings, whether or not, during the company's operation of the road, there was a diversion of income, either in paying interest or in betterments; and even where the company has misappropriated such income to purposes not beneficial to the mortgagee; Virginia & A. Coal Co. v. R. & B. Co., 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. See Miltenberger v. Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117.

The dominant feature of the doctrine, as applied in Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, is said to be that where expenditures were made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness would be paid out of current earnings, a superior equity arises in favor of the materialman as against the mortgage bonds as to the income arising both before and after the appointment of a receiver; Virginia & A. Coal Co. v. R. & B. Co., 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. This equity arises upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt. Even though the mortgage provides for a sequestration of income for the benefit of the bondholders, that income, until strict foreclosure or a sale of the road, is charged with the prior equity of unpaid supply claims; *id.* Equity will confine itself within very restricted limits in the application of this doctrine; Kneeland v. Loan & T. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; in both of which cases it was not, under special circumstances, applied to car trust rentals prior to the suit for foreclosure.

The doctrine has in some courts been extended with great freedom, and the granting of preferences and the issue of receiver's certificates carried to such an extent as to give rise in the public mind to an erroneous view of the powers of courts of equity in this regard. In Central Trust Co. v. R. Co., 80 Fed. 624, 26 C. C. A. 30, the circuit court of appeals remarks that "the liberality with which this equity was extended by some of the circuit courts in favor of general creditors, induced the supreme court in Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, to call attention to the necessity of preserving the general priority of contract liens over all but a limited class of claims. Through Mr. Justice Brewer, the court said: 'The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. . . . It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable power, has unlimited discretion in this matter of the displacement of vested liens.'" While the court appointing an ancillary receiver will protect local creditors having prior rights or liens, it will recognize no distinction between foreign and domestic creditors whose claims stand on equal footing, and it rests in the court's discretion whether it will distribute the assets or transmit them to a primary receiver; Sands v. Greeley & Co., 88 Fed. 130, 31 C. C. A. 424.

Orders appointing a receiver usually direct the payment of such preferred claims of this class as the master shall find to be equitably entitled; Blair v. R. Co., 22 Fed. 471; and it is the better practice to make the order then; Central Trust Co. v. R. Co., 41 Fed. 551; they will be paid even if not provided for in the original decree; Miltenberger v. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; the order can be made afterwards; Central Trust Co. v. R. Co., 41 Fed. 551. It has been held that there can be no preference as to the *corpus* of the property where payment was not provided for in the original decree; Cutting v. R. Co., 61 Fed. 150, 9 C. C. A. 401; nor *any* preference whatever; Central Trust Co. v. R. Co., 69 Fed. 295; but it is also held that where the earnings have been diverted to the payment of interest or permanent improvements, preferred debts will be charged on the *corpus* if the current income is not sufficient to pay them; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; St. Louis, A. & T. H. R. Co. v. R. Co., 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832; and sometimes even without showing a diversion of earnings; Miltenberger v. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117.

A receiver of a railroad on coming into possession of earnings should pay out of the same all debts for supplies contracted within a reasonable time before the receivership, before making any expenditure for betterments or interest on mortgages; Southern R. Co. v. Brake Co., 76 Fed. 502, 22 C. C. A. 298.

The court may authorize receivers, in their

discretion, to pay the current payrolls and supply accounts incurred in the operation of the road within four months before their appointment; New England R. Co. v. Steel Co., 75 Fed. 54, 21 C. C. A. 219. Current operating expenses for a limited time before the appointment of a receiver under a foreclosure bill may be charged on the income earned during the receivership or upon the *corpus* of the property, in preference to the lien of the mortgage; Ames v. R. Co., 74 Fed. 335. A receiver of a railroad is properly authorized to pay all balances due to other carriers and connecting lines, and should be allowed to pay, from the proceeds of the sale of receiver's certificates, charges for freight on cars, coal, oil, etc., consigned to the insolvent company and due before the appointment of a temporary receiver; Finance Co. of Pa. v. R. Co., 62 Fed. 205, 10 C. C. A. 323, 8 U. S. App. 547.

Mileage due under a contract for the use of Pullman cars is not distinguishable from car rentals, and cannot be made a preferred claim on the appointment of a receiver; Pullman's Palace-Car Co. v. Trust Co., 84 Fed. 18, 28 C. C. A. 263; Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663.

A cable for a cable railway, if necessary, is entitled to a preference, though no diversion of income is shown; and the lapse of two years will not bar the claim; New York, G. & I. Co. v. Motor Co., 83 Fed. 365, 27 C. C. A. 550.

The payment of unpaid debts for operating expenses accrued within ninety days, and of ticket and freight balances due, are necessary for the preservation of the mortgaged property, in order to keep it a going concern; Union Trust Co. v. R. Co., 117 U. S. 456, 6 Sup. Ct. 809, 29 L. Ed. 963.

Where a receiver is in possession under foreclosure proceedings of a general mortgage on a system of railroads, preferred debts will be charged on the earnings of the entire system; Central Trust Co. v. R. Co., 30 Fed. 332.

Preferred debts are said to be those "which, when incurred, operated in a direct way to the advantage of the bondholder;" Easton v. R. Co., 38 Fed. 12; or which were "made to preserve the estate;" Frazier v. R. Co., 88 Tenn. 138, 12 S. W. 537; or were payments "necessary in the ordinary administration of the affairs of the corporation;" Blair v. R. Co., 23 Fed. 521; or were reasonably "necessary to incur in order to keep the road in operation;" Short, Ry. Bonds § 624.

They include: Debts for freight and ticket balances; Miltenberger v. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; wages; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Miltenberger v. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117; wages and salaries of employés of every grade; Farmers' L. & T. Co. v. R. Co., 33 Fed. 778; counsel; Blair v. R. Co., 23 Fed. 521 (but not one employed for a special purpose; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023; nor an attorney's fee for services rendered a year and a half before the receivership; Bownd v. Ry. Co., 51 Fed. 58; but the annual salary of a regular counsel for a short time before receivership will be preferred; Blair v. R. Co., 23 Fed. 521; not a secretary of the company; Central Trust Co. v. R. Co., 69 Fed. 295; nor a claim for legal services in advising parties who lent money to keep the road in operation; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023); supplies and material for equipping, operating, and repairing the road; Fosdick v. Schall, 99 U. S. 252, 25 L. Ed. 339; Northern Pac. R. Co. v. Lamont, 69 Fed. 23, 16 C. C. A. 364; but not when furnished on credit payable at some definite period, in the future; Bound v. Ry. Co., 58 Fed. 473, 7 C. C. A. 322; American L. & T. Co. v. R. Co., 46 Fed. 101. It applies to ties, hardware and traffic balances; Gregg v. Trust Co., 109 Fed. 220, 48 C. C. A. 318; necessary repairs to a railroad; Southern R. Co. v. Tillett, 76 Fed. 507, 22 C. C. A. 303; jackscrews; Southern R. Co. v. Jack Co., 117 Fed. 424, 54 C. C. A. 598; new cable for a cable railroad (after two years); New York G. & I. Co. v. Motor Co., 83 Fed. 365, 27 C. C. A. 550; ties; Gregg v. Trust Co., 197 U. S. 193, 25 Sup. Ct. 415, 49 L. Ed. 717; rails; Lackawanna I. & C. Co. v. Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475; a gear wheel and pinion for a cable road; Central Trust Co. v. Clark, 81 Fed. 269; a power house for an electric street railway; Illinois T. & S. B. v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; damages for injuries to employees of a receiver are part of operating expenses; Meyer Rubber Co. v. R. Co., 174 Fed. 731, affirmed in Willcox v. Jones, 177 Fed. 870, 101 C. C. A. 84.

The vendor of rolling stock under a car trust is not preferred as to the balance of payments due him; Huidekoper v. Locomotive Works, 99 U. S. 258, 25 L. Ed. 344. The rental of cars used by the receiver is held to be chargeable to the proceeds of the sale of the property as one of the expenses of the administration; Lane v. R. Co., 96 Ga. 630, 24 S. E. 157; as is also the unpaid rental during their use by the company before the receiver was appointed, and compensation for the ordinary wear and tear and the expense of returning the cars to the owner; *id.; contra*, as to rentals accruing before the receivership; Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379; Union Trust Co. v. R. Co., 117 U. S. 479, 6 Sup. Ct. 809, 29 L. Ed. 963.

Rentals on a leased line will not be preferred; New York, P. & O. R. Co. v. R. Co., 58 Fed. 268; nor debts contracted for original construction; Toledo, D. & B. R. Co. v.

Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; nor the price of a locomotive bought six months before the receivership; Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140; nor will claims for damages for breach of contract; Central Trust Co. v. R. Co., 32 Fed. 566; nor those caused by the operation of the road before the appointment of the receiver; Hiles v. Case, 14 Fed. 141; Central Trust Co. v. R. Co., 28 Fed. 871; but see Dow v. R. Co., 20 Fed. 260, a case said to be of doubtful authority; Short, Ry. Bonds § 626. It does not apply to ballast cars used in improving the road bed where it appears that there was no net income; Fordyce v. R. R., 145 Fed. 544; nor to counsel fees; Gregg v. Trust Co., 109 Fed. 220, 48 C. C. A. 318.

The ordinary period within which such claims are allowed is six months; Scott v. R. Co., 6 Biss. 535, Fed. Cas. No. 12,527; but claims have been awarded a preference after eight months; Skiddy v. R. Co., 3 Hughes 320, Fed. Cas. No. 12,922; eleven months; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; nearly two years; Central Trust Co. v. R. Co., 41 Fed. 551; two years; Cobb v. Clough, 83 Fed. 605; three years; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419. There is no fixed time within which priority can be given; it is a question of reasonable time; Wood v. R. Co., 70 Fed. 741.

The rule has been held to apply only to railroads; Wood v. Trust Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; not to manufacturing corporations; Seventh N. B. of Philadelphia v. Iron Co., 35 Fed. 436; Fidelity Ins. & S. D. Co. v. Iron Co., 42 Fed. 372; nor to street railways; Front St. Cable Ry. Co. v. Drake, 84 Fed. 257; nor to steamship lines; Bound v. Ry. Co., 50 Fed. 312; nor to a hotel company; Raht v. Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456; it is held applicable to street railways; Litzenberger v. Trust Co., 8 Utah 15, 28 Pac. 871; Illinois T. & S. B. v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; a coal and coke company; Drennen v. Trust & D. Co., 115 Ala. 592, 23 South. 164, 39 L. R. A. 623, 67 Am. St. Rep. 72; a mining company; Cunningham v. Min. Co., 103 Mo. App. 398, 76 S. W. 487 (*contra*, Manhattan Trust Co. v. Iron Co., 19 Wash. 493, 53 Pac. 951); a telegraph and telephone company; Keelyn v. Tel. Co., 90 Fed. 29; to all *quasi*-public corporations; Drennen & Co. v. Deposit Co., 115 Ala. 592, 23 South. 164, 39 L. R. A. 623, 67 Am. St. Rep. 72. In Ohio it is a statutory rule.

The right to claim for labor and materials in preference to the mortgage debt is not affected by the sale of the property if such right be reserved in the decree affirming the same; Southern R. Co. v. Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458.

Suits. A receiver must ordinarily obtain leave of the appointing court before instituting a suit; but not where he sues for debt due him in his official capacity; L. R. 12 Eq. 614; or sues in the appointing court with its sanction; Smith, Rec. § 69; Cox v. Volkert, 86 Mo. 505.

A receiver cannot sue outside the jurisdiction of his appointment; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Kirwan Mfg. Co. v. Truxton, 2 Pennewill (Del.) 48, 44 Atl. 427; Southern B. & L. Ass'n v. Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; otherwise where, by statute or assignment, he has sufficient title, as a *quasi*-assignee, a representative of the creditors; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

In some cases in the federal courts, decided before the case (*supra*) of Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, such suits were sustained in a foreign jurisdiction; see Rogers v. Riley, 80 Fed. 759; In re Wood, 95 Fed. 947; Lewis v. Clark, 129 Fed. 570, 64 C. C. A. 138.

The objection must be made at the proper time; Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986. In this sense federal courts in different states are foreign to each other, and so are federal and state courts; but federal courts in different districts of the same state are not; Horn v. R. Co., 151 Fed. 626.

By comity a receiver may be permitted to sue for a specific asset, but not even then if the property would thereby be taken out of the state to the prejudice of domestic creditors; Nolen v. Kaufman, 70 Mo. App. 653. If he has obtained a judgment, he may sue on it in a foreign state; McBride v. Bank, 200 Fed. 895.

But it is also said to be now "well established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled," but not against the creditors of a non-resident debtor who are seeking to subject property to the payment of their debts; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; and this is a matter of comity; National Trust Co. v. Miller, 33 N. J. Eq. 155. A receiver appointed in one state can sue in another by comity, in respect of property rights in the latter state, provided the domestic creditors are protected; Toronto General T. Co. v. R. Co., 123 N. Y. 37, 25 N. E. 198.

It is held that an Illinois receiver appointed at the suit of a non-resident creditor may hold the assets against an Illinois creditor; Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, 27 L. R. A. 324, 46 Am. St. Rep. 917.

Assets in another state of the party for whose property the receiver is appointed are subject to attachment in the courts of such

other state by creditors there resident, and even by non-resident creditors (other than those of the receivership state); Mason v. Mfg. Co., 81 Md. 446, 32 Atl. 311, 29 L. R. A. 273, 48 Am. St. Rep. 524.

See Linville v. Hadden, 88 Md. 594, 41 Atl. 1047, 43 L. R. A. 222; Gilman v. Ketcham 81 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899; Commercial Nat. Bank v. Iron & S. Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164; Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. Rep. 569.

In Buswell v. Order of Iron Hall, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846, it was held that the ancillary receiver should remit the fund to the home receiver for distribution, if it should appear that Massachusetts claimants would there be placed on an equality with home claimants. This case is said to have gone to the limits of comity; Smith, Rec. § 73. Where a receiver takes property to a foreign state his possession will be protected; Singerly v. Fox, 75 Pa. 112; *contra*, Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76.

One who has a legal cause of action sounding merely in tort against a receiver appointed by a court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the chancellor's permission, but this cannot be refused, unless the claim preferred be manifestly unfounded; Davis v. Gray, 16 Wall. (U. S.) 218, 21 L. Ed. 447. See Barton v. Barbour, 25 Alb. L. J. 46.

A receiver cannot be sued without the consent of the appointing court; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Wayne Pike Co. v. State, 134 Ind. 672, 34 N. E. 440; Smith v. Ry. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; but there are exceptions to this rule: By act of congress, March 3d, 1889, every receiver appointed by a federal court may be sued without leave of court, but subject to the general equity jurisdiction of the court which appointed him. This act extends to any court of competent jurisdiction, state or federal, and not merely to the appointing court; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753. It applies to actions for personal injuries to passengers; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; suits on patents may be brought without leave; Hupfeld v. Piano Co., 66 Fed. 788; but not one to condemn a crossing over the railroad in the receiver's hands; Buckhannon & N. R. Co. v. Davis, 135 Fed. 707, 68 C. C. A. 345, or one to take from the receiver's control property belonging to the corporation; Hollifield v. R. Co., 99 Ga. 365, 27 S. E. 715.

Receivers operating a railroad in another state are liable to action there; Paige v. Smith, 99 Mass. 395; property in another state, in the hands of a receiver, may be garnisheed there; Phelan v. Ganebin, 5 Colo. 14; where a receiver has taken possession of property not specified in the decree appointing him; Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63.

It is held that suing without leave is mere contempt of court and does not affect the jurisdiction of the court in which the suit is brought; Phelan v. Ganebin, 5 Colo. 14; and that the proceedings are regular till the appointing court interferes; Pruyn v. McCreary, 182 N. Y. 568, 75 N. E. 1133; other cases hold that there is no jurisdiction till leave is granted; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Keen v. Breckenridge, 96 Ind. 69; Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. Ed. 322. Leave to sue rests in the discretion of the appointing court; Mechanics' N. B. v. Landauer, 68 Wis. 44, 31 N. W. 160; ordinarily leave will be granted to sue only in the appointing court; Palmer v. Scriven, 21 Fed. 354; and a case at law may be ordered to be tried in equity; Shedd v. Seefeld, 230 Ill. 118, 82 N. E. 580, 13 L. R. A. (N. S.) 709, 120 Am. St. Rep. 269.

A failure to get leave is waived if the case has gone on to an adverse decision against the receiver; Manker v. Loan Ass'n, 124 Ia. 341, 100 N. W. 38; but in Haag v. Ward, 89 Mo. App. 186, it was held not to be waived where the receiver pleaded. Application for leave to sue may be made by motion in the receivership case; Wilson v. Rankin, 129 N. C. 447, 40 S. E. 310.

See, generally, 38 Amer. L. Rev. 516.

Under the strict common law, a receiver must sue in the name of the corporation or firm of which he is receiver; High, Rec. § 209; the receiver brings suit in the company's name but for his own use; Yeager v. Wallace, 44 Pa. 294; he sues in his own name on his own contracts; Singerly v. Fox, 75 Pa. 112; in states having codes of procedure he may sue in his own name, as having the beneficial interest; 5 Thomps. Corp. § 6979.

Suit should be brought against the company, but service made on the receiver; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; an attachment execution should be served on him; Conshohocken Tube Co. v. Car Co., 167 Pa. 589, 31 Atl. 934.

The receiver of a corporation cannot sue in his own name to recover property of the corporation which has never been in his possession nor been assigned to him, where authority to bring such suit has not been conferred on him by statute or by decree of court; Wilson v. Welch, 157 Mass. 77, 31 N. E. 712. Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal; and judgments against him as receiver are payable only out of the funds in his hands; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796.

He has a summary remedy against one who has possession of receivership funds, obtained since the appointment, even though the party claims title or a lien; but must bring suit if possession was had before the receivership, or the party claims adversely; Horn v. R. Co., 151 Fed. 626.

The court can, by summary proceedings, compel payment by a purchaser from a receiver of the price of goods sold and delivered; McCarter v. Finch, 55 N. J. Eq. 245, 36 Atl. 937.

Where a circuit court has appointed a receiver of a steamer and all other property of a railroad company, and the steamer came into collision with another vessel and was libelled in admiralty, it was held that the circuit court did not err in declining to issue an injunction against the admiralty proceedings; Paxson v. Cunningham, 63 Fed. 132, 11 C. C. A. 110, 21 U. S. App. 466.

Where property is in the hands of a receiver, an independent suit cannot be brought to foreclose a mortgage on it, even in the same court; American Loan & T. Co. v. R. Co., 86 Fed. 390.

Judgment against a corporation obtained between the entry of an order appointing a receiver therefor and the approval of his bond creates no lien on the property; Temple v. Glasgow, 80 Fed. 441, 25 C. C. A. 540.

Where a receiver has been guilty of a public nuisance, the court will enjoin him therefrom; Felton v. Ackerman, 61 Fed. 225, 9 C. C. A. 457, 22 U. S. App. 154.

A purchaser of a claim against a railroad company which is in the hands of a receiver is not estopped to attack the validity of an order appointing the receiver made before he became a party to the action; Grant v. Ry. Co., 116 Cal. 71, 47 Pac. 872.

It is not inconsistent with the relations between a receiver and the court appointing him that he should appeal from an order of such court granting an injunction against him; Felton v. Ackerman, 61 Fed. 225, 9 C. C. A. 457, 22 U. S. App. 154.

The appointment of a receiver of a corporation fixes the status and priorities of its creditors; Cowan v. Glass Co., 184 Pa. 1, 38 Atl. 1075.

A circuit court of the United States has no power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court; Shields v. Coleman, 157 U. S. 169, 15 Sup. Ct. 570, 39 L. Ed. 660.

A receiver appointed for one corporation cannot act for another; Hook v. Bosworth, 64 Fed. 443, 12 C. C. A. 208, 24 U. S. App. 341.

Where a receiver has been wrongfully appointed, the defeated complainant is held to be liable for costs and expenses; Hendrie & B. Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113; In re Lacov, 142 Fed. 960, 74 C. C. A. 130; State v. Dist. Court, 28 Mont. 227, 72 Pac. 613; Link Belt Mach. Co. v. Hughes, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673; but not in the case of an insolvent corporation where the other creditors received the benefits of the appointment, though the complainant did not make his claim; Berry v. Rood, 225 Mo. 85, 123 S. W. 888; to the same effect, Clark v. Brown, 119 Fed. 130, 57 C. C. A. 76; McCarthy v. Peake, 18 How. Pr. (N. Y.) 138, where the costs and expenses were not put on the complainant.

If the appointment was made without jurisdiction, the receiver cannot have compensation out of the fund, though he realized profits; Grant v. Ry. Co., 116 Cal. 71, 47 Pac. 872; Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589; State v. Bank, 197 Mo. 605, 95 S. W. 867; Brundage v. S. & L. Ass'n, 11 Wash. 288, 39 Pac. 669; but it has been held that it must be paid out of the funds in his hands regardless of who is ultimately to bear the burden; In re Hill Co., 159 Fed. 73, 86 C. C. A. 263; Hopfensack v. Hopfensack, 61 How. Pr. (N. Y.) 508; Cutter v. Pollock, 7 N. D. 631, 76 N. W. 235.

If the fund is insufficient, he may come upon whoever secured his appointment; Frick v. Fritz, 124 Ia. 529, 100 N. W. 513; Tome v. King, 64 Md. 166, 21 Atl. 279; Ephraim v. Bank, 129 Cal. 589, 62 Pac. 177; by having it taxed against the complainant; German N. B. v. Best & Co., 32 Colo. 192, 75 Pac. 398; or by separate proceedings; Ephraim v. Bank, 129 Cal. 589, 62 Pac. 177.

In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155, a trustee under a mortgage given by a canal and irrigation company, who brought suit to foreclose, was held not liable for receivers' certificates authorized by the court for the purpose of operating the property. To the same effect, McLean v. Gillespie, 130 Ill. App. 356; Farmers' Loan Co. v. R. Co., 31 Or. 237, 48 Pac. 706, 38 L. R. A. 424, 65 Am. St. Rep. 822. In some cases the court has been held to have discretion to put the costs on the fund, or on the plaintiff, or divide them among the parties; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Rounsaville v. Langston, 99 Ga. 117, 24 S. E. 972; French v. Gifford, 31 Ia. 428. See generally Bellamy v. Tel. Co., 25 Okl. 18, 105 Pac. 340, 25 L. R. A. (N. S.) 412, and note.

An order fixing the compensation of a receiver, and taxed as such in the costs, is a final judgment upon a collateral matter arising out of the action and appealable by any party interested in the fund; Grant v. R. Co., 116 Cal. 71, 47 Pac. 872. As to a receiver's compensation, see 32 A. & E. Corp. Cas. 532.

The appointment of a receiver does not abate personal actions against the debtor, and the receiver has no status in court thereunder until he is made a party thereto on his own application. The plaintiff may proceed to final judgment without him; Wilder v. New Orleans, 87 Fed. 843, 31 C. C. A. 249.

A receivership of a railroad as a going con-

cern should not be unnecessarily prolonged, and in case of unnecessary delay the court should listen to the application of any creditor and give due notice to the receiver, for its prompt termination; In re Metropolitan Ry. Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403.

A bond given to the receiver of a corporation, "his successors and assigns," enures after the termination of the receivership to the benefit of the corporation which may sue upon it and the surety is not discharged; American Surety Co. v. Campbell & Zell Co., 138 Fed. 531, 71 C. C. A. 55.

After the receiver has settled his account and been discharged, jurisdiction of the cause may be retained by the court for the purpose of carrying into final effect any orders made.

See Smith, Receiverships; High; Gluck & Becker, Receivers; Bailiff; Rolling Stock; Mortgage; Lease; Merger; Receivers' Certificates; Reorganization.

RECEIVER GENERAL OF THE DUCHY OF LANCASTER. An officer of the Duchy court, who collects all the revenues, fines, forfeitures, and assessments within the duchy.

RECEIVER GENERAL OF THE PUBLIC REVENUE. An officer appointed in every county in England to receive the taxes granted by parliament, and remit the money to the treasury.

RECEIVER OF STOLEN GOODS. By statutory provision, the receiver of stolen goods, knowing them to have been stolen, may be punished as the principal, in perhaps all the states.

To make this offence complete, the goods received must have been stolen, they must have been received by the defendant, and he must know that they had been stolen.

The original theft must be proved against the receiver just as strictly as if the thief were being tried for larceny, but only by such evidence as is admissible against the receiver. A confession by the thief when charged with the crime is inadmissible; 18 Cox 470; and the jury must disregard the fact that they had just heard the thief plead guilty; Odgers, C. L. 372. The thief may be called as a witness for the prosecution, and if he admits his guilt, that is some evidence to go to the jury, but it is entitled to but little weight if uncorroborated: 4 F. & F. 43. Receiving goods stolen abroad does not constitute the offence; but otherwise by act of 1896 in England.

The goods stolen must have been received by the defendant. *Prima facie*, if stolen goods are found in a man's house, he, not being the thief, is a receiver; 1 Den. Cr. Cas. 601. And though there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained; 2 *id.* 37. So a principal in the first degree, *particeps criminis*, cannot at the same time be treated as a receiver; 2 *id.* 459. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing; Bell, Cr. Cas. 20. See Whiting v. State, 48 Ohio St. 220, 27 N. E. 96. But a person having a *joint* possession with the thief may be convicted as a receiver; Dearsl. 494. The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it; *id.* 494; as of a servant, to the master's knowledge; 72 J. P. 451.

Husband and wife were indicted jointly for receiving. The jury found both guilty, and found, also, that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband; Dearsl. & B. 329. A wife could not be convicted for receiving from her husband goods which she knew he had stolen; Odgers, C. L. 373.

The offence of receiving stolen property involves a criminal intent as a material element, such as an intent to aid the thief, of obtaining a reward for restoring it to the owner, or in some way to derive profit from the act; Arcia v. State, 26 Tex. App. 193, 9 S. W. 685.

It is almost always difficult to prove guilty knowledge; and that must, in general, be collected from circumstances. If such circumstances are proved which to a person of common understanding and prudence, and situated as the prisoner was, must have satisfied him that they were stolen, this is sufficient. For example, the receipt of watches, jewelry, large quantities of money, bundles of clothes of various kinds, or personal property of any sort, to a considerable value, from boys or persons destitute of property and without any lawful means of acquiring them, and specially if bought at untimely hours, the mind can arrive at no other conclusion than that they were stolen. This is further confirmed if they have been bought at an under-value, concealed, the marks defaced, and falsehood resorted to in accounting for the possession of them; 2 Russ. Cr. 253; 1 Fost. & F. 51; Whart. Cr. L. 983, 986. See Huggins v. People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357. Evidence that other stolen goods were found in defendant's possession is admissible to show guilty knowledge; State v. Crawford, 38 S. C. 330, 17 S. E. 36.

At common law, receiving stolen goods, knowing them to have been stolen, is a misdemeanor; 2 Russ. Cr. 253. But in Massachusetts it has been held to partake so far of the nature of felony that if a constable has reasonable grounds to suspect one of the crime of receiving or aiding in the concealment of stolen goods, knowing them to be stolen, he may without warrant arrest the supposed offender; Rohan v. Sawin, 5 Cush. (Mass.) 281.

A current coin, which has not passed into circulation, may be sold as a curiosity and, if stolen from its owner by the vendor, who is convicted of larceny, an order of restitution may be made against the purchaser. *Semble* otherwise, if the thief has dealt with it as current coin and passed it into circulation; [1899] 2 Q. B. 111.

See [1892] 2 Q. B. 597; RECENT POSSESSION OF STOLEN GOODS; also a note in 22 L. R. A. (N. S.) 833.

RECEIVERS' CERTIFICATES. Acknowledgments of indebtedness issued by a receiver under the order of the court by which he was appointed, either directly in discharge of obligations incurred in the management of the property, or for borrowing money for the maintenance and operation of the property, and redeemable out of its proceeds. They may be made a lien on the property when that is necessary for its proper management and operation in the interest of all who may be concerned in it, as directed in the order under which they are issued, and are usually made a first charge on the fund in the receiver's hands, after payment of the operating expenses.

They are not negotiable instruments, so as to relieve the purchaser or his assigns from equities arising out of the proceedings in the case; Bernard v. Trust Co., 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118. The view is held that they lack every element of negotiability; Gluck & Becker, Recrs. § 95. The leading (early) case is Meyer v. Johnston, 53 Ala. 237. A holder takes subject to prior equities; Central Nat. Bank v. Hazard, 30 Fed. 484.

In the case of property such as a railroad, which is of a character to give the public a right to its continued operation and use, the court in a proper case may impose the expenses and obligations of operation upon the property regardless of the question of who may be the ultimate owner of the property; Illinois T. & S. Bank v. Ry. Co., 115 Cal. 285, 47 Pac. 60. A court of equity has power to appoint a receiver for a railroad and to authorize the issue of certificates for raising money necessary for the management and preservation of the road, and make the debt thereby created a first lien; Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895; Union Trust Co. v. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. But a court of equity cannot order the issue of certificates, to be a paramount lien, by the receiver of an insolvent private corporation, where the business is affected with no public interest unless such issue is essential to preserve the property or franchises; Florida Land & Imp. Co. v. Merrill, 52 Fed. 78, 2 C. C. A. 629; International Trust Co. v. Decker Bros., 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152; Fidelity Ins., T. & S. D. Co. v. Iron Co., 68 Fed. 623; as against lienors who have not assented to their issue; Doe v. Transp. Co., 78 Fed. 62. But where the receiver and 85 per cent. of the creditors petitioned the court to allow an issue of receivers' certificates, to conserve a valued property, and only one small creditor objected, the court allowed him to be paid and certificates to be issued; Borchardt Co. v. Naval Stores Co., 206 Fed. 366.

In Lockport Felt Co. v. Paper Co., 74 N. J. Eq. 686, 70 Atl. 980, the insolvent corporation owned eighteen mills; after a receiver was appointed foreclosure on one of them was threatened; the court ordered receiver's certificates to issue, to become a lien on all the mills, and prior to existing mortgages.

In the case of a mining company the court cannot, against the objection of even a small minority of the mortgage bondholders, authorize the issue of certificates to be a first lien, to enable a continuance of the operation of the mines; Farmers' L. & T. Co. v. Coal Co., 50 Fed. 481, 16 L. R. A. 603; nor can such certificates be issued for payment of taxes in the case of the foreclosure of the second mortgage of a private corporation, to be a paramount lien, against the consent of the first mortgagee; Hanna v. Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; or in the like case for carrying out contracts for improvements made with purchasers of the company's land; Hanna v. Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201, 36 U. S. App. 61. In the case of a railroad such certificates cannot be issued and given a first lien, on an application *ex parte* without notice to lienholders, the proceeds to be used for the maintenance of the road; State v. R. Co., 45 S. C. 464, 23 S. E. 380; Bernard v. Trust Co., 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118.

Where a mine and railroad were operated in connection with each other by the same company, certificates were issued as a charge upon both properties; Karn v. Iron Co., 86 Va. 754, 11 S. E. 431.

If the order authorizing certificates for borrowing money to carry on the business does not limit their payment to any particular fund, the right of *bona fide* holders for value to resort to the general assets as against general creditors will not be qualified by a *quasi*-limitation apparent on the face of the certificates; Appeal of Neafie (Pa.) 12 Atl. 271.

When the receiver is appointed on petition of a stockholder, and earnings have been

used to pay interest on the bonds, there is no equity which requires payment of past due claims for labor and materials by the issue of receivers' certificates therefor, payable out of the *corpus* of the property; there is an equity to pay out of net earnings for labor necessary to keep the property in actual operation, but such earnings cannot be anticipated by the issue of receivers' certificates unless by agreement of parties; Street v. R. Co., 59 Fed. 25; nor can such certificates be issued against the opposition of first mortgage bondholders for new equipment and construction of a narrow gauge road of which new owners would manifestly change the gauge to the standard, so that the proposed improvements would be useless; *id.* Except under extraordinary circumstances, a court ought not to order the issue of receivers' certificates, with a prior lien, to complete an unfinished railroad; Shaw v. R. Co., 100 U. S. 605, 25 L. Ed. 757. Such an order was made in Kennedy v. R. Co., 2 Dill 448, Fed. Cas. No. 7,706, where it was necessary to complete the road in order to secure a land grant; and in Stanton v. Alabama & C. R. Co., 2 Woods 506, Fed. Cas. No. 13,296, to preserve a railroad and complete some inconsiderable portion of it.

Certificates issued, under an order made without notice to creditors, for debts prior to the receivership, give the holders no preference over other creditors; Laughlin v. Rolling-Stock Co., 64 Fed. 25. They cannot be issued, with priority over existing mortgages, for wages accrued before the appointment of the receiver or for deficiency of supplies; Union Trust Co. v. Souther, 107 U. S. 592, 2 Sup. Ct. 295, 27 L. Ed. 488; In re Eureka Basin W. & M. Co., 96 N. Y. 49; Turner v. R. Co., 95 Ill. 134, 35 Am. Rep. 144. Certificates issued, not to preserve the property, but to pay unsecured claims, cannot be given priority over an antecedent mortgage; Hooper v. Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262 (but see RECEIVER, as to paying material and labor claims); when in excess of the amount authorized by the court they cannot be enforced against the property unless the proceeds were used for its benefit; Wesson v. Chapman, 77 Hun 144, 28 N. Y. Supp. 431. They cannot be issued to pay interest on bonds; Newton v. Mfg. Co., 76 Fed. 418 (unless perhaps on a prior mortgage not in controversy). They may be issued to pay claims for supplies; Rutherford v. R. Co., 178 Pa. 38, 35 Atl. 926; or to complete and equip a railroad and pay labor claims previously incurred; First Nat. Bank of Houston v. Ewing, 103 Fed. 168, 43 C. C. A. 150.

Allowances to receivers and their counsel as compensation for services are taxable as costs, and have priority over receivers' certificates; Petersburg Sav. & Ins. Co. v. Dellatorre, 70 Fed. 643, 7 C. C. A. 310; and certificates issued under an order not giving them priority over other claims, are not entitled to preference over debts of the receiver contracted in carrying on the business; Lewis v. Steel Co., 183 Pa. 248, 38 Atl. 606; and persons taking such certificates in exchange for certificates before issued under an order giving them a preference, are not entitled to priority even under the first order; *id.* Whether they are entitled to priority out of net income over a deficiency judgment on a mortgage depends on the equities of the case and on no fixed rule; American Trust Co. v. S. S. Co., 190 Fed. 113, 111 C. C. A. 376.

The holder of certificates is put upon inquiry as to the whole course of the proceedings of a litigation in which they were issued, and is charged with notice thereof; Mercantile Trust Co. v. R. Co., 58 Fed. 6, 7 C. C. A. 3; and when the order for the issue was *ex parte*, and the proceeds were improperly applied, a holder who made no demand for three years and until the foreclosure sale was confirmed and a decree of distribution entered, was guilty of gross laches and estopped by the decree from asserting his claim; *id.* Where defendants held receivers' certificates for a right of way and agreed that they should be postponed to other certificates to be issued to plaintiffs, but on a sale defendants were paid for the right of way and plaintiffs' certificates were not paid in full, the latter were entitled to recover from the defendants the amount so paid them; Fletcher v. Waring, 137 Ind. 159, 36 N. E. 896.

Holders of certificates cannot enjoin a sale under a decree in favor of an intervening mechanics' lien creditor whose claim was prosecuted before the certificates were authorized; Gordon v. Newman, 62 Fed. 686, 10 C. C. A. 587.

It has been held that a chancellor cannot authorize a receiver to borrow money by selling interest-bearing receivers' certificates of indebtedness at less than their face value; Meyer v. Johnston, 53 Ala. 237; but see Stanton v. R. Co., 2 Woods 506, Fed. Cas. No. 13,296.

Such certificates are considered as "costs of suit," in a decree directing the payment of the "costs of this suit" after the payment of the expenses of the sale; Farmers' L. & T. Co. v. R. Co., 106 Fed. 565.

Purchasers of certificates are not bound to see to the application of the purchase money; Union Trust Co. v. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963. See RECEIVER; ROLLING STOCK; MORTGAGE.

RECEIVING. Taking or having. Baker v. Keiser (Md.) 23 Atl. 735.

RECENT POSSESSION OF STOLEN PROPERTY. Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence, or

by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is usually regarded by the jury as conclusive. 1 Tayl. Ev. § 122. See 1 Greenl. Ev. § 34; Wilson v. U. S., 162 U. S. 615, 16 Sup. Ct. 895, 40 L. Ed. 1090.

It is manifest that the force of this rule of presumption depends upon the *recency* of the possession as related to the crime, and upon the *exclusiveness* of such possession.

If the interval of time between the loss and the finding be considerable, the presumption, as it affects the party in possession of the stolen property, is much weakened, and the more especially so if the goods are of such a nature as, in the ordinary course of things, frequently to change hands. From the nature of the case, it is not possible to fix any precise period within which the effect of this rule of presumption can be limited; it must depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, it was held that the prisoner should explain how he came by the property; 7 C. & P. 551. But where the only evidence against a prisoner was that certain tools had been traced to his possession three months after their loss, an acquittal was decided; 3 C. & P. 600. And so, on an indictment for horse-stealing, where it appeared that the horse was not discovered in the custody of the accused until after six months from the date of the robbery; 3 C. & K. 318; and where goods lost sixteen months before were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence; 2 C. & P. 459.

Such possession of stolen goods may be indicative of any more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the possession of the prisoner was held to raise a probable presumption that he was present and concerned in the offence; 2 East, Pl. Cr. 1035. A like inference has been raised in the case of murder accompanied by robbery; Wills, Circ. Ev. 72, 241; in the cases of burglary and shopbreaking; 4 B. & Ald. 122; 9 C. & P. 364; Com. v. Millard, 1 Mass. 6; and in the case of the possession of a quantity of counterfeit money; Russ. & R. 308; Dearsl. 552; but the recent possession of stolen property by one charged with receiving it, knowing it to be stolen, raises no presumption that he knew that it had been stolen; State v. Bulla, 89 Mo. 595, 1 S. W. 764.

Upon the principle of this presumption, a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavorable to the supposition of innocence; Com. v. Montgomery, 11 Metc. (Mass.) 534, 45 Am. Dec. 227. See Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 101.

But this rule of presumption must be applied with caution and discrimination; for the bare possession of stolen property, though recently stolen, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt; 2 Hale, Pl. Cr. 289.

See 1 Benn. & H. Lead. Cr. Cas. 371, where this subject is fully considered; RECEIVER OF STOLEN GOODS.

RECEPTUS (Lat.). **In Civil Law.** The name sometimes given to an arbitrator, because he had been received or chosen to settle the differences between the parties. Dig. 4, 8; Code 2, 56.

RECESS. The time in which the court is not actually engaged in business. In re Gannon, 69 Cal. 541, 11 Pac. 240.

RECESSION. A re-grant; the act of returning the title of a country to a government which formerly held it, by one which has it at the time; as, the recession of Louisiana, which took place by the treaty between France and Spain, of October 1, 1800. See 2 White, N. Rec. 516.

RÉCIDIVE (Fr.). The state of an individual who commits a crime or misdemeanor, after having once been condemned for a crime or misdemeanor; a relapse.

Récidiviste, an old offender.

RECIDIVIST. A habitual criminal. One who makes a trade of crime. Reformation in such cases is rare. Such criminals generally either succumb to tuberculosis or heart disease in prison or end in an asylum. Sometimes attacks of acute mania or melancholia have a good influence upon such persons, but generally after an attack of acute insanity they are found to be still subject to their criminal tendencies. McDonald, Criminology, ch. viii. As to cases of innate tendency to particular crimes or special propensities, see *id.* pt. ii. ch. i.–ii.

RECIPROCAL CONTRACT. In Civil Law. One by which the parties enter into mutual engagements.

They are divided into perfect and imperfect. When they are perfectly reciprocal, the obligation of each of the parties is equally a principal part of the contract, such a sale, partnership, etc. Contracts imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract: as, mandate, deposit, loan for use, and the like. In all reciprocal contracts the consent of the parties must be expressed. Pothier, Obl. n. 9; La. Civ. Code, arts. 1758, 1759. See CONTRACT; MUTUAL CONSENT.

RECIPROCITY. Mutuality; state, quality, or character of that which is reciprocal.

The states are bound to many acts of reci-

procity. The constitution requires that they shall deliver to each other fugitives from justice; that the records of one state, properly authenticated, shall have full credit in the other states; that the citizens of one state shall be citizens of any state into which they may remove. Their privileges and immunities shall not be abridged by any state law.

See EXTRADITION; FOREIGN JUDGMENTS; PRIVILEGES AND IMMUNITIES.

Between nations. Mutual concessions made by nations in favor of the importation of the products and manufactures of each other.

The president of the United States has been authorized by various tariff acts to enter into reciprocal agreements with foreign countries, concerning the mutual importation of manufactures and products, and to suspend certain provisions of the tariff laws, accordingly. For the purpose of readjusting the present duties on importations into the United States and at the same time to encourage the export trade of this country, the President is authorized and empowered to negotiate trade agreements with foreign nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce, but such agreements before becoming operative must be submitted to Congress for ratification or rejection. Act of Oct. 3, 1913.

Under the Copyright Act of 1909 he may determine the existence of certain conditions on which reciprocity shall exist; Bong v. Art Co., 214 U. S. 236, 29 Sup. Ct. 628, 53 L. Ed. 979, 16 Ann. Cas. 1126.

RECITAL. The repetition of some former writing, or the statement of something which has been done. It is useful to explain matters of fact which are necessary to make the transaction intelligible. 2 Bla. Com. 298; Big. Estop. 365.

IN CONTRACTS. The party who executes a deed is bound by the recitals of essential facts contained therein; Com. Dig. *Estoppel* (A 2); 2 Co. 33. The amount of consideration received is held an essential fact under this rule, in England; 5 B. & Ald. 606; 1 B. & C. 704; otherwise in the United States; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Shephard v. Little, 14 Johns. (N. Y.) 210; Weigley's Adm'rs v. Weir, 7 S. & R. (Pa.) 311. But see Brocket v. Foscue, 8 N. C. 64; Forest v. Shores, 11 La. 416; Powell v. Mfg. Co., 3 Mas. 347, Fed. Cas. No. 11,356.

IN DEEDS. The recitals in a deed of conveyance bind parties and privies thereto, whether in blood, estate, or law; Whart. Ev. 1039; 1 Greenl. Ev. § 23; and see 3 Ad. & E. 265; Carver v. Jackson, 4 Pet. (U. S.) 1, 7 L. Ed. 761. See ESTOPPEL. Recitals in a deed bind parties and claimants under them, but not strangers claiming by an adverse title, or those who claim by title anterior or paramount to the deed; Sabariego v. Maverick, 124 U. S. 261, 8 Sup. Ct. 461, 31 L. Ed. 430. Recitals of preliminary proceedings in tax deeds are not evidence of the facts recited; Downer v. Tarbell, 61 Vt. 530, 17 Atl. 482; Henderson v. White, 69 Tex. 103, 5 S. W. 374.

Recitals are deemed to be made upon suggestion of the grantee; Carver v. Jackson, 4 Pet. (U. S.) 87, 7 L. Ed. 761; and are part of the title; Penrose v. Griffith, 4 Binn. (Pa.) 231; they are evidence against the grantee; Schuylkill & D. Imp. & R. Co. v. McCreary, 58 Pa. 304; and parol evidence is not admissible to contradict them.

Recitals of relationship in a recent deed are generally held inadmissible; Costello v. Burke, 63 Ia. 361, 19 N. W. 247. A map or plat referred to in a deed may become a part thereof; Beach Front Hotel Co. v. Sooy, 197 Fed. 881, 118 C. C. A. 579. Reference in a deed for shore land to a plat containing curved lines, apparently indicating the lines of high and low water, does not estop the grantee and his successors in title to claim that the lands were riparian or littoral; Beach Front Hotel Co. v. Sooy, 197 Fed. 881, 118 C. C. A. 579.

Where certain guaranties recited a consideration of $1 to the subscriber in hand paid, the receipt thereof was thereby acknowledged, the guarantors were estopped to deny that any consideration had in fact been paid; Bond v. Farwell, 172 Fed. 58, 96 C. C. A. 546.

If the recitals of a patent nullify its granting clause, the grant falls; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 644, 26 L. Ed. 875. See Kirby v. Lewis, 39 Fed. 70. If the operative parts of a deed are ambiguous, the recitals may be referred to as a key to the intention of the parties; 5 Russ. 344; but not if the operative parts are clear; 19 L. J. Q. B. 462; and the same rule applies to statutes; 4 Ch. D. 592. If they are at variance, the operative parts must be effective and the recitals ineffective, but the latter may explain ambiguities; L. R. 1 Eq. 183; in such case, in a conveyance, if the recital is clear as to what is meant and the operative parts go beyond the recitals, the conveyance must be restricted; L. R. 1 Eq. 361; 29 Ch D. 514. A misrecital in a deed may influence its construction; Elphins. Interpr. of Deeds, 139.

The recital of the payment of the consideration money is evidence of payment against subsequent purchasers from the same grantor; Pennsylvania Salt Mfg. Co. v. Neel, 54 Pa. 19; but not against third parties, when it is necessary for the party claiming under the deed to show full payment before receiving notice of an adverse equity; Lloyd v. Lynch, 28 Pa. 425, 70 Am. Dec. 137. A deed of defeasance which professes to recite the principal deed must do so truly; Cruise, Dig.

tit. 32, c. 7, § 28. See 3 Ch. Cas. 101; Co. Litt. 352; Com. Dig. *Fait* (E 1).

IN STATUTES. A mere recital in an act, whether of fact or of law, is not conclusive, unless it is clear that the legislature intended that the recital should be accepted as a fact in the case; Kinkead v. U. S., 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152.

IN BONDS. The recitals in corporate bonds may constitute notice to holders of facts which will affect their rights. See Parsons v. Jackson, 99 U. S. 434, 25 L. Ed. 457; Byers v. Trust Co., 175 Pa. 318, 34 Atl. 629. One who buys bonds which recite that they are for the principal and interest of other bonds, is chargeable with notice that the former indebtedness was overdue; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362. In Provident Life & Trust Co. v. Mercer Co., 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156, it was said as to recitals in county bonds: "By a long series of decisions such recitals are held conclusive, in favor of a *bona fide* holder of bonds, that precedent conditions, prescribed by statute and subject to the determination of those county officers, have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a *bona fide* holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to these in the bonds before us." The court applied the doctrine of the conclusive effect of such recitals not only to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, etc., but also to conditions which it was urged were to be performed subsequently to the execution, such as that the bonds should not be binding until the railway should have been so completed through the county, that a train of cars had passed over it.

See, also, Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Citizens' Saving & Loan Ass'n v. Perry Co., 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585; Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; BONDS; MUNICIPAL BONDS.

IN JUDICIAL RECORDS. A recital in the record of a court imports absolute verity, and all parties thereto are estopped from denying its truth; Ex parte Rice, 102 Ala. 671, 15 South. 450; and the recitals of the record of a trial court are conclusive on the parties as to the term at which a decree was rendered; if the record is incorrect, the remedy is by a proceeding in the trial court to secure a correction; State v. Hopewell, 35 Neb. 822, 53 N. W. 990.

IN PLEADING. *In Equity.* The decree formerly contained a recital of the pleadings. This usage is now mostly abolished, though it obtains largely in New Jersey.

At Law. Recitals of deeds or specialties bind the parties to prove them as recited.

Definite recitals in municipal bonds of preliminary facts relating to the regularity of their issue will estop the municipality from disputing the facts; Lake County v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; L. R. 5 Q. B. 642 (*contra*, Ontario v. Hill, 99 N. Y. 324, 1 N. E. 887); or recitals of the performance of conditions precedent, as against a *bona fide* purchaser for value; Presidio County v. Bond & Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402; but no recital of power to issue them is binding; Northern Nat. Bank of Toledo v. Porter Tp., 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. If the recital in a public bond is that the bonds were issued "in pursuance of" or "in conformity with" the statute, this is an assertion that the statute has been followed; but if "under" the statute is used, the purchaser is put upon inquiry and the municipality is not estopped to show that the bonds are void because in excess of the constitutional limit; Bates v. School Dist., 25 Fed. 192; Com. Dig. *Pleader* (2 W. 18); 4 East 585; Wilbur v. Brown, 3 Den. (N. Y.) 356; Scott v. Horn, 9 Pa. 407; Baltimore Cemetery Co. v. First Independent Church, 13 Md. 117; and a variance in an essential matter will be fatal; Bishop v. Quintard, 18 Conn. 395; even though the variance be trivial; 1 Chitty, Pl. 424. The rule applies to all written instruments; Ulrick v. Ragan, 11 Ala. 529; Addis v. Van Buskirk, 24 N. J. L. 218; Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252; not, it seems, where it is merely brought forward as evidence, and is not made the ground of action in any way; Marshall v. Adams, 11 Ill. 40.

Recitals of public statutes need not be made in an indictment or information; Dy. 155 *a*, 346 *b*; Cro. 187; 1 Wms. Saund. 135; nor in a civil action; Crawford v. Bank, 6 Ala. 289; Shaw v. Tobias, 3 N. Y. 188; but, if made, a variance in a material point will be fatal; 4 Co. 48; Cro. Car. 135; Bac. Abr. *Indictment* ix.

Recitals of private statutes must be made; Eckert v. Head, 1 Mo. 593; and the statutes proved by an exemplified copy unless admitted by the opposite party; Steph. Pl. 347; Proprietors of Kennebeck Purchase v. Call, 1 Mass. 483; but not if a clause be inserted that it shall be taken notice of as a public act; 1 Cr. M. & R. 47; Brookville Ins. Co. v. Records, 5 Blackf. (Ind.) 170; *contra*, 1 Mood & M. 421. Pleading a statute is merely stating the facts which bring a case within it, without making any mention, or taking any notice of the statute itself; McKay v Woodle, 28 N. C. 352. Counting upon a statute consists in making express reference to

it, as by the words "against the form of the statute [or "by force of the statute"] in such case made and provided." Reciting a statute is quoting or stating its contents; Steph. Pl. 347; Gould, Pl. 46.

Recital of a record on which the action is based must be correct, and a variance in a material point will be fatal; Blakey v. Saunders, 9 Mo. 742; State v. Williams, 17 Ark. 371; Iglehart v. Hobart, 19 Ill. 637; otherwise where it is offered in evidence merely; State Bank v. Gray, 12 Ark. 760.

RECITE. In a statute requiring that a sheriff's deed recite the execution, names of the parties, etc., it was held that the word *recite* does not mean to copy or repeat *verbatim*, but only to state the substance of the execution. Armstrong's Lessee v. McCoy, 8 Ohio 128, 31 Am. Dec. 435.

RECKLESS. Heedless, careless, rash, indifferent to consequences. Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262. It implies heedlessness and indifference. Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. Reckless indifference as to the consequences of a criminal act may, no doubt, be characterized as malice. But heedlessness is not malice, and neither of them surely amounts to malice aforethought; Odgers, C. L. 270.

RECKLESSNESS. An indifference whether wrong is done or not. An indifference to the rights of others. Recklessness and wantonness are stronger terms than mere or ordinary negligence. Kansas Pac. R. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730.

RECLAIM. To demand again; to insist upon a right; as, when a defendant for a consideration received from the plaintiff has covenanted to do an act, and fails to do it, the plaintiff may bring covenant for the breach, or assumpsit to *reclaim* the consideration. Weaver v. Bentley, 1 Caines (N. Y.) 47.

RECLAMATION OF ARID LANDS. See IRRIGATION.

RECLAMATION OF SWAMP LANDS. See ASSESSMENT.

RECOGNITION. An acknowledgment that something which has been done by one man in the name of another was done by authority of the latter. See AGENCY; RATIFICATION.

In International Law. The acknowledgment of the claim of a new state to be admitted into the family of nations. In the case of states whose uncivilized condition has prevented them from being recognized as members of the family of nations, the question of the justice of their claim to recognition will depend upon the extent to which it seems probable that they are in a condition to abide by the principles and fulfill the duties imposed by international law. In the case of states which are formed by the successful revolt of one part of a nation against the rest of the nation, the question of their recognition depends upon the fact that they have established a *de facto* government and have proven their ability to maintain their independence. No fixed rule can be laid down regarding the time when recognition is due to an insurgent state. If the parent state itself acknowledges the independence of the insurgent state, no difficulty is presented; but in other cases the *de facto* independence of the new state must be determined from the cessation of hostilities against it by the parent country, or by the manifest inability of the parent state to conquer the territory. A too precipitate recognition of an insurgent colony would constitute an offense on the part of the recognizing state against the parent state. I Opp. 116–121.

In the United States it devolves upon the president to determine when recognition is to be accorded to a new state, and his decision is not subject to review by the courts. It has been claimed that congress may dictate to the president on this point, but precedents are against the claim. 1 Willoughby, Constitutional Law 461. See EXECUTIVE POWER.

As a general rule international law is not concerned with internal changes within a sovereign state. The government of a state may change from a monarchy to a republic without any change in the identity of the state in the family of nations.

As to recognition of belligerency, see NEUTRALITY; BELLIGERENCY; INSURGENCY.

See EXECUTIVE POWER.

A method of deciding doubtful questions of property by sworn witnesses instead of by the English process of compurgation or ordeal. Twelve men, who must be freemen and hold property, were chosen from the neighborhood and sworn, and the matter was decided according to their witness, or "recognition." It was introduced into England by the Norman kings; Mrs. John Richard Green, in 1 Sel. Essays in Anglo-Amer. L. H. 116.

RECOGNITORS. In English Law. The name by which the jurors impanelled on an assize were known. Barnet v. Ihrie, 17 S. & R. (Pa.) 174.

See ASSIZE; RECOGNITION.

RECOGNIZANCE. An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. 2 Bla. Com. 341. See U. S. v. Insley, 49 Fed. 776.

The liability of bail above in civil cases, and of the bail in all cases in criminal matters, must be evidenced by a recognizance, as the sheriff has no power to discharge upon a bail-bond being given to him in these cases. See 4 Bla. Com. 297.

The object of a recognizance is to secure

the presence of the defendant to perform or suffer the judgment of the court. In some of the United States, however, this distinction is not observed, but bail in the form of a bail-bond is filed with the officer, which is at once bail below and above, being conditioned that the party shall appear and answer to the plaintiff in the suit, and abide the judgment of the court.

In civil cases they are entered into by bail, conditioned that they will pay the debt, interest, and costs recovered by the plaintiff under certain contingencies, and for other purposes under statutes.

In criminal cases they are either that the party shall appear before the proper court to answer to such charges as are or shall be made against him, that he shall keep the peace or be of good behavior. The presence of witnesses may also be secured in the same manner; People v. Rundle, 6 Hill (N. Y.) 506.

Who may take. In *civil* cases recognizances are generally taken by the court; Treasurer of Vermont v. Rolfe, 15 Vt. 9; State v. Montgomery, 7 Blackf. (Ind.) 221; or by some judge of the court in chambers, though other magistrates may be authorized therefor by statute, and are in many of the states; Frost v. Roatch, 6 Whart. (Pa.) 359; State v. Austin, 4 Humphr. (Tenn.) 213.

In *criminal* cases the judges of the various courts of criminal jurisdiction and justices of the peace may take recognizances; State v. Dawson, 6 Ohio, 251; Com. v. M'Neill, 19 Pick. (Mass.) 127; Goodwin v. Dodge, 14 Conn. 206; People v. Rutan, 3 Mich. 42; the sheriff, in some cases; Gray v. State, 5 Ark. 265; Shreeve v. State, 11 Ala. 676; but in case of capital crimes the power is restricted usually to the court of supreme jurisdiction. See BAIL.

In cases where a magistrate has the power to take recognizances it is his duty to do so, exercising a judicial discretion, however; State v. Best, 7 Blackf. (Ind.) 611. In form it is a short memorandum on the record, made by the court, judge, or magistrate having authority, which need not be signed by the party to be found; Kean v. Franklin, 5 S. & R. (Pa.) 147; Com. v. Downey, 9 Mass. 520; Grigsby v. State, 6 Yerg. (Tenn.) 354. It is to be returned to the court having jurisdiction of the offence charged, in all cases; People v. Van Eps, 4 Wend. (N. Y.) 387; Treasurer of Vermont v. Merrill, 14 Vt. 64.

Discharge and excuse under. A surrender of the defendant at any time anterior to a fixed period after the sheriff's return of *non est* to a *ca. sa.*, or taking the defendant on a *ca. sa.;* Bryan v. Simonton, 8 N. C. 51; Smith v. Rosecrantz, 6 Johns. (N. Y.) 97; discharges the bail (see FIXING BAIL); Arch. Cr. P. 184; as does the death of the defendant before the return of *non est;* Bish. Cr. Proc. 264; Antonio v. Arthur, 1 N. & M'C. (S. C.) 251; Parker v. Bidwell, 3 Conn. 84; or a loss of custody and control by act of government or of law without fault of the bail prior to being fixed; Way v. Wright, 5 Metc. (Mass.) 380; Caldwell v. Com., 14 Gratt. (Va.) 698; including imprisonment for life or for a long term of years in another state; Loflin v. Fowler, 18 Johns. (N. Y.) 335; but not voluntary enlistment; Herrick v. Richardson, 11 Mass. 234; or long delay in proceeding against bail; Champion v. Noyes, 2 Mass. 485; Howard v. Miller, 1 Root (Conn.) 428; or a discharge of the principal under the bankrupt or insolvent laws of the state; McCausland v. Waller, 1 Harr. & J. (Md.) 156; Trumbull v. Healy, 21 Wend. (N. Y.) 670; Payson v. Payson, 1 Mass. 292; McGlensey v. McLear, 1 Harr. (Del.) 466; and, of course, performance of the conditions of the recognizance by the defendant, discharges the bail. And see BAIL-BOND; FIXING BAIL.

The formal mode of noting a discharge is by entering an exoneration; Boggs v. Teackle, 5 Binn. (Pa.) 332; Strang v. Barber, 1 Johns. Cas. (N. Y.) 329; Lockwood v. Jones, 7 Conn. 439. A culprit giving a recognizance to appear to an indictment, and not to depart from the court without leave, is not discharged from his obligation, nor is his surety thereon, by the quashing of the indictment; State v. Hancock, 54 N. J. L. 393, 24 Atl. 726.

The remedy upon a recognizance is by means of a *scire facias* against the bail; Cappeau v. Middleton, 1 Harr. & G. (Md.) 154; State v. Carr, 4 Ia. 289; State v. Stout, 11 N. J. L. 124; Com. v. M'Neill, 19 Pick. (Mass.) 127; or by suit, in some cases; Matthews v. Cook, 13 Wend. (N. Y.) 33; Mix v. Page, 14 Conn. 329. A surety on a recognizance may defend by showing the invalidity of the indictment against his principal; McDaniel v. Campbell, 78 Ga. 188; *contra*, Lee v. State, 25 Tex. App. 331, 8 S. W. 277.

Without notice to the principal, a recognizance cannot be legally amended against objection of the sureties; Hand v. State, 28 Tex. App. 28, 11 S. W. 679.

It is indispensable to a legal default and declaration of forfeiture of a recognizance, that the principal in the recognizance should have been regularly called, and, upon such call, failed to appear; Brown v. People, 24 Ill. App. 72. See BAIL; SURETYSHIP; SUBROGATION.

RECOGNIZE. To try; to examine in order to determine the truth of a matter. 3 Sharsw. Bla. Com. App. No. III, § 4; Bracton 179.

To enter into a recognizance.

RECOGNIZEE. He for whose use a recognizance has been taken.

RECOGNIZOR. He who enters into a recognizance.

RECOLEMENT. In French Law. The reading and re-examination by a witness of

a deposition, and his persistence in the same, or his making such alteration as his better *recollection* may enable him to do after having read his deposition. Without such re-examination the deposition is void. Pothier, *Procéd. Cr.* s. 4, art. 4.

RECOMMENDATION. The giving to a person a favorable character of another.

When the party giving the character has acted in good faith, he is not responsible for the injury which a third person, to whom such recommendation was given, may have sustained in consequence of it, although he was mistaken.

But when the recommendation is knowingly untrue, and an injury is sustained, the party recommending is civilly responsible for damages; 3 Term 51; Russell v. Clark's Ex'rs, 7 Cra. (U. S.) 69, 3 L. Ed. 271; Allen v. Addington, 7 Wend. (N. Y.) 9; Boyd's Ex'rs v. Browne, 6 Pa. 310; whether it was done merely for the purpose of benefiting the party recommended or the party who gives the recommendation. See PRIVILEGED COMMUNICATIONS.

And in case the party recommended was a debtor to the one recommending, and it was agreed, prior to the transaction, that the former should, out of the property to be obtained by the recommendation, be paid, or in case of any other species of collusion to cheat the person to whom the credit is given, they may both be criminally prosecuted for the conspiracy. See CHARACTER; Fell, Guar. c. 8; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Wise v. Wilcox, 1 Day (Conn.) 22; Lobre v. Pointz, 5 Mart. N. S. (La.) 443.

RECOMPENSE. A reward for services; remuneration for goods or other property.

In maritime law there is a distinction between *recompense* and *restitution*. When goods have been lost by jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, the owner of the goods lost by jettison cannot claim restitution from the owners of the other goods; but in the case of expenses incurred with a view to the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship-owner himself.

RECOMPENSE OF RECOVERY IN VALUE. A phrase applied to the matter recovered in a common recovery, after the vouchee has disappeared and judgment is given for the demandant. 2 Bouvier, Inst. n. 2093.

RECONCILE. While etymologically not synonymous with "harmonize," reconcile is so nearly equivalent as not to mislead a jury instructed as to the reconciliation of conflicting testimony. Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265.

RECONCILIATION. The act of bringing persons to agree together, who before had had some difference.

A renewal of cohabitation between husband and wife is proof of reconciliation; and such reconciliation destroys the effect of a deed of separation; 4 Eccl. 238. See Bish. Mar. & D. § 1707.

RECONDUCTION. In Civil Law. A renewing of a former lease; relocation. Dig. 19. 2. 13. 11; Code, Nap. art. 1737–1740.

RECONSTRUCTION. This term has been widely used to describe the measures adopted by congress, at the close of the War of Secession in the United States, to regulate the admission of the representatives from the Southern states, the re-establishment of the federal authority within their borders, and the changes in their internal government, in order to adapt them to the condition of affairs brought about by the war.

RECONSTRUCTION OF A CORPORATION. A term used in England instead of the more common term *amalgamation*. See 20 L. Q. R. 392; MERGER.

RECONVENTION. In Civil Law. An action brought by a party who is defendant against the plaintiff before the same judge. Lanusse's Syndics v. Pimpienella, 4 Mart. N. S. (La.) 439. To entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with it and incidental to the same. La. Code of Pr. art. 375; Keene v. Relf, 11 La. 309. The reconvention of the civil law was a species of cross-bill. Story, Eq. Pl. § 402. See RECOUPMENT.

RECOPILACION. In Spanish Law. A compilation of the Laws of the Indies, made by Philip IV in 1661. See Ponce v. Church, 210 U. S. 315, 28 Sup. Ct. 737, 52 L. Ed. 1068.

RECORD. A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. Mandeville v. Perry, 6 Call (Va.) 78; Com. v. Rodes, 1 Dana (Ky.) 595.

Records may be either of legislative or judicial acts. Memorials of other acts are sometimes made by statutory provisions.

Legislative acts. The federal and state constitutions, acts of congress and of the several legislatures are the highest kind of records. The printed journals of congress have been so considered. See Dougl. 598; Cowp. 17.

A record in *judicial proceedings* is a precise statement of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts; or in the language of Lord Coke, "records are memorials or remembrances, in rolls of parchment, of the

proceedings and acts of a court of justice, which hath power to hold pleas according to the course of the common law." See Davidson v. Murphy, 13 Conn. 216.

The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record is not a record; Leveringe v. Dayton, 4 Wash. C. C. 698, Fed. Cas. No. 8,288. See Snyder v. Wise, 10 Pa. 157; Thomas v. Robinson, 3 Wend. (N. Y.) 267; Good v. French, 115 Mass. 201.

Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered; Gresl. Ev. 101. And see Scott v. Blanchard, 8 Mart. N. S. (La.) 303; Craig v. Brown, 1 Pet. C. C. 352, Fed. Cas. No. 3,328.

In a case brought from the circuit court, the opinion regularly filed below may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the United States Constitution, but not to ascertain that which should be made to appear in a bill of exceptions, or the pleadings; Loeb v. Columbia Tp. Trustees, 179 U. S. 484, 21 Sup. Ct. 174, 45 L. Ed. 280; or to ascertain whether the case raises any question determined adversely to a right, etc., under the constitution or laws of the United States; Gross v. Mortg. Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795. The former rule that the opinion below was no part of the record was abrogated (Murdock v. Memphis, 20 Wall. [U. S.] 590, 22 L. Ed. 429), and finally a rule of court provided that a copy of the opinion below should go up in the transcript; Loeb v. Columbia Tp. Trustees, 179 U. S. 484, 21 Sup. Ct. 174, 45 L. Ed. 280. But the mere fact that a paper is found among the files does not make it a part of the record; it must be put there by some action of the court below; England v. Gebhardt, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. Ed. 811, but it is said that this language cannot be taken too broadly; Loeb v. Columbia Tp., 179 U. S. 484, 21 Sup. Ct. 174, 45 L. Ed. 280.

It is within the power of any court of general jurisdiction to restore its lost records or to expunge false or fraudulent interpolations therein; Blakemore v. Wilson, 61 Ill. App. 454; or where the record is silent, or, where it suggests as a fact something contrary to the fact, to correct the record by an order *nunc pro tunc;* Holman v. State, 79 Ga. 155, 4 S. E. 8. See In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865. The power of a court to amend its own records is limited to the correction of actual mistakes and omissions; Jones v. Newton, 65 Hun 619, 19 N. Y. Supp. 786. A court has an inherent power to amend its record; this is not to create a new record, but presupposes an existing record susceptible of amendment; Gagnon v. U. S., 193 U. S. 451, 24 Sup. Ct. 510, 48 L. Ed. 745. A court may always, after the expiration of the term, amend the record *nunc pro tunc* to conform to the facts, where there are sufficient data; Borrego v. Territory, 8 N. M. 446, 46 Pac. 349. If there has been a failure to file a record within the time required, a subsequent filing cures this defect; provided no motion to docket and dismiss has been made; 24 U. S. App. 527.

In criminal proceedings all parts of the record must be interpreted together, and a deficiency in one part may be supplied by what appears elsewhere therein; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

Altering records of a court is a crime punishable at common law; 2 East, P. C. 866. See Saunders v. People, 38 Mich. 218; State v. Williams, 30 Me. 484; 1 Bish. Cr. L. § 468 (6). An attorney may be disbarred for alteration of the record by falsifying the stenographer's transcript of the evidence to deceive an appellate court; State v. Harber, 129 Mo. 291, 31 S. W. 889.

Laws for the *registration of deeds* are of statutory origin, and the statute must be examined to determine what instruments are to be recorded, where they are to be recorded, and the effect of a failure to record them; First Nat. Bank of Claremore v. Keys, 229 U. S. 179, 33 Sup. Ct. 642, 57 L. Ed. 1140.

The fact of an instrument affecting property being recorded according to law is held to operate as a constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394. And even if not recorded, if it has been filed for record and its existence is necessarily implied from the existence of another instrument already of record, purchasers will be deemed to have had notice of its existence; 14 Cent. L. J. 374.

But all conveyances and deeds which may be *de facto* recorded are not to be considered as giving notice: in order to have this effect, the instruments must be such as are authorized to be recorded, and the registry must have been made in compliance with the law, otherwise the registry is to be treated as a mere nullity, and it will not affect a subsequent purchaser or incumbrancer unless he has actual notice; 2 Sch. & L. 68; Astor v. Wells, 4 Wheat. (U. S.) 466, 4 L. Ed. 616; 1 Story, Eq. Jur. § 403; Bullard v. Hinckley, 5 Greenl. (Me.) 272; but where a statute makes it discretionary to record an instrument, the effect of recording is in no wise lessened, but is deemed a constructive notice the same as if the recording had been required; Appeal of Pepper, 77 Pa. 373. The record of a deed is not constructive notice of its contents when it is not entitled to be recorded under the recording acts; Prentice v. Storage Co., 58 Fed. 437, 7 C. C. A. 293. Where a proper book is kept for the purpose

of showing when an instrument is left for record, delay or negligence in entering it in other books will not affect it as a lien upon the property; Appeal of Woods, 82 Pa. 116.

But it is held that it is the duty of a mortgagee to see that his mortgage is correctly recorded; a mortgage defectively recorded and indexed by changing the first initial of the mortgagor's name, the correct name being entirely omitted from the record, is not binding on a subsequent purchaser, without notice, from the mortgagor; Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550, 25 L. R. A. (N. S.) 1211. So a judgment docketed against Amanda Haring is not notice as to property standing in the name of Melvina Harnig; Haring v. Murphy, 60 Misc. Rep. 374, 113 N. Y. Supp. 452. See cases cited in Burns v. Ross, 215 Pa. 293, 64 Atl. 526, 7 L. R. A. (N. S.) 415, 114 Am. St. Rep. 963.

A recorder, if errors in transferring should occur, should explain them and not erase; Glasgow v. Kann, 171 Pa. 262, 32 Atl. 1095. An action will lie against a recorder of deeds for neglect; Rising v. Dickinson, 18 N. D. 478, 121 N. W. 616, 23 L. R. A. (N. S.) 127, 138 Am. St. Rep. 779, 20 Ann. Cas. 484.

Records of a public office (here a card index of assessments made by the official, though not required by law to be kept) are public property; Robison v. Fishback, 175 Ind. 132, 93 N. E. 666, Ann. Cas. 1913B, 1271.

See, as to recording acts, 3 Law Mag. & Rev., 4th sec. 412; Judge Cooley's Paper in 4th Rep. Am. Bar Asso. (1881); Lecture of W. H. Rawle before the Law Dept. Univ. of Pa., 1881; as to mortgages, see MORTGAGE; as to falsification of a record, see FORGERY.

As to giving *full faith and credit* to judicial proceedings, under the United States constitution, see FOREIGN JUDGMENT. The constitutional provision applies in terms to public acts, records, and judicial proceedings, and it is held that the term records in the Judiciary Act of May 26, 1790, which provides how they shall be proved and admitted in evidence, includes all acts, legislative, executive, judicial, and ministerial, composing the public records of the state; White v. Burnley, 20 How. (U. S.) 250, 15 L. Ed. 886.

Questions as to what is or is not a part of the record have arisen, principally on *writ of error or appeal*, as to what parts of the record and proceedings of the court below are to be considered as parts of the record before the appellate court. In many of these cases, matters which were actually a part of the record below are only such in the court above when made so by being embodied in the bill of exceptions. Among the matters and things which have been held not to be a part of the record, but to be considered with reference to the foregoing qualification, are: Trial list; Moore v. Kline, 1 Pen. & W. (Pa.) 129; bond for costs; Montgomery v. Carpenter, 5 Ark. 264; Maynard v. Hoskins, 8 Mich. 81; writing sued on; Williams v. Duffy, 7 Humphr. (Tenn.) 255; Clark v. Gibson, 2 Ark. 109 (unless made so by oyer or otherwise; Pelham v. Bank, 4 Ark. 202); an affidavit made to supply a part of the record which has been lost; Troy v. Reilley, 3 Scam. (Ill.) 259; papers presented to a court and acted upon merely as matters of evidence; Kirby v. Wood, 16 Me. 81; the registry of a mechanic's lien; Davis v. Church, 1 W. & S. (Pa.) 240; the statement of demand, in the court for the trial of small causes; Vandyke v. Bastedo, 15 N. J. L. 224; a warrant of attorney to confess judgment and an affidavit showing the death of one of the signers of it; Magher v. Howe, 12 Ill. 379; instructions to the jury; Pierce v. Locke, 11 Ia. 454 (*contra*, where they were signed by the judge and filed; Allen v. Davison, 16 Ind. 416); letters copied into the transcripts as exhibits; Stodder v. Grant, 28 Ala. 416; papers filed after an appeal prayed, taken, and signed by the judge; Gray v. Nations, 1 Ark. 557; a plea stricken from the files; Kelly v. Matthews, 5 Ark. 223; Schmidt v. Colley, 29 Ind. 120; minutes of the court taken at the trial; Dawley v. Hovious, 23 Cal. 103; or clerk's minutes; People v. Mining Co., 33 Cal. 171; a bill of particulars; Eggleston v. Buck, 24 Ill. 262; a summons or other writ; Childs v. Risk, Morr. (Ia.) 439 (otherwise where there was no appearance; Stanton v. Woodcock, 19 Ind. 273).

The following have been held to be parts of the record: A stipulation as to sale of mortgaged premises and solicitor's fee; Cord v. Southwell, 15 Wis. 211; depositions in a probate court; Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; affidavits filed in opposition to an application for an injunction; Gagliardo v. Crippen, 22 Cal. 362; motions, notices, and rulings of court; Lemondo v. French, 4 G. Greene (Ia.) 123; a finding of the court; Smith v. Lewis, 20 Wis. 350; Sutter v. Streit, 21 Mo. 157; a submission and award filed; Buntain v. Curtis, 27 Ill. 374; a bill of exceptions settled on an appeal from an order; Mead v. Walker, 20 Wis. 518; an instrument of which oyer is craved; Cummins v. Woodruff, 5 Ark. 116. The opinion of the trial court as to the facts was held a part of the record; Gregg v. Spencer, 96 Ia. 501, 65 N. W. 411; but in Pennsylvania it was said to be not a good principle so to treat the opinion; In re Morrison's Estate, 183 Pa. 155, 38 Atl. 895.

Under recording acts. Statutes of the several states have required enrolment of certain deeds, mortgages, and other instruments, and declared that the copies thus made should have the effect of records. An instrument lodged for record is considered as recorded from that time, whether it was actually copied in the book or not, or in the proper book or not; Farabee v. McKerrihan, 172 Pa. 234, 33 Atl. 583, 51 Am. St. Rep. 734.

The sole object of acts for the restoration

of lost records is to restore them as they existed; In re Jones' Estate, 17 Cal. App. 330, 119 Pac. 670; Whitney v. Land Co., 119 Ala. 497, 24 South. 259; Vail v. Iglehart, 69 Ill. 332.

The legislature has power to provide for the re-establishment of lost record title papers to real estate against unknown claimants, upon process served by publication; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, 11 Ann. Cas. 465; that such a statute limited its operation to cases where such records were destroyed by earth-quakes, fire, or flood, will not render it invalid as special legislation; *id.* The duty of determining unsettled questions respecting the title to real estate is local in its nature to be discharged in such mode as may be provided by the state in which the land is situated; Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918.

Inspection of Records. At common law, there was no general right of inspection, but the right depended entirely upon the question whether the party seeking to exercise it had an interest. If he had, he was entitled to exercise the right upon the payment of the usual fees; 7 Mod. 127; 1 Stra. 304; 2 *id.* 260, 954, 1005; but a mere stranger who had no such interest had no right of inspection at common law; 8 Term 390; and the custodian might permit or refuse the inspection at his discretion without any control by a court; 6 Ad. & El. 84. At a comparatively early period, this distinction between those who had and those who had not an interest became obliterated; 1 Wils. 297; People v. Cornell, 47 Barb. (N. Y.) 329. The effect of modern recording acts making the public records notice, has aided to accomplish this result, and, indeed, makes the right of inspection and of enforcing the privilege an essential one; 4. D. & R. 820; Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; Silver v. People, 45 Ill. 224; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634. It does not extend in England to merely *quasi*-public records, such as court rolls of a manor; Bunb. 269; or to records of a justice of the peace; Perkins v. Cummings, 66 Vt. 485, 29 Atl. 675; or to a marriage license docket; Marriage License Docket No. 2, 4 Pa. Dist. R. 284; *contra*, marriage license docket, *id.* 162.

The right of inspection will not exist as to the record of private suits, at least before trial, where it is sought only to gratify malice or curiosity, or to make profit by disclosing private affairs and making public scandalous matters; Schmedding v. May, 85 Mich. 1, 48 N. W. 201, 24 Am. St. Rep. 74; nor does it extend to records required by law to be kept secret, as, the proceedings of a county electrical board; Gleaves v. Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144. The right of inspection is secured by statute in most of the states, and is not dependent on interest, though in some cases it is denied if detrimental to public policy or is sought by a citizen of another state; Brewer v. Watson, 61 Ala. 310. In case of refusal, the right may be enforced; In re Chambers, 44 Fed. 786; Lum v. McCarty, 39 N. J. L. 287; State v. Long, 37 W. Va. 266, 16 S. E. 578; even though the rules of the office require the records to be kept secret. The right when denied is enforced by mandamus; Barber v. Title & Guaranty Co., 53 N. J. Eq. 158, 32 Atl. 222; Brewer v. Watson, 71 Ala. 299; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634; Hawes v. White, 66 Me. 305. Injunction is usually held not to be a proper remedy; Belt v. Abstract Co., 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212; Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Diamond Match Co. v. Powers, 51 Mich. 145, 16 N. W. 314; Barber v. Title & Guaranty Co., 53 N. J. Eq. 158, 32 Atl. 222. The right of inspection is very much drawn into question in cases where the right is sought to be exercised by abstract and title insurance companies. Objections to the use of public offices by the agents of such companies are made upon the ground of interference with the legitimate fees of the public officers, with the business of the office, and of possible injuries to the records. The right has been sustained in Re Chambers, 44 Fed. 786; Stockman v. Brooks, 17 Colo. 248, 29 Pac. 746; People v. Richards, 99 N. Y. 620, 1 N. E. 258; Com. v. O'Donnell, 12 W. N. C. (Pa.) 291; and, after some fluctuation, in Barber v. Title & Guaranty Co., 53 N. J. Eq. 158, 32 Atl. 222; Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452; Randolph v. State, 82 Ala. 527, 2 South. 714, 60 Am. Rep. 761; Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Belt v. Abstract Co., 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212, a statute having been passed as a result of a previous decision otherwise. They are always at the service of a person desiring to examine them; Miller v. Moise, 168 Fed. 940. A citizen is not required to show a special interest; Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73. A title insurance company has the right to examine judgment indexes in the district court on a matter of current business if it does not interfere with the clerk in his duties or with persons exercising their right of access thereto; Bell v. Ins. & Trust Co., 189 U. S. 131, 23 Sup. Ct. 569, 47 L. Ed. 741.

As to the custody of court records and when they may be removed, see In re Caswell, 18 R. I. 835, 29 Atl. 259, 27 L. R. A. 82, 49 Am. St. Rep. 814.

Where the right is permitted, the custodian may make reasonable rules; People v. Richards, 99 N. Y. 620, 1 N. E. 258; Day v. Button, 96 Mich. 600, 56 N. W. 3; Upton v. Catlin, 17 Colo. 546, 31 Pac. 172, 17 L. R. A. 282; and charge reasonable fees; Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452. The right to inspect has been held to include the

right to copy; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. 30; State v. Rachac, 37 Minn. 372, 35 N. W. 7; *contra*, Boylan v. Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551; Randolph v. State, 82 Ala. 527, 2 South. 714, 60 Am. Rep. 761.

As to parish and church registers and records, see REGISTER.

See VITAL STATISTICS; ROGUES' GALLERY.

RECORD, CONTRACT OF. See CONTRACT.

RECORD, CONVEYANCES BY. Extraordinary assurances, as private acts of parliament and royal grants.

RECORD, COURT OF. See COURT OF RECORD.

RECORD OF NISI PRIUS. In English Law. A transcript from the issue-roll: it contains a copy of the pleadings and issue. Steph. Pl. 105.

RECORDARE. A writ to bring up judgments of justices of the peace. Halcombe v. Loudermilk, 48 N. C. 491.

RECORDARI FACIAS LOQUELAM. In English Practice. A writ commanding the sheriff that he cause the plaint to be recorded which is in his county, without writ, between the parties there named, of the cattle, goods, and chattels of the complainant taken and unjustly distrained as it is said, and that he have the said record before the court on a day therein named, and that he prefix the same day to the parties, that then they may be there ready to proceed in the same plaint. 2 Sell. Pr. 166. Now obsolete.

RECORDATION. Used in Louisiana as equivalent to recording. See RECORDING ACTS.

RECORDATUR (Lat.). An order or allowance that the verdict returned on the *nisi prius* roll be recorded. Bacon, Abr. *Arbitration, etc.* (D).

RECORDER. A judicial officer of some cities, possessing generally the powers and an authority of a judge. Respublica v. Dallas, 3 Yeates (Pa.) 300. See Egleston v. City Council, 1 Mill. Const. (S. C.) 45.

Anciently, *recorder* signified to recite or testify on recollection, as occasion might require, what had previously passed in court; and this was the duty of the judges, thence called *recordeurs*. Steph. Pl. note 11.

An officer appointed to make record or enrolment of deeds and other legal instruments authorized by law to be recorded. See RECORDING ACTS; RECORD.

In England, a judge of a borough court of quarter sessions. He is appointed by the crown on the recommendation of the home secretary. He must be a barrister of not less than five years standing and is *ex officio* a justice of the peace for the borough.

A judicial officer in Philadelphia under the charter of 1691, next in authority to the mayor. He was required to be learned in the law. See Vaux's Recorder's Reports, Philadelphia, 1846.

RECORDER OF LONDON. One of the justices of oyer and terminer, and a justice of the peace of the *quorum* for putting the laws in execution for the preservation of the peace and government of the city. Whart. Law Lex.

RECORDING ACTS. Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other instruments, for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons. See RECORD.

RECORDS, EARLY ENGLISH. A record commission was appointed in 1800 by parliament, which in 37 years of service printed many records of England, Wales and Scotland. See their reports. Extracts from that on the "Statutes of the Realm" will be found in 2 Sel. Essays in Anglo. Amer. L. H. 171. See 2 Holdsw. Hist. E. L.

RECORDUM. A record; a judicial record. It is used in the phrase *prout patet per recordum*, which is a formula employed, in pleading, for reference to a record, signifying as it appears from the record. 1 Chit. Pl. 385; Philpot v. McArthur, 10 Me. 127.

RECOUPMENT (Fr. *recouper*, to cut again). The act of abating or recouping a part of a claim upon which one is sued by reason of a legal or equitable right resulting from a counter-claim arising out of the same transaction. The right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract. Mayor of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Heaston v. Colgrove, 3 Ind. 265; Robertson v. Davenport, 27 Ala. 574; Brunson v. Martin, 17 Ark. 270; Higgins v. Lee, 16 Ill. 495; Nelson v. Johnson, 25 Mo. 430.

Recoupment is the right to set off unliquidated damages, while the right of set-off, as distinguished from recoupment, comprehends only liquidated demands, or those capable of being ascertained by calculation; Parker v. Hartt, 32 N. J. Eq. 225. Both these terms have a technical meaning and both are included in the same general term, counter-claim, which see.

Is a cross demand, which a defendant may set up or not, at his choice; he is not concluded if he does not. Whether he can afterwards sue for the residue of his claim, or not, is a disputed question. He could not,

at common law, obtain a judgment against the plaintiff in his favor; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 258, 30 Sup. Ct. 78, 54 L. Ed. 179.

Defences, such as recoupment, which, though arising out of the transaction constituting the plaintiff's demand, may cut it down or give rise to an antagonistic demand, are of modern growth and are merely a connivance that saves bringing another suit, not a necessity of the defence. When defendant sets them up he becomes a plaintiff in his turn and subjects himself to the jurisdiction; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179. It is a cross demand as distinguished from a defence; Merchants H. & L. Co. v. J. B. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

This is not a new title in the law, the term occurring from the 11th to the 16th centuries, although it seems of late years to have assumed a new signification, and the present doctrine is said to be still in its infancy; 7 Am. L. Rev. 389. Originally it implied a mere deduction from the claim of the plaintiff, on account of payment in whole or in part, or a former recovery, or some analogous fact; 3 Co. 65; 4 *id.* 94; 5 *id.* 2, 31; 11 *id.* 51, 52. See note to Ielly v. Grew, 6 Nev & M. 467; Viner, Abr. *Discount*, pl. 3, 4, 9, 10; Barber v. Chapin, 28 Vt. 413. This meaning has been retained in many modern cases, but under the name of deduction or reduction of damages; 1 Maule & S. 318, 323; 2 M. & G. 241; 7 M. & W. 314; Curtis v. Ward, 20 Conn. 204, McMorris v. Simpson, 21 Wend. (N. Y.) 610; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396. The word recoupment has also been applied to cases very similar to the above; Stearns v. Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. See 7 Am. L. Rev. 389, where *recoupment* is fully treated.

Recoupment as now understood seems to correspond with the *reconvention* of the civil law, sometimes termed *demandes incidentes* by the French writers, in which the *reus*, or defendant, was permitted to exhibit his claim against the plaintiff for allowance, provided it arose out of, or was incidental to, the plaintiff's cause of action. *Œuvres de Pothier*, vol. 9, p. 39; 1 White, New Rec. 285; Voet. tit. *de Judiciis*, n. 78; La. Code Pr. art. 375; Lanusse's Syndics v. Pimpienella, 4 Mart. N. S. (La.) 439; Walcott v. Hendrick, 6 Tex. 406.

In England, as well as in some states, the principles of recoupment as defined above have been recognized only in a restricted form. Under the name of reduction of damages, the defendant is allowed to show all such violations of his contract by the plaintiff as go to render the consideration less valuable, but he is compelled to resort to an independent action for any immediate or consequential damages affecting him in other respects; 8 M. & W. 858; 1 C. & P. 384; McAlpin v. Lee, 12 Conn. 129, 30 Am. Dec. 609; Dodge v. Tileston, 12 Pick. (Mass.) 330; Withers v. Greene, 9 How. (U. S.) 231, 13 L. Ed. 109. See Reynolds & Lee v. Bell, 84 Ala. 496, 4 South. 703; Andre v. Morrow, 65 Miss. 315, 3 South. 659, 7 Am. St. Rep. 658. But these restrictions are all gradually disappearing, and the law is assuming the form expressed in the cases cited under the definition of modern recoupment, the main reason upon which the doctrine now rests being the avoidance of circuity of action.

In Pennsylvania a defendant may avail himself, by way of recoupment or equitable defence, of a breach of warranty or of a fraudulent representation, and show that the goods sold were worth less than they would have been if they were such as they were warranted or represented to be; Dushane v. Benedict, 120 U. S. 648, 7 Sup. Ct. 696, 30 L. Ed. 810.

There are some limitations and qualifications to the law of recoupment, as thus established. Thus, it has been held that the defendant is not entitled to any judgment for the excess his damages in recoupment may have over the plaintiff's claim, nor shall he be allowed to bring an independent action for that excess; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; Stow v. Yarwood, 14 Ill. 424; McLane v. Miller, 12 Ala. 643; Batterman v. Pierce, 3 Hill (N. Y.) 171; Brunson v. Martin, 17 Ark. 270. If recoupment is put upon the ground of a cross-action and not a more defence for the reduction of damages, there is no reason why he should not have judgment to the extent of his injury. Such seems to be the practice in Louisiana, under the name of *reconvention;* Miller v. Stewart, 12 La. Ann. 170; and such will probably be the practice under those systems of pleading which authorize the court, in any action which requires it, to grant the defendant affirmative relief; Ogden v. Coddington, 2 E. D. Sm. (N. Y.) 317. See, also, Calvin v. McClure, 17 S. & R. (Pa.) 385; Davidson v. Remington, 12 How. Pr. (N. Y.) 310.

The damages recouped must be for a breach of the same contract upon which suit is brought; Deming v. Kemp, 4 Sandf. (N. Y.) 147; Miles v. Elkin, 10 Ind. 329; Haldeman v. Berry, 74 Mich. 424, 42 N. W. 57. For example, when chattels have been sold with an express or implied warranty, and there were latent defects unknown to the purchaser, he may retain the goods without notifying the vendor, and either sue for his damages or recoup the same in an action against him for the price; Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129, 30 N. W. 295; Tillyer v. Glass Co., 13 Ohio C. C. 99, 7 O. C. D. 209; even if the sale were on approval, but the contract did not limit the purchaser to the return of the property, if unsatisfactory: Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; or one who has pledged stocks as collateral to a note, if sued on the note, may recoup the damages resulting from wrongful appropriation of the stocks by the pledgee; Rush v. Bank, 71 Fed. 102, 17 C. C. A. 627, 36 U. S. App. 248. The surety on a note, in an action by the payee, may set up, by way of recoupment, the breach of warranty of the property sold to the maker for which the note was given; Loring v. Morrison, 15 App. Div. 498, 44 N. Y. Supp. 526; but if a surety is sued alone,

he cannot recoup for a warranty in favor of his principal, without the consent of the latter; Phœnix Iron Works Co. v. Rhea, 98 Tenn. 461, 40 S. W. 482. It may be for a tort; but it seems that the tort must be a violation of the contract, and it is to be measured by the extent of this violation, and no allowance taken of malice; Allaire Works v. Guion, 10 Barb. (N. Y.) 55; Brigham v. Hawley, 17 Ill. 38; Heck v. Shener, 4 S. & R. (Pa.) 249, 8 Am. Dec. 700. The language of some cases would seem to imply that recoupment may be had for damages connected with the subject-matter or transaction upon which the suit is brought, but which do not constitute a violation of any obligation imposed by the contract, or of any duty imposed by the law in the making or performance of the contract; Stow v. Yarwood, 14 Ill. 424. But these cases will be found to be decided with reference to statutes of counter-claim. And even in the construction of such statutes it has been doubted whether it is not better to confine the damages to violations of the contract; Lovejoy v. Robinson, 8 Ind. 399; Cram v. Dresser, 2 Sandf. (N. Y.) 120.

It is well established, in the absence of statutory provisions, that it is optional with the defendant whether he shall plead his cross-claim by way of recoupment, or resort to an independent action; Cook v. Moseley, 13 Wend. (N. Y.) 277; Hall v. Clark, 21 Mo. 415. Nor does the fact of a suit pending for the same damages estop him from pleading them in recoupment, although he may be compelled to choose upon which action he shall proceed; Naylor v. Schenck, 3 E. D. Sm. (N. Y.) 135; Good v. Good, 5 Watts (Pa.) 116. Payment after action brought, although never pleadable in answer to the action, was usually admitted in reduction of damages; Pemigewasset Bk. v. Brackett, 4 N. H. 557; Bischof v. Lucas, 6 Ind. 26; 1 M. & W. 463. But the defendant can never recoup for damages accruing since action brought; 20 E. L. & E. 277; Harger v. Edmonds, 4 Barb. (N. Y.) 256; Gordon v. Kennedy, 2 Binn. (Pa.) 287.

The right of recoupment will usually be allowed to sureties and indorsers in cases where it would be permitted for the benefit of the principal debtor, as, for example, a successful recoupment by the maker of a note will enure to the benefit of the indorser when sued with the maker; Wolf v. Michael, 21 Misc. Rep. 86, 46 N. Y. Supp. 991.

It has been maintained by some courts that the law of recoupment is not applicable to real estate. Accordingly, they have denied the defendant the right, when sued for the purchase-money, to recoup for a partial failure of title; Greenleaf v. Cook, 2 Wheat. (U. S.) 13, 4 L. Ed. 172; Key v. Henson, 17 Ark. 254. But most of these cases will be found denying him that right only before eviction. A confusion has been introduced by regarding failure of title and failure of consideration as convertible terms. The consideration of a deed without covenants is the mere delivery of the instrument; Rawle, Cov. 588. A failure of title in such case is not a failure of consideration, and it therefore affords no ground for recoupment. The consideration of a deed with covenants does not fail till the covenantee has suffered damages on the covenants, which in most cases does not happen till eviction, either actual or constructive. After this has happened, his right to recoup is now pretty generally admitted. This is nothing more than allowing him to recoup as soon as he can sue upon the covenants; Mayor of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Rice v. Goddard, 14 Pick. (Mass.) 293; Pence v. Huston's Ex'rs, 6 Gratt. (Va.) 305; Dart, Vend. 381; Rawle, Cov. 583.

It has been more generally admitted that where there is a failure of the consideration as to the quantity or quality of the land, the purchaser may recoup upon his covenants; Wheat v. Dotson, 12 Ark. 699; 2 Kent 470; House v. Marshall, 18 Mo. 368; Green v. Batson, 71 Wis. 54, 36 N. W. 849, 5 Am. St. Rep. 194.

Under the common-law system of pleading, the evidence of a recoupment, if going to a total failure of consideration, might be given under the general issue without notice, but if it went only to a partial failure, notice was required to prevent surprise; McCullough v. Cox, 6 Barb. (N. Y.) 386; Jones v. Winchester, 6 N. H. 497. This is the only way it could be admitted, for it could not be pleaded, a partial defence constituting neither a plea in bar nor in abatement. Under a notice it was admitted to aid in sustaining the general denial.

But under the new systems of practice there being no general issue to which the notice was subsidiary, the defendant is required to plead his defence whether it is in answer of the whole demand or only in reduction of damages; Bush v. Prosser, 11 N. Y. 352; House v. Marshall, 18 Mo. 368.

The effect to be given to the law of recoupment will depend, in many of the states, upon the statutes of counter-claim and offset in force. In Missouri, for instance, it is provided that if any two or more persons are mutually indebted in any manner whatever, and one of them commence an action against the other, one debt may be set against the other, although such debts are of a different nature; 1 R. S. § 3867. The term *counter-claim* under this statute is held to include both set-off and recoupment; Gordon v. Bruner, 49 Mo. 570; the distinction between the two terms being important only from the fact that the former must arise from contract, and can only be used in an action founded on contract; while the latter may spring from a wrong, provided it arose out of the transaction set forth in the petition, or was connected with the subject of the ac-

tion; *id.* In the case of actions arising out of contracts it has been held that nothing would be allowed by way of recoupment unless it worked a violation of some obligation imposed by the contract, or some duty imposed by the law in the making or performance of it; Cram v. Dresser, 2 Sandf. (N. Y.) 120; Lovejoy v. Robinson, 8 Ind. 399.

See SET-OFF; Waterman, Set-Off, etc.; 10 L. R. A. 378, note; 7 Am. L. Rev. 389; 9 Am. L. Reg. 330; Beecher v. Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 63.

RECOURSE. To recur. As to indorsement without recourse, see INDORSEMENT.

RECOVERER. The demandant in a common recovery, after judgment has been given in his favor, assumes the name of recoverer.

RECOVERY. The restoration of a former right, by the solemn judgment of a court of justice. Hoover v. Clark's Adm'r, 7 N. C. 169. See 28 L. J. C. P. 312; 8 Q. B. D. 470.

In its general use, recovery signifies a collection of a debt by process and course of law. People v. Reis, 76 Cal. 269, 18 Pac. 309.

The phrase *right of recovery* is used to express the possession of a right of action under the existing facts.

A *true recovery*, usually known by the name of recovery simply, is the procuring a former right by the judgment of a court of competent jurisdiction: as, for example, when judgment is given in favor of the plaintiff when he seeks to recover a thing or a right.

A *common recovery* is a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit. Bacon, Tracts 148.

Common recoveries are considered as mere forms of conveyance or common assurances: although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The first thing, therefore, necessary to be done in suffering a common recovery is that the person who is to be the demandant, and to whom the lands are to be adjudged, should sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the tenant to the *præcipe*. In obedience to this writ the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty. The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The defendant then desires leave of the court to imparl, or confer with the vouchee in private, which is granted of course. Soon after the demandant returns into court, but the vouchee disappears or makes default, in consequence of which it is presumed by the court, that he has no title to the lands demanded in the writ, and therefore cannot defend them; whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value in recompense for those so warranted by him, and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the crier of the court to act, who is hence called the common vouchee, the tenant can only have a nominal and not a real recompense for the land thus recovered against him by the demandant. A writ of *habere facias* is then sued out directed to the sheriff of the county in which the lands thus recovered are situated; and on the execution and return of the writ the recovery is completed. The recovery here described is with single voucher; but a recovery may be, and is frequently, suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

Common recoveries were invented by the ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing, or receiving under the pretence of a free gift, any land or tenements whatever. They have been used in some states for the purpose of breaking the entail of estates. See, generally, Cruise, Digest, tit. 36; 2 Wms. Saund. 42, n. 7; 4 Kent 487; Pigot, Comm. Rec. *passim*. See Chall. Real P. 279; Big. Estop. 418.

All the learning in relation to common recoveries is nearly obsolete, as they are out of use. Rey, a French writer, in his work *Des Institutions Judiciaires de l'Angleterre*, tom. ii. p. 221, points out what appears to him the absurdity of a common recovery. See Lyle v. Richards, 9 S. & R. (Pa.) 330; Sharp v. Thompson, 1 Whart. (Pa.) 151; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Rep. 632; Dudley v. Sumner, 5 Mass. 438; Carroll's Lessee v. Maydwell, 3 Harr. & J. (Md.) 292.

Recovery Back—of money paid by mistake. The right to recover excessive payments made to public service corporations depends upon whether or not the payments are made under such circumstances as to be involuntary, and when payment is made under protest, this is sometimes termed "duress of goods" and may be recovered; Mt. Pleasant Mfg. Co. v. R. Co., 106 N. C. 207, 10 S. E. 1046; Southwestern Alabama Ry. Co. v. Maddox & Son, 146 Ala. 539, 41 South. 9; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; but, it seems, a shipper may, if he chooses, refuse to pay the over-charge and recover damages for the delay; Loomis v. Ry. Co., 17 Mo. App. 340.

An illegal license fee cannot be recovered back if voluntarily paid; Garrison v. Tillinghast, 18 Cal. 408, but it may be, if involuntarily paid; Magnolia v. Sharman, 46 ARK. 358; Neumann v. La Crosse, 94 Wis. 103, 68 N. W. 654; Harvey v. Olney, 42 Ill. 336; whereas, payment in excess of amount constitutionally chargeable, for a license fee imposed under an unconstitutional ordinance, may be recovered back; C. & J. Michel Brewing Co. v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911.

An agent paying his principal's money, by mistake, to a third person, may maintain an action in his own name to recover it back; Parks v. Fogleman, 97 Minn. 157, 105 N. W. 560, 4 L. R. A. (N. S.) 363, 114 Am. St. Rep. 703. Where overpayment is made in ignorance or forgetfulness of previous payments, the money so paid may be recovered; Hum-

mel v. Flores (Tex.) 39 S. W. 309; Gooding v. Morgan, 37 Me. 419; Pool v. Allen, 29 N. C. 120; Ashley v. Jennings, 48 Mo. App. 142; Jackson v. McKnight, 17 Hun (N. Y.) 2.

Where one employed a printer to print a libellous pamphlet and paid him £50 and the printer set up the type and then refused to publish it because libellous, it was held that there could be no recovery back; 23 T. L. R. 575.

Money paid out by an officer under a misconstruction of law may be recovered back; U. S. v. Saunders, 79 Fed. 407, 24 C. C. A. 649.

Parties receiving moneys illegally paid by a public officer are liable, *ex æquo et bono*, to refund them; Wisconsin Cent. R. Co. v. U. S., 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399.

See PROTEST; REPETITION; QUASI-CONTRACTUS.

RECREANT. A coward; a poltroon. 3 Bla. Com. 340.

RECRIMINATION. In Criminal Law. An accusation made by a person accused against his accuser, either of having committed the same offence or another.

In general, recrimination does not excuse the person accused nor diminish his punishment, because the guilt of another can never excuse him. But in applications for divorce on the ground of adultery, if the party defendant can prove that the plaintiff or complainant has been guilty of the same offence, the divorce will not be granted; 2 Bish. Mar. & D. 340; 1 Hagg. Cons. 144; 4 Eccl. 360. See 1 Hagg. Eccl. 790; 1 Hagg. Cons. 147; Dig. 24. 3. 39; 48. 3. 13. 5; 1 Add. Eccl. 411; Redington v. Redington, 2 Colo. App. 8, 29 Pac. 811; COMPENSATION; CONDONATION; DIVORCE.

RECTIFIER. As used in the internal revenue laws, this term is not confined to a person who runs spirits through charcoal; but is applied to any one who rectifies or purifies spirits in any manner whatever, or who makes a mixture of spirits with anything else, and sells it under any name. Quantity of Distilled Spirits, 3 Ben. 73, Fed. Cas. No. 11,494.

RECTOR. In Ecclesiastical Law. One who rules or governs: a name given to certain officers of the Roman church. Dict. Canonique.

In English Law. He that hath full possession of a parochial church. A rector (or parson) has for the most part the whole right to all the ecclesiastical dues in his parish; where, as in theory of law, a vicar has an appropriator over him, entitled to the best part of the profits, to whom the vicar is, as it were, perpetual curate, with a standing salary. Cowell; 1 Bla. Com. 384; 2 Steph. Com. 677.

RECTORY. In English Law. Corporeal real property, consisting of a church, glebelands, and tithes. 1 Chitty, Pr. 163.

RECTUM (Lat.). Right. *Breve de recto*, writ of right.

RECTUS IN CURIA (Lat. right in court). The condition of one who stands at the bar, against whom no one objects any offence or prefers any charge.

When a person outlawed has reversed his outlawry, so that he can have the benefit of the law, he is said to be *rectus in curia*. Jacob, Law Dict.

RECUPERATORES (Lat.). **In Roman Law.** A species of judges originally established, it is supposed, to decide controversies between Roman citizens and strangers concerning the right to the possession of property requiring speedy remedy, but gradually extended to questions which might be brought before ordinary judges.

After the enlargement of their powers, the difference between them and judges, it is supposed, was simply this:—if the prætor named three judges, he called them *recuperatores;* if one, he called him *judex*. But opinions on this subject are very various. Colman, *De Romano judicio recuperatorio*. Cicero's oration *pro Cœcin.* 1, 3, was addressed to *recuperatores*.

The result of the latest investigation of this subject is that, while ordinary cases were referred to the college of the *centumviri*, in cases where the *prætor* wished to obtain a speedy decision he had power to appoint an extraordinary college of three or five *recuperatores* whose instructions required them to find a verdict within a designated time. Such a course was often required in cases involving personal liberty, and the result was that the jurisdiction of the *decemviri* over all such actions became displaced by the court of *recuperatores*. The latter were also appointed in cases to which aliens were parties. Like the *judices* the *recuperatores* were private persons; Sohm, Inst. Rom. L. 150, n. 3.

RECUSABLE. See IRRECUSABLE; CONTRACTUAL OBLIGATION; CONTRACT.

RECUSANTS. In English Law. Persons who wilfully absent themselves from their parish church, and on whom penalties were imposed by various statutes passed during the reigns of Elizabeth and James I. Whart. Dict.

Those persons who separate from the church established by law. *Termes de la Ley.*

RECUSATION. In Civil Law. A plea or exception by which the defendant requires that the judge having jurisdiction of the cause should abstain from deciding upon the ground of interest, or for a legal objection to his prejudice.

A recusation is not a plea to the jurisdiction of the court, but simply to the person of the judge. It may, however, extend to all the judges, as when the party has a suit against the whole court. Pothier, *Procéd. Civ.* 1ère *part.* ch. 2, s. 5. It is a personal challenge of the judge for cause. See State v. Lewis, 2 La. 390. It may be done by the judge himself; Peyton v. Enos, 16 La. Ann. 135.

The challenge of jurors. La. Code Pract. art. 499, 500. An act, of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir. Dig.

29. 2. 95. See, generally, Poydras v. Livingston, 5 Mart. O. S. (La.) 292.

RED BOOK OF THE EXCHEQUER OF WESTMINSTER. An ancient book of records containing entries and inrollments of many charters and ancient acts of parliament as well as other instruments relating to the king and the rights of the crown, from the time of William I to the end of Edward III. Some of the earlier parts of it were compiled by Alexander de Swereford, first a clerk, and afterwards a baron, of the Exchequer, in the reign of Henry III. Record Commission, in 2 Sel. Essays in Anglo-Amer. L. H. 190.

RED TAPE. In a derivative sense, order carried to fastidious excess; system run out into trivial extremes. Webster v. Thompson, 55 Ga. 434.

REDDENDO SINGULA SINGULIS (Lat.). Referring particular things to particular persons. For example: when two descriptions of property are given together in one mass, both the next of kin and the heir cannot take, unless in cases where a construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate, and the heir-at-law the real estate. 14 Ves. 490. See 11 East 513, n.; Bac. Abr. *Conditions* (L).

REDDENDUM (Lat.). That clause in a deed by which the grantor reserves something to himself out of that which he therein granted. It usually follows the *tenendum*, and is generally in these words, "yielding and paying." Formerly it indicated the services to be rendered to the lord of the fee. In every good *reddendum* or reservation these things must concur: namely, it must be in apt words; it must be of something issuing or coming out of the thing granted, and not a part of the thing itself nor of something issuing out of another thing; it must be of a thing on which the grantor may resort to distrain; it must be made to one of the grantors, and not to a stranger to the deed. See 2 Bla. Com. 299; Co. Litt. 47; Shepp. Touchst. 80; Cruise, Dig. tit. 32, c. 24, s. 1; Dane, Abr. Index.

See YIELDING AND PAYING.

REDDIDIT SE (Lat. he has rendered himself). **In English Practice.** An indorsement made on the bail-piece when a certificate has been made by the proper officer that the defendant is in custody. Com. Dig. *Bail* (Q 4).

REDDITION. A surrendering or restoring; also, a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person surrendering. Cowell.

REDEEM. To purchase back; to regain, as mortgaged property by paying what is due; to receive back by paying the obligation. Miller v. Ratterman, 47 Ohio St. 156, 24 N. E. 496; See Pace v. Bartles, 47 N. J. Eq. 170, 20 Atl. 352.

REDEMPTION (Lat. *re*, back, *emptio*, a purchase). A purchase back by the seller from the buyer. It is applied to denote the performance of the conditions upon performance of which a conditional sale is to become ineffective as a transfer of title, or, more strictly, a right to demand a reconveyance becomes vested in the seller. In the case of mortgages, this right is a legal right until a breach of conditions, when it becomes an equitable right, and is called the equity of redemption. See MORTGAGE; EQUITY OF REDEMPTION; [1914] A. C. 25.

REDEMPTIONES (Lat.). Heavy fines. Distinguished from Misericordia, which see.

REDHIBITION. In Civil Law. The avoidance of a sale on account of some vice or defect in the thing sold, which renders its use impossible or so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. La. Civ. Code, art. 2496.

This is essentially a civil-law right. The effect of the rule expressed by the maxim *caveat emptor* is to prevent any such right at common law, except in cases of express warranty. 2 Kent 374; Sugd. Vend. 222.

REDHIBITORY ACTION. In Civil Law. An action instituted to avoid a sale on account of some vice or defect in the thing sold which renders its use impossible or so inconvenient and imperfect that it must be supposed the buyer would not have purchased it had he known of the vice. La. Civ. Code 2496.

REDISSEISOR. See DISSEISIN.

REDITUS ALBI (Lat.). A rent payable in money; sometimes called white rent, or blanche farm. See ALBA FIRMA.

REDITUS NIGRI (Lat.). A rent payable in grain, work, and the like; it was also called black mail. This name was given to it to distinguish it from *reditus albi*, which was payable in money.

REDITUS QUIETI. Quit rents. 1 Steph. Com. 676.

REDMANS, or RADMANS. Men who, by the tenure or custom of their lands, were to ride with or for the lord of the manor, about his business. Domesday Book.

REDOBATORES (L. Lat.). Those that buy stolen cloth and turn it into some other color or fashion, that it may not be recognized. Redubbers, *q. v.* Barrington, Stat., 2d ed. 87, n.; Co. 3d Inst. 134; Britton, c. 29.

REDRAFT. In Commercial Law. A bill of exchange drawn at the place where another bill was made payable and where it was protested, upon the place where the first bill was drawn, or, when there is no regular commercial intercourse rendering that practicable, then in the next best or most direct practicable course. 1 Bell, Com. 406. See RE-EXCHANGE.

REDRESS. The act of receiving satisfaction for an injury sustained. For the mode of obtaining redress, see REMEDIES; 1 Chitty, Pr. Anal. Table.

REDUBBERS. See REDOBATORES.

REDUNDANCY. Matter introduced in an answer or other pleading which is foreign to the bill or article.

The respondent is not to insert in his answer any matter foreign to the articles he is called upon to answer, although such matter may be admissible in a plea; but he may, in his answer, plead matter by way of explanation pertinent to the articles, even if such matter shall be solely in his own knowledge, and to such extent incapable of proof; or he may state matter which can be substantiated by witnesses; but in this latter instance, if such matter be introduced into the answer, and not afterwards put in the plea, or proved, the court will give no weight or credence to such part of the answer. Per Lushington, 3 Curt. Eccl. 543.

A material distinction is to be observed between redundancy in the allegation and redundancy in the proof. In the former case, a variance between the allegation and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation; 1 Greenl. Ev. § 67.

REEF. In Mining Law. A vein or lode containing or supposed to contain minerals.

RE-ENTRY. The act of resuming the possession of lands or tenements in pursuance of a right which the party exercising it reserved to himself when he quit his former possession.

Conveyances in fee reserving a groundrent, and leases for a term of years, usually contain a clause authorizing the proprietor to re-enter in case of the non-payment of rent, or of the breach of some covenant in the lease, which forfeits the estate. Without such reservation he would have no right to re-enter for the mere breach of a covenant, although he may do so upon the breach of a condition which, by its terms, is to defeat the estate granted; 2 Bingh. 13; 1 M. & Ry. 694; Tayl. Landl. & T. § 290; Woodf. Landl. & T. 310.

An estate granted upon condition subsequent is not vested again in the grantor or his heirs for condition broken until after re-entry; Edmondson v. Leach, 56 Ga. 461; Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145; or if actual entry be impossible, then until the grantor or his heirs lay claim to the property; First Presbyterian Church of Beaufort v. Elliott, 65 S. C. 251, 43 S. E. 674.

When a landlord is about to enforce his right to re-enter for the non-payment of rent, he must make a specific demand of payment, and be refused, before the forfeiture is complete, unless such demand has been dispensed with by an express agreement of the parties; McCormick v. Connell, 6 S. & R. (Pa.) 151; 7 Term 117; 5 Co. 41. In the latter case, a mere failure to pay, without any demand, constitutes a sufficient breach, upon which an entry may at any time subsequently be made; Van Rensselaer v. Jewett, 2 N. Y. 147; Coon v. Brickett, 2 N. H. 164; 2 B. & C. 490. The demand may be in the form of a notice to quit; Haynes v. Inv. Co., 35 Neb. 766, 53 N. W. 979.

The requisites of a demand upon which to predicate a forfeiture for the non-payment of rent, at common law, are very strict. It must be for the payment of the precise sum due upon the day when, by the terms of the lease, it becomes payable; if any days of grace are allowed for payment, then upon the last day of grace; Co. Litt. 203; 7 Term 117; Van Rensselaer v. Jewett, 2 N. Y. 147; see Finkelstein v. Herson, 55 N. J. L. 217, 26 Atl. 688; at a convenient time before sunset, while there is light enough to see to count the money; Jackson v. Harrison, 17 Johns. (N. Y.) 66; 1 Saund. 287; at the place appointed for payment, or if no particular place has been specified in the lease, then at the most public place on the land, which, if there be a dwelling-house, is the front door; Remsen v. Conklin, 18 Johns. (N. Y.) 450; Connor v. Bradley, 1 How. (U. S.) 211, 11 L. Ed. 105; Co. Litt. 202 *a*; notwithstanding there be no person on the land to pay it; Bac. Abr. *Rent* (I); and if the re-entry clause is coupled with the condition *that no sufficient distress be found upon the premises*, the landlord must search the premises to see that no such distress can be found; 15 East 286; McCormick v. Connell, 6 S. & R. (Pa.) 151.

A re-entry, at common law, for condition forfeited in a lease, is void unless the evidence shows that the common-law forms have been complied with. A mere taking possession of the premises, when unoccupied, is not sufficient; Prout v. Roby, 15 Wall. (U. S.) 475, 21 L. Ed. 58.

But the statutes of most of the states, following 4 Geo. II. c. 28, now dispense with the formalities of a common-law demand, by providing that an action of ejectment may be brought as substitute for such a demand in all cases where no sufficient distress can be found upon the premises. And this latter restriction disappears entirely from the statutes of such of the states as have abolished distress for rent.

The clause of re-entry for non-payment of rent operates only as a security for rent; for at any time before judgment is entered in the action to recover possession the tenant may either tender to the landlord, or bring into the court where the action is pending, all the rent in arrear at the time of such pay-

ment, and all costs and charges incurred by the landlord, and in such case all further proceedings will cease. And in some states, even after the landlord has recovered possession, the tenant may in certain cases be reinstated upon the terms of the original lease, by paying up all arrearages and costs; Tayl. Landl. & T. 302. See, generally, Wms. R. P. 285.

The acceptance by a landlord, after his right of possession is fixed, of property from the tenant in payment of rent that had accrued, is no waiver of his right to enter; Frazier v. Caruthers, 44 Ill. App. 61; but the acceptance of rent accruing after breach of a condition in a lease, with full knowledge of the breach, is a waiver of the right to declare a forfeiture and re-enter; Brooks v. Rogers, 99 Ala. 433, 12 South. 61.

But the courts will not relieve against a forfeiture which has been wilfully incurred by a tenant who assigns his lease, or neglects to repair or to insure, contrary to his express agreement, or if he exercises a forbidden trade, or cultivates the land in a manner prohibited by the lease; for in all such cases the landlord, if he has reserved a right to reenter, may at once resume his former possession and avoid the lease; 2 Price 206, n.; 9 C. & P. 706; Pollard v. Shaaffer, 1 Dall. (U. S.) 210, 1 L. Ed. 104; 3 V. & B. 29; 12 Ves. 291.

Where the landlord is justified in re-entering and taking possession of the premises, the lessee can recover no damages for the loss of the portion of the term, or for injury to the business, but may recover for property destroyed or any unnecessary damage thereto; Bergland v. Frawley, 72 Wis. 559, 40 N. W. 372.

REEVE. An ancient English officer of justice, inferior in rank to an alderman.

He was a ministerial officer appointed to execute process, keep the king's peace, and put the laws in execution. He witnessed all contracts and bargains, brought offenders to justice and delivered them to punishment, took bail for such as were to appear at the county court, and presided at the court or folcmote. He was also called *gerefa*.

There were several kinds of reeves: as, the *shire-gerefa*, shire-reeve or sheriff; the *heh-gerefa*, or high-sheriff; *tithing-reeve*, burghor or borough-reeve.

REEVELAND. See REVELAND.

RE-EXAMINATION. A second examination of a thing. A witness may be re-examined, in a trial at law, in the discretion of the court; and this is seldom refused. In equity, it is a general rule that there can be no re-examination of a witness after he has once signed his name to the deposition and turned his back upon the commissioner or examiner. The reason of this is that he may be tampered with, or induced to retract or qualify what he has sworn to; 1 Mer. 130.

RE-EXCHANGE. The expense incurred by a bill being dishonored in a foreign country where it is made payable and returned to that country in which it was made or indorsed and there taken up. 11 East 265; 2 Campb. 65.

The loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.

It is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange at the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. The holder may draw a sight bill for such sum on either the drawer or one of the indorsers. Such bill is a "redraft"; Benj. Chalm. Bills, art. 221. See L. R. 3 App. Cas. 146; Byles, Bills 444.

The drawer of a bill is liable for the whole amount of re-exchange occasioned by the circuitous mode of returning the bill through the various countries in which it has been negotiated, as much as for that occasioned by a direct return; 11 East 265; 3 B. & P. 335. And see Price v. Page, 24 Mo. 65; Watt v. Riddle, 8 Watts (Pa.) 545; 2 How. 764; 9 Exch. 25.

In some states legislative enactments have been made which regulate damages on re-exchange. These damages are different in the several states. See Lennig v. Ralston, 23 Pa. 137; Hendricks v. Franklin, 4 Johns. (N. Y.) 119; Farmers' Bank of Canton v. Brainerd, 8 Ohio 292; MEASURE OF DAMAGES.

RE-EXTENT. A second extent on lands or tenements, on complaint that the former was partially made, etc. Cowell.

REFALO. A word composed of the three syllables re. fa. lo., for *recordari facias loquelam*. 2 Sell. Pr. 160; 8 Dowl. 514.

REFARE. To bereave, take away, or rob. Cowell.

REFECTION (Lat. *re*, again, *facio*, to make). **In Civil Law.** Reparation; re-establishment of a building. Dig. 19. 1. 6. 1.

REFEREE. A person to whom has been referred a matter in dispute, in order that he may settle it. His judgment is called an award. See ARBITRATOR; REFERENCE.

REFEREES, COURT OF. In the passage of private bills through the house of commons, the practice was adopted in 1864 of the appointment of referees on such bills, consisting of the chairman of ways and means and not less than three other persons to be appointed by the speaker. The referees were formed into one or more courts, three at least being required to constitute each court, a member in every case being chairman, but receiving no salary. The referees inquired into the proposed works, etc., and

reported to the house. The committees of the house on any bill might also refer any question to the referees for their decision. It was also ordered in 1864 that the referees should decide on all petitions as to the right of the petitioner to be heard, *i. e.*, his *locus standi*. A court of referees was specially constituted for the adjudication of this right, called *locus standi*. A series of reports of the court of referees on private bills in parliament, called *Locus Standi* reports, has been published since 1867.

REFEREES, OFFICIAL. Officials in the King's Bench Division of the High Court of Justice in England, created by the judicature acts. They are three in number. They try such questions and actions as may be referred to them, and act as arbitrators in certain cases.

REFERENCE. In Contracts. An agreement to submit to certain arbitrators matters in dispute between two or more parties for their decision and judgment. See ARBITRATION AND AWARD.

In Mercantile Law. A direction or request by a party who asks a credit to the person from whom he expects it, to call on some other person named, in order to ascertain the character or mercantile standing of the former. See PRIVILEGED COMMUNICATIONS.

In Practice. The act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court.

That part of an instrument of writing where it points to another for the matters therein contained. For the effect of such reference, see Corbin v. Jackson, 14 Wend. (N. Y.) 619, 28 Am. Dec. 550. The thing referred to is also called a reference.

Reference bureau. See STATUTE.

REFERENDARIUS (Lat.). An officer by whom the order of causes was laid before the Roman emperor, the desires of petitioners made known, and answers returned to them. Vicat, Voc. Jur.; Calvinus, Lex.

A king's chancellor at the time of the conquest. 1 Social England 136. See CANCELLARIUS.

REFERENDUM (Lat.). **In International Law.** A note addressed by an ambassador to his government, submitting to its consideration propositions made to him touching an object over which he has no sufficient power and is without instructions. When such a proposition is made to an ambassador, he accepts it *ad referendum;* that is, under the condition that it shall be acted upon by his government, to which it is referred.

In Municipal Law. The submission of a proposed law to the voting citizens of a country for their ratification or rejection. A mode of appealing from an elected body to the whole body of voters.

The laws are first passed upon by the legislature and then referred to the people for their final ratification.

This method of government is supposed to have originated in Switzerland; but it has in effect been employed in the United States since the revolution, in country, city, township, and school district governments, especially in New England. It has also, during the same time, been the practice in the United States for new state constitutions to be submitted to popular vote after they have been prepared by a convention of delegates elected by the people.

See INITIATIVE, REFERENDUM AND RECALL; LOCAL OPTION; CONSTITUTIONALITY; Oberholtzer, The Referendum in America; DELEGATION; LEGISLATIVE POWER.

REFORM. To reorganize; to rearrange. Thus, the jury "shall be reformed by putting to and taking out of the persons so impannelled." Stat. 3 Hen. VIII. c. 12; Bacon, Abr. *Juries* (A).

To reform an instrument in equity is to make a decree that a deed or other agreement shall be made or construed as it was originally intended by the parties, when an error or mistake as to a fact has been committed. A contract has been reformed although the party applying to the court was in the legal profession and he himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties; 1 S. & S. 210; 3 Russ. 424. But a contract will not be reformed in consequence of an error of law; see 1 Story, Eq. Jur. 109; 1 Russ. & M. 418; 1 Chitty, Pr. 124; Clapp v. Hoffman, 159 Pa. 531, 28 Atl. 362; nor unless the mistake is mutual; Steinberg v. Ins. Co., 49 Mo. App. 255; and only as between the original parties, or those claiming under them in priority, including purchasers with notice; Cross v. Bean, 81 Me. 525, 17 Atl. 710. Equity will not reform instruments which express an intention of the parties at the time they are made, based on the knowledge then possessed by them, though their intention would have been different if they had been better informed; Wise v. Brooks, 69 Miss. 891, 13 South. 836.

A person who seeks to rectify a deed on the ground of mistake must establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all the parties down to the time of its execution; and also must be able to show exactly and precisely the form to which the deed ought to be brought; 4 De G. & J. 265; Roberts v. Derby, 68 Hun, 299, 23 N. Y. Supp. 34; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063. Before commencing an action to reform a deed a demand must be made on the grantee; Popijoy v. Miller, 133

Ind. 19, 32 N. E. 713. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation; Ad. Eq. 171; Bellows v. Stone, 14 N. H. 175. But if there is mistake on one side and fraud on the other, there is a case for reformation; Welles v. Yates, 44 N. Y. 525; Bisph. Eq. § 469; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

A lease will not be reformed in equity, so as to make it conform to another lease, where both leases have the same legal effect, as judicially construed; Liggett v. Shira, 159 Pa. 350, 28 Atl. 218.

Where a deed does not express the intention of the parties at the time of its execution, equity will afford relief and decree a reformation; Baldwin v. Fence Co., 73 Fed. 574, 19 C. C. A. 575, 39 U. S. App. 162.

A clerical mistake by one party at the time of executing the contract, unknown to the other, for which the latter is not responsible, will be sufficient ground for such relief and decree; Trenton T. C. Co. v. Shingle Co., 80 Fed. 46.

Where a policy of insurance was issued to a receiver of property, there being a contest as to the title to the property held by the receiver, the real owner, having established his title, may have the policy reformed, or, if the intent of the parties appears on its face, no reformation is necessary in order to enable the real owner to maintain an action on it; Steel v. Ins. Co., 51 Fed. 715, 2 C. C. A. 463, 7 U. S. App. 325.

The correction of a written instrument for fraud or mistake in its execution requires clear, unequivocal, and convincing evidence; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384. It will not be decreed against *bona fide* purchasers for value; American Mtg. Co. of Scotland v. O'Harra, 56 Fed. 278, 5 C. C. A. 502, 15 U. S. App. 79.

Where a bid for certain public work contained an error in the amount for which it was offered to do the work, and the bidder sought to rescind his offer, it was held that equity would not reform a written contract unless a mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of one party as to facts material to the contract; Moffett Co. v. Rochester, 82 Fed. 255.

Where a decree has been entered reforming a contract, the contract as so reformed will be taken as the true agreement; Blair v. Implement Co., 87 Neb. 736, 128 N. W. 632.

See MISTAKE.

REFORM ACT. An act passed by parliament in 1832, drawn by Lord John Russell, which disfranchised 56 boroughs, increased the county representation and increased the electorate.

REFORMATORY. An institution or place in which efforts are made, either to cultivate the intellect or instruct the conscience or improve the conduct where the inmates voluntarily submit themselves to its instruction or discipline or are forcibly detained therein. Hughes v. Daly, 49 Conn. 34. See PRISONER.

REFRESHING THE MEMORY. To revive the knowledge of a subject by having a reference to something connected with it.

As to witnesses, see MEMORANDUM.

REFRIGERATOR CARS. See RAILROADS.

REFUND. To pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.

On a deficiency of assets, executors and administrators *cum testamento annexo* are entitled to have refunded to them legacies which they may have paid, or so much as may be necessary to pay the debts of the testator; and in order to insure this they are generally authorized to require a refunding bond. See Bac. Abr. *Legacies* (II).

REFUNDING BOND. See REFUND.

REFUSAL. The act of declining to receive or to do something.

A grantee may refuse a title, see ASSENT; one appointed executor may refuse to act as such. In some cases, a neglect to perform a duty which the party is required by law or his agreement to do will amount to a refusal.

The word is often used to indicate an option: as, the refusal of a house. See OFFER; CONTRACT.

REFUSE. To deny a request or demand. Burns v. Fox, 113 Ind. 206, 14 N. E. 541.

REGALIA. A privilege, prerogative, or right of property pertaining to a sovereign. The regalia includes the power of judicature of life and death, of war and peace, of masterless goods as estrays; of assessments, and of minting money.

In England the term was sometimes applied to things, as the crown and sceptre, etc., and sometimes to the dignity, power, and pecuniary rights of the king. The term differs from sovereignty as being applicable to both things and to rights to things, and also as not being inherent in or inseparable from the sovereign power, for regalia may be alienated, either with or without the consent of parliament. 1 Hall, Int. Law 150.

Upon the breaking up of the Roman Empire, the princes and cities which declared themselves independent, appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions or reserved rights were called *regalia*. *Id.*

REGARD, THE. An enquiry held, once every three years, by twelve knights chosen for the purpose (Henry III). The most important articles of their enquiry related to essarts, purprestures and waste. Other articles

dealt with hawks and falcons, mines, harbors in the forest suitable for the export of timber, etc., and the possessors of arrows, greyhounds or other things likely to harm the deer. 1 Holdsw. Hist. E. L. 344. See Rawle, Exmoor Forest. In 3 Bla. Com. 71, it is spoken of as a court for the lawing and expeditation of dogs.

REGARDANT. (French, *regardant*, seeing or vigilant). A villein regardant was one who had the charge to do all base services within the manor, and to see the same freed of annoyances. Co. Litt. 120; 2 Bla. Com. 93.

REGE INCONSULTO. An ancient writ issued from the sovereign to the judges not to proceed in a cause which may prejudice the crown, until advised. Jenk. Cent. 97.

REGENCY. The authority of the person in monarchical countries invested with the right of governing the state, in the name of the monarch, during his minority, absence, sickness, or other inability.

REGENT. A ruler; a governor. The term is usually applied to one who governs a regency, or rules in the place of another.

In the canon law, it signifies a master or professor of a college. *Dict. du Dr. Can.*

It sometimes means simply a ruler, director, or superintendent; as in New York, where the board who have the superintendence of all the colleges, academies, and schools are called the regents of the University of the state of New York.

REGIAM MAJESTATEM (Lat.). An ancient book purporting to contain the law of Scotland, and said to have been compiled by king David, who reigned 1124–1153. It is not part of the law of Scotland, though it was ordered to be revised with other ancient laws of Scotland by parliaments of 1405 and 1407. Stair, Inst. 12, 508. So Craig, Inst. 1. 8. 11; Scott, Border Antiq. prose works 7, 30; but Erskine, Inst. b. 1, tit. 1, § 13, and Ross 60, maintain its authenticity. It is cited in some modern Scotch cases. 2 Swint. 409; 3 Bell, Hou. L. It is a servile copy of Glanville; Robertson, Hist. Charles V. 262.

REGICIDE (Lat. *rex*, king, *cædere*, to kill, slay). The killing of a king, and, by extension, of a queen. *Théorie des Lois Criminelles*, vol. 1, p. 300.

REGIDOR. In Spanish Law. One of a body, never exceeding twelve, who formed a part of the *ayuntamiento*, or municipal council, in every capital of a jurisdiction in the colonies of the Indies. The office of a regidor was held for life; that is to say, during the pleasure of the supreme authority. In most places the office was purchased; in some cities, however, they were elected by persons of the district, called *capitulares*. Strother v. Lucas, 12 Pet. (U. S.) 442, 9 L. Ed. 1137, note.

RÉGIME DOTAL. See DOTAL PROPERTY.

REGIMIENTO. In Spanish Law. The body of regidores, who never exceeded twelve, forming a part of the municipal council, or *ayuntamiento*, in every capital of a jurisdiction. Strother v. Lucas, 12 Pet. (U. S.) 442, 9 L. Ed. 1137, note.

REGINA (Lat.). A Queen.

REGIO ASSENSU. A writ whereby the sovereign gives his assent to the election of a bishop. Reg. Orig. 294.

REGISTER. A book containing a record of facts as they occur, kept by public authority; a register of births, marriages, and burials.

In England, where there is a state church, which has authority to legislate with respect to parish records, parish records are by law invested with the characteristics of public records; 1 Salk. 281; Stark. Ev., 4th ed. 299. But in the United States where there is no religion established by law, church registers, in the absence of statutory provisions, are not regarded as public records; Kennedy v. Doyle, 10 Allen (Mass.) 161; Childress v. Cutter, 16 Mo. 24.

Entries in the baptismal register of a church, made by a clergyman in the regular discharge of his duties, are admissible in evidence after his death, though there is no law requiring such records to be kept. Ordinarily such entries are admissible only for the purpose of proving the fact and date of baptism, and not of other matters therein stated, such as the date of the birth of the child; Weaver v. Leiman, 52 Md. 708; Kennedy v. Doyle, 10 Allen (Mass.) 161; Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 18 L. Ed. 186.

These registers, when admissible, are not, in general, evidence of any fact not required to be recorded in them; Morrissey v. Ferry Co., 47 Mo. 521; Kabok v. Ins. Co., 51 Hun, 639, 4 N. Y. Supp. 718; Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521; Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 18 L. Ed. 186. They have sometimes been admitted in evidence as being made by a third person in the discharge of an official duty; Whitcher v. McLaughlin, 115 Mass. 167; Weaver v. Leiman, 52 Md. 708. See DECLARATIONS.

Statutes have been enacted in several states which give to such records, in a measure, their common-law importance. See Lewis v. Marshall, 5 Pet. (U. S.) 475, 8 L. Ed. 195; Lavin v. Mutual Aid Soc., 74 Wis. 349, 43 N. W. 143; Shutesbury v. Hadley, 133 Mass. 242.

In Pennsylvania, the registry of births, etc., made by any religious society in the state is evidence, by act of assembly, but it must be proved as at common law; Stoever v. Lessee of Whitman, 6 Binn. 416. A copy of the register of births and deaths of the Society of Friends in England, proved before the lord mayor of London by an *ex parte* affidavit, was allowed to be given in evidence to prove the death of a person; Hyam v.

Edwards, 1 Dall. 2, 1 L. Ed. 11; and a copy of a parish register in Barbadoes, certified to be a true copy by the rector, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, under his hand and seal, was held admissible to prove pedigree, the handwriting and office of the secretary being proved; Kingston v. Lesley, 10 S. & R. 383. In North Carolina, a parish register of births, marriages, and deaths, kept pursuant to the statute of that state, is evidence of pedigree; Jacocks v. Gilliam, 7 N. C. 47. In Connecticut, a parish register has been received in evidence; Huntly v. Compstock, 2 Root 99. See Jackson v. Boneham, 15 Johns. (N. Y.) 226; 1 Phill. Ev. 305; 1 Curt. 755; 6 Eccl. 452.

See VITAL STATISTICS; REGISTRATION.

The certificate of registry granted to the person or persons entitled thereto, by the collector of the district, comprehending the port to which any ship or vessel shall belong; more properly, the registry itself. For the form, requisites, etc., of certificate of registry, see Acts of Cong. Dec. 31, 1792, May 6, 1864, R. S. § 4182; 3 Kent 141.

REGISTER, REGISTRAR. An officer authorized by law to keep a record called a register or registry: as, the register for the probate of wills.

REGISTER GENERAL. An officer of England to whom, subject to such regulations as shall be made by a principal secretary of state, the general superintendence of the whole system of registration of births, deaths, and marriages is entrusted. 3 Steph. Com. 234.

REGISTER OF SHIPS. A register kept by the collectors of customs, in which the names, ownership, and other facts relative to the merchant vessels are required by law to be entered. The register is evidence of the nationality and privileges of an American ship. Rap. & L. Law Dict.

The purpose of a registry is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found; The Mohawk, 3 Wall. (U. S.) 566, 18 L. Ed. 67.

A certificate of a vessel's registry and proof that she carried the flag of the United States establish a *prima facie* case of proper registry under the laws of the United States, and of the nationality of the vessel and its owners; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

REGISTER OF WILLS. An officer in Pennsylvania who has jurisdiction over the probate of wills and granting letters of administration.

REGISTER OF WRITS. A book preserved in the English court of chancery, in which were entered, from time to time, all forms of writs once issued. Stat. Westm. 2, c. 25.

See DE NATURA BREVIUM.

It is spoken of as one of the most ancient books of the common law. Co. Litt. 159; Co. 4th Inst. 150; 8 Co. Pref.; 3 Shars. Bla. Com. 183*. It was first printed and published in the reign of Hen. VIII. This book is still an authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice.

But many of the writs now in use are not contained in it. And a variation from the register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. Steph. Pl. 7, 8.

REGISTERED BOND. One whose negotiability is temporarily withdrawn by a writing thereon that it belongs to a specific person, and by a registry to that effect at a specified office. Cook, St. & Stockh. § 15.

REGISTERED LETTER. A letter is not registered so as to complete service of notice by registered letter until it is numbered as required by the postal laws, although the postmaster has received it properly addressed and given a receipt therefor. Ross v. Ins. Co., 93 Ia. 222, 61 N. W. 852, 34 L. R. A. 466. A registered letter must be delivered by the carrier to the person to whom it is addressed; Joslyn v. King, 27 Neb. 38, 42 N. W. 756, 4 L. R. A. 457, 20 Am. St. Rep. 656.

REGISTRARIUS (Lat.). An ancient name given to a notary. In England this name is confined to designate the officer of some court the records or archives of which are in his custody.

REGISTRATION. The word "registration," used in the U. S. R. S. § 2011, has a general, not a technical, meaning, and indicates any list or schedule containing a list of voters, the being upon which constitutes a prerequisite to vote, unless there is a system of registration described by act of congress, and applied by the act as the only registration of voters under the law. The Delaware assessment lists, made primarily by the assessors of the different hundreds, and completed by the levy courts of the different counties, are such lists, though they contain not only a list of voters, but of other persons besides. The registration of voters intended by the act of congress need not be conclusive evidence that the person registered is qualified to vote; In re Appointment of Supervisors of Election, 1 Fed. 1. This decision was prior to the existence in Delaware of a registration act *eo nomine*.

The registration of voters under the Delaware act was held to be so far judicial and not ministerial that a mandamus was refused to restore to the voting list the name of a person stricken off by the board of registration; Lurtz v. Hardcastle, 1 Marvel (Del.) 450, 41 Atl. 194.

In the United States circuit court for South Carolina it was held that the registration

laws of that state were null and void as being an unreasonable restriction of the right of suffrage, evidently intended to exclude ignorant persons, especially of the African race, and a violation both of the constitution of the state and of the fourteenth and fifteenth amendments to the constitution of the United States; Mills v. Green, 67 Fed. 818.

See LAND TRANSFER; TORRENS SYSTEM; RECORD; REGISTRATION.

REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS. In most states acts have been passed requiring physicians, clergymen, etc., to register all such events with the proper county officer. The validity of these laws has been sustained under the police power; Robinson v. Hamilton, 60 Ia. 134, 14 N. W. 202, 46 Am. Rep. 63. See REGISTER; VITAL STATISTICS.

REGISTRUM BREVIUM (Lat.). The name of an ancient book which was a collection of writs. See REGISTER OF WRITS.

REGISTRY. A book, authorized by law, in which writings are registered or recorded.

RÉGLE DE DROIT (Fr.). A rule of law.

REGNAL YEARS. The years in which a sovereign has reigned.

The following is a table of the reigns of English and British kings and queens:

	Accession.
Egbert	827
Ethelwulf	839
Ethelbald	858
Ethelbert	858
Ethelred	866
Alfred	871
Edward the Elder	901
Athelstan	925
Edmund	940
Edred	946
Edwy	955
Edgar	958
Edward the Martyr	975
Ethelred II	979
Edmund Ironside	1016
Canute	1017
Harold I	1035
Hardicanute	1040
Edward Confessor	1042
Harold II	1066
William I.	December 25, 1066
William II.	September 26, 1087
Henry I.	August 5, 1100
Stephen	December 26, 1135
Henry II.	December 19, 1154
Richard I.	September 3, 1189
John	May 27, 1199
Henry III.	October 28, 1216
Edward I.	November 20, 1272
Edward II.	July 8, 1307
Edward III.	January 24, 1327
Richard II.	June 22, 1377
Henry IV.	September 30, 1399
Henry V.	March 21, 1413
Henry VI.	September 1, 1422
Edward IV.	March 4, 1461
Edward V.	April 9, 1483
Richard III.	June 25, 1483
Henry VII.	August 22, 1485
Henry VIII.	April 22, 1509
Edward VI.	January 28, 1547
Mary	July 6, 1553
Philip and Mary.	July 25, 1554
Elizabeth	November 17, 1558
James I.	March 24, 1603
Charles I.	March 27, 1625
Commonwealth	January 30, 1649
Oliver Cromwell, Protector.	Dec. 12, 1653
Richard Cromwell, Protector.	Sept. 4, 1658
Charles II.*	January 30, 1649
James II.	February 6, 1685
William and Mary.	February 13, 1689
William III.	December 28, 1694
Anne	March 8, 1702
George I.	August 1, 1714
George II.	June 11, 1727
George III.	October 25, 1760
George IV.	January 29, 1820
William IV.	June 26, 1830
Victoria	June 20, 1837
Edward VII.	January 22, 1901
George V.	May 6, 1910

REGNANT. One having authority as a king; one in the exercise of royal authority.

REGRATING. In Criminal Law. Every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise, is so denominated. Co. 3d Inst. 196; 1 Russell, Cr. 169. Whart. Cr. Law 1849. See RESTRAINT OF TRADE.

REGULA. See MAXIMS.

REGULAR CLERGY. Monks who lived according to the rules of their respective houses or societies, in contradistinction to the parochial clergy, who did their duties "*in seculo*," and hence were called secular clergy. 1 Sharsw. Bla. Com. 387, n.

REGULAR PROCESS. Regular process is that which has been lawfully issued by a court or magistrate having competent jurisdiction.

When the process is *regular*, and the defendant has been damnified, as in the case of a malicious arrest, his remedy is by an action on the case, and not trespass; when it is *irregular* the remedy is by action of trespass.

If the process be *wholly* illegal or *misapplied* as to the *person* intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment, and may escape, be rescued, or even

* The Restoration of Charles II. did not take place till 1660, but the regnal year of his reign is computed from the death of Charles I., disregarding the Commonwealth.

break prison; but if the process and imprisonment were in form legal, each of these acts would be punishable, however innocent the defendant might be, for he ought to submit to legal process and obtain his release by due course of law; 1 Chitty, Pr. 637; 5 East 304, 308; 2 Wils. 47; 1 East, Pl. Cr. 310. See ESCAPE; ARREST; ASSAULT; FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

REGULATE. To adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. State v. Ream, 16 Neb. 683, 21 N. W. 398.

REGULATION OF COMMERCE. It is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, 5 Sup. Ct. 826, 29 L. Ed. 158.

It means the power to make laws not merely rules and regulations; Snead v. R. Co., 151 Fed. 608.

As used in the constitution, transportation being essential to commerce, every obstacle to it, or burden laid upon it, by legislative authority, is regulation; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 24 L. Ed. 527; Bagg v. R. Co., 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569. See COMMERCE; INTER-STATE COMMERCE COMMISSION.

REGULATIONS. Army regulations prescribed by the secretary of war and intended for the government of the army do not bind the commander-in-chief nor the secretary of war; U. S. v. Burns, 12 Wall. (U. S.) 246, 20 L. Ed. 388; but see Arthur v. U. S., 16 Ct. Cl. 422; those made pursuant to law bind even the executive; Davis, Military Law; they differ from the Articles of War, which are express enactments of Congress. Departmental regulations are issued under R. S. § 161. Military orders are authoritative directions, issued by the president. The general regulations are sometimes called Standing Orders.

See ARTICLES OF WAR; MILITARY LAW.

Regulations of the secret service department of the treasury are laws of the United States under R. S. § 753; U. S. v. Fuellhart, 106 Fed. 911. Those of the department as to internal revenue have the force of laws; Stegall v. Thurman, 175 Fed. 813.

REHABERE FACIAS SEISINAM (Lat. do you cause to regain seisin). When a sheriff in the *"habere facias seisinam"* had delivered seisin of more than he ought, this judicial writ lay to make him restore seisin of the excess. Reg. Jud. 13, 51, 54.

REHABILITATION. The act by which a man is restored to his former ability, of which he had been deprived by a conviction, sentence, or judgment of a competent tribunal.

REHEARING. A second consideration which the court gave to a cause on a second argument.

In England a case heard by the Chancellor on appeal from the Master of the Rolls, etc., is a *rehearing;* Emerson v. Davies, 1 W. & M. 21, Fed. Cas. No. 4,437.

A rehearing cannot be granted by the supreme court after the record has been remitted to the court below; Browder v. McArthur, 7 Wheat. (U. S.) 58, 5 L. Ed. 397.

Where any judge, who concurred in the decision, thinks proper to have a rehearing, the motion for one will be considered, otherwise it will be denied as of course; Brooks v. Raynolds, 59 Fed. 923, 8 C. C. A. 370, 16 U. S. App. 713.

Where the grounds for a rehearing were not brought to the attention of the court at the argument or by brief, permission to reargue will be granted only in extreme cases; U. S. v. Hall, 63 Fed. 472, 11 C. C. A. 294, 21 U. S. App. 426; and not where the questions have already been fully considered; Imperial Life Ins. Co. v. Newcomb, 63 Fed. 560, 11 C. C. A. 340, 27 U. S. App. 290; and not when the ground was not overlooked at the former trial; Clark v. Five Hundred and Five Thousand Feet of Lumber, 70 Fed. 1020, 17 C. C. A. 555, 34 U. S. App. 45. That a judgment of affirmance was by an equal decision of the judges merely, affords no ground for granting a rehearing; People v. New York, 25 Wend. (N. Y.) 256, 35 Am. Dec. 669. See PRECEDENT.

The practice in the federal courts is to file a petition for a rehearing which, with the argument in its support, is submitted, without oral argument, for the consideration of the court.

When a motion for a new trial of an action at law and a petition for rehearing have been denied, equity will not entertain a bill to set the judgment aside on the same grounds alleged in the motion and petition; Hendrickson v. Bradley, 85 Fed. 508, 29 C. C. A. 303.

The refusal of the circuit court to grant a rehearing is not the subject of review; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141.

Courts, especially in cases of general interest, order a reargument where they are in doubt or where the case was not argued before a full bench. In Taylor v. Young, 71 Pa. 81, eminent counsel not connected with the cause petitioned the court for a reargument on the ground that the judgment was not well considered and that it would unsettle titles to real estate. A reargument was ordered and the former decision was reversed. See REOPENING CASE; BILL OF REVIEW.

When the merits have been decided on appeal, the circuit court cannot without leave of the supreme court grant a new trial, rehearing or review or hear new defences by amendment to the answer; In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994. After the mandate has gone down to the lower court, an application for a rehearing must be made in the appellate court. See BILL OF REVIEW.

REHYPOTHECATION. See PLEDGE; STOCK BROKER.

REI INTERVENTUS (Lat.). When a party is imperfectly bound in an obligation, he may, in general, annul such imperfect obligation; but when he has permitted the opposite party to act as if his obligation or agreement were complete, such *things have intervened* as to deprive him of the right to rescind such obligation: these circumstances are the *rei interventus;* 1 Bell, Com., 5th ed. 328, 329; Burton, Man. 128.

REIGN. For the years of the reigns of English and British sovereigns, see REGNAL YEARS.

REIMBURSE. To pay back. Philadelphia Trust, S. D. & I. Co. v. Audenreid, 83 Pa. 264.

REINSCRIPTION. The law of Louisiana requires a mortgage to be periodically reinscribed in order to preserve its priority, though suit be pending to foreclose; Watson v. Bondurant, 30 La. Ann. 1. When ten years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all persons whatsoever who are not parties to it; Adams v. Daunis, 29 La. Ann. 315.

REINSTATE. To restore to a state from which one has been removed. South v. Com'rs of Sinking Fund, 86 Ky. 190, 5 S. W. 567.

REINSTATEMENT. This term in the law of insurance implies placing the insured in the same condition that he occupied and sustained towards the insurer next before the forfeiture was incurred, and does not imply reinsurance or the making of a new contract or policy of insurance. Lovick v. Life Ass'n, 110 N. C. 93, 14 S. E. 506.

REINSURANCE. Insurance effected by an underwriter upon a subject against certain risks, with another underwriter, on the same subject, against all or a part of the same risks, not exceeding the same amount. In the original insurance, he is the insurer; in the second, the assured. His object in reinsurance is to protect himself against the risks which he has assumed. There is no privity of contract between the original assured and the reinsurer, and the reinsurer is under no liability to such original assured; 3 Kent 227; New York Cent. Ins. Co. v. Ins. Co., 20 Barb. (N. Y.) 468; Philadelphia Ins. Co. v. Ins. Co., 23 Pa. 250; Eagle Ins. Co. v. Ins. Co., 9 Ind. 443; Louisiana Mut. Ins. Co. v. Ins. Co., 13 La. Ann. 246. See Pars. Mari. Ins. 301.

In the absence of any usage to the contrary, and of any specific stipulation in the policy, the original insurer may protect himself by reinsurance to the whole extent of his liability; Insurance Co. of North America v. Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517.

Reinsurance has been considered as a contract of indemnity against liability, not for actual loss; 1 Joyce, Ins. § 134. A reinsurer is liable on his policy although the reinsurance is to the whole extent of the original insurer's liability, as such a contract is valid and is not affected by local custom to the contrary; Insurance Co. of North America v. Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517. He is liable on a parol agreement to reinsure; Bartlett v. Ins. Co., 77 Ia. 155, 41 N. W. 601; and to the full extent of his policy notwithstanding the insolvency of the reinsured; In re Republic Ins. Co., Fed. Cas. No. 11,705; which does not affect the responsibility under it, the contract of reinsurance being totally distinct from the original insurance; the original insured has no claim against the reinsurers. The reassured remains solely liable on the original insurance and alone has no claim against the reinsurer. Hence if the original insurer become bankrupt and the assured were paid but a small dividend out of his estate, the reinsurer is still liable to pay the whole amount of the reinsurance to the trustee of the original insurer without deducting the dividend and the original assured has no claim in respect of the money so paid; Consolidated Real Estate & Fire Ins. Co. of Baltimore v. Cashow, 41 Md. 59; Strong v. Ins. Co., 62 Mo. 289, 21 Am. Rep. 417. The extent of the liability of the reinsurer is neither contingent upon the amount paid by the reassured, nor upon any payment whatever by him. When a loss occurred which is covered by the policy of reinsurance, the reassured is entitled to recover from the reinsurer not what he has paid, but all that he has become liable to pay by reason of such loss; Gantt v. Ins. Co., 68 Mo. 503.

Where the insurer reinsured in the name and for the benefit of the original insured, the reinsurer was held liable to the original insured; 12 N. B. 432. Under an agreement by which the reinsurer agreed to reinsure a life association on all its risks and to assume all such policies and to pay the holders thereof all such sums as the company might under such policies become liable to pay, the reinsurer was held directly liable to a policy holder of the reinsured; Glen v. Ins. Co., 56 N. Y. 379. And so where the reinsurer agreed to reinsure all outstanding fire risks of another insurance company and assume all liability under any outstanding policies;

Shoaf v. Ins. Co., 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804.

The contract is one of indemnity to the reinsured and binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is insured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the reinsured or its inability to fulfill its own contract with the original insured; Allemannia Ins. Co. v. Ins. Co., 209 U. S. 332, 28 Sup. Ct. 544, 52 L. Ed. 815, 14 Ann. Cas. 948, citing Hone v. Ins. Co., 1 Sandf. (N. Y.) 137; Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

If the contract of reinsurance provides that the insured can sue the reinsurer, it is held in most of the cases that such action will lie; Richards, Ins. Law § 319. As soon as the reinsured company has sustained a loss it may at once bring suit against its reinsuring company; (1892) 2 Ch. 423; Gantt v. Ins. Co., 68 Mo. 503.

REISSUABLE NOTES. Bank-notes which, after having been once paid, may again be put into circulation.

They cannot properly be called valuable securities while in the hands of the maker, but in an indictment may properly be called goods and chattels; Ry. & M. 218. See U. S. v. Moulton, 5 Mas. 537, Fed. Cas. No. 15,827; 2 Russ. Cr. 147. And such notes would fall within the description of *promissory* notes; 2 Leach 1090.

REISSUE; REISSUED PATENT. See PATENT.

REJOINDER. The defendant's answer to the plaintiff's replication. Andr. Steph. Pl. 151.

It must conform to the plea; Keay v. Goodwin, 16 Mass. 1; 2 Mod. 343; be triable, certain, direct, and positive, and not by way of recital, or argumentative; Lewis v. Cooke, 1 H. & McH. (Md.) 159; must answer every material averment of the declaration; Judge of Probate v. Ordway, 23 N. H. 198. It must not be double; Neff v. Powell, 6 Blackf. (Ind.) 421; U. S. v. Cumpton, 3 McLean 163, Fed. Cas. No. 14,902; and there may not be several rejoinders to the same replication; Slocumb's Adm'r v. Holmes's Adm'r, 1 How. (Miss.) 139; 1 Wms. Saund. 337, n.; nor repugnant or insensible. See Co. Litt. 394; Archb. Civ. Pl. 278; Comyns, Dig. *Pleader* (H).

REJOINING GRATIS. Rejoining within four days from the delivery of the replication, without a notice to rejoin or demand of rejoinder. 1 Archb. Pr. 280, 317. But judgment cannot be signed without demanding; 3 Dowl. 537.

RELATION (Lat. *re*, back, *fero*, to bear). **In Civil Law.** The report which the judges made of the proceedings in certain suits to the prince were so called.

These relations took place when the judge had no law to direct him, or when the laws were susceptible of difficulties; it was then referred to the prince, who was the author of the law, to give the interpretation. They were made in writing, and contained the pleadings of the parties and all the proceedings, together with the judge's opinion, and prayed the emperor to order what should be done. This ordinance of the prince thus required was called a rescript. Their use was abolished by Justinian, Nov. 125.

In Contracts. When an act is done at one time, and it operates upon the thing as if done at another time, it is said to do so by relation: as, if a man deliver a deed as an escrow, to be delivered, by the party holding it, to the grantor, on the performance of some act, the delivery to the latter will have relation back to the first delivery. *Termes de la Ley.* Again, if a partner be adjudged a bankrupt, the partnership is dissolved, and such dissolution relates back to the time when the commission issued; 3 Kent 33. See Litt. 462; Johnson v. Stagg, 2 Johns. (N. Y.) 510; Jackson v. Dickenson, 15 Johns. (N. Y.) 309, 8 Am. Dec. 236; Hammond v. Warfield, 2 Harr. & J. (Md.) 151; FICTION.

This doctrine, like every other fiction, has its limitations; its root must be planted in some antecedent, lawful right; U. S. v. R. Co., 142 Fed. 187; thus when an attachment was issued and levied without sufficient affidavit, an amended affidavit will relate back and uphold the levy; *id.;* Powers v. Hurmert, 51 Mo. 136.

RELATIONS. A term which, in its widest sense, includes all the kindred of the person spoken of. It has long been settled that in the construction of wills it includes those persons who are entitled as next of kin under the statute of distribution; 2 Jarm. Wills 661; Drew v. Wakefield, 54 Me. 291; L. R. 20 Eq. 410; [1894] 3 Ch. 565; Gallagher v. Crooks, 132 N. Y. 338, 30 N. E. 746; in the interpretation of a statute, the term was held not to include a stepson; Kimball v. Story, 108 Mass. 382; or a wife; Esty v. Clark, 101 Mass. 36, 3 Am. Rep. 320; In re Estate of Renton, 10 Wash. 533, 39 Pac. 145; or a brother-in-law; Horton v. Earle, 162 Mass. 448, 38 N. E. 1135; held to include a step-father; Smith v. Supreme Tent Knights of Maccabees of the World, 127 Ia. 115, 102 N. W. 830, 69 L. R. A. 174.

A legacy to "relations" generally, or to "relations by blood or marriage," without enumerating any of them, will, therefore, entitle to a share such of the testator's relatives as would be entitled under the statute of distributions in the event of intestacy; 1 Madd. 45; 1 Bro. C. C. 33. The same rule extends to devises of real estate; 1 Taunt. 263. See LEGACY; KINDRED.

Relations to either of the parties, even be-

yond the ninth degree, have been holden incapable to serve on juries; 3 Chitty, Pr. 795, note *c*. As to the disqualification of a judge by reason of relationship, see JUDGE. Relationship or affinity is no objection to a witness, unless in the case of husband and wife. See WITNESS.

RELATIVE FACT. A fact having relation to another fact; a minor fact; a circumstance. Burril, Circ. Ev. 121. See RELEVANCY.

RELATIVE POWERS. Those which relate to land; so called to distinguish them from those which are collateral to it.

These powers are *appendant:* as, where a tenant for life has a power of making leases in possession. They are *in gross* when a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but notwithstanding, is annexed in privity to it, and takes effect in the appointee out of an interest appointed in the appointer. 2 Bouvier, Inst. n. 1930.

RELATIVE RIGHTS. Those to which a person is entitled in consequence of his relation with others; such as the rights of a husband in relation to his wife; of a father as to his children; of a master as to his servant; of a guardian as to his ward.

In general, the superior may maintain an action for an injury committed against his relative rights.

RELATOR. A rehearser or teller. One who, by leave of court, brings an information in the nature of a *quo warranto.*

At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of 9 Anne. In this country, even where no similar statute prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators; though no judgment for costs can be rendered for or against them; Com. v. Woelper, 3 S. & R. (Pa.) 52. In chancery, the relator is responsible for costs; 4 Bouvier, Inst. n. 4022.

See QUO WARRANTO.

RELEASE. The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced.

Releases may either give up, discharge, or abandon a right of action, or convey a man's interest or right to another who has possession of it or some estate in the same. Shepp. Touchst. 320; Littleton 444. In the former class a mere right is surrendered; in the other not only a right is given up, but an interest in the estate is conveyed and becomes vested in the release.

An *express* release is one directly made in terms by deed or other suitable means.

An *implied* release is one which arises from acts of the creditor or owner, without any express agreement. See Pothier, Obl. nn. 608, 609.

A *release by operation of law* is one which, though not expressly made, the law presumes in consequence of some act of the releasor; for instance, when one of several joint obligors is expressly released, the others are also released by operation of law; 3 Salk. 298; Rowley v. Stoddard, 7 Johns. (N. Y.) 207.

Releases of claims which constitute a cause of action acquit the releasee, and remove incompetency as a witness resulting from interest.

Littleton says a release of all *demands* is the best and strongest release; sect. 508. Lord Coke, on the contrary, says *claims* is a stronger word; Co. Litt. 291 *b*.

In general, the words of a release will be restrained by the particular occasion of giving it; T. Raym. 399. It cannot apply to circumstances of which the party had no knowledge at the time he executed it; and if it be so general as to include matters never contemplated, the party will be entitled to relief; 6 H. & N. 347.

The general words in a release are limited always to the things which were in the contemplation of the parties when the release was given; L. R. 4 H. L. 623.

The word release in an assignment for the benefit of creditors, requiring creditors accepting its terms to execute releases of their claims, was held to include any instrument sufficient to secure the absolute discharge of the debtor as to creditors accepting the terms of the assignment; Burgiss v. Westmoreland, 38 S. C. 425, 17 S. E. 56. See PREFERENCE.

In the following cases a construction has been given to the expressions mentioned: A release of "all actions, suits, and demands;" 3 Mod. 277; "all actions, debts, duties, and demands;" *id.* 1, 64; 8 Co. 150 *b;* 2 Saund, 6 *a;* "all demands;" 5 Co. 70 *b;* Salk. 578; Tryon v. Hart, 2 Conn. 120; "all actions, quarrels, trespasses;" Dy. 2171, pl. 2; Cro. Jac. 487; "all errors, and all actions, suits, and writs of error whatsoever;" T. Raym. 399; "all suits;" 8 Co. 150; "of covenants;" 5 Co. 70 *b.*

Where a creditor promised to sign a release of his claim, but afterwards refuses to execute it, the debtor is not released from liability; McNutt v. Loney, 153 Pa. 281, 25 Atl. 1088. A parol agreement to release a party from liability on a note, unsupported by any consideration, cannot be enforced; Maness v. Henry, 96 Ala. 454, 11 South. 410. The voluntary payment by a third person of the amount then due on a contract is a sufficient consideration to support a release of the contract; Indianapolis Rolling Mill v. R. R., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639.

A release under seal may be attacked at law for fraud in the consideration where the seal is by statute made only *prima facie*

evidence of consideration; Olston v. Ry. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915; Wagner v. Ins. Co., 90 Fed. 395, 33 C. C. A. 121; an injured person may defeat the operation of a release under seal pleaded in bar to an action at law for the injury, by showing fraud in its procurement, although there was no actual misrepresentation as to the character and purport of the instrument executed; Rockwell v. Traction Co., 25 App. D. C. 98. It has been held that the only fraud which may be availed of in an action at law to avoid a formally executed release, not under seal, of all claims under a life insurance policy, is misrepresentation, deceit or trickery, practiced to induce the execution of the release which the signer never intended to execute and upon which the minds of the contracting parties never met. Misrepresentations of fact to procure the execution of a release as actually made can only be availed of in equity; Pacific Mut. L. Ins. Co. of Cal. v. Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752. A release may be impeached where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he really does sign. A release procured through fraud of this character may be shown in an action at law for the injury, if the release is pleaded as a bar to the action; Hartley v. R. Co., 214 Ill. 78, 73 N. E. 398. A release, if executed by the injured party with the belief that it was only a receipt for wages, is not a bar to an action at law for the injuries; Cleary v. Electric Light Co., 65 Hun, 621, 19 N. Y. Supp. 951, affirmed 139 N. Y. 643, 35 N. E. 206.

A release of a claim for personal injuries by an injured person at a time when he was mentally incapacitated is not a bar to an action for injuries; Julius v. Traction Co., 184 Pa. 19, 39 Atl. 141; Alabama & V. R. Co. v. Jones, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 488; Perry v. M. O'Neil & Co., 78 Ohio St. 200, 85 N. E. 41; or where the injured person was so enfeebled by opiates and the shock and pain of the injuries as to be unable to enter into contractual relations; Bliss v. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

Where a release from liability for personal injury was obtained by fraud, it is not necessary, before suit for the injury, to obtain a decree rescinding the release or to refund the amount paid under the release; St. Louis & S. F. R. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032. The amount paid under the release need not be repaid or tendered, where the facts show that a tender would have been rejected; O'Brien v. R. Co., 89 Ia. 644, 57 N. W. 425; Rotan Grocery Co. v. Noble, 36 Tex. Civ. App. 231, 81 S. W. 586; Missouri Pac. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066; U. S. v. Edmondston, 181 U. S. 500, 21 Sup. Ct. 718, 45 L. Ed. 971; Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996; Williams v. Patrick, 177 Mass. 160, 58 N. E. 583; Merrill v. Pike, 94 Minn. 186, 102 N. W. 393; or where it appears that the defendant's unsoundness prevented him from understanding the transactions; Johnson v. Granite Co., 53 Fed. 569; in such cases an allowance on the recovery will be made of the amount received under the release; Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Sanford v. Ins. Co., 11 Wash. 653, 40 Pac. 609; *contra*, that there must first be a tender back of the amount received, see Bramble v. R. Co., 132 Ky. 547, 116 S. W. 712, and cases cited in Olston v. R. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915.

Where one has a right of action against two or more, and covenants with one of them not to sue him, it does not operate as a release of the others, though an express release to him would have that effect; L. R. 8 Ex. 81; 4 Ch. App. 208; Maslin's Ex'rs v. Hiett, 37 W. Va. 15, 16 S. E. 437; so of covenant to sue one of two joint tort-feasors; [1892] 2 Q. B. 511.

In Estates. The conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. Shepp. Touchst. 320. The relinquishment of some right or benefit to a person who has already some interest in the tenement, and such interest as qualifies him for receiving or availing himself of the right or benefit so relinquished. Burton, R. P. 15*.

The words generally used in such conveyance are "remised, released, and forever quitclaimed." Littleton § 445.

Releases of land are, in respect of their operation, divided into five sorts: releases that enure by way of passing the estate, or *mitter l'estate* (*q. v.*), *e. g.* a release by joint-tenant to co-joint-tenant, which conveyance will pass a fee without words of limitation. Releases that enure by way of passing the right, or *mitter le droit*, *e. g.* by disseisee to disseisor. Releases that enure by enlargement of the estate. A release to the tenant in possession, by him who hath the reversion or inheritance, is said to *enlarge* his estate and to be equal to an entry and feoffment and to amount to a grant and attornment. The law requires privity of estate, that the releasor have a right, and the releasee such a possession as will make him capable of taking an estate; Bac. Abr. *Release* (C) 4.

Releases that enure by way of extinguishment: *e. g.* a lord releasing his seignorial rights to his tenant.

Releases that enure by way of feoffment and entry: *e. g.* if there are two disseisors, a release to one will give him a sole estate, as if the disseisee had regained seisin by entry and enfeoffed him. 2 Sharsw. Bla. Com. 325*. See 4 Cruise, Dig. 71; Gilb. Ten. 82; Co. Litt. 264; Russell v. Coffin, 8 Pick.

(Mass.) 143; Carroll v. Norwood's Heirs, 5 Harr. & J. (Md.) 158; Jackson v. Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349.

A release must be to a specific person.

The technicalities of English law as to releases are not generally applicable in the United States. The corresponding conveyance is a quit-claim deed. Smith's Heirs v. Bank, 21 Ala. 125.

RELEASEE. A person to whom a release is made.

RELEASOR. He who makes a release.

RELEGATIO. In Civil Law. A kind of banishment known to the civil law, which did not take away the rights of citizenship, which *deportatio* did.

Some say that *relegatio* was temporary, *deportatio* perpetual; that *relegatio* did not take away the property of the exile, and that *deportatio* did; but these distinctions do not seem always to exist. There was one sort of *relegatio* for slaves, viz. *in agros;* another for freemen, viz. *in provincias. Relegatio* only exiled from certain limits; *deportatio* confined to a particular place (*locus pœnæ*). Calvinus, Lex.

RELEGATION. The temporary banishment or exile by special act of parliament. Co. Litt. 133 *a*.

RELEVANCY. Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. See 1 Greenl. Ev. § 49. Two facts are said to be relevant to each other when so related "that according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." Steph. Dig. Ev. art. 1. This is relevancy in a logical sense. Legal relevancy requires a higher standard of evidentiary force. It includes logical relevancy and demands a close connection between the fact to be proved and the fact offered to prove it. The fact, however, that it is logically relevant does not insure admissibility; it must also be legally relevant; U. S. v. Ross, 92 U. S. 281, 23 L. Ed. 707; it is, however, the tendency of modern jurisprudence to admit most evidence logically relevant. Chamb. Best, Ev. 251, n.

Relevancy of evidence does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

RELICTA VERIFICATIONE (Lat. his pleading being abandoned). A confession of judgment made after plea pleaded: viz. a *cognovit actionem* accompanied by a withdrawal of the plea.

RELICTION (Lat. *relinquo*, to leave behind). An increase of the land by the retreat or recession of the sea or a river.

Where the sea cut off the sea front of the main land between certain points and afterwards a beach was reformed outside the main land, and divided from it by a bay of navigable water, it was held that the title to the new formation was in the owners of the part cut off. Murphy v. Norton, 61 How. Pr. (N. Y.) 197.

See AVULSION; ALLUVION; LAKE; RIVER; WATERS.

RELIEF. A sum payable by a new tenant, the duty being incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate which was lapsed or fallen in by the death of the last tenant. At one time the amount was arbitrary: but afterwards the relief of a knight's fee became fixed at one hundred shillings. 2 Bla. Com. 65. See 3 Holdsw. Hist. E. L. 53.

RELIEF ASSOCIATION. See RAILROAD RELIEF FUNDS.

RELIEF, PRAYER FOR. A bill in equity concludes with such prayer for specific relief as the plaintiff deems himself entitled to under the averments of the bill; and a prayer for general relief is usually added. See BILL.

RELIGION (Lat. *re*, back, *ligo*, to bind). Real piety in practice, consisting in the performance of all known duties to God and our fellow-men. It has been held to include the principle of gratitude to an active power who can confer blessings. 38 L. J. M. C. 5.

The constitution of the United States provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." See Story, Const. 1870; Miller, Const. 645. Congress cannot pass a law for the government of a territory which prohibits the free exercise of religion; Reynolds v. U. S., 98 U. S. 162, 25 L. Ed. 244; religion is not defined in the constitution, its meaning there must be ascertained elsewhere. Jefferson was the leader of the movement for placing this clause in the constitution; *id.* See 12 Hening's Stat. 84; 1 Jeff. Works 45, 79; 2 *id.* 355; 8 *id.* 113. This provision and that relating to religious tests (*q. v.*) are limitations upon the power of congress only; Cooley, Const. 205; perhaps the fourteenth amendment may give additional securities if needful; *id.* By establishment of religion is meant the setting up of a state church, or at least the conferring upon one church of special favors which are denied to others; 1 Tuck. Bla. Com. App. 296; 2 *id.* App. n. G. The Christian religion is, of course, recognized by the government, yet not so as to draw invidious distinctions between different religious beliefs, etc.; Cooley, Const. 206. As to a religious country; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

With the exception of these provisions, the preservation of religious liberty is left to the states. The various state guarantees have been summed up by Judge Cooley, who says that under American constitutions the following things are unlawful: 1. Any law respecting the establishment of religion. 2. Compulsory support by taxation or otherwise of religious instruction. 3. Compulsory attendance upon religious worship. 4. Restraints upon the free exercise of religion according to the dictates of conscience. 5. Restraints upon the expression of religious belief. Const. Lim. 575.

The constitutions of most of the states forbid any religious test for holding office, except that in some states belief in the existence of God is required.

A person's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land (polygamy); Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. By the constitution "congress is deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order;" *id.*, 98 U. S. 164, 25 L. Ed. 244. Where the parents of a sick child omitted to call in medical attendance because of their religious belief that what they did would be effective, they were held not guilty of manslaughter; 10 Cox, Cr. Cas. 531; otherwise, if they had actively starved it to death under like religious belief; *id.*

A father who belonged to a sect called the "Peculiar People" was convicted of manslaughter for neglect to provide medical aid for his child; [1899] 1 Q. B. 283. "Religious belief" is no defense to a prosecution for failure to procure medical attendance for a sick child; Owens v. State, 6 Okl. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1912B, 1218. See Reynolds v. U. S., 98 U. S. 167, 25 L. Ed. 244.

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true." Holy Trinity Church v. U. S., 143 U. S. 465, 12 Sup. Ct. 511, 36 L. Ed. 226. The opinion quotes from the early charters of the colonies, the Declaration of Independence and from state constitutions, and then adds: "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people."

The opinion quotes the language of Updegraph v. Com., 11 S. & R. (Pa.) 394: "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." It also quotes the opinion of Kent, Ch., in People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335: "The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice." In the Girard Will Case, 2 How. (U. S.) 127, 11 L. Ed. 205, it was said: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

An agreement by the District of Columbia to erect buildings on the grounds of a private incorporated hospital, in charge of Roman Catholic sisters, to be used by poor patients sent there, is not in conflict with art. 1 of the United States constitution forbidding congress to make laws for the establishment of religion; Bradfield v. Roberts, 175 U. S. 291, 20 Sup. Ct. 121, 44 L. Ed. 168.

As to reading the Bible in schools, see SCHOOLS.

See ASSOCIATION; CHARITIES; CHARITABLE USES; POLYGAMY; RELIGIOUS TEST; RELIGIOUS EDUCATION; RELIGIOUS SOCIETY; CHRISTIANITY.

As to religious belief as a qualification for a witness, see WITNESS; ECCLESIASTICAL LAW; CONSTITUTION OF UNITED STATES.

RELIGIOUS BOOKS. Those which tend to promote the religion taught by the Christian dispensation, unless by associated words the meaning is so limited to show that some other form of worship is referred to. Simpson v. Welcome, 72 Me. 500, 39 Am. Rep. 349.

RELIGIOUS CORPORATION. See RELIGIOUS SOCIETY.

RELIGIOUS EDUCATION. Questions respecting the religious education of children arise not infrequently by reason of applications to the courts for either restraining or mandatory process intended to control the religious education of children where differences exist between the parents or where the relations of a deceased parent seek to control the direction given to the mind of the child.

Where the husband was a Roman Catholic and the wife a Protestant, and by an antenuptial agreement the children were to be brought up as Roman Catholics, but they had been educated as Protestants, and it appeared that the father gave way to drink and two girls of fifteen and eleven were before the court on the application of the father, who had reformed, to restore them to his charge and educate them at a Papist school, it was held that the children should remain at the Protestant school where they then were; [1896] 1 Ch. 740.

Courts or those who have the guardianship of a child after the father's death should have a sacred regard to the religion of the

father and, unless under very special circumstances, should see that the child is brought up in his religious faith; L. R. 6 Ch. 539.

Where both father and mother were Roman Catholics and, after the death of the father, a posthumous child was born, and five years after the father's death, the mother became a Protestant and, until the child was about nine years of age, educated it in that faith, the court refused to order the child to be brought up in the father's belief; 8 D. M. & G. 760.

Where no abandonment by the father is shown, the mere fact that a child will be better off or more contented under other people's care will not justify his instruction in a creed other than the father's; but when abandonment is proved, the question turns upon the welfare of the child; L. R. 8 Ch. 622. See 24 Ch. Div. 317. The pecuniary welfare of the child will be weighed together with its moral welfare, but the danger of making the former all important must be guarded against; 4 My. & Cr. 688.

The practice of the courts of having interviews with the children is discouraged as tending to encourage controversial opinions in their tender minds, and because the child is often so nervous that the court can form no useful opinion in that way; [1893] 1 Ch. 143.

See CUSTODY; INFANT; PARENT AND CHILD.
As to the Bible in schools, see SCHOOLS.

RELIGIOUS IMPOSTORS. Those who falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgment; punishable with fine, imprisonment, and infamous corporal punishment. 4 Br. & H. Com. 71.

RELIGIOUS MEN. Such as entered into some monastery or convent. In old English deeds, the vendee was often restrained from aliening to "Jews or religious men," lest the lands should fall into mortmain. Religious men were civilly dead. Blount.

RELIGIOUS SOCIETY. A body of persons associated together for the purpose of maintaining religious worship. In this country they are not ecclesiastical corporations in the English sense, but ordinary private, civil corporations, and as such subject to the ordinary civil jurisdiction; Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Gram v. Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Smith v. Nelson, 18 Vt. 511.

The religious corporation and the church are distinct bodies, independent of each other, though one may exist within the other. When a church and society are united, the society commonly owns the property and makes the pecuniary contract with the clergyman, but in many instances a society exists without a church and a church without a society; Silsby v. Barlow, 16 Gray (Mass.) 329. Membership in the church is not ordinarily a prerequisite to membership in the corporation, and the excommunication of a member who was trustee of a religious society did not disqualify him from holding that office; Bouldin v. Alexander, 15 Wall. (U. S.) 131, 21 L. Ed. 69. This distinction between the church and the society has been stated by Judge Cooley, who said that the statute under consideration contemplates a church connected with the corporation, though that may not be essential. The church is not incorporated and does not control the property or the membership of the society, while the corporation has nothing to do with the church except to provide for its temporal wants; Hardin v. Second Baptist Church of Detroit, 51 Mich. 137, 16 N. W. 311, 47 Am. Rep. 555. The unincorporated ecclesiastical body has power to control and discipline its membership, but the religious corporation has no power to try or disfranchise a corporator for moral delinquency, and in case of an attempt to do so, he has his remedy at law; People v. Church, 53 N. Y. 103.

Their powers, like those of other corporations, are construed with reference to the object of their corporate existence and extend so far, and so far only, as necessary to effectuate them. It has been held that a church corporation the object of whose incorporation was "the more efficient worship of God, the preservation and perpetuation of said church, and the better control and regulation of the property thereof," had no power to charter a steamboat, manage a public excursion, and sell tickets therefor, in order to raise money to pay debts of the church; Harriman v. Church, 63 Ga. 186, 36 Am. Rep. 117.

Where there is a dispute over the rights of contending factions of an unincorporated church to the use of the church property, an injunction will lie at the suit of the faction entitled to the property to restrain trespasses thereon by the other faction; Fulbright v. Higginbotham, 133 Mo. 668, 34 S. W. 875.

Even where the corporation is defective, yet where land has been acquired for the use of a religious society, equity will enforce that use no matter where the legal title is vested or though it be in an individual. So the corporation itself will be compelled by the courts to administer the property upon the trusts attached to it in the grant or donation. "The corporation or society are trustees and can no more divert the property from the use to which it was originally dedicated than any other trustee. If they should undertake to divert the funds, equity will raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers." Sharswood, J., in Appeal of Schnorr, 67 Pa. 138, 5 Am. Rep. 415.

The effect of church divisions upon such trusts is discussed by Mr. Justice Miller in Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666. He classifies the cases under three heads:

(1st.) Was the property in question devoted, by the express terms of the gift, grant, or sale, to the support of any specific religious doctrine, or was it acquired for the general use of the society for religious purposes, with no other limitation?

(2d.) Is the society which owned it of strictly congregational form of church government, owing no submission to any organization outside the congregation?

(3d.) Or is it one of a number of such societies, united to form a more general body, with ecclesiastical control in the general association over the members and societies of which it is composed?

In the first class of cases, the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.

If the property was acquired in the ordinary way of purchase, or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.

In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society as, by its own rules, constitute its government.

In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, or ecclesiastical government.

In such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it; Watson v. Jones, 13 Wall. (U. S.) 680, 20 L. Ed. 666; s. c. 11 Am. L. Reg. 430, with a full note by Judge Redfield.

Where a church is in full connection with a synodical body, those who secede, whether a majority or not, lose all right and privilege to the corporate property, and those who remain hold them; Gable v. Miller, 10 Paige (N. Y.) 627.

The majority of a church cannot change its doctrines and still retain the property given to it against the minority adhering to the faith in which the church was founded; Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675; Christian Church of Sand Creek v. Church, 219 Ill. 503, 76 N. E. 703.

Where property is devoted under a trust to a particular religious faith or form of church government, those who adhere, however small in numbers, are entitled to its use, as against those who abandon the doctrines of a church; Harmon v. Dreher, Speer Eq. (S. C.) 87; McGinnis v. Watson, 41 Pa. 9; Keyser v. Stansifer, 6 Ohio, 363; Hosea v. Jacobs, 98 Mass. 65; Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

In the leading English case, Free Church of Scotland v. Overtoun, [1904] A. C. 515, on the question of the right of the majority to unite with another religious organization, differing in essential points, it was held that the majority could not lawfully alienate the property from its original purpose and that it belonged to the minority who held to the original tenets of the founder.

Where the members of a parish sought an injunction to prevent the vestry of a church from closing it, in order to carry on its work in another part of the parish, the injunction was refused; Burke v. Rector of Trinity Church, 63 Misc. Rep. 43, 117 N. Y. Supp. 255.

In some states, as Illinois, Maryland, and Massachusetts, statutes provide that the appropriate Roman Catholic archbishop shall be and may become a corporation sole. See ROMAN CATHOLIC CHURCH.

An allegation that by the regulations of the Roman Catholic Church the bishop of the diocese holds all its property in his own name as trustee, for its benefit, and that each priest assigned to duty is entitled to hold the bishop individually liable for his salary, is not sufficient to sustain an action for salary brought by a priest against his bishop. A trust created by the rules of a church which is not shown to be capable of making contracts, accepting benefits, and compelling performance, is not recognized by law. The courts will not take judicial notice of the civil rights and powers of the Roman Catholic Church, so far as its civil rights and duties are concerned, in the absence of averment or proof upon the subject. Where such a question has been submitted to an ecclesiastical tribunal in the church, its decision, adverse to the claim, is a bar to an action therefor; Baxter v. McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670.

A bishop is not liable to a priest for his salary; both are fellow-servants of the same church; Rose v. Vertin, 46 Mich. 457, 9 N. W. 491, 41 Am. Rep. 174. Those who deal with an unincorporated church must trust the performance of civil obligations to the honor and good faith of its members; Trustees for First Soc. of M. E. Church v. Clark, 41 Mich. 737, 3 N. W. 207.

The condition in a gift to a church to teach a definite Christian doctrine is not satisfied by teaching merely a form of general evangelical Christianity; Lowrey v. Hawaii, 215 U. S. 554, 30 Sup. Ct. 209, 54 L. Ed. 325.

A conveyance of real estate to a trustee for the use of a particular congregation constitutes an executed legal estate in the congregation itself, to be used by it for such purposes as the law allows; and the congregation may direct the trustee to convey to other persons as trustees, and he may not refuse to do so on the ground that he is a Bishop of the Roman Catholic Church of which the congregation is a part; Krauczunas v. Hoban, 221 Pa. 213, 70 Atl. 740.

The right of a communistic religious association to engage in business enterprises is upheld in State v. Amana Soc., 132 Ia. 304, 109 N. W. 894, 8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231.

A priest necessarily subjects his conduct, in that capacity, to the laws and customs of his church; and in that respect, when his case has been heard according to the prescribed forms, the decision of the tribunals of the church will be respected by the courts; Stack v. O'Hara, 98 Pa. 213; Chase v. Cheney, 58 Ill. 509, 11 Am. Rep. 95.

In religious bodies all matters of faith and internal government will be left to the decision of the bodies themselves; Tuigg v. Treacy, 104 Pa. 493; Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663; Stewart v. Lee, 5 Del. Ch. 573; Schlichter v. Keiter, 156 Pa. 119, 27 Atl. 45, 22 L. R. A. 161; Schweiker v. Husser, 146 Ill. 428, 34 N. E. 1022. But where these decisions violate the law of the land, or their own law; Appeal of Kerr, 89 Pa. 97; courts will examine them; Pounder v. Ashe, 36 Neb. 564, 54 N. W. 847; after the ecclesiastical remedies have been exhausted; Buettner v. Frazer, 100 Mich. 179, 58 N. W. 834.

If property rights are involved, courts will assume jurisdiction; Cushman v. Church, 162 Pa. 280, 29 Atl. 872; Lynd v. Menzies, 33 N. J. L. 162; and the office of priest; O'Hara v. Stack, 90 Pa. 477; or vestryman; Dahl v. Palache, 68 Cal. 248, 9 Pac. 94; involves a property right.

See RELIGION; EXPULSION; 12 Am. L. Reg. N. S. 201; 15 *id.* 264; Mt. Zion Baptist Church v. Whitmore, 83 Ia. 138, 49 N. W. 81, 13 L. R. A. 198; Brown v. Clark, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 671; Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675, 692; Poynter v. Phelps, 129 Ky. 381, 111 S. W. 699, 24 L. R. A. (N. S.) 729.

RELIGIOUS TEST. The constitution of the United States declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." This clause was introduced for the double purpose of satisfying the scruples of many persons who feel an invincible repugnance to any religious test or affirmation, and to cut off forever every pretence of any alliance between church and state in the national government. Story, Const. § 1841. See RELIGION.

RELIGIOUS USE. See CHARITABLE USES.

RELINQUISHMENT. In Practice. A forsaking, abandoning, or giving over a right: for example, a plaintiff may relinquish a bad count in a declaration, and proceed on a good; a man may relinquish a part of his claim in order to give a court jurisdiction.

RELIQUA. The remainder or debt left upon balancing an account.

RELOCATIO (Lat.). **In Civil Law.** A renewal of a lease on its determination on like terms as before. It may be either express or tacit; the latter is when the tenant holds over with the knowledge and without objection of the landlord. Mackeldey, Civ. Law, § 379.

REMAINDER. The remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgment of it. 4 Kent 197. See Will. Real P. 282.

A *contingent* remainder is one which is limited to an uncertain or dubious person, or which is to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate.

A *vested* remainder is one by which a present interest passes to the party, though perhaps to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent.

There are four classes of contingent remainders. 1. Where the remainder depends on a contingent determination of the preceding estate, and it remains uncertain whether the use or estate limited *in future* will ever vest. 2. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate and must precede the remainder. 3. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. 4. Where the person to whom the remainder is limited is not ascertained or not in being. 4 Kent 207, quoting Fearne, Cont. Rem.

They are divided by Blackstone into two kinds. 1. Remainders limited to take effect to a dubious and uncertain person, or 2. Upon a dubious or uncertain event; and by Lord Ch. J. Willes into, 1. Where the person to whom the remainder was limited is

not *in esse*. 2. Where the commencement of the remainder depended on some matter collateral to the determination of the particular estate; Willes 327; 4 Kent 207, and note, where the classification of Blackstone is approved.

There are exceptions to the third and fourth classes of contingent remainders, as enumerated by Fearne, as, a limitation for a long term of years with remainder over gives a vested remainder; and where one takes an estate of freehold and an immediate remainder is limited thereon in the same instrument to his heirs in fee or in tail, the remainder is immediately executed in possession and he becomes seised in fee or in tail. 4 Kent 209. See SHELLEY'S CASE, RULE IN.

The rule that where there is a possibility upon a possibility, the remainder is void: 2 Co. 51; is said to be obsolete; 4 Kent 206, n.; 2 H. L. Cas. 186.

See CONTINGENT REMAINDER; CROSS-REMAINDER; EXECUTORY DEVISE; LIMITATION; REVERSION.

REMAINDER-MAN. One who is entitled to the remainder of the estate after a particular estate carved out of it has expired. Will. Real P. 290.

REMAND. When a prisoner is brought before a judge on a *habeas corpus*, for the purpose of obtaining his liberty, the judge hears the case, and either discharges him or not: when there is cause for his detention, he remands him.

REMANDING A CAUSE. The sending it back to the same court out of which it came, for the purpose of having some action on it there. March 100. See REMOVAL OF CAUSES.

REMANENT PRO DEFECTU EMPTORUM (Lat. *remanent*, they remain, *pro defectu*, through lack, *emptorum*, of buyers). The return made by the sheriff to a writ of execution when he has not been able to sell the property seized, that the same *remains unsold for want of buyers;* in that case the plaintiff is entitled to a *venditioni exponas*. Com. Dig. *Execution* (C 8).

REMANET (Lat.). The causes which are entered for trial, and which cannot be tried during the term, are *remanets*. 1 Sell. Pr. 434; 1 Phill. Ev. 4.

REMEDIAL. That which affords a remedy: as, a remedial statute, or one which is made to supply some defects or abridge some superfluities of the common law. 1 Bla. Com. 86. The term remedial statute is also applied to those acts which give a new remedy. Esp. Pen. Act. 1. See Wilberf. Stat. L. 231.

REMEDY. The means employed to enforce a right or redress an injury.

Remedies for *non-fulfillment* of contracts are generally by action; see ACTION; ASSUMPSIT; COVENANT; DEBT; DETINUE; or in equity, in some cases, by bill for specific performance. Remedies for the redress of injuries are either public, by indictment, when the injury to the individual or to his property affects the public, or private, when the tort is only injurious to the individual. See INDICTMENT; FELONY; MERGER; TORTS; CIVIL REMEDY.

Remedies are *preventive* which seek *compensation*, or which have for their object *punishment*. The *preventive*, or *removing*, or *abating* remedies may be by acts of the party aggrieved or by the intervention of legal proceedings: as in the case of injuries to the person or to personal or real property, *defense*, *resistance*, *recaption*, *abatement of nuisance*, and *surety of the peace*, or *injunction* in equity, and perhaps some others. Remedies *for compensation* may be either by the *acts of the party aggrieved*, or *summarily* before justices, or by *arbitration*, or *action*, or *suit* at law or in equity. Remedies which have for their object *punishments* or compensation and punishments are either *summary proceedings* before magistrates, or *indictment*, etc.

Remedies are *specific* or *cumulative:* the former are those which can alone be applied to restore a right or punish a crime: for example, where a statute makes unlawful what was lawful before, and gives a particular remedy, that is specific, and must be pursued, and no other; Cro. Jac. 644; 2 Burr. 803. But when an offence was antecedently punishable by a common-law proceeding, as by indictment, and a statute prescribes a particular remedy, there such particular remedy is cumulative, and proceedings may be had at common law or under the statute; 1 Saund. 134, n. 4.

In a very large number of cases there are concurrent remedies the resort to one of which does not bar the other. This is particularly true where there is a legal and an equitable remedy with respect to the same subject-matter. For example, a bill in equity against the holder of a note to recover possession of it, and against makers for the balance due on it, may be maintained, pending an action at law against the holders and makers to recover from the latter the balance due; and where the action at law failed on the ground that the plaintiffs were not in possession, the judgment did not bar the proceeding in equity; New England Trust Co. v. Packing Co., 166 Mass. 46, 43 N. E. 928.

The maxim *ubi jus ibi remedium* has been considered so valuable that it gave occasion to the first invention of that form of action called an action on the case; 1 Sm. Lead. Cas. 472. The novelty of the particular complaint alleged in an action on the case is no objection, provided there appears to have been an injury to the plaintiff cognizable by law: 3 Term 63: 2 M. & W. 519.

There is an important distinction to be considered in connection with the construction and effect of statutes, between those which create rights, and those which afford remedies. This distinction has an important effect upon the legislative power, with respect to many subjects constantly involved in the question whether an act is obnoxious to the provision of the federal constitution against impairing the obligation of contracts, under which title the subject is discussed and to which reference should be made. The distinction is also important in many questions merely of state legislation. "The remedies which one legislature may have prescribed for the redress of private wrongs, a subsequent legislature can change or modify at pleasure, and make the new remedy applicable to pending controversies, provided a substantial or adequate remedy is left, and provided, further, that the legislature is not prohibited from making the new remedy applicable to pending suits by some provision of the organic law. . . . It is true that the courts have, on some occasions, refused to apply statutes which dealt with the remedy for the redress of private grievances to existing controversies, and have held them solely applicable to actions thereafter brought. But it will be found, we think, on an examination of most of this class of cases, that the refusal to apply to existing suits statutes which were plainly applicable thereto, and which merely changed or modified the course of procedure, was based either on the ground that, if so applied, they would operate unfairly, and cause loss or inconvenience to the parties, or on the ground that the right involved had become so far established by acts done and performed in reliance on the prior law, and its continuance in force, that it would savor of injustice to take away such right by making the new law applicable to the pending controversy;" Campbell v. Min. Co., 83 Fed. 643, 27 C. C. A. 646, where it was held that a statutory right to two trials in ejectment may be taken away by the legislature as to pending suits.

See RETROSPECTIVE; EX POST FACTO LAW; ELECTION OF REMEDIES.

REMEMBRANCER, KING'S. He was at the head of the department which had charge of all revenue suits, and of matters pertaining to the office of sheriff. He attended as the officer of the king's bench when the lord mayor made his appearance on November 9th, and as representing the old court of exchequer when the city of London did suit and service in discharge of quit-rents for certain lands anciently held under the crown. He presided at the Trial of the Pyx, the assaying and weighing of the coins of the realm. See Remembrances of Sir F. Pollock.

The present incumbent is in the central office of the supreme court of judicature.

REMISE, RELEASE, AND QUIT-CLAIM. The ordinary effective words in a release. These words are, in this country, sufficient to pass the estate in a primary conveyance; Dart v. Dart, 7 Conn. 250; Thorndike v. Norris, 24 N. H. 460; Smith's Heirs v. Bank, 21 Ala. 125. Remise is a French word synonymous with release. See QUIT-CLAIM.

REMISSION (Lat. *re*, back, *mitto*, to send).

In Civil Law. A release of a debt.

It is *conventional* when it is expressly granted to the debtor by a creditor having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title, under private signature constituting the obligation. La. Civ. Code. art. 2195.

Forgiveness or pardon of an offence.

It has the effect of putting back the offender into the same situation he was before the commission of the offence. Remission is generally granted in cases where the offence was involuntary or committed in self-defence. Pothier, Pr. Civ. sect. 7, art. 2, § 2.

At Common Law. The act by which a forfeiture or penalty is forgiven. U. S. v. Morris, 10 Wheat. (U. S.) 246, 6 L. Ed. 314.

REMIT. To annul a fine or forfeiture.

This is generally done by the courts where they have a discretion by law: as, for example, when a juror is fined for non-attendance in court, after being duly summoned, and, on appearing, he produces evidence to the courts that he was sick and unable to attend, the fine will be remitted by the court.

In Commercial Law. To send money, bills, or something which will answer the purpose of money.

To send back, as to remit a check. Colvin v. Acc. Ass'n, 66 Hun, 543, 21 N. Y. Supp. 734.

REMITTANCE. Money sent by one merchant to another, either in specie, bill of exchange, draft, or otherwise.

REMITTEE. A person to whom a remittance is made. Story, Bailm. § 75.

REMITTER. To be placed back in possession.

When one having a right to lands is out of possession, and afterwards the freehold is cast upon him by some defective title, and he enters by virtue of that title, the law *remits* him to his ancient and more certain right, and, by an equitable fiction, supposes him to have gained possession under it. 3 Bla. Com. 190; Com. Dig. *Remitter;* Litt. § 659.

REMITTIT DAMNA (Lat. he releases damages). An entry on the record by which the plaintiff declares that he remits the damages or a part of the damages which have been awarded him by the jury.

In some cases a misjoinder of action may be cured by the entry of a *remittit damna;* Chitty, Pl. 207.

REMITTITUR DAMNUM. The act of the plaintiff upon the record, whereby he abates the excess of damages found by the jury beyond the sum laid in the declaration. See 1 Saund. 285, n. 6. It cannot be filed by one of several plaintiffs, and where the widow of one killed by the negligence of a railroad company brought an action for damages on behalf of herself and her children and the parents of the deceased, a *remittitur* filed by the widow, reducing the judgment on behalf of each claimant, was held to be invalid and a new trial was ordered; Southern Pac. Co. v. Tomlinson, 163 U. S. 369, 16 Sup. Ct. 1171, 41 L. Ed. 193.

It is within power of the trial court, in tort for unliquidated damages, to require a plaintiff to remit so much as the court deems excessive, under penalty of having a new trial granted; Noxon v. Remington, 78 Conn. 296, 61 Atl. 963.

REMITTITUR OF RECORD. After a record has been removed to the supreme court and a judgment has been rendered, it is to be remitted or sent back to the court below, for the purpose of re-trying the cause, when the judgment has been reversed, or of issuing an execution when it has been affirmed. The act of so returning the record, and the writ issued for that purpose, bear the name of remittitur.

REMITTOR. A person who makes a remittance to another.

REMONSTRANCE. A petition to a court or deliberative or legislative body, in which those who have signed it request that something which is in contemplation to perform shall not be done.

REMOTE. At a distance; afar off. See CAUSA PROXIMA; MEASURE OF DAMAGES.

REMOVAL FROM OFFICE. A deprivation of office by the act of a competent officer or of the legislature. It may be express, that is, by a notification that the officer has been removed, or implied, by the appointment of another person to the same office; Bowerbank v. Morris, Wall. Sr. 118, Fed. Cas. No. 1,726. See In re Hennen, 13 Pet. (U. S.) 230, 10 L. Ed. 136. See OFFICER.

REMOVAL OF CAUSES. Under what are known as the removal acts, provision is made by federal statutes for the removal of causes in the state courts to the federal courts in certain cases.

The legislation on the subject begins with the Judiciary Act of 1789, which provided for the removal of suits commenced in the state courts against aliens, or citizens of other states, where the matter in dispute exceeded $500; 1 Stat. 73. This act continued in force, being substantially included in the Revised Statutes (section 639, now repealed by the Judicial Code), until 1875, when the jurisdiction was greatly enlarged; 18 Stat. 470; Girardey v. Moore, 3 Woods, 397, Fed. Cas. No. 5,462. The same section also provided for the removal of suits between citizens of one state claiming lands under grants of different states; 1 Stat. 73; and this act was also substantially included in the Revised Statutes (section 647, also repealed), and also in the act of 1887, with changes as to the jurisdictional limit, the party who might petition for removal, and the state from which the grant must be derived.

The act of 1833, occasioned by the nullification laws in South Carolina, provided for the removal of proceedings against federal revenue officers; 4 Stat. 633. This act was included in the Revised Statutes (section 643, also repealed by the Judicial Code), which with some extension of its scope, was, until the enactment of that Code, still in force, not having been repealed expressly or by implication by the act of 1875; Venable v. Richards, 105 U. S. 636, 26 L. Ed. 1196; and being excepted from repeal by the act of 1887; 25 Stat. 433. The act of 1863 related in terms to certain cases arising out of the civil war and has no subsequent force or effect. Several acts were passed during the reconstruction period, which were consolidated in R. S. §§ 641, 642 (both repealed by the Judicial Code and replaced by section 31), relating to the removal of causes in which there was a denial of civil rights, either by the action or non-action of the judicial tribunals of the state. This act was expressly saved from repeal by the act of 1887. The act of 1866 related to procedure merely, and authorized the removal of a separable part of a cause by one non-resident defendant joined with a resident; 14 Stat. 306. This was substantially covered by R. S. § 639 (repealed by the Judicial Code), but was repealed by the act of 1875 and not revived by that of 1887. The act of 1870 (14 Stat. 558), subsequently included in R. S. § 639, authorized the removal of causes upon an affidavit of prejudice or local influence. This was not repealed by the act of 1875 (Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927), but was repealed and supplied by that of 1887; Fisk v. Henarie, 142 (U. S.) 459, 12 Sup. Ct. 207, 35 L. Ed. 1080. See *infra*. The act of 1868 authorized the removal of suits against federal corporations other than banks; 15 Stat. 227; R. S. § 640 (repealed by the Code); but this was repealed by the act of 1887. The act of 1868 authorized the removal of personal actions brought by an alien against civil officers of the United States; 17 Stat. 44; R. S. § 644 (repealed by the Code). Subject to the change in the jurisdictional amount, this act was expressly, and probably not impliedly, repealed by the act of 1887.

The general act of 1875 was one largely extending the federal jurisdiction and the right of removal: 18 Stat. L. 470; and the result of it was such an overcrowding of the

dockets of the federal courts as to induce the passage of the very restrictive act of 1887, which is now in force, as part of the Judicial Code. It was generally considered to have been framed for the purpose of reorganizing the circuit courts of the United States and its operation was practically to repeal prior legislation on the subject, except some special acts of limited scope, and to substitute this act for pre-existing legislation as to the federal law on the subject of the removal of causes. The act of 1887 was supplemented by the act of August 13, 1888; 25 Stat. 433, which was passed for the purpose of correcting errors and ambiguities in the act of 1887. As thus amended, the act gave to the circuit courts original concurrent jurisdiction of all civil suits where the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2,000 (now enlarged to $3,000). In certain classes of cases there is a right to remove independently of amount; such as criminal cases and those civil actions touching matters not capable of a reduction to a pecuniary basis.

All the acts regulating the removal of causes are combined and codified in Chapter III of the Judicial Code, including sections 28–39. Section 28, down to the proviso at the end, is identical with section 2 of the Act of March 3, 1875, as amended by the acts of March 3, 1887, and October 13, 1888, except the substitution of the district for the circuit court. Sections 29 and 30 are, with mere verbal changes, section 3 of the Acts of March 3, 1887, and October 13, 1888. Sections 31, 32, 33 and 35 are sections 641, 642, 643, 644 and 645 of the Revised Statutes respectively. Sections 36, 37, 38 and 39 are sections 4, 5, 6, and 7 respectively of the act of March 3, 1875, as amended by acts of March 3, 1887 and Oct. 13, 1888. In the repealing proviso of the Judicial Code contained in Chapter XIV, all the statutes and sections of the Revised Statutes, for which the sections of Chapter III are thus substituted are expressly repealed (including the whole of the act of March 3, 1875, which repeal of course carries the amendments to that act in the acts of March 3, 1887, and August 3, 1888). The limitations of jurisdiction of the federal courts declared in the statutes thus embodied in the Judicial Code limit the jurisdiction as to actions removed from state courts as well as to those originally begun in the circuit court; Hyde v. Victoria Land Co., 125 Fed. 970.

The constitutional right of congress to enact the legislation providing for the removal of causes "arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the constitution, and the power has been in constant use ever since." The jurisdiction of the federal courts "is essential, also, to a uniform and consistent administration of national laws. . . . The founders of the constitution could never have intended to leave to the possibly varying decisions of the state courts what the laws of the government it established are, what rights they confer, and what protection should be extended to those who execute them;" Tennessee v. Davis, 100 U. S. 257, 265, 25 L. Ed. 648. The removal of suits from the state courts depends on the legislation of congress; Gumbel v. Pitkin, 124 U. S. 131, 153, 8 Sup. Ct. 379, 31 L. Ed. 374. "The constitution declares the lines with which congress may confer jurisdiction, but the ground and limit of actual jurisdiction to be exercised by the court are to be found in the acts of congress and not in the constitution;" In re Cilley, 58 Fed. 977.

In determining whether an amount in dispute exceeds the jurisdictional amount, the plaintiff's demand, unless colorable, must furnish the rule, but where the law does give the rule, the legal cause of action, and not the plaintiff's demand, must be regarded; Hayward v. Mfg. Co., 85 Fed. 4, 29 C. C. A. 438. See JURISDICTION.

Where the main controversy is removed the ancillary proceedings go with it without respect to the amount involved; Lanning v. Osborne, 79 Fed. 657. And a proceeding which is merely ancillary to a decree of foreclosure in a state court is not removable; Daugherty v. Sharp, 171 Fed. 466.

Chapter III of the Judicial Code, which is practically a re-enactment of the law as it stood upon the act of 1887, authorizes the removal from the state courts of the following classes of suits:

1. Suits at law or in equity arising under the constitution or laws or treaties of the United States.

2. Any other suits of which the district courts of the United States have jurisdiction under the act.

3. Any suits in which there is a controversy wholly between citizens of different states, and which can be fully determined as between them.

4. Any suit pending in a state court in which the defendant, being a citizen of another state, shall make it appear to the district court that from prejudice or local influence he will not be able to obtain justice in the state court.

In all these cases the jurisdictional limit of $2,000 is applicable. It was at first doubted whether this was so in cases removed on the ground of prejudice or local influence, and there were decisions to the effect that the limitation of amount did not apply in those cases; Fales v. Ry. Co., 32 Fed. 673; McDermott v. Ry. Co., 38 Fed. 529, 3 L. R. A. 455; Frishman v. Ins. Co., 41 Fed. 449; but it was finally settled by the supreme court that the limitation applies in this as in other cases; In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

Provisions are also continued by Chapter

III for the removal of causes in which civil rights were denied, as previously provided in section 641, of suits against revenue officers as in section 643, or by aliens against civil officers of the United States as in section 644. In all cases, the removal is, of course, to the district courts in lieu of the circuit courts, as theretofore.

The proceeding for removal is by petition filed in the state court, upon which an order is made, if the case is within the act, directing the removal, upon the filing of a bond, with surety, for entering a copy of the record in the circuit court, where the case proceeds as if originally commenced therein; if improperly removed it may be remanded to the state court and there proceeded with. The proceedings under the act of 1887 are generally of the same character as those under the preceding acts, and, as a rule, the decisions under the latter are applicable, with the exception, of course, of cases relating to the construction of acts repealed and not supplied by subsequent legislation.

The procedure for removal is prescribed in section 29, Jud. Code, and those for dismissing or remanding a case improperly removed are in section 27. Section 38 prescribes that the federal court shall proceed in a suit removed as if it had been originally commenced in that court. Section 39 provides for securing the record by *certiorari* when a proper return is not made by the state court.

The removal acts are not penal and therefore not subject to any rule of strict construction; they are not in derogation of any right to a trial in a state court, as there is no such right; the rule of construction is that applied to other statutes giving jurisdiction; Woolridge v. McKenna, 8 Fed. 650; but the act of 1887 is to be construed with reference to its evident restrictive intent, and more strongly against one seeking to avoid its requirements; Dwyer v. Peshall, 32 Fed. 497; and this, as all other cases of construction, applies to the present law under section 294, which provides that the Code is to be treated as a continuation of the previous act and not as a new enactment.

The right to remove is no more a vested right than the right to trial in the state court, and may therefore be taken away at will by congress; Manley v. Olney, 32 Fed. 708.

The cognizance over cases removed to the federal court has been referred to the appellate jurisdiction; on the ground that the suit is not instituted in that court by original process; Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; but this jurisdiction has been more accurately characterized as "original jurisdiction acquired indirectly by a removal from the state court"; Dennistown v. Draper, 5 Blatchf. 336, Fed. Cas. No. 3,804.

The federal jurisdiction attaches on the filing of the bond and petition; Crehore v. Ry. Co., 131 U. S. 243, 9 Sup. Ct. 692, 33 L. Ed. 144. The validity of the legislation on this subject has been repeatedly affirmed; Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; State v. Hoskins, 77 N. C. 530; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208. And it has been further decided that when the terms upon which the right is given have been complied with, the right of removal cannot be defeated by state legislation; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445, 22 L. Ed. 365. It has been said that a state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, on the transaction of business within its territory by a foreign corporation, or having given a license, to revoke it with or without cause; and that it may therefore require foreign corporations to forego their right of removal, or cease to do business within the state; Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 148; State v. Doyle, 40 Wis. 220, 22 Am. Rep. 692.

But in Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915, it was said that the point decided in Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 148, was expressly limited to the principle that an injunction would not be granted to restrain the action of state officers in such case; and it is settled that any legislation by the states intended to defeat the right of removal or to require from foreign corporations a stipulation in advance that they will not exercise it, is unconstitutional and void; *id.*; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Herndon v. R. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Roach v. R. Co., 218 U. S. 159, 30 Sup. Ct. 639, 54 L. Ed. 978; Com. v. Coal Co., 97 Ky. 238, 30 S. W. 608; Erie R. Co. v. Stringer, 32 Ohio St. 468; or by a state law providing a special remedy in its own courts; Mason v. Boom Co., 3 Wall. Jr. 252, Fed. Cas. No. 9,232; nor can the right of removal be defeated by agreement of parties; Hobbs v. Ins. Co., 56 Me. 417, 96 Am. Dec. 472. But a state statute providing that if a foreign corporation shall remove cases to the United States courts the license to do business shall be revoked, is not unconstitutional; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317.

See JURISDICTION.

Formerly the right of removal was given to either party without regard to the position occupied as plaintiff or defendant; Meyer v. Const. Co., 100 U. S. 457, 25 L. Ed. 593; but under the act of 1887 this right is in most cases given to the defendant only, the exception being where citizens of the same state claim land under grants from different states and the defendant must be a non-resident; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; but a case is not removable from the state court on the ground

of citizenship, unless both at the commencement of the action, and also when the removal is asked, the defendants are citizens of a state other than the one of which the plaintiff is a citizen; Kellam v. Keith, 144 U. S. 568, 12 Sup. Ct. 922, 36 L. Ed. 544; Young v. Ewart, 132 U. S. 267, 10 Sup. Ct. 75, 33 L. Ed. 352. Some question has arisen as to which party is to be considered the plaintiff in proceedings for the exercise of the right of eminent domain, and if, by local practice, the landowner is the plaintiff, he cannot remove; Mt. Washington Ry. Co. v. Coe, 50 Fed. 637; Hudson River R. & T. Co. v. Day, 54 Fed. 545.

By a proviso at the end of the Jud. Code, § 26, no case arising under the Employers' Liability Act of April 22, 1908, can be removed to a federal court and this was enforced by a remand of such case to the state court upon the ground that under the Jud. Code considered as a whole, including the proviso, the right of removal did not exist in such case; Lee v. Ry. Co., 193 Fed. 685; on any ground whatever; Hulac v. Ry. Co., 194 Fed. 747; McChesney v. R. Co., 197 Fed. 85; and the same result was reached in the Second Employers' Liability Cases, Mondou v. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, where, after quoting from the Employers' Liability Act of 1908, as amended in 1910, the provision that the jurisdiction of the federal courts is made "concurrent with that of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States," the court added that the amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possess it.

Where several are sued as partners and only one has been served, he is not precluded from removal by the non-joinder of the others in the removal proceedings; Tremper v. Schwabacher, 84 Fed. 413. Where one may sue either one of two parties and he chooses to sue both, he may do so, though his motive in joining them is to prevent a removal to a federal court; Deere, Wells & Co. v. Ry. Co., 85 Fed. 876.

A suit between a state and citizens of another state cannot be removed on the ground of citizenship; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; State v. Trustees of University, 65 N. C. 714, Fed. Cas. No. 10,318; Connecticut v. Adams, 9 Ohio C. C. 21, 6 O. C. D. 46. Nor a suit between a state and a foreign corporation; Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; but in a suit by railroad commissioners to restrain a railroad company from violating the law and a late order of the commissioners the state is not the real party plaintiff so as to preclude a removal, although it is contingently liable for costs; Missouri, K. & T. Ry. Co. v. Warehouse Com'rs, 183 U. S. 53, 22 Sup. Ct. 18, 46 L. Ed. 78; and the mere presence on the record of a state as a party plaintiff, will not defeat removal, if it appears that the state has no real interest; Ex parte Nebraska, 209 U. S. 436, 28 Sup. Ct. 581, 52 L. Ed. 876.

Corporations existing by virtue of acts of congress may remove to the federal courts actions brought against them in the state courts, on the ground that they are "suits arising under the laws of the United States"; Supreme Lodge of Knights of Pythias v. Hill, 76 Fed. 468, 22 C. C. A. 280.

As to the status of corporations as non-residents, see Patch v. R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518; Martin's Adm'r v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. "Citizens," as used in the removal laws and jurisdictional statutes, means residence with the intention of permanently remaining in a particular place; Harding v. Standard Oil Co., 182 Fed. 421. Where there is no separable controversy, the cause can not be removed on the ground of diversity of citizenship unless all the defendants are non-residents of the state in which it is brought, notwithstanding that the plaintiff is a citizen of a different state from any of the defendants; Parkinson v. Barr, 105 Fed. 81. The removal provisions in the Judicial Code, § 28, though available as between citizens of states, are not so to citizens of territories; Anaconda Copper Min. Co. v. Copper Co., 200 Fed. 808.

The diversity of citizenship at the commencement of the action must appear from the petition; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; La Confiance Compagnie Anonyme D'Assurance v. Hall, 137 U. S. 61, 11 Sup. Ct. 5, 34 L. Ed. 573; and if it does not it cannot be supplied by amendment; Fife v. Whittell, 102 Fed. 537; though imperfect statements may be amended; Crehore v. R. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144. Diversity of citizenship must be shown to have existed when the suit was commenced, as well as at the time of the application for removal; Wilson v. Giberson, 124 Fed. 701; Kellam v. Keith, 144 U. S. 568, 12 Sup. Ct. 922, 36 L. Ed. 544. A federal court cannot acquire jurisdiction by removal on the ground of diversity of citizenship where neither of the parties is a resident of the district and there is no consent or waiver of rights; Southern Pac. Co. v. Burch, 152 Fed. 168, 82 C. C. A. 34; Yellow Aster Min. & Mill. Co. v. Crane Co., 150 Fed. 580, 80 C. C. A. 566; Bottoms v. R. Co., 179 Fed. 318; Goldberg-Bowen & Co. v. Ins. Co., 152 Fed. 831; and in such case the action should, on plaintiff's motion, be remanded; Turk v. R. Co., 193 Fed. 252. Where an alien sues a citizen in a state court in the district of the latter's residence, the cause is not removable unless a federal ques-

tion is presented; H. J. Decker, Jr., & Co. v. R. Co., 189 Fed. 224.

A suit between plaintiffs who are citizens of different states, and a defendant which is a corporation of a state other than the state in which the suit is brought, is not removable on the ground of diversity of citizenship under section 28, of the Judicial Code; Puget Sound S. M. Works v. R. Co., 195 Fed. 350.

Application for removal must be before the plea is due; and this means at or before the time when the defendant is required by the laws of the state to answer or plead to the merits; Wilson v. R. Co., 82 Fed. 15; and the time is not extended by delay in taking judgment or default for want of plea; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; nor can it be by stipulation of the parties or by the discretionary action of the judge in a particular case; Fox v. R. Co., 80 Fed. 945.

When the petition and bond are filed, the state court is without authority to proceed further; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.

The court will not permit any fraud on the law either to prevent removal or to secure it, and the joinder of a party for this purpose will not be allowed to prevent a removal; Crawford v. R. Co., 130 Fed. 395; Kelly v. Ry. Co., 122 Fed. 286; but where there is a joint cause of action against both defendants, the cause cannot be removed even though to prevent it was the real purpose of the joinder; Armstrong v. R. Co., 192 Fed. 608; Evansberg v. Insurance Stove R. & F. Co., 168 Fed. 1001; and where, under the settled law of the state, the defendants were jointly liable it will not be treated as a fraudulent joinder; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521.

All the facts essential to federal jurisdiction must appear on the record; Tod v. Ry. Co., 65 Fed. 145, 12 C. C. A. 521, 22 U. S. App. 707. They must appear from the plaintiff's statement where that is the ground of removal, and cannot be supplied by statement in the petition for removal or subsequent pleadings; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; Oregon Short Line & U. N. Ry. Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048. A prima facie case must be shown by the record; Stone v. S. Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

If a cause removed is not remanded when it might be, and proceeds without objection to judgment, the latter remains in force until vacated; Des Moines Nav. & R. Co. v. Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202. One who petitions for or consents to removal cannot afterwards object to it as not asked for in time; Connell v. Smiley, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443. If a cause is removed and the circuit court decides it has no jurisdiction, it *remands* and does not *dismiss;* Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

A state court may take cognizance of a suit brought by the state in its own courts against citizens of other states, subject to the right of the defendant to have such suit removed and subject also to the appellate jurisdiction of the supreme court of the United States; Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511, 18 Sup. Ct. 685, 42 L. Ed. 1126.

Where the state court denies the motion for removal but the record is nevertheless filed in the circuit court, which proceeds to a hearing and then remands, the order refusing removal works no prejudice, and the error, if any, is immaterial; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536.

Actual removal subjects the defendants to the jurisdiction of the federal court and is a waiver of privileges claimed by pleas in abatement, but the mere filing a petition in the state court is not a waiver of exception to its jurisdiction; Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231, 13 U. S. App. 222.

An order of the circuit court remanding a case to a state court was, at the time of the enactment of the Judicial Code, not reviewable by the supreme court by any direct proceeding; Powers v. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. And such order was held not reviewable prior to the act of March 3, 1875, because such order was not a final judgment or decree, but by that act it was expressly made reviewable. By the act of March 3, 1887, however, it was provided that no appeal or writ of error from the decision of the circuit court remanding the case should be allowed, and under this state of the law it was held that the action of the circuit court was final; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 580, 16 Sup. Ct. 389, 40 L. Ed. 536, followed in McLaughlin Bros. v. Hallowell, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. Ed. 835. The Judicial Code does not seem to change the conditions created by the act of 1887, and at all events, inasmuch as the appellate jurisdiction of both the circuit court of appeals and the supreme court is only from final judgments or decrees, the subject seems to be remitted to the condition in which it was prior to the act of March 3, 1875, as decided in Missouri P. Ry. v. Fitzgerald, *supra.* In both cases cited it was also held that the order to remand could not be reviewed on appeal or error from the state court, inasmuch as that court could not be held to have decided against a final right when it merely recognized the decision of the federal court as conclusive and acted upon it. The act of 1887 (re-enacted Aug. 13, 1888) it was held, took away the inherent power of the supreme court to relieve by mandamus when a case, removed from a state court, was improperly remanded; In re Pennsylvania Co., 137 U.

S. 451, 11 Sup. Ct. 143, 34 L. Ed. 741. The defendant may waive defects in removal proceedings if jurisdiction actually exists, and if he does so, the court will not of its own motion inquire into the regularity of the proceedings; Mackay v. Development Co., 229 U. S. 173, 33 Sup. Ct. 638, 57 L. Ed. 1138; but when the state court asserts jurisdiction after a proper application for removal, the question is not waived by the party entitled to the removal by reason of his appearing and contesting the matter in dispute; Home L. Ins. Co. v. Dunn, 19 Wall. (U. S.) 214, 22 L. Ed. 68; Meyer v. Const. Co., 100 U. S. 457, 25 L. Ed. 593; National Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. He may take an appeal, should the decision be against him, to the highest court of the state, save the question of removal on the record, and failing there, to the supreme court of the United States; Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643. In the event of his obtaining a decision in favor of removal there, the judgment of the state court will be reversed and an order made to transfer the case to the circuit court for trial on the merits; Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524. If a cause be improperly removed and the circuit court entertains jurisdiction improperly, its judgment will be reversed by the supreme court with directions to the circuit court to remand the same to the state court; Knapp v. R. Co., 20 Wall. (U. S.) 117, 22 L. Ed. 328.

The denial by a state court of an application to amend a petition for removal is not a denial of a right secured by the constitution of the United States; Stevens's Adm'r v. Nichols, 157 U. S. 370, 15 Sup. Ct. 640, 39 L. Ed. 736.

When a suit over which a state court has full jurisdiction in equity is removed to a circuit court on the ground of diverse citizenship, and it appears that the courts of the United States have no jurisdiction in equity over such a controversy, the cause should be remanded to the state court, instead of dismissing it for want of jurisdiction; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

A bill in equity to reach partnership property and set aside judgments confessed by fraud, presented a single controversy as to all defendants and could not be removed by one for diversity of citizenship; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; so also of a bill to prevent the payment of county bonds alleged to be invalid where some bondholders were citizens of the same state with the plaintiffs and others who sought to remove of a different state; Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987; so of a bill to recover possession of town bonds where the bailee is a necessary party and a citizen of the same state; Wilson v. Oswego Tp., 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70. One of two corporations sued jointly in a state court for tort, though pleading severally, cannot remove the case on the ground of a separable controversy; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; so of a complaint against a corporation and its agents individually for damages for polluting a stream, and seeking a remedy against them jointly, though they answer separately with separate defences; Plymouth G. Min. Co. v. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232. To remove upon the ground of separable controversy, the case must be capable of separation into two or more independent suits, one of which is wholly between citizens of different states in the sense that it may be fully determined as between them without the presence of the other parties to the record; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; see Merchants' Cotton Press & Storage Co. v. Ins. Co., 151 *id.* 368, 14 Sup. Ct. 367, 38 L. Ed. 195; but separate defences do not create separate controversies within the meaning of the removal act; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269; and a defendant cannot make an action several which plaintiff elects to make joint; Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

The right of removal under the Judicial Code, § 31, formerly R. S. § 641, is authorized only upon petition setting forth infractions of the fourteenth amendment to the constitution previous to the trial and final hearing of the cause, and has no applicability to those occurring after the trial or final hearing has commenced. This section was drawn only with reference to state action, and has no reference to individual violations of rights; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667. The right of removal under R. S. § 641, exists only in the special cases mentioned in it, and in the absence of the denial or inability to enforce in the judicial tribunals of the state the equal civil rights of citizens, does not embrace cases in which a right is denied by judicial action during trial, or in the sentence or mode of its execution; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, where it was held, following Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, that a removal was not authorized by the exclusion of negroes *because of their race* from service on grand juries.

A suit cannot be removed on the ground of prejudice or local influence, unless all the opposing parties are citizens of the state in which suit was brought, which state must also be other than that of which the peti-

tioners are citizens; Cambria Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. 929, 30 L. Ed. 60; or under the act of 1887, where there is no separable controversy, and in such case the petition and affidavit must show facts, not mere conclusions; P. Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92, 19 U. S. App. 300. Whether the controversy is separable will be determined from the allegations of the bill; Graves v. Corbin, 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462; and such case may be removed by the defendant having the separable controversy; Chicago, R. I. & P. Ry. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. But one of several tortfeasors cannot remove on the ground of a separable controversy; Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121.

If the petition is filed by the final hearing it is in time; Schraeder Min. Co. v. Packer, 129 U. S. 688, 9 Sup. Ct. 385, 32 L. Ed. 760. The motion cannot be made *ex parte;* Schwenk & Co. v. Strang, 59 Fed. 209, 8 C. C. A. 92; Lawson v. R. Co., 112 N. C. 396, 17 S. E. 169. The application is too late after a third trial in the state court; Fisk v. Henarie, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; it may be at any time before the first trial; In re Cilley, 58 Fed. 980; Detroit v. Ry. Co., 54 Fed. 7. The matter in dispute in a case removed for prejudice, etc., must exceed the jurisdictional amount; In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Tod v. Ry. Co., 65 Fed. 145, 12 C. C. A. 521, 22 U. S. App. 707; Bierbower v. Miller, 30 Neb. 161; though it was at first a matter of some controversy whether the jurisdictional limit of amount applied to these cases, and there were decisions that it did not; Fales v. Ry. Co., 32 Fed. 673; McDermott v. Ry. Co., 38 Fed. 529, 3 L. R. A. 455; Frishman v. Ins. Co., 41 Fed. 449. In such case the defendant should obtain an order from the federal court for the removal, file that order in the state court, and take from it a transcript which should be filed in the federal court; Pennsylvania Co. v. Bender, 148 U. S. 255, 13 Sup. Ct. 591, 37 L. Ed. 441. All issues of fact upon petition for removal for prejudice or local influence must be tried in the circuit court; Burlington, C. R. & N. Ry. Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159.

In cases under R. S. § 643, the jurisdiction of the state court is taken away only after the petition for removal is filed in the circuit court and a writ of *certiorari* or of *habeas corpus cum causa* issued and served; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

The jurisdiction of the federal court must rest on that of the state court from which it was removed; Zikos v. R. & Nav. Co., 179 Fed. 893; and hence by removal the federal court cannot acquire jurisdiction of a cause of which the state court was without it; R. J. Darnell, Inc., v. R. Co., 190 Fed. 656; as where the action was to enforce rights under the interstate commerce acts, the state court, being without jurisdiction of the subject matter, the federal court could not acquire it by removal; Auracher v. R. Co., 102 Fed. 1; Sheldon v. R. Co., 105 Fed. 785; that the state law requires questions of law and fact involved to be brought into a state court by appeal instead of by process does not affect the right of removal; Terre Haute v. R. Co., 106 Fed. 545.

To be removable the cause must be one of which the federal court might have exercised original jurisdiction; Ex parte Wisner, 203 U. S. 449, 457, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; Canary Oil Co. v. Asphalt & Rubber Co., 182 Fed. 663; Anderson v. Sharp, 189 Fed. 247; Younts v. Tel. & Tel. Co., 192 Fed. 200; Waterman v. Ry. Co., 199 Fed. 667; but though the action was not originally cognizable in the federal courts, controversies therein may arise between the parties which would present grounds for removal; West Virginia v. King, 112 Fed. 369.

Proceedings in a probate court to determine whether the property of a deceased person is separate or community property, cannot be removed to a federal court, though the opposing parties are citizens of different states. The federal courts have no jurisdiction of proceedings for the administration of decedent's estates, either original or by removal; Clark v. Guy, 114 Fed. 783; and see EXECUTORS AND ADMINISTRATORS; and they will not interfere with the custody of the estate of a deceased person by the state probate court in which proceedings are pending for administration; In re Foley, 80 Fed. 949. But a suit for a claim against the estate of a decedent is within its jurisdiction; Amer. Baptist Home Miss. Soc. v. Stewart, 192 Fed. 976, and is removable although the claim was originally filed in the probate court; Schneider v. Eldredge, 125 Fed. 638. A suit before a justice of the peace who, under the state constitution, is clothed with judicial powers, is removable if the other elements of jurisdiction concur; Katz v. Mfg. Co., 150 Fed. 684.

A proceeding by mandamus to compel the register of the transfer of stock may be removed; Washington Imp. Co. v. Ry. Co., Fed. Cas. No. 17,242; but not one on a plea which raises the issue of title to an office; State v. Johnson, 29 La. Ann. 399; nor an action in the nature of *quo warranto* to determine the title to office of presidential electors; State v. Bowen, 8 S. C. 382. Suits by attachment may be removed; Barney v. Bank, 5 Blatchf. 107, Fed. Cas. No. 1,031; ejectment suits; Ex parte Turner, 3 Wall. Jr. 258, Fed. Cas. No. 14,245; a bill in equity to reform an insurance policy; Charter Oak Fire Ins. Co. v. Ins. Co., 6 Blatchf. 208, Fed.

Cas. No. 2,623; a suit to annul a will; Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524; a railway foreclosure suit; Scott v. R. Co., 6 Biss. 529, Fed. Cas. No. 12,527; a condemnation proceeding; Searl v. School Dist. No. 2, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; a suit against a marshal for trespass for goods taken on attachment; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; where the controversy involved the authority of the land department to grant a patent; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; a proceeding to seize and sell a vessel under a mortgage; W. G. Coyle & Co. v. Stern, 193 Fed. 582, 113 C. C. A. 450; a proceeding to condemn a right of way for a railroad; South Dakota Cent. R. Co. v. R. Co., 141 Fed. 578, 73 C. C. A. 176; a suit to compel an executor to assent to a legacy; Camp v. Field, 189 Fed. 285; an appeal to the state court from the decision of the state engineer by one desiring to appropriate water from a stream; Waha-Lewiston Land & Water Co. v. Irr. Co., 158 Fed. 137; a similar appeal from the award of commissioners to award damages for opening streets; Terre Haute v. R. Co., 106 Fed. 545; or a proceeding in a state court to assess such damages; Kirby v. R. Co., 106 Fed. 551; or to condemn private property for a public use; Fishblatt v. Atlantic City, 174 Fed. 196; of a municipality; Kansas City v. Hennegan, 152 Fed. 249; or of a corporation; Helena Power Transmission Co. v. Spratt, 146 Fed. 310; to recover a statutory penalty against a telephone company; Gruetter v. Tel. & Tel. Co., 181 Fed. 248; proceeding in garnishment after judgment; Baker v. Mill Co., 149 Fed. 612. But a proceeding in condemnation is not removable until by appeal to a court it has become a "suit"; Kaw Valley Drainage Dist. of Wyandotte County v. Water Co., 186 Fed. 315, 108 C. C. A. 393; but when exceptions to an award of benefits are filed in the county court which has judicial powers, it is a suit and removable; Drainage Dist. No. 19, Caldwell Co., Mo. v. R. Co., 198 Fed. 253.

Actions against national banks or receivers thereof are removable; Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312; as also suits against or for the acts of United States officers; Woods v. Root, 123 Fed. 402, 59 C. C. A. 206; Bryant Bros. Co. v. Robinson, 149 Fed. 321, 79 C. C. A. 259; but to render such case removable the cause of action must have some connection with official duties; People's U. S. Bank v. Goodwin, 162 Fed. 937; and the mere fact that defendant is a United States officer and claims to have been acting under an act of congress is not alone sufficient; Stanfield v. Water Users' Ass'n, 192 Fed. 596; but a criminal prosecution for an assault committed in repelling an attack upon a posseman is removable under section 33 Judicial Code; Com. of Virginia v. De Hart, 119 Fed. 626.

A suit in equity which appears on the face of the bill to have the effect of obstructing or defeating the enforcement of a judgment of a federal court is removable as involving a federal question; Cornue v. Ingersoll, 176 Fed. 194, 99 C. C. A. 548. But when a proposition, claimed to raise a federal question, has been definitely decided by the supreme court, it ceases to be such within the removal act; Arkansas v. R. Co., 134 Fed. 106. It must appear from the pleadings that the case is one which involves a federal question, where its removal is sought upon that ground; Minnesota v. Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. See FEDERAL QUESTION. A suit to recover a penalty for a violation of the rules of a state railroad commission, being of a criminal nature, is not removable; Arkansas v. R. Co., 173 Fed. 572; nor an action of mandamus, though under a statute damages may be recovered; Mystic Milling Co. v. Ry. Co., 132 Fed. 289; Kelly v. Grand Circle, Women of Woodcraft, 129 Fed. 830; nor a proceeding before a state board of control to determine water rights: In re Silvies River, 199 Fed. 495. An action of tort against several defendants for a conspiracy cannot be removed by a part of them; Ex parte Andrews, 40 Ala. 639.

A foreign attachment on which a suit in equity is brought to establish the claim and enforce the lien is removable on the ground of diversity of citizenship where the requisite facts appear; Craddock v. Fulton, 140 Fed. 426.

A *motion* under a state statute as to corporations, for executions against a stockholder, cannot be removed; Webber v. Humphreys, 5 Dill. 223, Fed. Cas. No. 17,326. Nor can an appeal under a state law from assessment of taxes; Upshur Co. v. Rich, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196; or a writ of *habeas corpus* (under act of 1875); Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

Where the suit is in its nature an equitable proceeding, it must proceed as such in the federal court, and in accordance with the rules governing equity cases in such court without regard to the system in the state court; Neves v. Scott, 13 How. (U. S.) 268, 14 L. Ed. 140; Green v. Custard, 23 How. (U. S.) 484, 16 L. Ed. 471. Where the suit unites legal and equitable questions of relief or defence, a repleader is necessary after removal; Sands v. Smith, 1 Dill. 290, Fed. Cas. No. 12,305; Partridge v. Ins. Co., 15 Wall. (U. S.) 573, 21 L. Ed. 229. The circuit court may issue a *certiorari* to bring in the record from the state courts. This was provided by the act of 1875 (18 Stat. L. 470) and not repealed by the act of 1887; but a *certiorari* is not an essential part of the pro-

ceeding and need only be resorted to if necessary to procure the record; Scott v. R. Co., 6 Biss. 529, Fed. Cas. No. 12,527. The circuit court may enjoin further proceedings in the state court: Abeel v. Culberson, 56 Fed. 329; French v. Hay, 22 Wall. (U. S.) 250 note, 22 L. Ed. 857, where it was held that the prohibition against injunctions by federal courts touching proceedings in the state courts has no application to such cases.

See Dillon, Removal of Causes (Black's ed.); UNITED STATES COURTS.

REMOVE. To move away from the position occupied; to displace. South v. Com'rs of Sinking Fund, 86 Ky. 190, 5 S. W. 567. To change place in any manner; to go from one place to another. First Soc. of Waterbury v. Platt, 12 Conn. 186.

REMOVER. *In Practice.* A transfer of a suit or cause out of one court into another, which is effected by writ of error, *certiorari*, and the like. 11 Co. 41.

REMUNERATION. Reward; recompense; salary. Dig. 17. 1. 7. See 1 Q. B. Div. 663.

RENDER. To yield; to return; to give again: it is the reverse of *prender*. See Ætna Life Ins. Co. v. Hesser, 77 Ia. 387, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297.

A judgment is "rendered" when the court makes an order therefor; State v. Biesman, 12 Mont. 11, 29 Pac. 534.

RENDEZVOUS. A place appointed for meeting. Especially used of places appointed for the meeting of ships and their convoy, and for the meeting of soldiers.

RENDITION. See FUGITIVE FROM JUSTICE; EXTRADITION.

RENEGADE. One who has changed his profession of faith or opinion. Whart.

RENEW. To make again; as, to renew a treaty or a covenant. Daggett v. Daggett, 124 Mass. 151.

RENEWAL. A change of something old for something new; as, the renewal of a note; the renewal of a lease. See NOVATION.

RENOUNCE. To give up a right; for example, an executor may renounce the right of administering the estate of the testator; a widow, the right to administer to her intestate husband's estate.

RENOUNCING PROBATE. Giving up the right to be executor of a will, wherein he has been appointed to that office, by refusing to take out probate of such will. 1 Will. Exec. 230, 231. It is usually done by writing filed in the probate office.

RENOVANT. Renewing. Cowell.

RENT (Lat. *reditus*, a return). A return or compensation for the possession of some corporeal inheritance. A certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use.

The compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. Jacks. & Gross, Landl. & T. § 38; Woodf. Landl. & T. 375.

It has been held that a rent may issue out of lands and tenements corporeal, *and also*, out of them and their furniture, in this case a dairy farm with its stock and utensils; Appeal of Vetter, 99 Pa. 52. See, as to furnished lodgings, 5 B. & P. 224; 5 Co. 16 *b*.

Some of its common-law properties are that it must be a profit to the proprietor, certain in its character, or capable of being reduced to a certainty, issuing yearly, that is, periodically, out of the thing granted, and not be part of the land or thing itself; Co. Litt. 47; 2 Bla. Com. 41.

At common law there were three species of rent: rent *service*, where the tenant held his land by fealty, homage, or other corporal service and a certain rent to which the right of distress was necessarily incident; 3 Kent *461; Kenege v. Elliot, 9 Watts (Pa.) 258; rent *charge*, which was a reservation of rent, with a clause authorizing its collection by distress; and rent *seek*, where there was no such clause, but the rent could only be collected by an ordinary action at law as by a writ of annuity or writ of assize. These distinctions, however, for all practical purposes, have become obsolete, in consequence of various statutes both in England and in this country, allowing every kind of rent to be distrained for without distinction. See Tayl. Landl. & T. § 370; FEUDAL LAW.

The payment of rent is incident to every tenancy where the relation of landlord and tenant subsists, except as to mere tenancies at will or by sufferance, where this relation cannot be said to exist. And no tenant can resist a demand for rent unless he shows that he has been evicted or become otherwise entitled to quit the premises, and has actually done so, before the rent in question became due. By the strictness of the common law, when a tenant has once made an agreement to pay rent, nothing will excuse him from continuing to pay, although the premises should be reduced to a ruinous condition by some unavoidable accident of fire, flood, or tempest; Fowler v. Bott, 6 Mass. 63; Bussman v. Ganster, 72 Pa. 285; Cowell v. Lumley, 39 Cal. 151, 2 Am. Rep. 430; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Cook v. Anderson, 85 Ala. 99, 4 South. 713; Nonotuck Silk Co. v. Shay, 37 Ill. App. 542.

But this severity of the ancient law has been somewhat abated in this country, and in this respect conforms to the more reasonable provisions of the Code Napoléon, art. 1722, which declares that if the thing hired is destroyed by fortuitous events, during the

continuance of the lease, the contract of hiring is rescinded, but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the rent or a rescission of the contract itself. The same provision is to be found substantially in the Code of Louisiana, art. 2667, and in the act of the legislature of New York of 1860, c. 345, § 1. A somewhat similar provision is found in the laws of Minnesota; Laws 1883, c. 100; Roach v. Peterson, 47 Minn. 291, 50 N. W. 80. In South Carolina and Pennsylvania it was decided that a tenant who had been dispossessed by a public enemy ought not to pay rent for the time the possession was withheld from him; and in Maryland it has been held that where a hurricane rendered a house untenantable it was a good defence to an action for rent. But these cases are evidently exceptions to the general rule of law above stated; Bayly v. Lawrence, 1 Bay (S. C.) 499; Fairman v. Fluck, 5 Watts (Pa.) 517. A tenant is not compelled to keep and pay rent for a house which, from defects in its construction, becomes untenantable and unfit for habitation; Leonard v. Armstrong, 73 Mich. 577, 41 N. W. 695. Where land has been swept away or gained upon by the sea, the lessee is no longer liable for rent; Bac. Abr. 63; Rolle, Abr. 236.

The right of the lessor to terminate a lease for non-payment of rent will not give the lessee any right to avoid the lease or his liability for agreed rent; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215.

The quiet enjoyment of the premises, unmolested by the landlord, is an implied condition to the payment of rent. If, therefore, he ousts the tenant from any considerable portion of the premises, or erects a nuisance of any description upon or so near to them as to oblige the tenant to remove, or if the possession of the land should be recovered by a third person, by a title superior to that of the landlord, the dispossession in either case amounts to an eviction, and discharges the obligation to pay rent; Gilhooley v. Washington, 4 N. Y. 217; 1 M. & W. 747; Hoeveler v. Fleming, 91 Pa. 322; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Scott v. Simons, 54 N. H. 426; O'Neill v. Manget, 44 Mo. App. 279; Richmond v. Cake, 1 App. D. C. 447. By retaining possession of premises in spite of such acts of his landlord as would otherwise amount to an eviction, a tenant waives his right to withold the rent; De Witt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent, and not to his entire exclusion; Heller v. Ins. Co., 151 Pa. 101, 25 Atl. 83.

A tenant's liability for rent is not affected by condemnation of part of the leased premises; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; but where the estate of both landlord and tenant in the entire premises is extinguished by condemnation, the obligation to pay rent ceases; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212.

As rent issues out of the land, it is said to be incident to the reversion, and the right to demand it necessarily attaches itself to the ownership, and follows a transfer of the premises, and the several parts thereof, without the consent of the occupant. Every occupant is chargeable with rent by virtue of his occupation, whether he be the tenant or an assignee of the tenant. The original tenant cannot avoid his liability by transferring his lease to another, but his assignee is only liable so long as he remains in possession, and may discharge himself by the simple act of assigning over to some one else; Walton v. Cronly's Adm'r, 14 Wend. (N. Y.) 63; Farmers' Bank v. Assur. Soc., 4 Leigh (Va.) 69; Streaper v. Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; 11 Ad. & E. 403; Co. Litt. 46 *b*. When rent will be apportioned, see APPORTIONMENT; LANDLORD AND TENANT.

The day of payment depends, in the first instance, upon the contract; if this is silent in that respect, rent is payable quarterly or half-yearly, according to the custom of the country; but if there be no usage governing the case, it is not due until the end of the term. Formerly it was payable before sunset of the day whereon it was to be paid, on the reasonable ground that sufficient light should remain to enable the parties to count the money; but now it is not considered due until midnight or the last minute of the natural day on which it is made payable; Paul's Ex'rs v. Paul, 36 Pa. 272. This rule, however, may be varied by the custom of different places; Co. Litt. 202 *a;* Smith v. Shepard, 15 Pick. (Mass.) 147, 25 Am. Dec. 432. Under a lease requiring rent to be paid annually on a certain day for a year in advance, a tenant continuing in possession three months after that day is liable for the year's rent; Congregational Soc. v. Rix (Vt.) 17 Atl. 719. See FORFEITURE; RE-ENTRY; PAYMENT.

Interest accrues on rent from the time it is due, but cannot be included in a distress; Gaskins v. Gaskins, 17 S. & R. (Pa.) 390.

When rent is payable in money, it must strictly be paid in legal-tender money; with respect to foreign coin, the lessor may decline to receive it except by its true weight and value. Bank-notes constitute part of the currency of the country, and ordinarily pass as money, and are a good tender, unless specially objected to by the creditor at the time of the offer; Bank of U. S. v. Bank, 10 Wheat. (U. S.) 347, 6 L. Ed. 334. Payment may be made in commodities, when so reserved. If the contract specifies a place of payment, a tender of rent, whether in money or in kind, must be made at that

place; but, if no place is specified, a tender of either on the land will be sufficient to prevent a forfeiture; 16 Term 222; Livingston v. Miller, 11 N. Y. 80.

Under an income-tax statute, rent is to be treated as identical with land; Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. An assignment of rent must be in writing under the statute of frauds; King v. Kaiser, 3 Misc. Rep. 523, 23 N. Y. Supp. 21.

See DISTRESS; RE-ENTRY; GROUND-RENT; REPLEVIN; PAYMENT.

RENT CHARGE. A rent reserved with a power of enforcing its payment by distress. See RENT.

RENT ROLL. A list of rents payable to a particular person or public body. See RENT.

RENT SECK. A rent collectable only by action at law in case of non-payment. See RENT.

RENT SERVICE. A rent embracing some corporal service attendant upon the tenure of the land. Distress was necessarily incident to such a rent. See RENT; GROUND-RENT; FEUDAL SYSTEM.

RENTAL. A roll or list of the rents of an estate, containing the description of the lands let, the names of the tenants, and other particulars connected with such estate. This is the same as *rent roll*, from which it is said to be corrupted.

It is commonly used as synonymous with rent.

RENTE. In French Law. A word nearly synonymous with our word annuity. *Rentes:* Public funds.

RENTE FONCIÈRE. In French Law. A rent which issues out of land; and it is of its essence that it be perpetual, for if it be made but for a limited time it is a lease. It may, however, be extinguished. La. Civ. Code, art. 2750, 2759; Pothier. See GROUND-RENT.

RENTE VIAGÈRE. In French Law. An annuity. La. Civ. Code, art. 2764; Pothier, *Rente*, n. 215.

RENTS, ISSUES, AND PROFITS. The profits arising from property generally. This phrase in the Vermont statute has been held not to cover "yearly profits." Bruce v. Thompson, 26 Vt. 741.

RENTS OF ASSIZE. The certain and determined rents of the freeholders and ancient copyholders of manors. Brown.

RENUNCIATION. The act of giving up a right.

It is a rule of law that any one may renounce a right which the law has established in his favor. To this maxim there are many limitations. A party may always renounce an acquired right; as, for example, to take lands by descent; but one cannot always give up a future right before it has accrued, nor the benefit conferred by law, although such advantage may be introduced only for the benefit of individuals. The right to administer upon an intestate estate may be renounced.

For example, the power of making a will, the right of annulling a future contract on the ground of fraud, and the right of pleading the act of limitations cannot be renounced. The first, because the party must be left free to make a will or not; and the latter two, because the right has not yet accrued.

This term is usually employed to signify the abdication or giving up of one's country at the time of choosing another. The act of congress requires from a foreigner who applies to become naturalized a renunciation of all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof such alien may at the time be a citizen or subject. See CITIZEN; EXPATRIATION; NATURALIZATION.

RENVOI. The act of a state in summarily reconducting foreign vagabonds, criminals, etc., to the frontiers of their own state. The act is justified by the fundamental right of a state to protect itself against undesirable immigrants from other countries. Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. It differs from deportation or expulsion in that the latter consists of an order to leave subject to penalties, whereas *renvoi* is a forcible conducting of individuals out of the country. I Opp. § 326.

While a state has, by virtue of its independence and territorial sovereignty, a right to exclude aliens and to conduct them out of the country when they are found upon its soil, the right must not be exercised arbitrarily and without grounds, in such a way as to constitute a discrimination against the citizens of a particular nation apart from any moral or physical disqualifications on their part. Bouvé, Exclusion and Expulsion of Aliens in the United States, 3–21.

See DEPORTATION.

REOPENING A CASE. A court of equity, in the exercise of a sound discretion, has full power to reopen a case, and allow the correction of mistakes in testimony. To reopen a case is to permit the introduction of new evidence and, practically, try it anew; to rehear a case is to hear it again upon the same proofs and allegations. Such applications are not favored, however, and, when granted, must be based upon strong circumstances to justify a deviation from the general rule; Adams, Eq. 372; Coburn v. Schroeder, 11 Fed. 425; Schneider v. Thill, 3 Fed. 95. An application to reopen a case and take further proofs has been granted on condition that the moving party pay his opponent's counsel fee for the previous argument, where the new testimony appeared to be newly discovered, material, and not cumulative, and there was no great laches; Hake v. Brown, 44 Fed.

283. But an application to reopen and admit a newly discovered defence, after final hearing, will only be granted when it appears that such defence, if made at the final hearing, would have been effectual; Adair v. Thayer, 7 Fed. 920.

Reopening patent cases is to be discouraged when the grounds offered therefor pertain to matters of evidence which could as well have been produced at the hearing; Hicks v. Ferdinand, 20 Fed. 111.

See BILL OF REVIEW; REHEARING; NEW TRIAL.

REORGANIZATION. A term in common use to denote the carrying out, by proper agreements and legal proceedings, of a business plan for winding up the affairs of, or foreclosing a mortgage or mortgages upon the property of, insolvent corporations, more frequently railroad companies. It is usually by the judicial sale of the corporate property and franchises, and the formation by the purchasers of a new corporation, in which the property and franchises are thereupon vested, and the stock and bonds of which are divided among such of the parties interested in the old company as are parties to the reorganization plan.

In most of the states, statutes have been passed to regulate the purchase of corporate properties and franchises at judicial sales. They usually provide that the purchasers shall be, or become, or may organize, a new corporation in taking over the assets and franchises purchased, and have and enjoy the corporate rights and franchises of the former company.

Usually some of the security holders name a committee who formulate a plan of reorganization providing for the deposit of securities with the committee as agents or trustees for the owners; for the purchase of the property at the sale; and the organization of a new company upon the basis of a specified scheme of distribution of the new securities among those who assent to the plan. The securities are generally deposited with the committee with very full powers of control, under the plan, and usually with a certain power of modification of the plan under specified circumstances. When the new company has been formed, the new securities are issued to the assenting parties in accordance with the terms of the plan.

Where a reorganization is the only feasible method of protecting the relative rights of all parties interested in a large enterprise, and it can be done only by co-operation, courts of equity, in the absence of fraud or oppression, are disposed to aid rather than to thwart such schemes of reorganization; Central Trust Co. of New York v. Rolling Stock Co., 56 Fed. 7. They are to be promoted, because they are necessary to prevent great sacrifice and loss; Robinson v. R. Co., 28 Fed. 340.

The creditors of a mortgagor railroad company may fairly combine to purchase the property at a mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale; Kropholler v. Ry. Co., 2 Fed. 302. Courts will endeavor to carry into effect a fair plan of reorganization and will overlook merely technical defects in it; 11 Ch. D. 605. Such an agreement is not a fraud on non-assenting creditors and does not entitle them to claim their debts against the new company; Appeal of Pennsylvania Transportation Co., 101 Pa. 576.

Where a railroad company has issued several series of mortgage bonds, some covering all the property and some only a part, and become insolvent, and the principal of some of the mortgages was due and the company had a large floating debt, it was held that a decree foreclosing all the mortgages, entered by consent of the bondholders, would not be set aside on the petition of some of the stockholders on the ground that some of the mortgages were not yet due, as it was in the interest of the company to effect a reorganization which would secure and extend its bonded debt and reduce the rate of interest thereon and provide the necessary means to satisfy the floating debt; Carey v. Ry. Co., 45 Fed. 438.

Reorganization agreements must be carried out according to their terms. If they are not, the subscribers to them are not bound; Miller v. R. Co., 40 Vt. 399, 94 Am. Dec. 413; and the assenting security holders must also comply strictly with the agreement to which they have assented; Short, Ry. Bonds 857.

Where there was a compromise in which stockholders of a company were given the right to subscribe for stock in the reorganized company, upon terms specified in a circular addressed to the old stockholders, it was held, on proceedings by a stockholder who averred want of notice of the circular, that he had no right of action against the company, because the agreement was not made by the company or on its behalf, and that he could not complain of the terms of the agreement, as he was not a party to it; Thornton v. Ry. Co., 81 N. Y. 462. A reorganization committee is not a trustee for non-assenting bondholders; Bound v. R. Co., 78 Fed. 49, 23 C. C. A. 636.

Creditors who do not assent to a reorganization agreement are entitled to enforce payment of the purchase price paid at a foreclosure sale by the reorganization committee, for the purpose of discharging their claims. Creditors coming in under the plan thereby release their rights against the old company; First Nat. Bank of Chattanooga, Tenn., v. Trust Co., 80 Fed. 569, 26 C. C. A. 1.

Where a reorganization agreement provided that if stockholders neglected to pay the assessments within the period limited, the

privilege of receiving the shares allotted to them should be ratably distributed among those who did pay their assessments, it was held that as soon as the default occurred on the part of a non-assenting stockholder, his interest became a vested right in the assenting stockholders under the plan. Likewise that an assenting bondholder who fails to deliver his bonds to the trustee under the agreement is debarred from any benefit therein; Carpenter v. Catlin, 44 Barb. (N. Y.) 75.

In an action against a reorganized railroad company for failure to deliver its stock in amount equal to the bonds and coupons of the old company held by the plaintiff, it was held that as the plaintiff had not exercised his option to come into the plan prior to the execution of the deed of the property to the new company, he was not entitled to the stock, and his only right was to take his share of the proceeds of the sale; Landis v. R. Co., 133 Pa. 579, 19 Atl. 556. The right to participate ceases when the property has passed to the new corporation; the rights of the security holders thereby become fixed, and a majority of certificate holders cannot then modify them; Dutenhofer v. Ry. Co., 60 Hun, 578, 14 N. Y. Supp. 558.

Where a statute required the consent of bondholders for foreclosure proceedings of a railroad property and such consent was given, it was held that outstanding bondholders would be regarded as consenting by reason of their silence during a protracted litigation; Barnes v. Ry., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

A majority of bondholders cannot compel a minority, however small, to enter into a joint agreement with them; Canada Southern R. Co. v. Gebhard, 109 U. S. 535, 3 Sup. Ct. 363, 27 L. Ed. 1020; nor will equity, at the suit of the corporation, compel minority bondholders to accept new bonds for a smaller amount, without additional security, in aid of stockholders; Lake St. El. R. Co. v. Ziegler, 99 Fed. 114, 39 C. C. A. 431; but it is said that the relations of corporate bondholders are peculiar, and that the courts, in foreclosure proceedings, have sometimes considered them as analogous to those which exist among stockholders; Short, Ry. Bonds, § 27; and that this is especially true in carrying out reorganization schemes; *id.* See Shaw v. R. Co., 100 U. S. 605, 25 L. Ed. 757. An act for the reorganization of an embarrassed corporation which provides that all mortgage bondholders who do not, within a given time, expressly dissent from the plan of reorganization, shall be deemed to have assented to it, is valid; Gilfillan v. Canal Co. of Pennsylvania, 109 U. S. 401, 3 Sup. Ct. 304, 27 L. Ed. 977; and so is an act which provides that a majority of the bondholders, with equal opportunities to all, may reorganize a new corporation; Gates v. R. Co., 53 Conn. 333, 5 Atl. 695. The theory is that railroad property is pledged to public use and that this consideration is superior to the property rights of corporators, stockholders, and bondholders See Canada Southern R. Co. v. Gebhard, 109 U. S. 535, 3 Sup. Ct. 363, 27 L. Ed. 1020. It seems to be eminently proper that, when the legislative power exists, some statutory provision should be made for binding the minority in a reasonable way by the will of the majority, and unless laws impairing the obligations of contracts are forbidden, there seems no reason that such provision should not be made as to existing obligations. In respect of embarrassed corporations, it would be a species of bankrupt act; Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (concerning a Canadian railroad). But in Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, it was held that reorganization contracts between bondholders and stockholders of a company financially embarrassed, involving the transfer of the property to a new corporation, cannot, even where made in good faith, defeat the claim of non-assenting creditors; nor is there any difference whether the reorganization was made by contract or private sale or consummated by a master's deed under a consent decree or even in the absence of fraud; any device, whether by private contract or under judicial sale whereby stockholders are preferred to creditors, is invalid; Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931. Lurton, J., dissented upon the ground that any plan of reorganization which in any way includes stockholders of the reorganized company is not for that reason alone to be regarded as illegal, but that every case should stand upon its own facts. White, C. J., and Holmes and Van Devanter, JJ., concurred in the dissent.

Where a corporation mortgage vests certain powers of control in a majority of the bondholders, as to sanction a modification of a deed of trust; 55 L. T. N. S. 347; Hackettstown Nat. Bank v. Brewing Co., 74 Fed. 110, 20 C. C. A. 327; [1893] 1 Ch. 477, 484; to direct the trustee to purchase the mortgaged property at a foreclosure sale and to reorganize a new company; Sage v. R. Co., 99 U. S. 334, 25 L. Ed. 394; or to control the mortgagee trustee in beginning or discontinuing foreclosure proceedings; Elwell v. Fosdick, 134 U. S. 500, 10 Sup. Ct. 598, 33 L. Ed. 998; the courts will carry into effect the decision of such majority.

In Sahlgaard v. Kennedy, 13 Fed. 242, Treat, J., criticized the decree of foreclosure then before the court, for the omission of what he considered the *usual* clause in foreclosure decrees, viz., one permitting the minority bondholders to come in, after purchase, within a limited time, on equal terms with purchasing bondholders.

A sale under foreclosure of an insolvent railroad company under an agreement by

which the bondholders, according to their priorities, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds (16 per cent. of the par of their stock), was held fraudulent as against general creditors, although the road was mortgaged far above its value; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117; and the unsecured creditors could hold the new company; Central of Georgia Ry. Co. v. Paul, 93 Fed. 878; St. Louis Trust Co. v. Ry. Co., 191 Fed. 632; *contra*, Carlisle v. Trust Co., 109 Fed. 177, 48 C. C. A. 275.

But where the plan gives stockholders an interest but does not include general creditors, it is not invalid unless the scheme is to give the stockholders that which should go to creditors; Paton v. R. Co., 85 Fed. 838. Such plan will be subjected to close scrutiny, if there are old creditors unprovided for; but the mere fact that stockholders are given some interest in the new security, while it may be indicative of fraud, does not render the sale fraudulent; actual fraud must be shown, and that property exceeding the mortgage debt had been placed beyond the creditors' reach; Wenger v. R. Co., 114 Fed. 34, 51 C. C. A. 660; and where a bondholders' plan permitted stockholders to take new stock, on the payment of a difference, it was not, for that reason, fraudulent if it deprive the creditors of no right; Farmers' L. & T. Co. v. R. Co., 103 Fed. 110.

The holders of preferred stock may not use it to make up the amount of their bid on foreclosure sale of the property; Continental Trust Co. v. R. Co., 86 Fed. 930.

Where the local managers and officers of an insolvent railroad company, holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale and proceeded in a hasty and rather secret way to sell and buy it in at the lowest value for themselves, the proceedings were held invalid as against the bondholders, generally, and the stockholders; Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. Ed. 492.

In England, if some of the majority of bondholders are not acting in good faith, a reorganization agreement will not be sanctioned; 44 Ch. Div. 403. Secured creditors of a railroad company, after bringing the property within the jurisdiction of the court, will not be permitted, by any private arrangement with the company or otherwise, so to dispose of the property as seriously and unnecessarily to prejudice the unsecured creditors. They may not, for their own benefit or for the common interest of themselves and the debtor, place the surplus which may exist after the satisfaction of their own claims beyond the reach of the latter; Farmers' L. & T. Co. v. R. Co., 21 Fed. 264.

On proceedings by an unsecured creditor praying that the stock of a reorganized company, set aside in the reorganization agreement for the stockholders of the old company, should be sold and the proceeds paid to the holders of the floating debt, it appearing that the plan showed a due regard for the interests of all classes of creditors and stockholders, and that the bill did not show any injustice intended or done to the complainant, the bill was dismissed; Hancock v. R. Co., 9 Fed. 738.

Bondholders who decline, on request, to assent, and take no steps to protect themselves, have no standing in equity to set aside a foreclosure sale, if the transaction was fair; Wetmore v. R. Co., 3 Fed. 177. An unsecured creditor may be barred by laches from going against the new company; Wenger v. R. Co., 105 Fed. 796.

A bill praying that a reorganization of a railroad company be set aside and a new plan formulated, and for a receiver, was dismissed, it appearing that the plaintiff had her representative on the new board and had attempted to buy more of the new issue of bonds, although it was alleged that the new company was illegally organized, which fact was, however, known to the plaintiff; Matthews v. Murchison, 15 Fed. 691.

Where a reorganization of an English mining company, whose property was all in the United States, was carried on in England by the voluntary act of the English stockholders and not by the British courts, and was found to have been in flagrant violation and disregard of the rights of the American stockholders, it was held that no principle of international comity required that it should be sustained; Brown v. Silver Mines, 55 Fed. 7.

In Memphis & L. R. R. Co. v. R. Com'rs, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837, it was held that a mortgage on a charter of a corporation made in the exercise of a power given by a statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation; if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to the laws existing at the time of the reorganization. The court said: "The real transaction, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers."

In Pennsylvania, under the act of April, 1861, the sale of a railroad creates the purchaser a body corporate, with all the rights, etc., of the old corporation. Irregularities in the organization are not necessarily fatal to the being of the new corporation, and will, at the most, enable the commonwealth to retake the franchise. It cannot be said that the franchises do not exist; Com. v. Ry., 52 Pa. 506.

Where foreclosure was brought on a railroad mortgage containing the usual clause that the trustee on request of a majority of

the bondholders should bid at the sale, and reorganize on their account, it was held that the agreement enured equally for the benefit of the bondholders, and that each held his interest subject to the controlling power given to the majority; that, upon proper request from the bondholders, the court might direct the trustee to bid at the sale the amount of the principal and interest due on the first mortgage bonds and to proceed to execute the trust; Sage v. R. Co., 99 U. S. 334, 25 L. Ed. 394.

The pendency of a reorganization plan for the preservation of an entire railroad system may sometimes be reason for refusing temporarily an application on the part of the trustees of a divisional mortgage to be put in possession of the property covered by the mortgage to them; Short, Ry. Bonds 854.

In reorganization proceedings it is not necessary that notice of the terms of the plan nor of the legal proceedings be given to the stockholders in order to bar their rights if they do not assent; In re Eureka Basin W. & Mfg. Co., 96 N. Y. 49.

A reorganized corporation, to whom a receiver had turned over the assets of the insolvent company, succeeds to the rights of its predecessor including the claimed right to reform a deed; Williams v. American Ass'n, 197 Fed. 500, 118 C. C. A. 1.

See MERGER; MORTGAGE; NEWSPAPER; RAILROAD; RECEIVER; LEASE; VOTING TRUST.

REPAIRS. That work which is done to property to keep it in good order.

To restore to a sound state after decay, injury, dilapidation, or partial injury; State v. R. Co., 85 Mo. 263, 55 Am. Rep. 361; to be synonymous with "make and keep up"; 23 Ind. 281; and sometimes to mean *replace;* Beach v. Crain, 2 N. Y. 93, 49 Am. Dec. 369.

Tenantable repairs. Decorative repair is not included. Papering always, and painting, unless intended for the protection of the property, are decorative repairs. The obligation does not extend to repairing or restoring what is worn out by age, but voluntary waste is a breach of the obligation; 59 L. J. Q. B. 129.

What a party is bound to do, when the law imposes upon him the duty to make necessary repairs, does not appear to be very accurately defined. Natural and unavoidable decay in the buildings must always be allowed for, when there is no express covenant to the contrary; and it seems the lessee will satisfy the obligation the law imposes on him by delivering the premises at the expiration of his tenancy in a habitable state. Questions in relation to repairs most frequently arise between landlord and tenant.

In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the premises at the date of the demise; and if the premises through their own inherent defects fall in the course of the tenancy into a particular condition, the result of their being in that condition are not breaches of a covenant to repair, however wide that covenant may be; [1893] 2 Q. B. 212.

When there is no express agreement between the parties, the tenant is always required to do the necessary repairs; Woodf. Landl. & T. 244; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440. He is, therefore, bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises; but he is not required to put a new roof on an old worn-out house; 2 Esp. 590. The landlord is under no implied obligation to make ordinary repairs; Medary v. Cathers, 161 Pa. 87, 28 Atl. 1012.

An express covenant on the part of the lessee to keep a house in repair, and leave it in as good a plight as it was when the lease was made, does not bind him to repair the ordinary and natural decay; Woodf. Landl. & T. 256. See Kramer v. Cook, 7 Gray (Mass.) 550. And it has been held that such a covenant does not bind him to rebuild a house which had been destroyed by a public enemy; Pollard v. Shaaffer, 1 Dall. (Pa.) 210, 1 L. Ed. 104, 1 Am. Dec. 239; but where in a lease there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, though the premises be destroyed by fire or accident; Hoy v. Holt, 91 Pa. 88, 36 Am. Rep. 659; Dermott v. Jones, 2 Wall. (U. S.) 1, 17 L. Ed. 762; McIntosh v. Lown, 49 Barb. (N. Y.) 554.

Repair means to restore to its former condition, not to change either the form or material of a building; Ardesco Oil Co. v. Richardson, 63 Pa. 162. When a landlord covenants to repair, he is bound only to restore to a sound state either what has become decayed or dilapidated, or better, what has been partially destroyed; his covenant does not extend to improvements, nor to new buildings erected by the tenant; Cornell v. Vanartsdalen, 4 Pa. 364. See 1 Dy. 33 *a*.

In order to entitle a tenant to recover from his landlord for repairs made by the tenant upon the premises, he must show a contract with the landlord, express or implied, to pay for them; Powell v. Beckley, 38 Neb. 157, 56 N. W. 974.

As to the time when the repairs are to be made, it would seem reasonable that when the lessor is bound to make them he should have the right to enter and make them, when a delay until after the expiration of the lease would be injurious to the estate; but when no such damage exists, the landlord should have no right to enter without the consent of the tenant. See 18 Toullier, n. 297. A general covenant by a lessor to repair is construed to mean within a reasonable time after notice; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260. When a house has been destroyed

by accidental fire, neither the tenant nor the landlord is bound to rebuild, unless obliged by some agreement so to do; Gates v. Green, 4 Paige (N. Y.) 355, 27 Am. Dec. 68; 1 Term 708. See LANDLORD AND TENANT; RENT; 4 Camp. 275; Co. Litt. 27 *a;* Fowler v. Bott, 6 Mass. 63; 1 Saund. 322; 2 *id.* 158 *b.*

REPARATION. The redress of an injury; amends for a tort inflicted. See REMEDY.

REPARATIONE FACIENDA, WRIT DE (Lat.). The name of an ancient writ which lies by one or more joint tenants against the other joint tenants, or by a person owning a house or building against the owner of the adjoining building, to compel the reparation of such joint property. Fitzherbert, Nat. Brev. 295.

REPATRIATION. The regaining nationality after expatriation.

REPAY. Repay does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; Grant v. Dabney, 19 Kan. 390.

REPEAL. The abrogation or destruction of a law by a legislative act.

A repeal is *express*, as, when it is literally declared by a subsequent law, or *implied*, when the new law contains provisions contrary to or irreconcilable with those of the former law.

The power to revoke or annul a statute or ordinance is equivalent to the power to repeal it; and in either case the power is legislative and not judicial in its character; Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635.

A statute is not to be deemed repealed merely by the enactment of another statute on the same subject. There must be a positive repugnancy between the provisions of the new law and the old, to work a repeal by implication; and even then the old law is repealed only to the extent of such repugnancy; Mersereau v. Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832. This rule is supported in a vast variety of cases.

A law may be repealed by implication, by an affirmative as well as by a negative statute, if the substance is inconsistent with the old statute; Moore's Lessee v. Vance, 1 Ohio, 10; Adams v. Ashby, 2 Bibb (Ky.) 96; West v. Pine, 4 Wash. C. C. 691, Fed. Cas. No. 17,423; and a repeal by implication has been effected even where two inconsistent enactments have been passed in the same session; 2 B. & Ald. 818; or where two parts of the same act have proved repugnant to each other; 4 C. P. Div. 29; but this will be presumed only in extreme cases; 13 C. B. 461. A repeal by implication is not favored; the leaning of the courts is against such repeal, if it be possible to reconcile the two acts; Cook Co. v. Gilbert, 146 Ill. 268, 33 N. E. 761; People v. Gustin, 57 Mich. 407, 24 N. W. 156; Cerf v. Reichert, 73 Cal. 360, 15 Pac. 10; Chamberlain v. State, 50 Ark. 132, 6 S. W. 524; Texas & P. R. Co. v. Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; [1892] 1 Q. B. 654; and a general law is not to be held as repealing a prior special law unless it clearly manifests such intention; State v. Frazier, 98 Mo. 426, 11 S. W. 973; Adams Exp. Co. v. Owensboro, 85 Ky. 265, 3 S. W. 370; Cook Co. v. Gilbert, 146 Ill. 268, 33 N. E. 761; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190, 12 U. S. App. 574. General legislation must give way to special legislation on the same subject; *id.* 267. But where the constitution directs the legislature to pass general legislation, and a law is passed, which is complete and does evidently intend to provide a uniform system, no words of repeal are necessary; Chalfant v. Edwards, 176 Pa. 67, 34 Atl. 922.

The later of two clearly inconsistent and repugnant acts must prevail; Lyddy v. Long Island City, 104 N. Y. 218, 10 N. E. 155; State v. Howe, 28 Neb. 618, 44 N. W. 874; and is an implied repeal of the earlier; 29 Ch. D. 15; but not unless their provisions are clearly inconsistent; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190, 12 U. S. App. 574; and where they can be read together without repugnancy, both should stand; Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; and the burden is on the one who asserts that there is an implied repeal; 29 Ch. D. 15.

An earlier statute is repealed by a subsequent one only in those particulars wherein it is clearly inconsistent and irreconcilable with the later enactment. The leaning of all courts is against repealing the positive provisions of former statutes by construction, unless there be such a manifest and total repugnance between the two enactments that they cannot both stand. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject: there must be a conflict between different acts on the same specific subject; Com. v. De Camp, 177 Pa. 112, 35 Atl. 601. Where the repealing act is unconstitutional and void, it will not work a repeal; Devoy v. N. Y., 35 Barb. (N. Y.) 264; State v. Thomas, 138 Mo. 95, 39 S. W. 481; Cooley, Const. Lim. 186; Campau v. Detroit, 14 Mich. 276; *contra*, Meshmeier v. State, 11 Ind. 489; and where part of an act was unconstitutional, but the repeal in part was valid, and they were separable, it worked a repeal; Equitable Guarantee & Trust Co. v. Donahoe, 3 Pennewill (Del.) 191, 49 Atl. 372.

Special legislation is not necessarily repealed by subsequent general legislation without words of repeal; McKenna v. Edmundstone, 91 N. Y. 231; Com. v. Macferron, 152 Pa. 244, 25 Atl. 556, 19 L. R. A. 568; Cook County v. Gilbert, 146 Ill. 268, 33 N. E. 761; L. R. 10 A. C. 68. To have that effect there must be express reference or necessary impli-

cation; 2 J. & H. 53; 10 App. Cas. 68; there may be a repeal without express words; Hudson v. Ely, 36 Okl. 576, 129 Pac. 11.

Where a statute amends a former statute "so as to read as follows" and restates it at length the prior act is not repealed and reenacted but is continued; Com. v. Kenneson, 143 Mass. 418, 9 N. E. 761; inconsistent provisions in the former, omitted in the later, act are repealed; In re Estate of Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713.

Where there is a general revision of statutes, clearly intended to be complete, it repeals prior legislation, though not repugnant and though the revision contains no words of repeal; Com. v. Mason, 82 Ky. 256; Stead v. Curtis, 191 Fed. 529, 112 C. C. A. 463; Pingree v. Snell, 42 Me. 53; Wakefield v. Phelps, 37 N. H. 295; Illinois & Mich. Canal v. Chicago, 14 Ill. 334; but only where the intent to repeal plainly appears; Clark v. Powell, 62 Vt. 442, 20 Atl. 597.

A new Constitution repeals all acts inconsistent therewith; Mannie v. Hatfield, 22 S. D. 475, 118 N. W. 817.

A statute purporting to cover an entire subject repeals all former statutes on the same subject, either with or without a repealing clause and notwithstanding it may omit material provisions of the earlier statutes; Terrell v. State, 86 Tenn. 523, 8 S. W. 212; Millay v. White, 86 Ky. 170, 5 S. W. 429; Little v. Cogswell, 20 Or. 345, 25 Pac. 727.

A statute will not repeal a prior statute merely because it repeals some of its provisions and omits others, or adds new provisions; the later act operates as a repeal only when it plainly appears that it was intended as a substitute for the first act; Chicago, Milwaukee & St. P. R. Co. v. U. S., 127 U. S. 406, 8 Sup. Ct. 1194, 32 L. Ed. 180; and a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and prescribes the only rules in respect to that subject that are to govern; Tracy v. Tuffly, 134 U. S. 206, 10 Sup. Ct. 527, 33 L. Ed. 879.

Where a new statute expressly repeals the former statute, and the new and the repeal of the old are to take effect at the same time, a provision in the old statute which is embodied in the new is deemed to have continued in force without suspension; Fullerton v. Spring, 3 Wis. 667. But it has been held that where the new law does not go into effect until a time subsequent to that at which the repeal takes effect, such a provision is to be deemed repealed meantime; State v. King, 12 La. Ann. 593. But see Spaulding v. Alford, 1 Pick. (Mass.) 33.

As to what force should be given to portions of a statute excepted from repeal, see Endlich, Interpr. Stat.; Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030.

A difference in the punctuation of similar statutes does not in all cases warrant a different construction, particularly when the printer is responsible for it, and not the legislature; Griffiths v. Montandon, 4 Idaho, 377, 39 Pac. 548.

Where an amendment changes the phraseology of a former act, it will be presumed that it was the intention to make a corresponding change in its meaning; U. S. v. Bashaw, 50 Fed. 749, 1 C. C. A. 653. Where a section of a statute is amended and afterwards such section "as amended" is repealed, the original section, and not the amendment merely, is repealed; State v. Burk, 88 Ia. 661, 56 N. W. 180. The amendment of a statute does not repeal it so that a subsequent statute, which professes to amend the original act, is invalid; State v. Bemis, 45 Neb. 724, 64 N. W. 348.

It is a general rule that when a penal statute punishes an offence by a certain penalty, and a new statute is passed imposing a greater or a lesser penalty for the same offence, the former statute is repealed by implication; Nichols v. Squire, 5 Pick. (Mass.) 168; Buckallew v. Ackerman, 8 N. J. L. 48; Ely v. Thompson, 3 A. K. Marsh. (Ky.) 70; see Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Bacon, Abr. *Statute* (D); but subsequent statutes which add accumulative penalties do not repeal former statutes; 1 Cowp. 297; 6 Mod. 141.

At common law the repeal of a repealing act revived the former act; 6 Co. 199; Hastings v. Aiken, 1 Gray (Mass.) 163; Doe v. Naylor, 2 Blackf. (Ind.) 32; Wallace v. Bradshaw, 54 N. J. L. 175, 23 Atl. 759; but not where there is a general law governing the subject and the act in question was a private act; In re Opening of Knox St., 12 Super. Ct. Rep. (Pa.) 534; and it has been held to have this effect, unless the language of the repealing statute or some general statute provides otherwise; U. S. v. Philbrick, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559; but this rule is now altered in England by an act passed in 1880 and amended in 1889, and in many states this rule has been changed, as in Ohio, Louisiana, Kentucky, Wisconsin and Minnesota; and such an act applies only to absolute repeal and not where the repealed law merely engrafted an exception on a prior law; Pepin Tp. v. Sage, 129 Fed. 657, 64 C. C. A. 169; La. Civ. Code, art. 23. In some states, as Tennessee and Georgia, the substance of an act repealed or revived must be stated in the caption or otherwise, and in others, as Connecticut and Arkansas, a repealing or amending act must recite the law so amended sufficiently to show the effect of the amendment or repeal.

A repealed statute is as if it had never existed, except as to transactions which are past and closed before the repeal; 4 De G. & J. 557; but the repeal leaves all the civil rights of the parties acquired under the law unaffected; Taylor v. Rushing, 2 Stew. (Ala.)

160; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805. An action for penalties cannot be sustained when the statute inflicting them has been repealed before judgment; Norris v. Crocker, 13 How. (U. S.) 429, 14 L. Ed. 210; nor an action for the recovery of money paid in violation of law, under similar circumstances; Kimbro v. Colgate, 5 Blatch. 229, Fed. Cas. No. 7,778.

When a penal statute is repealed or so modified as to exempt a class from its operation, violations committed before the repeal are also exempted, unless specifically reserved, or unless there has been some private right vested by it; Com. v. Welch, 2 Dana (Ky.) 330; In re Road in Hatfield Tp., 4 Yeates (Pa.) 392; Anonymous, 1 Wash. C. C. 84, Fed. Cas. No. 475; Attoo v. Com., 2 Va. Cas. 382.

Under "Initiative and Referendum" provisions, the legislature may still repeal an act, however passed; In re Senate Resolution No. 4, 54 Colo. 262, 130 Pac. 333.

There can be no such thing as an unrepealable statute; Com. v. Iron Co., 153 Ky. 116, 154 S. W. 931.

As to repeal by nonuser, see OBSOLETE.

Stat. 8 Edw. VII repealed 102 old acts that "are peut."

See REPUGNANCY; INTERPRETATION; STATUTE; REVISED STATUTES.

REPETITION. **In Civil Law.** The act by which a person demands and seeks to recover what he has paid by mistake or delivered on a condition which has not been performed. Dig. 12. 4. 5.

The name of an action which lies to recover the payment which has been made by mistake when nothing was due.

Repetition is never admitted in relation to natural obligations which have been voluntarily acquitted, if the debtor had capacity to give his consent. 6 Toullier 386.

In order to entitle the payer to recover back money paid by mistake, it must have been paid by him to a person to whom he did not owe it, for otherwise he cannot recover it back,—the creditor having, in such case, the just right to retain the money. *Repetitio nulla est ab eo qui suum recepit.*

How far money paid under a mistake of law is liable to repetition has been discussed by civilians; and opinions on this subject are divided. 2 Pothier, Obl., Evans ed. 369, 408–437; 1 Story, Eq. Pl. § 111.

REPLEADER. Making a new series of pleadings.

Judgment of repleaders differs from a judgment *non obstante veredicto* in this: that it is allowed by the court to do justice between the parties where the defect is in the form or manner of stating the right, and the issue joined is on an immaterial point, so that it cannot tell for whom to give judgment; Gerrish v. Train, 3 Pick. (Mass.) 124; Magoun v. Lapham, 19 Pick. (Mass.) 419; while judgment *non obstante* is given only where it is clearly apparent to the court that the party who has succeeded has, upon his own showing, no merits, and cannot have by any manner of statement; 1 Chitty, Pl. 568. See Tatum v. Tatum, 19 Ark. 194.

It may be ordered by the court for the purpose of obtaining a better issue, if it will effect substantial justice where issue has been reached on an immaterial point; 3 B. & P. 353; Havens v. Bush, 2 Johns. (N. Y.) 388; Gould, Pl. 473; as a plea of payment on a given day to an action on a bond conditioned to pay *on or before* that day; 2 Stra. 994. It is not allowed till after trial for a defect which is aided by verdict; 2 Saund. 319 *b*; Bac. Abr. *Pleas*. If granted or denied where it should not be, it is error; 2 Salk. 579. See Shippey v. Eastwood, 9 Ala. 198.

The judgment is general, and the parties must begin at the first fault which occasioned the immaterial issue; 1 Ld. Raym. 169; entirely anew, if the declaration is imperfect; 1 Chitty, Pl. 568; that the action must be dismissed in such case; Smith v. Walker, 1 Wash. (Va.) 135; with the replication, if that be faulty and the bar be good; 3 Keb. 664; Stevens v. Taliaferro, 1 Wash. (Va.) 155. No costs are allowed to either side; 6 Term 131; 2 B. & P. 376.

It cannot be awarded after a default at *nisi prius*; 1 Chitty, Pl. 568; nor where the court can give judgment on the whole record; Willes 532; nor after demurrer; Perkins v. Burbank, 2 Mass. 81; unless, perhaps, where the bar and replication are bad; Cro. Eliz. 318; Potter v. Titcomb, 7 Me. 302; nor after writ of error, without the consent of the parties; 3 Salk. 306; nor at any time in favor of the person who made the first fault; 1 Ld. Raym. 170; Hartfield v. Patton, 1 Hempst. 268, Fed. Cas. No. 6,158 *a*; Bledsoe v. Chouning, 1 Humphr. (Tenn.) 85; Andre v. Johnson, 6 Blackf. (Ind.) 375; nor after judgment; Page v. Walker, 1 Tyl. (Vt.) 146. The same end is secured in many of the states by statutes allowing amendments. See, generally, Tidd, Pr. 813, 814; Com. Dig. *Pleader* (R 18); Bac. Abr. *Pleas* (M).

REPLEGIARE (Lat.). To replevy; to redeem a thing detained or taken by another, by putting in legal sureties.

REPLEGIARE DE AVERIIS (Lat.). A writ brought by one whose cattle are impounded or distrained, upon security given to the sheriff to pursue or answer the action at law. 7 Hen. VIII. c. 4; Fitzh. N. B. 68; New Book of Entries, *Replevin*; Dy. 173; Reg. Orig. 81.

REPLEGIARE FACIAS (Lat.). A writ of replevin, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in regard to the matter in his own county court. It was abolished by statute of Marl-

bridge, which provided a shorter process. 3 Sharsw. Bla. Com. 147*; Andr. Steph. Pl. 92.

REPLEVIN. A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully.

The action originally lay for the purpose of recovering chattels taken as a distress, but has acquired a much more extended use. In England and most of the states it extends to all cases of illegal taking, and in some of the states it may be brought wherever a person wishes to recover specific goods to which he alleges title. See *infra*.

A general use of this remedy seems to date from the latter part of the 13th century, referring to the fact that at that period the remedy known as *vetitum namium* (*q. v.*) was falling into desuetude. It is said that at that time, "under the name of *Replegiare*, or Replevin, an action was being developed which was proving itself to be convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigor, its rapidity, and therefore its convenience, to the supposition that a serious offence had been committed against the king." 2 Poll. & Maitl. 576; see 3 Holdsw. Hist. E. L. 248.

By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fail so to do. It is said to have laid formerly in the *detinuit*, which is the only form now found at common law, and also in the *detinet*, where the defendant retained possession, and the sheriff proceeded to take possession and deliver the property to the plaintiff after the trial and proof of title; Chitty, Pl. 145; 3 Bla. Com. 146; DETINET; DETINUIT.

It differs from *detinue* in this: that it requires an unlawful taking as the foundation of the action; and from all other personal actions in that it is brought to recover the possession of the specific property claimed to have been unlawfully taken.

The action lies to recover possession of personal property; Roberts v. Bank, 19 Pa. 71; including parish records; Sawyer v. Baldwin, 11 Pick. (Mass.) 492; trees after they had been cut down; Warren v. Leland, 2 Barb. (N. Y.) 613; Davis v. Easley, 13 Ill. 192; records of a corporation; Southern Plank-Road Co. v. Hixon, 5 Ind. 165; articles which can be *specifically* distinguished from all other chattels of the same kind by indicia or ear-marks; Low v. Martin, 18 Ill. 286; including money tied up in a bag and taken in that condition; 2 Mod. 61; a promissory note; Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80; trees cut into boards; Dillingham v. Smith, 30 Me. 370; Davis v. Easley, 13 Ill. 192; a house which is being moved from the land on which it was built; Luce v. Ames, 84 Me. 133, 24 Atl. 720; but *does not lie* for injuries to things annexed to the realty; 4 Term 504; Cresson v. Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Hooser v. Hays, 10 B. Monr. (Ky.) 72, 50 Am. Dec. 540; nor to recover such things, if dissevered and removed as part of the same act; De Mott v. Hagerman, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; nor for writings concerning the realty; 1 Brownl. 168.

Replevin lies in Massachusetts wherever detinue does, *e. g.* for deeds which attend the inheritance; Holmes, Com. L. 352.

A general property with the right to immediate possession gives the plaintiff sufficient title to maintain it; Dunham v. Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695; Collins v. Evans, 15 Pick. (Mass.) 63; Frizell v. White, 27 Miss. 198; Tittemore v. Labounty, 60 Vt. 624, 15 Atl. 196; as do a special property and actual possession; Mead v. Kilday, 2 Watts (Pa.) 110; Wilson v. Royston, 2 Ark. 315; Broadwater v. Darne, 10 Mo. 277; Williams v. West, 2 Ohio St. 82; and the bare possession of property, though wrongfully obtained, is sufficient title to maintain it against a mere stranger; Anderson v. Gouldberg, 51 Minn. 294, 53 N. W. 636. If the plaintiff has a right of possession, it is immaterial what his title is; Ferguson v. Lauterstein, 160 Pa. 427, 28 Atl. 852.

A joint owner of personal property can maintain replevin in his own name to recover it, against one whose right is not superior to his; Chaffee v. Harrington, 60 Vt. 718, 15 Atl. 350.

It will not lie for the defendant in another action to recover goods belonging to him and taken on attachment; 5 Co. 99; Clark v. Skinner, 20 Johns. (N. Y.) 470, 11 Am. Dec. 302; Kellogg v. Churchill, 2 N. H. 412, 9 Am. Dec. 104; Ranoul v. Griffie, 3 Md. 54; nor, generally, for goods properly in the custody of the law; Ranoul v. Griffie, 3 Md. 54; Pott v. Oldwine, 7 Watts (Pa.) 173; Goodrich v. Fritz, 4 Ark. 525; McLeod v Oates, 30 N. C. 387; Deshler v. Dodge, 16 How (U. S.) 622, 14 L. Ed. 1084; Johnson v. Wing, 3 Mich. 163; Watkins v. Page, 2 Wis. 92; Read v. Brayton, 72 Hun, 633, 25 N. Y. Supp. 186; but this rule does not prevent a third person, whose goods have been improperly attached in such suit, from bringing this action; Thompson v Button, 14 Johns. (N. Y.) 84; Chinn v. Russell, 2 Blackf. (Ind.) 172; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Angell v. Keith, 24 Vt. 371.

As to the rights of co-tenants to bring this action as against each other, see M'Elderry v. Flannagan, 1 Harr. & G. (Md.) 308; Prentice v. Ladd, 12 Conn. 331; Fines v. Bolin, 36 Neb. 621, 54 N. W. 990; as against strangers, see D'Wolf v. Harris, 4 Mas. 515, Fed. Cas. No. 4,221; Scrugham v Carter, 12 Wend. (N. Y.) 131; McArthur v. Lane, 15 Me.

245; Taylor v. True, 27 N. H. 220; Noble v. Epperly, 6 Ind. 414.

The action lies, in England and most of the states, wherever there has been an illegal taking; 18 E. L. & E. 230; Pangburn v. Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Ilsley v. Stubbs, 5 Mass. 283; Stoughton v. Rappalo, 3 S. & R. (Pa.) 562; Daggett v. Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752; Bruen v. Ogden, 11 N. J. L. 370, 20 Am. Dec. 593; Drummond v. Hopper, 4 Harr. (Del.) 327; and in some states wherever a person claims title to specific chattels in another's possessions; Ward v. Taylor, 1 Pa. 238; Skinner v. Stouse, 4 Mo. 93; Waterman v. Matteson, 4 R. I. 539; Lathrop v. Bowen, 121 Mass. 107; Eveleth v. Blossom, 54 Me. 447, 92 Am. Dec. 555; while in others it is restricted to a few cases of illegal seizure; Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Eggleston v. Mundy, 4 Mich. 295. The object of the action is to recover possession; and it will not lie where the property has been restored. And when brought in the *detinet* the destruction of the articles by the defendant is no answer to the action; 3 Bla. Com. 147.

The *declaration* must describe the place of taking. Great accuracy was formerly required in this respect; 2 Wms. Saund. 74 *b*; Gardner v. Humphrey, 10 Johns. (N. Y.) 53; but now a statement of the county in which it occurred is said to be sufficient, 1 P. A. Bro. 60.

The chattels must be accurately described in the writ; Snedeker v. Quick, 11 N. J. L. 179. The following descriptions were held sufficient: Six oxen; Farwell v. Fox, 18 Mich. 166; a lot of hard wood; all the utensils in a barn; Peterson v. Fowler, 76 Mich. 258, 43 N. W. 10; certain logs (identified by their mark); Schulenburg v. Harriman, 2 Dill. 398, Fed. Cas. No. 12,486; the contents of a (specified) grocery store; Litchman v. Potter, 116 Mass. 371; a moveable building on a (specified) lot, but found on another lot; Elliott v Hart, 45 Mich. 234, 7 N. W 812; but not a lot of sundries; Warner v Aughenbaugh, 15 S. & R. (Pa.) 9. Certainty to a general intent is sufficient; Ruch v. Morris, 28 Pa. 245; so is a description that would sustain a chattel mortgage; Ft. Dodge v. Moore, 37 Ia. 388. The sheriff may require the plaintiff to attend and point out the goods; Foredice v. Rinehart, 11 Or. 208, 8 Pac. 285; Smith v. McLean, 24 Ia. 324; no amendment of the writ is allowed; Paterson v. Parsell, 38 Mich. 607 (*contra;* Jaques v Sanderson, 8 Cush. [Mass.] 271); so as to conform to the affidavit and petition; Roberts v. Gee, 39 Fla. 531, 22 South. 877; but not to increase the amount of goods properly described in the writ; Musgrave v. Farren, 92 Me. 198, 42 Atl. 355.

A plaintiff may show that he mistakenly undervalued the property and the surety is bound by the judgment against his principal to the limit of his obligation; the question of the value as found in the replevin cannot be relitigated in a suit against the surety; Bierce v. Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237.

The *plea* of *non cepit* puts in issue the taking, and not the plaintiff's title; Rowland v. Mann, 28 N. C. 38; Sawyer v. Huff, 25 Me. 464; Ely v. Ehle, 3 N. Y. 506; Hopkins v. Burney, 2 Fla. 42; Vose v. Hart, 12 Ill. 378; and the pleas, not guilty; Gibson v. Mozier, 9 Mo. 256; *cepit in alio loco*, and property in another, are also of frequent occurrence.

An avowry, cognizance, or justification is often used in defence. See those titles.

The *judgment*, when the action is in the *detinuit*, if for the plaintiff, confirms his title, and is also for damages assessed by the jury for the injurious taking and detention; M'Cabe v. Morehead, 1 W. & S. (Pa.) 513; Cable v. Dakin, 20 Wend. (N. Y.) 172; Dore v. Hight, 15 Me. 20; Barham v. Massey, 27 N. C. 192. In actions of replevin the measure of damages is the real value of the chattel at the time the tortious possession of the defendant began, with damages for its unlawful detention; Maguire v. Dutton, 54 N. J. L. 597, 25 Atl. 254.

The defendant in replevin is not concluded by the value of the property named in the bond of the writ, when he brings an action on the bond, and is not estopped from showing such value to be greater than there stated; Washington Ice Co. v. Webster, 125 U. S. 426, 8 Sup. Ct. 947, 31 L. Ed. 799.

See JUDGMENT.

REPLEVY. To re-deliver goods which have been distrained to the original possessor of them, on his giving pledges in an action of replevin. It signifies also the bailing or liberating a man from prison, on his finding bail to answer. See REPLEVIN.

REPLIANT. One who makes a replication.

REPLICATION (Lat. *replicare*, to fold back.) The plaintiff's answer to the defendant's plea or answer.

In Equity. The plaintiff's avoidance or denial of the answer or defence. Story, Eq. Pl. § 877.

A general replication is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Cooper, Eq. Pl. 329, 330. Such a replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

A special replication was one which introduced new matter to avoid the defendant's answer. It might be followed by rejoinder, surrejoinder, and rebutter. Special replica-

tions have been superseded by the practice of amending bills; 1 How. Intr. 55; 17 Pet. App. 68. A replication must be made use of where the plaintiff intends to introduce evidence, and a subpœna to the defendant to rejoin must be added, unless he will appear gratis; Story, Eq. Pl. § 879.

A replication may be filed *nunc pro tunc* after witnesses have been examined under leave of court; Story, Eq. Pl. § 881; Mitf. Eq. Pl. by Jeremy 323. If a replication is taken to a plea and issue be found thereon, the bill will not be dismissed, provided the facts contained in the plea are proved; Elgin Wind Power & Pump Co. v. Nichols, 65 Fed. 215, 12 C. C. A. 578, 24 U. S. App. 542.

Under the new equity rules of the United States supreme court a replication is not required.

In Admiralty. No replication to the answer to a libel is now allowed; the libellant, under Adm. Rule 51, is considered as denying new facts set up in the answer.

At Law. The plaintiff's reply to the defendant's plea. It contains a statement of matter, consistent with the declaration, which avoids the effect of the defendant's plea or constitutes a joinder in issue thereon. See Andr. Steph. Pl. 151.

It is, in general, governed by the plea, whether dilatory or in bar, and most frequently denies it. When the plea concludes to the country, the plaintiff must generally reply by a similiter. See SIMILITER; Campbell v. Clark, Hempst. 67, Fed. Cas. No. 2,355a. When it concludes with a verification, the plaintiff may either *conclude* the defendant by matter of estoppel, deny the truth of the plea in whole or in part, *confess and avoid*, the plea, or new assign the cause of action in case of an evasive plea. Its character varies with the form of action and the facts of the case. See 1 Chitty, Pl. 519.

As to the form of the replication:

The title contains the name of the court, and the term of which it is pleaded, and in the margin the names of the plaintiff and defendant. 2 Chitty, Pl. 641.

The commencement is that part which immediately follows the title, and contains a general denial of the effect of the defendant's plea. When the plea is to the jurisdiction, it contains a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction. Rastell, Entr. 101. When misnomer is pleaded, no such allegation is required; 1 B. & P. 61.

When matter in estoppel is replied, it is, in general, in the words "and the said plaintiff saith that the said defendant."

When the replication denies or confesses and avoids the plea, it contains a *precludi non*, which see.

The body should contain—

Matter of estoppel, which should be set forth in the replication if it does not appear from the previous pleadings: as, if the matter has been tried upon a particular issue in trespass and found by the jury; 3 East 346; Warner's Ex'rs v. Bledsoe's Adm'x, 4 Dana (Ky.) 73; *denial of the truth* of the plea, either of *the whole* plea, which may be by a denial of the fact or facts constituting a single point in express words; Watriss v. Pierce, 36 N. H. 232; Moss v. Hindes, 28 Vt. 279; or by the general replication *de injuria, etc.*, according to the form of action; 8 Co. 67; 1 B. & P. 79; Allen v. Scott, 13 Ill. 80; *or of a part* of the plea, which may be of any *material* fact; Bradner v. Demick, 20 Johns. (N. Y.) 406; and of such only; 37 E. L. & E. 479; Yingling v. Hoppe, 9 Gill (Md.) 310; U. S. v. Buford, 3 Pet. (U. S.) 31, 7 L. Ed. 585; or of matter of right resulting from facts; 1 Saund. 23 *a*, n. 5; Calvert v. Lowell, 10 Ark. 147; see TRAVERSE; *a confession and avoidance;* Hoitt v. Holcomb, 23 N. H. 535; Jenkins v. Stanley, 10 Mass. 226; see CONFESSION AND AVOIDANCE; *a new assignment*, which see.

The conclusion should be to the country when the replication denies the whole of the defendant's plea containing matter of fact; Walker v. Johnson, 2 McLean, 92 Fed. Cas. No. 17,074; Hartwell v. Hemmenway, 7 Pick. (Mass.) 117; Bindon v. Robinson, 1 Johns. (N. Y.) 516; as well where the plea is to the jurisdiction; 1 Chitty, Pl. 385; as in bar; 1 Chitty, Pl. 554; but with a verification when new matter is introduced; 1 Saund. 103, n.; Hampshire Manufacturers Bank v. Billings, 17 Pick. (Mass.) 87; Hallett v. Slidell, 11 Johns. (N. Y.) 56. The conclusions in particular cases are stated in 1 Chitty, Pl. 615; Com. Dig. *Pleader* (F 5). See 1 Saund. 103, n.; Bindon v. Robinson, 1 Johns. (N. Y.) 516; Archb. Civ. Pl. 258; 19 Viner, Bac. Abr. *Trespass* (I 4).

As to the qualities of a replication. It must be responsive to the defendant's plea; Cannon v. State, 17 Ark. 365; Jones v. Hays, 4 McLean, 521, Fed. Cas. No. 7,467; answering all which it professes to answer; State Bank v. Sherrill, 12 Ark. 183; Whitehurst v. Boyd, 8 Ala. 375; and if bad in part, is bad altogether; 1 Saund. 338; Marsteller v. M'Clean, 7 Cra. (U. S.) 156, 3 L. Ed. 300; Williams v. Moore, 32 Ala. 506; *directly;* 10 East 205; see Conard v. Dowling, 7 Blackf. (Ind.) 481; without *departing* from the allegations of the declaration in any material matter; Burk v. Huber, 2 Watts (Pa.) 306; Breck v. Blanchard, 22 N. H. 303; see DEPARTURE; with *certainty;* Sealey v. Thomas, 6 Fla. 25; see CERTAINTY; and without *duplicity;* Hereford v. Crow, 3 Scam. (Ill.) 423; Downer v. Rowell, 26 Vt. 397; Ames v. West, 4 Wend. (N. Y.) 211; see DUPLICITY. Although the replication is a departure from the complaint, yet the defendant cannot avail himself of such a defect in a court of error, where he did not raise the question by demurrer or by motion, but went to trial upon

the issues as made up; Ankeny v. Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475.

An objection that replications were not filed to the defendant's pleas when the trial commenced, nor before judgment with leave of court, comes to late if made after entry of judgment; J. S. Keator Lumber Co. v. Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. Ed. 495.

REPLY. See OPENING AND CLOSING; RIGHT TO BEGIN; BURDEN OF PROOF.

REPORT OF COMMITTEE. That communication which the chairman makes to the house upon the close of the investigation in which the committee has been engaged.

REPORT OFFICE. Formerly a department of the English court of chancery. Whart.

REPORTING, COUNCIL OF LAW. The Incorporated Council of Law Reporting for England and Wales has charge of reporting and publishing the cases in those two countries.

REPORTS. A printed or written collection of accounts or relations of cases judicially argued and determined.

The value and force of *adjudicated precedents*, which is, to a greater or less degree, acknowledged in the jurisprudence of all civilized countries, is elsewhere discussed under the titles herein, *judge-made law*, *precedent*, and *stare decisis*. The greater weight given to precedent, however, in England and America, makes the subject of law reporting one of the utmost interest and importance. The multiplication of reports has given rise to much discussion on the subject.

In a report to the American Bar Association, 1898, by Edward Q. Keasbey, it was suggested that the evils of excessive reports would be lessened if the court could be induced to write shorter opinions, especially when passing upon well-settled principles of law, and if the dissenting opinions were brief. The committee thought that dissenting opinions should be published. Only the important cases should be reported, omitting those which decide only questions of fact, or reaffirm settled principles of law, the selection to be made by the reporter. In preparing the syllabus all *dicta* should be omitted, and also propositions of law made by the court *arguendo*. The reporter should state the facts even though they are stated by the court; an abstract of the arguments should be printed only in novel and important cases.

It was said in 1907 that there were about 14,500 volumes of reports; see Bulletin of Amer. Libr. Assoc. p. 94; and that, up to 1906, 725,000 cases had been reported and that 23,000 were being reported each year. See Index to Leg. Periodicals, April, 1909.

Prior to 1800, there were only one or two American Reports. In England there were many, but before the period of official reporting, and particularly among the early reports, there is a great difference in the value of the reports published by volunteer reporters. While some of them are of the highest authority, both in England and America, others are of little or, in many cases, of no authority whatever, and it is of the highest importance that a lawyer in citing them should know the character of the volume cited.

They are often mere *note-books* of lawyers or of students, or copies hastily and very inaccurately made from genuine manuscripts. In some instances one part of the book is *good*, when another is perfectly worthless. This is especially true of the early Chancery Reports, which were generally printed as booksellers' "jobs."

The failure to give due attention to the character of the old reports has led to grave judicial errors. Mr. John William Wallace, in "The Reporters," calls attention to the fact that the opinion of Chief Justice Marshall, which "had the effect of almost totally subverting in two states of our Union the entire law of charitable uses," relied upon an authority, which, twenty-five years afterwards, under the critical examination of Mr. Binney, was shown to be no authority, and the opinion passed upon it was overruled. The necessity of attention tc the apparent value of the old reports is enhanced by the fact that even in books of the worst authority, there are occasional cases well reported, and different parts of the same book are of very different value. The most thorough and satisfactory source of information on this subject is "The Reporters," the author of which made the most exhaustive investigations in London, and his work received the highest commendation from English judges; 5 C. B. N. S. 854, where the book was characterized "as highly valuable and interesting," and one to which "they could not refrain from referring" on a question involving the reputation of one of the early English reporters. See, also, Sir F. Pollock in 1903 Am. Bar. Assoc. Report as to the value of Mr. Wallace's work.

For a history of the "Law Reports" in England, with much information on reporting, see Daniel, History of the Origin of the Law Reports, 1884.

See 1 Abbott's National Digest x, for much information as to the Federal Reports, other than those in the supreme court. The federal cases (except in the supreme court) have been reprinted in thirty volumes, under the name of "Federal Cases."

In volume 30 of the series is much information as to the early Federal Reports other than those of the supreme court.

See, generally, 1 Kent, 14th ed. 471; 9 L. Quart. Rev. 179; 1 *id.* 137; Wambaugh, Study of Cases, *passim;* 2 Jurid. Soc. Papers 745, The Expediency of Digesting the Precedents of the Common Law, and Regulating the Publication of Reports; Veeder, The

English Reports (15 Harv. 2 Rev. 1, 109; 2 Sel. Essays in Anglo-Amer. L. H. 123). He is referred to below as Veeder.

For a list of reports, see Soule, Lawyers' Reference Manual, which gives the chronology of all reports; also Brief Making, by Lile and others, 3d Ed. by R. W. Cooley.

The National Reporter System reports currently in full all decisions, without selection or abridgment, of the courts of last resort of every state, also the decisions of the circuit and district courts, circuit courts of appeals, commerce court, and the supreme court of the United States. The decisions are published in two editions; first in weekly pamphlet form, as advance sheets, and later in bound volumes. There are ten distinct publications of this series, viz.:

The Northwestern Reporter, established in 1879, reporting the decisions in Michigan, Wisconsin, Minnesota, Iowa, Nebraska, Dakota, and North and South Dakota; the Pacific Reporter, established in 1883, reporting the decisions in California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Kansas, Oklahoma, Arizona, Utah, Washington, and Wyoming; the Northeastern Reporter, established in 1885, reporting the decisions in New York, Massachusetts, Ohio, Illinois, and Indiana; the Atlantic Reporter, established in 1885, reporting the decisions in Maine, New Hampshire, Vermont, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware, and Maryland; the Southwestern Reporter, established in 1886, reporting the decisions in Missouri, Arkansas, Indian Territory, Texas, Kentucky, and Tennessee; the Southeastern Reporter, established in 1887, reporting the decisions in Virginia, West Virginia, North Carolina, South Carolina, and Georgia; the Southern Reporter, established in 1887, reporting the decisions in Alabama, Florida, Louisiana, and Mississippi.

The New York Supplement was established in 1888 and reports the decisions of lower courts of record of the state of New York.

The Federal Reporter, established in 1880, contains the decisions of the United States circuit and district courts since that year and of the United States circuit courts of appeals and commerce court, from the organization of those courts.

The Supreme Court Reporter covers the decisions of the United States supreme court. It begins with volume 106 of the United States Reports and continues to date; one volume is published each year. In this series the decisions are first published in the form of biweekly advance sheets, during the term of court, then the bound volume is published, containing in full a report of all the cases decided during the year.

In addition to the various official and non-official reporting systems, there are several non-official series of law reports that publish selected cases only.

The "Lawyers' Reports Annotated" contains cases selected from the current decisions of the courts of last resort of the several states and territories and of the United States supreme and other federal courts. The series began in 1888, and comprises four volumes a year. In 1906, when 70 volumes had been published, a new series was begun. The new series are issued at the rate of about six volumes per year.

The "American Decisions" is a series of 100 volumes, purporting to contain the cases "of general value and authority" from the earliest state reports to the year 1869.

The "American Reports" is a continuation of the American Decisions, and comprises cases selected from the state reports published during the years 1869 to 1887. There are 60 volumes of this series.

The "American State Reports" is a continuation of the American Reports, and publishes cases selected from the state reports issued between 1887 and 1911. This series terminated with volume 140, issued in 1911.

The three series above named are sometimes styled "The Trinity." They do not cover any decisions of the inferior federal courts nor of the United States supreme court.

The "American and English Annotated Cases" began in 1906, and purports to contain the "Important Cases Selected from the Current American, Canadian and English Reports." Beginning with the twenty second volume of this series, it was merged with the American State Reports. Although published jointly, and identical in contents, the books are issued under separate designations by the two publishers. The series succeeding the American State Reports is published under the title "American Annotated Cases" (cited "Ann. Cas.") and designated by year and number, *i. e.*, 1912A, 1912B, etc. The publishers of the original series, however, retain the title originally adopted, together with the numerical sequence, and add an extra label at the bottom of each volume, giving the corresponding designation of the American Annotated Cases. Thus, vol. 22 American and English Annotated Cases is also labeled "Ann. Cas. 1912A."

Up to the year 1865, the English reports are entitled by the name of the reporter and commonly cited by abbreviation of the reporter's name. The year 1865 marked the organization of the Council of Law Reporting and the establishment of the "Law Reports," a system which has been in operation ever since.

As first established, the Law Reports comprised a separate series for each of the courts, including the House of Lords and the Privy Council Appeal Cases. In 1875 the series was consolidated into six series, namely, the Appeal Cases, Chancery Division, Common Pleas Division, Exchequer Division, Probate Division, and Queen's Bench Division. Commencing with 1881, cases in the Common Pleas and Exchequer Division are reported in the

Queen's Bench Division, so that, at present, there are four series, namely, Appeal Cases, Chancery, King's Bench, and Probate.

The Law Reports are cited by the court or division. Up to 1875, the mode of citation was, for example: Goodwin v. Robarts, L. R. 10 Exch. 337, indicating that this case was found in the Law Reports, vol. 10, of the Exchequer Reports. After 1875, when the first consolidation took place, cases were cited merely by the division, for example: Perry v. Barnett, 15 Q. B. D. 388, indicating that this case was found in Law Reports, vol. 15, of the Queen's Bench Division. In 1891, a new style of citation was adopted, the year being added to the citation. For example: Sanderson v. Collins, [1904] 1 K. B. 628, indicating that this case is to be found in the Law Reports, vol. 1, of the King's Bench Division for the year 1904.

CITATION OF IRISH REPORTS. Up to the year 1838, the Irish reports are entitled by the name of the reporter and commonly cited by an abbreviation of the reporter's name. In 1838 the two series entitled, respectively, "Irish Law Reports" and "Irish Equity Reports," commenced publication. Each of these ran to thirteen volumes, covering the years 1838–1850. They were continued by the "Irish Common Law Reports" (17 volumes, 1849–1866), and the "Irish Chancery Reports" (17 volumes, 1850–1866), which were in turn continued by the "Irish Reports, Common Law Series" (11 volumes, 1866–1877), and the "Irish Reports, Equity Series" (11 volumes, 1866–1877). In 1878 the "Irish Law Reports" were established. These reports ran to 32 volumes, covering the years 1878–1893, and were continued by the "Irish Reports," which is the present series. The "Irish Reports" are issued in two volumes a year and are cited by year and volume, as "(1894) 2 I. R. 512."

Among the English reporters the following possess little authority: Noy, Godbolt, Owen, Popham, Winch, March, Hutton, Ley, Lane, Hetley, Carter, J. Bridgman, Keble, Siderfin, Latch, several volumes of the "Modern" Reports, 3d Salkeld, Gilbert's Cases in Law and Equity, the 1st and 2d parts of "Reports in Chancery," Chancery Cases, Reports *temp.* Finch, "Gilbert's Reports," 8th Taunton, Peake's Nisi Prius Reports. The following: Bernardiston, Fitzgibbon, W Kelynge, Barnes, Ridgeway, Lee, Cunningham, Andrews, and Willes (1737–60), are said to be, "most of them, of inferior workmanship." Veeder. The same author states that Atkyns and Vesey, Sr., are "extremely unsatisfactory, though improved in subsequent editions."

Prof. Wambaugh (Study of Cases) speaks of the "many cases excellently reported by Dyer, Plowden, Coke, Croke, Yelverton, Hobart, and Saunders." The first reporter to make orderly and condensed reports in harmony with modern ideas was Sir James Burrow.

Want of space requires the omission of a detailed list of reports, but a few of the comments upon the older reporters are given here.

Abbreviatio Placitorum. An old collection of cases (1619–1626) abbreviated from the rolls of Rich. I to Edw. II, containing the earliest authentic statement of the common law and the working of the Curia Regis. 2 Holdsworth, Hist. Engl. Law 144. It was reprinted in 1811 by the Record Commission.

Aleyn (John). K. B., 1646–48. 1 vol. These are reports of cases in the time of the civil wars of Charles I., and do not possess much authority, though containing reports of Rolle's decisions.

Ambler (Charles). Cases in the High Court of Ch., 1737–83. Second edition by J. E. Blunt, 2 vols. (1828). As originally published of very little authority, but much improved by Mr. Blunt. "Extremely unsatisfactory;" Veeder.

Barnardiston (Thomas). High Ct. of Ch., 1740–41. 1 vol. Lord Mansfield (2 Burr. 1142) forbade the citing of this book as it would be only misleading the students to put them upon reading it. He said it was marvellous, however, to those who knew the sergeant and his manner of taking notes, that he should so often stumble upon what was right; but that there was not one case in his book which was so throughout. Lord Eldon, however, in 1 Bligh, N. R. 538, says, "in that book there are reports of very great authority."

Barnardiston (Thomas). K. B., 1726–34. 2 vols. A book which for many years was very little esteemed, the author having been reputed a careless fellow who let the wags scribble what they liked in his note-book while he was asleep. However, where his accuracy has been tested, as it has been of later times, it has come out pretty fairly; and now both the K. B. and Ch. reports of Barnardiston are reasonably respected. See Wallace, Report. 423.

Bendloes (Gulielme). All the Courts, 1531–1628. 1 vol. Properly cited as New Benloe, sometimes as old Benloe.

Benloe (Gulielme) & Dalison (Gulielme). C. P. Benloe contains cases from 1532 to 1579, and Dalison from 1546 to 1574. 1 vol. of each, bound together. There is very great confusion in the citations of the reports of Benloe and Dalison. Some cases of Benloe's are given at the end of Keilway's Reports and of Ashe's Tables. It is supposed that the title New Benloe was given to the volume here given as Bendloes to distinguish it from the cases in Keilway and Ashe. The volume given as Benloe & Dalison consists in reality of two separate series of reports, paged independently, although bound together, and the modes of reference are very various, being sometimes to Dalison when Benloe is in-

tended, and *vice versa*. A full account is given in Wallace's Report. They are said to be of secondary value.

Blackstone (William). K. B., C. P., and Exch. Chamber, 1746–79. 2 vols. Lord Mansfield said (Dougl. 92, n.): "We must not always rely on the words of reports, though under great names. Mr. Justice Blackstone's reports are not very accurate," but of late they have been well edited, and are more esteemed.

Bosanquet (J. B.) & Puller (C.). New Reports, C. P., Exch. Chamb., and House of Lords, 1804–07. 3 vols. Bosanquet & Puller are generally cited from 1 to 5 in American books. In English books the latter series is frequently cited as New Reports.

Bracton. Sir F. Pollock expresses the opinion that Bracton may perhaps be fairly reckoned as a book of reports. His name was Bratton. His Note Book has been edited by Maitland in three volumes (1887); but it has been declared that he can safely be cited only for historical illustration; [1896] A. C. 3.

Brooke (Robert). New Cases. Called also Petit Brooke, Little Brooke and Bellewe's Cases, *temp.* Henry VIII. Cases in the K. B., C. P., and Exch., 1515–58, selected out of Brooke's Abridgment by Richard Bellewe. Of secondary value.

Burrow (James). K. B., 1756–71. 5 vols. A full, excellent, and accurate reporter, who holds in a legal point of view the same relation to Lord Mansfield that in a literary and historical one Boswell does to Dr. Johnson. He marked an epoch in law reporting, and was the first to prefix a statement of the facts; *supra*.

Carthew (Thomas). King's Bench, 3 Jac. II.–12 Will. III. 1 vol. Lord Thurlow said, "Carthew and his book were equally bad authority," but Lord Kenyon, in 2 Term 776, says that Carthew is in general a good reporter. See also Willes 182. "Of poor reputation;" Veeder.

Cary (George). Ch., 1557–1604. 1 vol. Frequently mere transcripts from the Registrar's books.

Cases in B. R. *temp.* Holt. Cases and Resolutions in the Court of K. B., 1714–29. 1 vol. This must not be mistaken for "Reports *temp.* Holt," for which see "Holt."

Cases in Chancery. Two parts in 1 vol.; with this is usually bound "Select Cases in the High Ct. of Ch.," which contains the cases of the Duke of Norfolk and of the Earls of Bath and Montagu; it is cited as 1, 2, and 3 "Chancery Cases." A book of notoriously doubtful authority; Wallace, Reporters, approved in 19 L. Q. Rev. 236.

Cases *tempore* Hardwicke. K. B. at Westminster during the time of Hardwicke, usually cited as Hardwicke's Cases, which see; see also Ridgway.

Cases *tempore* Talbot. K. B., C. P., and Ch., 1734–38. 1 vol. By Alex. Forrester to page 217, and from there to the end, by Hawkins. A book of highly respectable authority, though not a monument worthy of Lord Talbot's transcendent virtue. Wallace, Report. 506.

Cases *tempore* William III. King's Bench, 1690–1702. 1 vol. See Modern, vol. 12. Buller said in Dougl. 83, "12 Modern is not a book of any authority."

Choyce Chancery Cases, 1557–1606. 1 vol. A very good little book, so far as it goes. See Wallace, Report. 470, where curious extracts are given from the volume. Reprinted, 1870.

Coke (Edward). King's Bench, Common Pleas, Exchequer, and Chancery, 1572–1618. 13 parts or volumes. He published the first part or volume in 1600 and the eleventh in 1616. A twelfth part was published in 1634 and a thirteenth in 1637. The last two are of inferior authority. Coke's Reports are usually called "The Reports." They are not, strictly speaking, reports, but each case constitutes a treatise on the point at issue. Lord Coke's reports are very voluminous. They have been severely criticised by Sir Edward Sugden, Lord Redesdale, and others, and Coke charged with "telling untruths" in them; but the charges made against him have been examined by Wallace (Reporters, p. 165), and Coke's integrity vindicated. The twelfth report is "a book of inferior authority." Pollock, Expansion of the C. L. 71. And see under the head of Plowden.

Comberbach (Roger). K. B., 1685–99. It is said by Lord Thurlow (1 Bro. C. C. 97) to be bad authority, though a *few* cases are better reported than in any other place. Its chief use is for comparison with other reports of the same cases. Wallace, Report. 396.

Cox (Edward W.). Criminal Cas. in all the Cts. in England and Ireland, 1843–81. 14 vols. These reports, which are edited by Mr. Cox, are prepared by a large number of reporters. Volume 12 is of questionable authority; 10 B. & C. 275.

Croke (Sir George). Ch., K. B., and C. P., 1582–1641. 4 vols. The reports in Croke are generally short, and, as the books consist of four closely-printed volumes, the cases are, of course, very numerous. Occasionally cases are misreported: but taken as a *whole*, Croke has enjoyed from early times a high reputation, and even now is constantly cited. Wallace, Report. 198. The Chancery cases in the time of Elizabeth are Sir Harbottle Grimston's. The reports are commonly cited by the name of the author and the reigning sovereign; vols. 1 and 2 as Croke (or Cro.) Eliz.; vol. 3 as Croke Jac.; and vol. 4 as Croke Car.

Davies, or Davis, or Davy (Sir John). K. B., C. P., and Exch. in Ireland, 1604–12. 1 vol. Davies, who was chief-justice of Ireland, and died on the night of the day on which he had been appointed chief-justice of England, was a man of great genius and accomplishments. See Wallace, Report. 229.

Dickens (John). High Ct. of Ch., 1559–1798. 2 vols. Dickens was a very attentive and diligent register; but his notes, being rather loose, are not to be considered as of very high authority. Lord *Redesdale*, 1 Sch. & L. 240. See, also, Sugd. Vend. 146. A few cases, where the opinions are printed from manuscripts prepared for publication, are valuable. Wallace, Report. 476.

Dyer (Sir James). K. B. and C. P. Exch. and Ch., 1513–82. 3 vols. Short notes, never intended by Dyer to have been published; always regarded, however, as among the best of the old reports. Wallace, Report. 126.

Ellis (Thomas F.) & Blackburn (Colm). Q. B., 1852–58. 8 vols. Among modern reports few are more valued for the success with which extraneous matter is stripped off and nothing but the essence of the case presented to the reader. 9 Lond. Law Mag. 339.

Equity Cases Abridged. Cases in the High Court of Ch., 1667–1744. 3 vols. This work is a digest, rather than reports, and is frequently cited. The first volume, which is attributed to Pooley, is of excellent authority; the second, much less so. Seldom cited without misgiving; 19 L. Q. R. 236.

Fortesque (John). Select cases in all the courts of Westminster Hall, *tempore* Will. III., Anne, Geo. I., and Geo. II.; also the Opinion of all the Judges of England relative to the Grandest Prerogatives of the royal family, and some observations relating to the Prerogative of a Queen-Consort. 1 vol.

Freeman (Richard). K. B. and C. P., 1670–1704. 1 vol. Freeman's note-book having been stolen by a student, and these reports published surreptitiously, they were for a long time but little esteemed. Of late, however, they have been re-edited, and enjoy a higher reputation than they formerly did. Lord Mansfield said, in Cowp. 16, "Some of the cases in Freeman are very well reported." Wallace, Report. 390.

Gilbert (J.). Cases in Law and Eq., 1713–15. 1 vol. A posthumous work, containing one or two cases well reported, but generally consisting of loose notes very badly edited. Wallace, Report. 251. "Of little value;" Veeder. Commonly cited as Gilbert's Cases.

Hardwicke's Cases. Court of King's Bench at Westminster, 7th to 10th Geo. II., during which time Hardwicke presided in that court, to which are added some cases decided by Lee and two Equity cases by Hardwicke.

Hetley (Sir Thomas). C. P., 1627–31. 1 vol. Not marked by any peculiar skill, accuracy, or information. Dougl. ix. Not valued. 2 Jurid. Soc. Papers 577.

Hobart (Sir Henry). C. P. and Ch., 1–23 Jac. I. Hobart was a great judge; and these reports, which are by himself, have always been esteemed. Wallace (Report. p. 163) cites from Judge Jenkins a splendid tribute to his character.

Holt. Reports *tempore* Holt. K. B., C. P., Exch., and Ch., 1688–1710. 1 vol., by Giles Jacob. (Taken from a MS. of Thomas Farresley.) In Rex v. Bishop of London, 1 Wilson, 15, Lee, C. J., said this was a book of no authority.

Howell (Thomas B.) & (Thomas J.). State Trials and Proceedings for High Treason and other Crimes and Misdemeanors, 1163–1820. 33 vols., and Index.

Vol. 1–21, 1163–1783. T. B. Howell.
22–33, 1783–1820. T. J. Howell.

This is an immense collection of cases, brought together by hunting through every collection in England, and, therefore, having very different degrees of merit. For a full account of its character and value, see Wallace's Report. 64.

Hutton (Sir Richard). C. P., 1612–38. 1 vol. This book seems to belong to that class of literary productions which do not obtain notoriety enough to be abused. Wallace, Report. 246.

Jenkins (David). Exchequer, 1220–1623. 1 vol. Eight centuries, or eight hundred cases. See an account of Jenkins, who was a Welsh judge, by D'Israeli, given in Wallace's Report. 71. The reports of Jenkins were prepared in prison, where Jenkins was put for his loyalty to Charles I. and kept for fifteen years. The book is of excellent authority. Brief, but accurate.

Jones (Sir William). K. B. and C. P., House of Lords, and Exch. Chamb., 1620–41. It is a book of good authority. It is sometimes cited as 1st Jones, to distinguish it from Sir Thomas Jones, which is then correspondingly cited as 2d Jones.

Keble (Joseph). K. B., 12–20 Car. II. 3 vols., an inaccurate reporter, yet a tolerable historian of the law; 3 Wils. 330. Not a satisfactory reporter, but a pretty good register, and more esteemed of late, perhaps, than formerly. Wallace, Report. 315. Lord Kenyon reprimanded counsel for citing Keble; 6 Bing. 664.

Keilwey (Robert). K. B. and C. P. It also contains some cases *incerti temporis*, and some *temp.* Edw. III. The volume, having been edited by John Croke, is sometimes cited as Croke's Reports. See Wallace, Report. 119. Of secondary value. Its preface shows it to be a selection from

Keilwey's common place book made by Croke as a supplement to the contemporary Year Books; 24 L. Q. R. 7.

Leonard (William). K. B., C. P., and Exch., 1540–1615. A very good and much-esteemed reporter; one of the best, indeed, of the old books. See Wallace, Report. 142, referring to Sugden, Lord Nottingham, and Sir George Treby.

Ley (Sir James). King's Bench, C. P., Ex., and Court of Wards, and Star Chamber, 1608–29. 1 vol. The book is seldom cited; Wallace, Report. 241. It is sometimes cited as Leigh; *id.* 244.

Lofft (Capel). K. B., C. P., and Ch., 1772–74. 1 vol. Not a highly esteemed reporter, but the only volume giving an account of the case of the negro Somerset.

Meeson (R.) & Welsby (W. N.). Exch. and Exch. Chamb., 1836–47. 16 vols. Among the most useful and best reported of the modern English reports.

Modern Cases in Law and Equity. See Modern Reports, parts 8 & 9; in 1 Burr. 386, it is observed, that it is a miserable, bad book, and in 3 Burr. 1326, the court said they treated it with the contempt it deserved.

Modern Reports. Select Cases in the K. B., C. P., Ch., and Exch., 1669–1732. 12 vols. By various hands, and of various degrees of excellence; some are very inferior. See much learning on the subject in Wallace, Report. 347–390. They are not treated with respect in the courts; Odger, C. L. See Modern Cases in Law and Equity.

Moore (Edmund F.). Cases in Privy Council. New Series, 1862–73. 9 vols. Vol. 3, p. 347 to the end, and vols. 4–9 are identical word for word with 1–4 Law Reports, Privy Council.

Moore (Francis). K. B., C. P., Exch., and Ch., 1512–1612. 1 vol. Moore's Reports are printed from a genuine manuscript, and are esteemed valuable and accurate.

Mosely (William). High Court of Ch., time of King, 1726–30. 1 vol. Condemned by Lord Mansfield, but perhaps on insufficient ground. Lord Eldon, a better judge of the merits of a Chancery Reporter, spoke well of it (19 Ves. 488, n.), as did also Mr. Hargrave. Wallace, Report. 504. "Not particularly good;" Veeder.

New Reports. See Bosanquet & Puller.

Noy (William). K. B. and C. P., 1559–1649. 1 vol. This is an abridgment by Serjeant Size, who when a student borrowed Noy's Reports and abridged them for his own use. *Vide* Ventr. 81; 2 Keb. 652; for a full account see Wallace, Report. 154.

Plowden (Edmund). K. B., C. P., and Exch., 1550–80. 1 vol. Probably the most full, finished, and thoroughly accurate of the old reporters; always highly esteemed. Plowden and Coke are the classical reporters of the common law; 2 Sel. Essays, Anglo-Amer. Leg. Hist. 128.

Raymond (Lord Robert). K. B. and C. P., 1694–1734. 3 vols. Some of the earlier cases in Lord Raymond, having been taken when he was a young man, or copied from the papers of his different young friends, have not been so highly esteemed, perhaps, as his other cases, which are, generally speaking, his own. As a whole, his reports are highly respected, and often cited, even in this day and country. Wallace, Report. 401. "His reports of Holt's decisions are of excellent authority;" Veeder.

Ridgeway (William). K. B. and Ch., at the time Lord Hardwicke presided in those courts. King's Bench, 1736, Chancery, 1744–45.

Salkeld (William). K. B., C. H., C. P., and Exch., 1 Will. III. to 10 Anne. 3 vols. The third volume having been published from notes less carefully prepared than the first two (published under the supervision of Lord Hardwicke) is not accounted as of the highest authority. The first two volumes "are too brief to be clear;" Veeder.

Saunders. K. B., 1666–1673. The most accurate and valuable reporter of his age. His work was subsequently enriched by the notes of Serjeant Williams, and is cited as Williams' Saunders.

Saville (Sir John). C. P. and Exch., 1580–94. This book, says Wallace (Report. 197), appears "to have no character at all. I have not found a word upon it, either of censure or of praise."

Sayer (Joseph). K. B., 1751–56. 1 vol. "An inaccurate reporter." 1 Sugd. Vend. 80.

Select Chancery Cases. High Court of Ch. Containing the great cases of the Duke of Norfolk, and of the Earls of Bath and Montague. (This is part 3 of Chancery Cases, and is usually bound with parts 1 and 2.)

Strange (Sir John). Ch., K. B., C. P., and Exch. 2 vols. Authoritative, though too brief in the style of reporting. Mr. Nolan, in 1795, published a new edition, which has rendered Strange more valuable than he was. Wallace, Report. 420.

Style (William). K. B., "now Upper Bench," 1646–1655. Printed from a genuine manuscript, and esteemed.

Taunton (William P.). C. P. and other Cts., 1807–19. 8 vols. The eighth volume is not very highly esteemed, having been made up from his notes and not supervised by him. Wallace, Report. 533, note; 9 Lond. Law Mag. 339.

Term Reports. 1785–1800, covering the period of Kenyon, C. J.

Vaughan (Sir J.). C. P., 1665–74. 1 vol. Edited by Edward Vaughan. Containing some cases from his own perfected manuscript, very well reported, but some others not fully prepared, and not so much esteemed. Vaughan was an interesting character, upon whose merits the author of

The Reporters dwells with interest. See page 334.

Vernon (Thomas). High Ct. of Ch., 1680–1719. 2 vols. Vernon was a very eminent chancery lawyer; but his reports were posthumously published from notes found in his study after his death. They were loose, and on that account unsatisfactory and inaccurate. A very highly improved edition was published in 1806, 1807, by Mr. Raithby, under the auspices of Lord Eldon. The manuscript reports of Vernon were the subject of an entertaining chancery suit between his widow, his heir-at-law, and his residuary legatee. No one of the parties, however, succeeded; and the case was ended by the lord chancellor's keeping the manuscript himself. See Wallace, Report. 493.

West (Martin, J.). High Court of Ch., 1736–39. 1 vol. A book published only of recent time, though from ancient and genuine manuscripts. It is a good work so far as it goes, but, unfortunately, includes but a short term of Lord Hardwicke's administration in Chancery.

Willes (John). C. P., Exch. Chamb., Ch., and House of Lords, 1737–58. 1 vol. Edited by Charles Durnford. Posthumously published, but quite authoritative and useful.

Wilson. 1743–1774, C. P. "A very accurate work;" Veeder.

Year-Books. See YEAR-BOOKS; C. C. Soule in Harv. L. Rev. (1901).

Yelverton (Sir Henry). K. B., 1603–13. 1 vol. Excellent reports of a first-rate old-school English lawyer, and admirably edited in America by Judge Metcalf. See Wallace, Report. 211, where a full biographical sketch of the gifted and unfortunate reporter is given.

REPRESENT. To exhibit, to expose before the eyes. To represent a thing is to produce it publicly. Dig. 10. 4. 2. 3.

REPRESENTATION. In Insurance. The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract. Augusta Ins. & B. Co. v. Abbott, 12 Md. 348; Lee v. Fire Ins. Co., 11 Cush. (Mass.) 324; Sawyer v. Mut. Ins. Co., 6 Gray (Mass.) 221.

A statement incidental to the contract, relative to some fact having reference thereto, and upon the faith of which the contract is made. May, Ins. 190. It may be *affirmative* or *promissory*.

The distinction between representation and warranty must be carefully observed; the latter is a part of the contract, the former is but a statement incidental thereto. In an action on the policy the plaintiff must show facts sufficient to bring him within the terms of the warranty, while the burden of proving the untruthfulness of representations, if any, is on the defendant. Further, representations need not be literally complied with; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; but only in *material* points; while in cases of warranty, the question of materiality does not arise; May, Ins. § 183. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835. Representations in writing are, *ipso facto*, material; 4 H. L. C. 484; Campbell v. Life Ins. Co., 98 Mass. 381; Miller v. Life Ins. Co., 31 Ia. 216, 7 Am. Rep. 122. Representations are material though the fact represented may not relate directly to the risk; Valton v. Life Assur. Co., 20 N. Y. 32.

Doctrines respecting representation and concealment usually have reference to those by the assured, upon whose knowledge and statement of facts the insurance is usually made; but the doctrine on the subject is equally applied to the underwriter, so far as facts are known to him; 3 Burr. 1905.

In the absence of fraud, deceit, or misrepresentation, the assured cannot be protected by ignorance of the contents of the application, since it is his duty to inform himself of its contents before signing; Herndon v. Triple Alliance, 45 Mo. App. 426; and it is the duty of the assured to communicate all material facts, and he cannot urge as an excuse for his omission to do so that they were actually known to the underwriters, unless the knowledge of the latter was as full and particular as his own information; Sun Mut. Ins. Co. v. Ins. Co., 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

A misrepresentation though made unintentionally, or through mistake, makes the insurance void, notwithstanding its being free from fraud. See Mut. Benefit Life Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812.

The material falsity of an oral promissory representation, without fraud, is no defence in an action on a policy. If made with the intent to deceive, the policy may be thereby avoided. Promissory representations, reduced to writing and made a part of the contract, become substantial warranties; May, Ins. § 182. See Kimball v. Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786.

A substantial compliance with a representation is sufficient,—the rule being less strict than in case of a warranty; Miller v. Life Ins. Co., 31 Ia. 216, 7 Am. Rep. 122; Mut. Benefit Life Ins. Co. v. Wise, 34 Md. 582. The validity of the policy does not depend on the literal truth of the assertion; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125. The substantial truth of the statement is for the jury, but not its *materiality;* May, Ins. § 187.

Insurance against fire and on life rests upon the same general conditions of good faith as marine insurance; but in the first two classes the contract is usually based mainly upon statements by the applicant in written replies to numerous inquiries expressly referred to in the policy, which answers are thus made express warranties and must, accordingly, be strictly true whether their being so is or is not material to the risk. The inquiries are intended to cover all material circumstances, subject, however, to the principle, applicable to all contracts, that fraud by either party will exonerate the other from his obligations, if he so elects; Smith v. Ins. Co., 24 Pa. 320; Glendale Woolen Co. v. Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; Clark v. Ins. Co., 8 How. (U. S.) 235; 2 M. & W. 505; Continental L. Ins. Co. v. Rogers, 119 Ill. 482, 10 N. E. 242, 59 Am. Rep. 810; Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 470, 2 South. 125, 59 Am. Rep. 816. See Cobb v. Ben. Ass'n, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; CONCEALMENT; INSURANCE; MISREPRESENTATION; WARRANTY.

REPRESENTATION OF PERSONS. A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.

The heir represents his ancestor; Bac. Abr. *Heir and Ancestor* (A); the devisee, his testator; the executor, his testator; the administrator, his intestate; the successor in corporations, the predecessor; and, generally speaking, they are entitled to the rights of the persons whom they represent, and bound to fulfil the duties and obligations which were binding upon them in those characters.

Representation was unknown to the Romans, and was invented by the commentators and doctors of the civil law. Toullier, *Dr. Civ. Fr.* liv. 3, t. 1, c. 3, n. 180. See Ayliffe, Pand. 397; Dalloz, Dict. *Succession*, art. 4, § 2.

REPRESENTATIVE. One who represents or is in the place of another.

In the law of decedents' estates any person who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law. Kroh v. Heins, 48 Neb. 691, 67 N. W. 771.

A representative of a deceased person, sometimes called a "personal representative," or "legal personal representative," is one who is executor or administrator of the person described. 6 Madd. 159; 5 Ves. 402. See Cox v. Curwen, 118 Mass. 200; Lodge v. Weld, 139 Mass. 504, 2 N. E. 95.

A gift in a will to the "representative" of a person is a gift to his legal personal representatives, in the absence of any context in the will showing that the word is to have a different meaning; 45 Ch. Div. 269.

See PERSONAL REPRESENTATIVES; LEGAL PERSONAL REPRESENTATIVE.

In *legislation*, it signifies one who has been elected a member of that branch of the legislature called the house of representatives.

The securing of fair apportionment of representatives in legislative bodies is one of the most serious problems in modern constitutional law, there being no subject as to which the legislation is more frequently affected by partisan bias. In many of the states there has been an effort to control the matter by constitutional provisions under which it is usually required that the districts shall be formed of contiguous territory and contain as nearly as possible an equal number of inhabitants. These are the principal provisions in the constitution of Illinois, in which state it was held that an apportionment act was valid which was a substantial compliance with the constitution, though the rule of compactness was only applied to a limited extent; People v. Thompson, 155 Ill. 451, 40 N. E. 307. The subject has been very carefully considered in Indiana. Among the conclusions reached there are: that under the state constitution requiring a sexennial enumeration of the male inhabitants over twenty-one years and an apportionment at the next legislative session thereafter, the legislature, having once made a valid apportionment after an enumeration, is prohibited from making a reapportionment and from repealing such valid apportionment during the enumeration period; that if the first apportionment is invalid, even before it has been declared so by the courts, a second may be passed; that the question of the validity of such a law is not a political one, to be determined only at the discretion of the legislature, but that it is entirely within the jurisdiction of the courts to determine its constitutionality; that where the question of constitutionality has been determined by a lower court in an action between the citizens, and an appeal is dismissed, the subject is not *res judicata* as against the state; and that the state is not estopped from objecting to the constitutionality of an apportionment by the fact that a legislature has been elected under an unconstitutional act; Board of Com'rs of Huntington Co. v. Heaston, 144 Ind. 593, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192.

In New Jersey it was held that the constitutionality of such acts is a subject of judicial inquiry and not a mere political question, but that the courts cannot overturn a law passed within constitutional limitations on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corporate means; State v. Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548, where it was held that mandamus to compel officers to proceed under prior laws in respect to elections instead of following an unconstitutional statute is not premature because no demand and refusal has been made or the time arrived when it is the duty of the officers to act.

In a Virginia case it was said that the laying off and defining of districts under a constitutional requirement that they should be of contiguous counties, etc., compact, and, as nearly as may be, equal in population, was an exercise of political and discretionary power of the legislature for which they are amenable to the people; Wise v. Bigger, 79 Va. 269; but this, it is remarked, "was a mere declaration of the court without discussion of the question and without any facts reported which show any attempt at a gerrymander"; 15 L. R. A. 561, note.

Any clear violation of the constitutional provisions will make an apportionment invalid; as, the division of a county or district where the constitution forbids it; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; or the allotment of a greater number of representatives than the constitution directs; State v. Francis, 26 Kan. 724; and glaring inequalities either of representation or of population in the districts will be considered a sufficient indication that the legislature has exceeded its discretion; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27; Giddings v. Blacker, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; People v. Canaday, 73 N. C. 198, 21 Am. Rep. 465; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *contra* People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836, as to which see 31 Am. Law Reg. 851. The opinion by Peckham, J., in the New York case takes a radically different view of the nature of the power involved in the apportionment of a state for representatives from that expressed in the other cases cited, particularly those from Indiana and New Jersey. He says: "From the formation of government under written constitutions in this country the question of the basis of representation in the legislative branch of the government has been one of the most important and most frequently debated. It is not true that equality of members in representation has been the leading idea at all times in regard to republican institutions. . . . The power to readjust the political divisions of a sovereignty with the view of representation of those divisions or of the inhabitants thereof, in the legislature, resides, of course, in the first instance, with the people, who in this country are the source of all political power. The essential nature of the power itself is not, however, altered by that fact. In its nature it is political as distinguished from legislative or judicial."

If the discretion of the legislature is fairly exercised, the apportionment will be sustained even if not mathematically correct; State v. Campbell, 48 Ohio St. 438, 27 N. E. 884; Prouty v. Stover, 11 Kan. 235, per Brewer, J.; Opinion of the Justices, 18 Me. 458; but there can be no legislative discretion to give a county of less population than another greater representation under a constitution requiring representative districts to contain "as nearly as may be" an equal number of inhabitants; Board of Supervisors v. Blacker, 92 Mich. 638.

These principles have been also applied to apportionments made by minor administrative bodies to which the power is granted; In re Baird, 142 N. Y. 523, 37 N. E. 619; In re Whitney, 142 N. Y. 531, 37 N. E. 621; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. In the case last cited a distinction was made by Peckham, J., between the legislative power of apportionment and that confided to an inferior body. The former, it was said, might reasonably be considered a power to divide according to the legislative discretion, "but in the case of inferior bodies, like boards of supervisors, who have no legislative power excepting what is specifically granted, the power to divide being given, the implication would be strong that it was only a power to divide equally." Nevertheless, as some discretion was necessarily involved, it must be an honest and a fair discretion arising out of the circumstances of the case and reasonably affecting the exercise of the power of equal division. But it was not to be considered "that every trifling deviation from equality of population would justify or warrant an application to a court for redress. . . . It must be a grave, palpable, and unreasonable deviation from the standard," making it apparent "that very great and wholly unnecessary inequality has been intentionally provided for." Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81.

As to the apportionment of representatives in congress among the states, see APPORTIONMENT; and see, generally, JUDICIAL POWER; LEGISLATIVE POWER.

REPRESENTATIVE DEMOCRACY. A form of government where the powers of the sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. 1 Bouvier, Inst. n. 31.

REPRESENTATIVE PEERS. See PEERS.

REPRIEVE (from Fr. *reprendre*, to take back). The withdrawing of a sentence for an interval of time, which operates in delay of execution. 4 Bla. Com. 394.

It is granted by the favor of the pardoning power, or by the court who tried the prisoner. Reprieves are sometimes granted *ex necessitate legis;* for example, when a woman is convicted of a capital offence, after judgment she may allege pregnancy in delay of execution. In order, however, to render this plea available, she must be *quick with child* (*q. v.*), the law presuming—perhaps wrongly enough—that before that period life does not commence in the fœtus; Co. 3d Inst. 17; 1 Hale, Pl. Cr. 368; 2 *id.* 413; 4 Bla. Com. 395. See JURY OF WOMEN.

The judge is also bound to grant a re-

prieve when the prisoner becomes insane; 4 Hargr. St. Tr. 205, 206; Co. 3d Inst. 4.

The president, under the constitution, Art. II. § 2, has the power to grant reprieves. A reprieve is said to be a withdrawal or withholding of punishment for a time after conviction and sentence, in the nature of a stay of execution. Cooley, Const., 2d ed. 104. See Bish. Cr. Proc. 1299. When a reprieve is granted in a capital case to a day certain, the warden should execute the sentence on the day the reprieve expires, and the time of execution need not be again fixed by the court; In re Buchanan, 146 N. Y. 264, 40 N. E. 883. See Sterling v. Drake, 29 Ohio St. 457, 23 Am. Rep. 762; PARDON; EXECUTION.

REPRIMAND. The censure which in some cases a public officer pronounces against an offender.

This species of punishment is used by legislative bodies to punish their members or others who have been guilty of some impropriety of conduct towards them. The reprimand is usually pronounced by the speaker.

REPRISALS. The forcible taking by one nation of a thing which belonged to another, in return or satisfaction for an injury committed by the latter on the former. Vattel, b. 2, c. 18, s. 342; 1 Bla. Com. c. 7.

Positive reprisals consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.

Negative reprisals take place when a nation refuses to fulfil a perfect obligation which it has contracted, or to permit another state to enjoy a right which it justly claims.

Special reprisals are such as are granted in times of peace to particular individuals who have suffered an injury from the citizens or subjects of the other nation.

General reprisals take place by virtue of commissions delivered to officers and citizens of the aggrieved state, directing them to take the persons and property belonging to the offending state wherever found.

Where an individual is injured by a foreign state he must first apply to its courts, if possible, and it is only when refused redress there that his own government can claim to interfere. Similarly where the injury is to a state, compensation should be demanded before recourse is had to reprisal. Risley, Law of War 57. An instance of reprisal occurred in December, 1897, when Germany threatened bombardment at Hayti unless the government within eight hours saluted the German flag and made compensation to an injured German subject. See LETTERS OF MARQUE.

Reprisals are made in two ways, either by embargo, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the citizen, authorized by the government. See 2 Brown, Civ. Law 334. Such letters are generally granted for a refusal to pay debts, for an unwarrantable suspension of treaty obligations, denial of evident justice, or a refusal to pay indemnity for losses. One of the last instances of a letter of reprisal was in 1778 when the King of France gave authority of reprisal to certain people whose vessels had been seized by the British government for carrying contraband of war; Snow, Int. Law 76. Congress has the power to grant letters of marque and reprisal. U. S. Const. art. 1, s. 8, cl. 11.

The property seized in making reprisals is preserved while there is any hope of obtaining satisfaction or justice; as soon as that hope disappears, it is confiscated, and then the reprisal is complete; Vattel, b. 2, c. 18, § 342. See Boyd's Wheat. Int. Law.

The term is now used in the sense of retaliation in general, and the act is directed not merely against property of the state or of its citizens, but against the citizens themselves, their liberty, and even their lives. II Opp. §§ 33–43.

While applied more strictly to acts falling short of actual war, the term also includes acts of retaliation in time of war done for the purpose of checking excesses committed by the enemy in violation of the laws of war. Spaight, War Rights on Land, 461–470.

REPRISES. The deductions and payments out of lands, annuities, and the like are called reprises, because they are *taken back;* when we speak of the clear yearly value of an estate, we say it is worth so much a year *ultra reprises*, besides all reprises.

In Pennsylvania, lands are not to be sold under an execution when the rents can pay the debt and interest and costs in seven years, beyond all reprises.

REPROBATION. In Ecclesiastical Law. The propounding exceptions either against facts, persons, or things; as, to allege that certain deeds or instruments have not been duly and lawfully executed; or that certain persons are such that they are incompetent as witnesses; or that certain things ought not, for legal reasons, to be admitted.

REPUBLIC. A commonwealth; that form of government in which the administration of affairs is open to all the citizens. In another sense, it signifies the state, independently of its form of government. 1 Toullier 28 and n., 202, note.

REPUBLICAN GOVERNMENT. A government in the republican form; a government of the people; a government by representatives chosen by the people. Cooley, Const. 194. It is usually put in opposition to a monarchical or aristocratic government. But it is said to be, strictly speaking, by no means inconsistent with monarchical forms; Cooley, Const. 194; there can be no doubt that in the light of the fact that the Revolu-

tion was intended to throw off monarchical forms, a republican form of government in the constitution means a government in which the people choose, directly or indirectly, the executive. A blending of legislative and executive powers in the same official does not violate the constitutional guarantee; Village of Saratoga Springs v. Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. Whether the government of a state is such is a political question; Kiernan v. Portland, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386.

See STATE; GOVERNMENT; POLITICAL QUESTION; CONSTITUTION OF THE UNITED STATES. See also Judge Baldwin's article in Col. L. Rev. (1909); Rawle, Constit.

REPUBLICATION. An act done by a testator, from which it can be concluded that he intended that an instrument which had been revoked by him should operate as his will. Schoul. Wills 441; or it is the re-execution of a will by the testator, with a view of giving it full force and effect.

The republication is *express* when there has been an actual re-execution of it; 1 Ves. 440; Bagwell v. Elliott, 2 Rand. (Va.) 192; Jackson v. Potter, 9 Johns. (N. Y.) 312; it is *implied* when, for example, the testator by a codicil executed according to the statute of frauds, reciting that he had made his will, added, "I hereby ratify and confirm my said will, except in the alterations after mentioned." 3 Bro. P. C. 85. See Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391. The will might be at a distance or not in the power of the testator, and it may be thus republished; 1 Ves. 486; 4 Bro. C. C. 2.

The republication of a will has the effect —*first*, to give it all the force of a will made at the time of the republication; Beach, Wills 143; if, for example, a testator by his will devise "all his lands in A," then revokes his will, and afterwards buys other lands in A, the republication, made after the purchase, will pass all the testator's lands in A; Cro. Eliz. 493. See 1 P. Wms. 275. *Second*, to set up a will which had been revoked.

REPUDIATE. To express in a sufficient manner a determination not to accept a right, when it is offered.

He who repudiates a right cannot by that act transfer it to another. Repudiation differs from renunciation in this, that by the former he who repudiates simply declares that he will not accept; while he who renounces a right does so in favor of another. Renunciation is, however, sometimes used in the sense of repudiation. See RENOUNCE; RENUNCIATION; Wolff, Inst. § 339.

REPUDIATION. In Civil Law. A term used to signify the putting away of a wife or a woman betrothed.

Properly, divorce is used to point out the separation of married persons; repudiation, to denote the separation either of married people, or those who are only affianced. *Divortium est repudium et separatio maritorum; repudium est renunciatio sponsalium, vel etiam est divortium.* Dig. 50. 16. 101.

A determination to have nothing to do with any particular thing: as, a repudiation of a legacy is the abandonment of such legacy, and a renunciation of all right to it.

In Ecclesiastical Law. The refusal to accept a benefice which has been conferred upon the party repudiating.

As to repudiation of a contract before the time of performance, see ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE.

REPUGNANCY. In Contracts. A disagreement or inconsistency between two or more clauses of the same instrument. In deeds, and other instruments *inter vivos*, the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty; 2 C. B. 830; 13 M. & W. 534. In wills, the latter clause prevails, under the same exceptions; Co. Litt. 112 *b*; 2 My. & K. 149; 1 Jarm. Wills 411. See, however, 18 Ch. Div. 17. Repugnancy in a condition renders it void; Stockton v. Turner, 7 J. J. Marsh. (Ky.) 192; 6 Ch. Div. 549.

In Pleading. An inconsistency or disagreement between the statements of material facts in a declaration or other pleading: as, where certain timber was said to be for the completion of a house already built; 1 Salk. 213. Repugnancy of immaterial facts, or of redundant and unnecessary matter, if it does not contradict material allegations, will not, in general, vitiate the pleadings; Co. Litt. 303 *b*; 1 Chitty, Pl. 233. See Steph. Pl. 378; Gould, Pl. § 172.

REPUTABLE. Worthy of repute or distinction, held in esteem, honorable, praiseworthy. Illinois State Board of Dental Examiners v. People, 123 Ill. 245, 13 N. E. 201,

REPUTATION. The opinion generally entertained in regard to the character or condition of a person by those who know him or his family. The opinion generally entertained by those who may be supposed to be acquainted with a fact.

In general, reputation is evidence to prove a *man's reputation in society*; a *pedigree*; 14 Camp. 416; 1 S. & S. 153; *certain prescriptive or customary rights* and obligations; *matters of public notoriety*. But as such evidence is in its own nature very weak, it must be supported, when it relates to the exercise of a right or privilege, by proof of acts of enjoyment of such right or privilege within the period of living memory; 1 Maule & S. 679; 5 Term 32. Afterwards, evidence of reputation may be given. Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon a dispassionate judgment, or upon warm admiration for habitual truthfulness or natural indignation at habitual falsehood, and whether his neighbors are virtuous or immoral in their own lives; Brown v. U. S., 164 U. S. 221, 17 Sup. Ct. 33, 41 L. Ed. 410. The facts must

be general, and not particular; they must be free from suspicion; 1 Stark. Ev. 54. An existing reputation is a fact to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes the reputation; Bathrick v. Post & Tribune Co., 50 Mich. 642, 16 N. W. 172, 45 Am. Rep. 63.

Formerly, and until the middle of this century, witnesses in England could testify as to their personal knowledge and opinion of a defendant's or witness's *character*. At present the question to be asked is whether the witness knows the witness's *reputation*, what it is, and whether, from such knowledge, he would believe him on oath. Tayl. Ev. § 1324. In America, as to the character of a defendant, reputation is in most states made the exclusive mode of proof. See an interesting article by Prof. John H. Wigmore, in 32 Am. L. Rev. 713.

Injuries to a man's reputation by circulating false accounts in relation thereto are remediable by action and by indictment. See LIBEL; SLANDER; CHARACTER.

REPUTED. Accepted by general, or public opinion.

REPUTED OWNER. In English Practice. A bankrupt trader who has in his apparent possession goods, which he holds with the consent of the true owner, is called the reputed owner. The Bankruptcy Act of 1869, sec. 15, § 5, provided that such goods in his possession at the commencement of his bankruptcy pass to his trustee; but things in action, other than debts due to him in the course of his trade or business, are not deemed goods and chattels within the meaning of that clause; Whart. Dict.; 2 Steph. Com. 166.

By the English Bankruptcy Act of 1883, the trustee is entitled to such goods as are, at the commencement of the bankruptcy (the date of the earliest act of bankruptcy), in the possession, order, or disposition of the bankrupt, by the consent of the true owner, in such a way that the former is the reputed owner of them; provided they are with the bankrupt in his trade or business. The ownership may be rebutted by showing a custom in the trade to take goods on hire, as in the case of a hotel-keeper having hired furniture; 18 Ch. D. 30; or pianos; 18 *id.* 601; and perhaps furniture in general; 41 L. J. Q. B. 20; but see, *contra*, 23 Ch. D. 261.

In mechanic's lien law, where the remedy is usually *in rem*, liens are filed of record against the "owner or reputed owner."

REQUEST. Within the provision of the constitution of a religious society providing that a change therein cannot be granted except at the request of two-thirds of the society, a vote was held not a request. Philomath College v. Wyatt, 27 Or. 390, 31 Pac. 216, 37 Pac. 1022, 26 L. R. A. 68.

In Contracts. A notice of a desire on the part of the person making it, that the other party shall do something in relation to a contract. Generally, when a debt is payable immediately, no request need be made; Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119; Ernst v. Bartle, 1 Johns. Cas. (N. Y.) 319. In some cases, the necessity of a request is implied from the nature of the transaction; as, where a horse is sold to A, to be paid for on delivery, A must show a request; 5 Term 409; or impossibility on the part of the vendor to comply, if requested; 5 B. & Ad. 712; previous to bringing an action; and on a promise to marry; 2 Dowl. & R. 55. See DEMAND. And if the contract in terms provides for a request, it must be made; Ernst v. Bartle, 1 Johns. Cas. (N. Y.) 327. It should be in writing, and state distinctly what is required to be done; 1 Chitty, Pr. 497.

In Pleading. The statement in the plaintiff's declaration that a demand or request has been made by the plaintiff of the defendant to do some act which he was bound to perform, and for which the action is brought.

A *general request* is that stated in the form "although often requested so to do" (*licet sæpe requisitus*), generally added in the common breach in the money counts. Its omission will not vitiate the declaration; 1 B. & P. 59; Leflingwell v. White, 1 Johns. Cas. (N. Y.) 100, 1 Am. Dec. 97.

A *special request* is one provided for by the contract, expressly or impliedly. Such a request must be averred; 2 B. & C. 685; and proved; 1 Saund. 32, n. 2. It must state time and place of making, and by whom it was made, that the court may judge of its sufficiency; 1 Stra. 89. See Com. Dig. *Pleader* (C 69, 70); 1 Saund. 33, n.; DEMAND.

A trial judge is *requested* to charge a jury in accordance with points submitted by counsel.

REQUEST, LETTERS OF. See LETTERS OF REQUEST.

REQUEST NOTES. In English Law. Certain notes or requests from persons amenable to the excise laws, to obtain a permit for removing any excisable goods or articles from one place to another.

REQUESTS, COURTS OF. See COURTS OF REQUESTS.

REQUISITION. The act of demanding a thing to be done by virtue of some right. See MILITARY OCCUPATION.

The demand made by the governor of one state on the governor of another for a fugitive, under the provision of the United States constitution. See EXTRADITION; FUGITIVE FROM JUSTICE.

REQUISITIONS OF TITLE. Written inquiries made by the solicitor of an intending purchaser of land, to the vendor's solicitor, in respect of some apparent insufficiency in the abstract of title. Moz. & W.

RES (Lat. things). The terms Res, Bona, Biens, used by jurists who have written in the Latin and French languages, are intended to include movable or personal, as well as immovable or real, property. 1 Burge. Confl. L. 19.

The word has two widely different meanings in Roman law. 1. It denotes things, acts, and forbearances, and sometimes even persons considered as the subjects or objects of rights and obligations. 2. It also has a meaning which includes, beyond these, rights and obligations themselves. In this widest sense the word "*res*" embraces the whole matter with which law is conversant. Campb. Austin 60. See a learned treatment in Nettleship, Contributions to Latin Lexicography.

See BIENS; BONA; THINGS; JUS AD REM.

RES ADIRATÆ. The gist of the old action for *res adiratæ* was the fact that the plaintiff had lost his goods, that they had come into the hands if the defendant, and that the defendant, on request, refused to give them up. 3 Holdsw. Hist. E. L. 275.

RES ADJUDICATA. Incorrectly used for *res judicata*.

RES COMMUNES (Lat.). **In Civil Law.** Those things which, though a separate share of them can be enjoyed and used by every one, cannot be exclusively and wholly appropriated; as, light, air, running water. Mackeldey, Civ. Law § 156; Erskine, Inst. 1. 1. 5. 6.

RES GESTÆ (Lat.). Transaction; thing done; the subject-matter.

Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act. Whart. Ev.; People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115.

Events speaking for themselves through the instructive words and acts of participants, not the words and acts of participants when narrating the events; Graves v. People, 18 Colo. 170, 32 Pac. 63.

"All declarations or exclamations uttered by the parties to a transaction, and which are contemporaneous with and accompany it, and are calculated to thrown light upon the motives and intentions of the parties to it, are clearly admissible as parts of the *res gestæ*." International & G. N. R. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

Professor Thayer prefers the singular form *res gesta*, of which he says in a note to 14 Am. L. Rev. 817: "In using this form . . . the writer is aware that he runs the risk of seeming over-nice about a trifle. It is believed, however, that the endeavor to give precision to the phrase will be more materially forwarded by fixing the mind upon the singular form of expression instead of the plural; that was the regular usage, at least in questions of evidence, and it is not at all obsolete today." It is used in Waldele v. R. Co., 95 N. Y. 274, 47 Am. Dec. 41.

When it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence as a part of the *res gestæ*, for the purpose of showing its true character. On an indictment for a rape, for example, what the girl said so recently after the fact as to exclude the possibility of practising on her, has been held to be admissible evidence as a part of the transaction; 2 Stark. 241; 1 Phill. Ev. 4th Am. ed. 185.

Declarations or acts, accompanying the fact in controversy and tending to illustrate or explain it, as conversations contemporaneous with the facts; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Brockett v. Steam-Boat Co., 18 Fed. 156; Weir v. Plymouth Borough, 148 Pa. 566, 24 Atl. 94; or the complaints of the injured party, both as to bodily suffering and the circumstances of the occurrence; Elkins v. McKean, 79 Pa. 493; Hall v. Masonic Accident Ass'n, 86 Wis. 518, 57 N. W. 366; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; Chicago West Div. R. Co. v. Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; or the declarations and conduct of third persons at the time; Kleiber v. R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Railway Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052; Mo. Pac. R. Co. & I. & G. N. R. Co. v. Collier, 62 Tex. 318; Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297, 59 L. R. A. 720, 102 Am. St. Rep. 274; see 21 How. St. Tr. 514; are admissible; also declarations of a party at the time of taking possession of personal property as to the nature of his possession; State v. Schneider, 35 Mo. 533; statements made by the parties at the time of the sale of personal property, when such statements bear upon the question of good faith or other fact in issue; Haight v. Hayt, 19 N. Y. 464; Banfield v. Parker, 36 N. H. 353; statements as to the conditions of an execution sale; Arnold v. Gorr, 1 Rawle (Pa.) 223; or of an officer or other persons interested at the time of levying on property; *id.*; Pierson v. Hoag, 47 Barb. (N. Y.) 243; of a person at the time of making an entry upon land, when they explain the character and purpose of making such entry; 3 Bla. Com. 174; by a bondsman when signing a bond; State v. Gregory, 132 Ind. 387, 31 N. E. 952; declarations accompanying the payment of money, to show the purpose or application of such payment; Bank of Woodstock v. Clark, 25 Vt. 308; statements of a

grantor at the time of making a conveyance; Badger v. Story, 16 N. H. 168; Chick v. Sisson, 95 Mich. 412, 54 N. W. 895; Kent v. Harcourt, 33 Barb. (N. Y.) 491; Potter v. McDowell, 31 Mo. 62. Declarations of a wife showing maltreatment on the part of her husband are part of the *res gestæ* in an action by him for the alienation of her affections; Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438; and so also declarations of a person whose mental capacity is the subject of investigation, as part of the facts on which a non-expert witness founds his opinion; Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; and what was said by an alleged borrower when the question was whether the money which passed was a loan; Mayes v. Power, 79 Ga. 631, 4 S. E. 681. Declarations made by an officer of a steamboat while engaged in violently removing a passenger from a part of the vessel in which his contract for transportation did not entitle him to be, were admitted as part of the *res gestæ;* New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049.

A mere narrative of a past occurrence is inadmissible as part of the *res gestæ;* Lund v. Tyngsborough, 9 Cush. (Mass.) 42; Rockwell v. Taylor, 41 Conn. 55; Archer v. Helm, 70 Miss. 874, 12 South. 702; the declaration must so harmonize with the fact as to form one transaction; Smith v. N. B. Society, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616. In a case frequently criticised, a statement made immediately after the act and whilst running from the room, where her throat had been cut, was held inadmissible; 14 Cox, Cr. C. 341. This was the famous Bedingfield Case which gave rise to an extended controversy between Cockburn, C. J., who presided at the trial, and Mr. Taylor, the English writer on evidence, in the course of which pamphlets were published by each of them. Lord Cockburn defined the term thus: "Whatever act or series of acts constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,—whether on the part of the agent or wrongdoer, in order to its performance, or on that of the patient or party wronged in order to its prevention,—and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as, e. g., in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestæ*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive has ceased, through the completion of the principal act or other determination of it by its prevention or abandonment by the wrong-doer,—such as, e. g., statements made with a view to the apprehension of the offender,—do not form part of the *res gestæ*, and should be excluded."

Mr. Taylor criticised this definition and expressed a doubt whether it was not better that the term should "be left unfettered by useless definition and be determined in each case either by the judge or the jury in the exercise of a sound discretion." This followed the view of Greenleaf on Evidence, § 108, in an extended discussion of this controversy. Prof. J. B. Thayer, in 14 Am. L. Rev. 817, dissents from the view of Mr. Taylor, remarking that "a term that cannot be defined should be dropped." He, however, criticised at length the proposed definition of Lord Cockburn. See an article on this controversy by N. W. Sibley in 19 L. Q. Rev. 203.

The question as to the requirement that the statements shall be absolutely contemporaneous with the crime or extended in question is not decided by the courts in this country with unanimity. That they must be contemporaneous in order to meet the requirement of being probably true is held in State v. Wagner, 61 Me. 178, because in such case fabrication is not probable; Mitchum v. State, 11 Ga. 615; so it was held that the statements must be contemporaneous; Durkee v. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Rep. 562, where a declaration made only five minutes after a railway accident was rejected. Statements made shortly after an accident have been admitted in other cases; Travelers' Ins. Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. Ed. 437; Hill v. Com., 2 Grat. (Va.) 594; Christopherson v. R. Co., 135 Ia. 409, 109 N. W. 1077, 124 Am. St. Rep. 284. Antecedent declarations have been rejected, even when made just before the subject of the inquiry; Ala. Great Southern R. Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764.

A leading text writer treats the subject in the nature of an exception to the hearsay rule, the underlying principle of which is that as the outburst of honest belief in a moment of intense excitement, they acquire a certain guarantee of trustworthiness; but in order that an exclamation should be admissible there must be (1) a startling occasion; (2) the statement must be made before there is time to fabricate; and (3) must relate to the circumstances of the occurrence; and (4) the declaration must be made by one who has had the opportunity to observe personally as to that of which he speaks. Accordingly, the writer referred to considers that if the evidence fulfils these requisites it is immaterial whether the words were spo-

ken by a party to the transaction or a bystander; Wigm. Ev. §§ 1750, 1751. Some courts, however, hold that the statements of a bystander are not admissible; Butler v. Ry. Co., 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738; Flynn v. State, 43 Ark. 289; State v. Bellard, 50 La. Ann. 594, 23 South. 504, 69 Am. St. Rep. 461; Bradshaw v. Com., 10 Bush (Ky.) 576; L. R. 18 Q. B. D. 537; Sullivan v. Electric Co., 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082, where the exclamations of a bystander were excluded because they related to matters of opinion and not to mere facts as to which the person might testify as a witness. In that case the offer was of the exclamation of a fellow-passenger "that it looked like murder" to let the deceased off at that place while intoxicated.

The length of the interval of time between the main facts and the statements cannot be important if sufficient time elapsed to make the statements, having regard to their form and substance, mere narrative; Jones v. State, 71 Ind. 66; and that only a minute elapsed, does not alter the rule; King v. State, 65 Miss. 576, 5 South. 97, 7 Am. St. Rep. 681; but see Travelers' Ins. Co. v. Mosley, 8 Wall. (U. S.) 397, 19 L. Ed. 437; Com. v. M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727, where the declarations are considered part of the *res gestæ*, if there is neither time nor motive for misrepresentation or intention; and if they are voluntary and spontaneous and made within so short a time after the occurrence as to preclude the idea of deliberate design; People v. Vernon, 35 Cal. 49, 95 Am. Dec. 49; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883; Texas & P. R. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Kirby v. Com., 77 Va. 681, 46 Am. Rep. 747.

In an action for personal injury, a physician's written statement concerning the injury made at the time and annexed to his deposition, is not admissible as part of the *res gestæ;* Vicksburg & M. R. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299.

It was said in 7 Ad. & El. 556: "Declarations accompanying acts are a wide field of evidence and to be carefully watched." The test is expressed in 7 Ad. & El. 361, in these words: "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible."

The danger of error is pointed out by Parker, C. J., in Patten v. Ferguson, 18 N. H. 528, where he said: "Here it is admitted that neither the fact nor the declaration, standing alone, are evidence; and when put together, it is the declaration which is significant, and not the fact. The fact was of no importance standing alone; and the declaration, standing alone, was incompetent. When they are united, the unimportant fact is used as a vehicle to introduce the incompetent declaration."

Professor Wigmore considers that the subject has been so confused as to make it almost impossible to arrive at a real basis of the principle involved. He discriminates between what he terms the verbal act doctrine and the exception to the hearsay rule for spontaneous exclamations. The latter he defines to be a statement or exclamation by an injured person immediately after the injury, declaring the circumstances of the injury, or by a person present at an affray, railroad collision or other exciting occasion, asserting the circumstances of it as observed by him; Wigm. Ev. § 1746. The verbal act he defines as the utterance of specific words in itself a part of the details of the issue under the pleadings; *id.* § 1770; or when the utterance accompanies conduct to which it is desired to attach some legal effect; *id.* § 1772.

The modern tendency is to extend rather than to narrow the rule as to the admission of declarations as part of the *res gestæ*, especially in view of the fact that the parties are now generally permitted to testify on their own behalf, and to consider the former grounds for excluding such declarations as affecting their weight only; Jack v. Mut. Reserve Fund Life Ass'n, 113 Fed. 49, 51 C. C. A. 36. In order to render such declarations admissible as part of the *res gestæ* it is insufficient to show that they were made "immediately" after the transaction, without showing, at least approximately, how nearly they were connected therewith in point of time. Declarations, to be introduced as part of the *res gestæ*, must be so nearly connected with the transaction under investigation in point of time as to be free from any suspicion of device or afterthought; Pool v. Warren County, 123 Ga. 205, 51 S. E. 328.

In order to determine whether a particular statement is part of the *res gestæ* it is necessary that it should be a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, and it must not be merely a narrative of a completed, past affair; Chicago City R. Co. v. White, 110 Ill. App. 23. Declarations made at the same time the main fact under consideration takes place and so connected with it as to illustrate its character, are admissible; Dills v. May, 3 Ky. L. Rep. 765. A declaration made under such circumstances as to raise the presumption that it was the unpremeditated explanation of the matter about which it was made is competent; Pledger v. R. Co., 69 Neb. 456, 95 N. W. 1057; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; Shannon v. Castner, 21 Pa.

Super. Ct. 294; Leach v. R. Co., 29 Utah, 285, 81 Pac. 90, 110 Am. St. Rep. 708.

An admission of declarations as part of the *res gestæ* rests largely in the discretion of the trial court; Pledger v. R. Co., 69 Neb. 456, 95 N. W. 1057; but where the declarations of a party do not explain, illustrate or characterize a fact, but are merely offered to establish the existence of a fact or strengthen other proof of its existence, they are not admissible; Corder v. Talbott, 14 W. Va. 277. Facts not in issue, but so connected with the facts in issue as to form a part of the same transaction or subject matter, are admissible; Schmidt v. Packard, 132 Ind. 398, 31 N. E. 944; and so are the circumstances in which the injury was committed; Illinois Central R. Co. v. Henon, 68 S. W. 456, 24 Ky. L. Rep. 298. The fact that the plaintiff was intoxicated at the time of the injury is admissible; Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333. A mere expression of opinion is not admissible; Trexler v. R. Co., 28 Pa. Super. Ct. 198. A statement which constitutes part of the *res gestæ* may be testified to by the person who made it; Gulf, C. & S. F. Ry. Co. v. Hall, 34 Tex. Civ. App. 535, 80 S. W. 133.

Where statements made by an agent are admissible, it is not necessary to call him to prove them, but they may be proved by any other witness; Geylin v. De Villerol, 2 Houst. (Del.) 311; statements made by a duly authorized agent are admissible; Lockwood v. Rose, 125 Ind. 588, 25 N. E. 710; Singleton v. Mann, 3 Mo. 464; Wheaton v. Ins. Co., 20 S. D. 62, 104 N. W. 850.

RES INCORPORALES. Things incorporeal; fixed relations in which men stand to things or to other men; relations giving them power over things or claims against persons. Inst. 2. 2.

RES INTEGRA (Lat. an entire thing; an entirely new or untouched matter). A term applied to those points of law which have not been decided, which are untouched by dictum or decision. 3 Mer. 269; 1 Burge, Confl. L. 241.

RES INTER ALIOS ACTA (Lat.). A technical phrase which signifies acts of others or transactions between others.

Neither the declarations nor any other acts of those who are mere strangers, or, as it is usually expressed any *res inter alios acta*, are admissible in evidence against any one; when the party against whom such acts are offered in evidence was privy to the act, the objection ceases; it is no longer *res inter alios;* 1 Stark. Ev. 52; 3 *id.* 1300; 4 Mann. & G. 282. See MAXIM.

RES IPSA LOQUITUR (Lat. the transaction speaks for itself). A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence. See 5 Ex. 787. It is thus defined by Erle, J., in Scott v. London Docks Co., 2 H. & C. 596: "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." This definition has been termed a legal classic; 1 Thomp. Negl. § 15, with a note collecting numerous cases.

In Shearm. & Redf. Negl. § 59, it is said that where it is shown that the accident is such as that its real cause may be the negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident by proving the circumstances and thus raising the presumption that if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant. Paducah Traction Co. v. Baker, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185; In re Hawkins, 165 N. Y. 188, 59 N. E. 925; Howser v. R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132; Rockwell v. McGovern, 202 Mass. 6, 88 N. E. 436, 23 L. R. A. (N. S.) 1022.

Wigm. Evid. § 2509, gives the cases in every state, and advances the following considerations that ought to limit the operation of the rule: 1. The apparatus must be such that in the ordinary instances no injurious operation is to be expected unless from a careless construction, inspection or user. 2. Both the inspection and user must have been at the time of the injury in the control of the party charged.

The doctrine is that when a thing which causes injury without fault of the person injured, is shown to be under the exclusive control of defendant and would not cause the damage in ordinary course if the party in control used proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care; San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680, where the doctrine was held rightly applied against an electric light company in the case of a person injured while adjusting an electric light in his residence by an electric shock transmitted from outside wires entirely without fault on his part and in a manner which would not have happened had the wires been in proper condition.

Where damage is done by the falling of objects to the highway from a building, the rule applies and the accident is of itself evi-

dence of negligence; Doll & Sons v. Ribetti, 203 Fed. 593, 121 C. C. A. 621, per Gray, C. J., following 2 H. & C. 722; 6 Q. B. 759.

The sudden sinking of a sidewalk under the weight of a pedestrian is evidence of negligence on the part of a contractor who took up and relaid it, in the execution of public work; Rockwell v. McGovern, 202 Mass. 6, 88 N. E. 436, 23 L. R. A. (N. S.) 1022; otherwise, in a suit against a city and its contractor in which there was judgment below against the contractor which was reversed, the court pointing out that the street was in the care of the city and that there was no evidence that the sidewalk was out of repair and that the city had knowledge of the fact; Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689.

The sudden starting of a street car as a passenger is alighting raises the presumption of negligence; Paducah Traction Co. v. Baker, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185.

Where a passenger was injured by the collision of the car in which she was riding with a cable car of an independent railway, it was held that as to the railway company, which was transporting plaintiff, the accident created a presumption of negligence, but that as to the line operating the other car, a presumption of negligence did not arise; Loudoun v. R. Co., 162 N. Y. 386, 56 N. E. 988.

Where a passenger in an electric car became alarmed at the sight of flame shooting from the controller-box and received an electric shock as she stepped over the metal door sill in an attempt to escape from the car, it was held that there was sufficient evidence of defendant's negligence; Buckbee v. R. Co., 64 App. Div. 360, 72 N. Y. Supp. 217. So also where plaintiff received an electric shock while using a telephone during a thunderstorm; Rocap v. Telephone Co., 19 Pa. Dist. R. 291; and where a patient was injured while having an X-ray photograph taken; Jones v. Tel. & Tel. Co., 118 Minn. 217, 136 N. W. 741, 40 L. R. A. (N. S.) 485.

This doctrine has a narrower application between master and servant than between carrier and passenger, for the carrier owes a higher degree of duty to a passenger than a master to a servant. A cause of action against a railroad for injuries to a brakeman by the derailment of a train is not established by evidence that one of the trucks under the car was defective, without showing which one; Henson v. R. Co., 194 N. Y. 205, 87 N. E. 85, 19 L. R. A. (N. S.) 790. The application of the rule arises from the nature of the occurrence and not from the relation of the parties; Klebe v. Distilling Co., 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140.

Allegations of specific omissions of duty do not deprive the plaintiff of his right to rely upon the doctrine if the case otherwise is a proper one for its application; Kluska v. Yeomans, 54 Wash. 465, 103 Pac. 819, 132 Am. St. Rep. 1121; McNeill v. R. Co., 130 N. C. 256, 41 S. E. 383; Dearden v. R. Co., 33 Utah, 147, 93 Pac. 271.

On the other hand, it has been held that the doctrine does not extend to cases in which acts of negligence specifically described are the gist of the action; Chicago Union Traction Co. v. Leonard, 126 Ill. App. 189; Todd v. Ry. Co., 126 Mo. App. 684, 105 S. W. 671. It is said that while it is inapplicable to support specific acts of negligence, yet if the plaintiff has made general allegations of negligence as well as specific allegations, he may rely upon the doctrine to support the general allegations; North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; but this rule was denied in Pierce v. R. Co., 22 Mont. 445, 56 Pac. 867; it was also said that the plaintiff, although alleging a specific act of negligence, may nevertheless rely upon the doctrine to establish the negligence of the defendant in the respect alleged; Palmer Brick Co. v. Chenall, 119 Ga. 842, 47 S. E. 239. An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not prevent the plaintiff from relying upon the presumption applicable to it; Sullivan v. Rowe, 194 Mass. 500, 80 N. E. 459; McNamara v. R. Co., 202 Mass. 491, 89 N. E. 131.

Where there are general allegations of negligence and these are followed by allegations of specific omissions of duty, the general allegations are to be deemed explained, limited and controlled by the special allegations. In many cases where the doctrine of *res ipsa loquitur* is inapplicable, this rule is invoked to prevent a recovery for acts of negligence not specifically pleaded; Walters v. R. Co., 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788.

The doctrine means that the facts of the occurrence warrant an inference of negligence, not that they compel such an inference. It does not shift the burden of proof, nor does it convert the defendant's general issue into an affirmative defence. When all the evidence is in, it is for the jury to determine whether the preponderance is with the plaintiff; Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815. Whether the defendant introduces evidence or not, the plaintiff is not entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were attributable to the defendant's negligence; Stewart v. Carpet Co., 138 N. C. 66, 50 S. E. 562.

Where contractual relations existed between the parties, and the plaintiff shows actual negligence or conditions so obviously dangerous as to admit of no other inference, the burden thus thrown on the defendant is not that of satisfactorily accounting for the accident, but of showing that he used due

care; Stearns v. Spinning Co., 184 Pa. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807.

See Foley v. R. R., 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; Stewart & Co. v. Harman, 108 Md. 446, 70 Atl. 333, 20 L. R. A. (N. S.) 228; NEGLIGENCE.

RES JUDICATA (Lat. the matter has been adjudged). A legal or equitable issue which has been decided by a court of competent jurisdiction.

When one is barred in any action, real or personal, by judgment, demurrer, confession, or verdict, he is bound as to that or a like action forever; 14 Q. B. D. 146; XII B. L. R. 304.

When a question is necessarily decided in effect though not in express terms between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form; 3 Atkins 626. This definition of Lord Hardwicke, in Gregory v. Molesworth, has been by some writers considered the best.

The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal; Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

Estoppel rests on equitable principles, while *res judicata* does not rest upon equitable principles, but on the two maxims which were its foundation in the Roman Law (see *infra*); Ind. L. R. VIII. All. 332; it is rather a principle of public policy than the result of equitable considerations. It is also a matter of private right; Putnam v. Clark, 34 N. J. Eq. 535.

It has been characterized as a "fundamental concept in the organization of civil society;" Jeter v. Hewitt, 22 How. (U. S.) 352, 16 L. Ed. 345.

It was derived from Roman law, being founded on the maxims *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action), and *interest reipublicæ ut sit finis litium* (it is the interest of the state that there should be an end of litigation).

It was said by the civilians *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum* (a decision makes white black; black, white; the crooked, straight; the straight, crooked).

It was said by Blackburn, L. J., that the doctrine was not received in England, as it was on the continent, directly from the Roman law; L. R. 2 App. Cas. 530.

A broad distinction is pointed out in Cromwell v. County of Sac, 94 U. S. 352, 24 L. Ed. 195: "It should be borne in mind that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the *same claim or demand*, and its effect as an estoppel in another action between the same parties upon *a different claim or cause of action*. In the former case, the judgment, if rendered upon the merits, constitutes an *absolute bar* to a subsequent action. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel *only as to those matters in issue or points controverted*, upon the determination of which the finding or verdict was rendered."

Where the cause of action is the same. In order to make a matter *res judicata*, there must be a concurrence of the four conditions following:

1. *Identity in the thing sued for;* 5 M. & W. 109; Bull v. Hopkins, 7 Johns. (N. Y.) 22.

2. *Identity of the cause of action;* Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. Ed. 218; Minor v. Walter, 17 Mass. 237; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Cist v. Zeigler, 16 S. & R. (Pa.) 282, 16 Am. Dec. 573; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

3. *Identity of persons and of parties* to the action; Legrand v. Rixey's Adm'r, 83 Va. 862, 3 S. E. 864; Sanford v. Oberlin College, 50 Kan. 342, 31 Pac. 1089.

4. *Identity of the quality in the persons* for or against whom the claim is made; 5 Co. 32 *b;* 6 Mann. & G. 164.

The simplest test as to whether it is the same cause of action is whether the cause of action has been merged in the former judgment. It is thus expressed by Lord Selborne, 2 App. Cas. 519: "When there is *res judicata* the original cause of action is gone."

In Lawrence v. Vernon, 3 Sumn. 22, Fed. Cas. No. 8,146, Judge Story said: "What is meant by the same cause of action is where the same facts will support both actions. This is a test to know whether a final determination in a former action is a bar or not to a subsequent action." To the same effect, 1 DeG., F. & J. 178, per Lord Westbury. In 15 C. B. N. S. 99, Willes, J., said: "To constitute a good plea of *res judicata*, it must be shown that the former suit was one in which the plaintiff might have recovered precisely what he seeks to recover in the second." So in [1893] 2 Q. B. 172.

In 14 Q. B. D. 147, Bowen, L. J., said: "The principle is frequently stated in the form of another legal proverb, *Nemo debet bis vexari pro eadem causa.* It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recorded once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. "The principle consideration," says De Grey, C. J., 2 W.

Bla. 827, "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case." "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions."

Plaintiff sued for too little, and then brought a new suit for his full claim; held estopped; 96 L. T. 679; a plaintiff must plead all his grounds in the first case. If he loses on that, he cannot bring another suit and urge a different ground; Manhattan Trust Co. v. Trust Co., 107 Fed. 332, 46 C. C. A. 322; Northern Pac. Ry. Co. v. Slaght, 205 U. S. 132, 27 Sup. Ct. 442, 51 L. Ed. 738. This is merely the necessary rule that as to a given cause of action the plaintiff may not split his case, nor the defendant his defence. The case must be tried once for all. And so, where it was the same cause of action, "it is quite right that the defendant should be estopped from setting up in the same action a defence that he might have pleaded, but has chosen to let the proper time go by;" Howlett v. Tarte, 10 C. B. N. S. 813.

Where the cause of action is different. Here, as held in Cromwell v. Sac, 94 U. S. 352, 24 L. Ed. 195, the judgment in the former action operates as an estoppel only to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. It is immaterial what *might have been* litigated and determined. The cause of action is considered a different cause of action if it was not merged in the former judgment.

A common case which illustrates what is a different cause of action is found in Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523, where it was held that there was a different cause of action because the former judgment was rendered upon different coupons than those involved in the second suit. To the same effect, Nesbitt v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562. See CAUSE OF ACTION.

In Cromwell v. Sac, 94 U. S. 352, 24 L. Ed. 195, it was said: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action, other demands arising out of the same transaction."

In Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282, an action for a second instalment of rent where the judgment between the parties for the first instalment was set up, it was said: "Such former judgment does not preclude defenses in the second case which might have been made in the first or which were set up in the answer to the first, they not having been, as a matter of fact, litigated and passed on in the first action."

In Hooker v. Hubbard, 102 Mass. 245, it was said: "If pleadings present several distinct propositions of fact, the judgment is not conclusive upon any one of them, unless it appears from the record or *aliunde* that the issue upon which it was rendered was upon that proposition."

It was said in Howlett v. Tarte, *supra*, quoted and followed in Cromwell v. Sac: "But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

In 1 H. & C. 797, Martin, B., interrupting counsel, said: "What is said in Smith's Lead. Cas. as to an award is no authority for saying that an award would be an estoppel in an action for another infringement of the same patent." And in 13 M. & W. 147, it was held: "If the plaintiff were to be deemed estopped now, when the point in issue was not raised at all in the former suit, he would be deemed estopped by the finding of a matter which he never disputed and on which the jury gave no verdict, and the court no judgment."

Where the record is such that there is or may be a material issue or matter that may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel, unless by pleading or proof the party asserting it establishes the fact that the issue, right, or matter in question was actually and necessarily litigated and determined in the former action; Ætna Life Ins. Co. v. Board of Com'rs, 117 Fed. 82, 54 C. C. A. 468.

In 10 L. R. C. P. 154, a replication that after a former judgment and before the second action, a second instalment had become due and there was default, was held good, the court saying that the default did not exist at the time of the first action, nor until after its determination and could not have been in controversy in such action and consequently there could be no estoppel.

"Facts not produced in the first action, whether then at hand or not, may be used in another suit on a different demand, though it be of the same nature and grow out of the same transaction;" Big. Est. 188.

What is concluded? In Last Chance Mining Co. v. Tyler Mng. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859, the court said: "The essence of estoppel by judgment is that there has been a judicial determination of a *fact*." In New Orleans v. Bank, 167 U. S. 387, 17 Sup. Ct. 905, 42 L. Ed. 202, the court said: "If in the prior cases, the question of exemption was necessarily presented and determined upon identically *the same facts*, up-

on which the right of exemption is now claimed." Parke, B., in 2 Exch. 665 (cited in Cromwell v. Sac), said: "The *facts* actually decided by an issue in any suit cannot be again litigated between the same parties."

"*Facts* not produced in the first action . . . may be used in another suit on a different demand, though it be of the same nature and grew out of the same transaction;" Big. Est. 188.

And in Outram v. Morewood, 3 East 346, the court said: "And it is not the recovery, but *the matter alleged* by the party upon which the recovery proceeds which creates the estoppel." (Quoted in Cromwell v. Sac.)

"A judgment is conclusive by way of estoppel of *facts* (necessary facts in general as well as the primary facts in issue) and none other without the existence and proof or admission, by which it could not have been rendered." Big. Est. 170. "The judgment is conclusive upon all *issues* which have become necessary for a decision of the case whatever their relation to the cause of action;" Big. Est. 177, citing King v. Chase, 15 N. H. 9, 41 Am. Dec. 675, as taking a contrary view, but as being inconsistent with the doctrine of the other cases which are cited. It was held in New Orleans v. Bank, 167 U. S. 376, 17 Sup. Ct. 905, 42 L. Ed. 202, that when the construction of a contract is in controversy, the construction adjudged by the court will bind the parties in all future disputes.

Cases to which the doctrine of *res judicata* has been applied are: The decision of a referee on a point properly determined by him and reviewable on appeal; 3 East 346; Castle v. Noyes, 14 N. Y. 329; a judgment rendered on a compromise; Culverhouse v. Marx, 39 La. Ann. 809, 2 South. 607; an agreed judgment; Robbins v. Hubbard (Tex.) 108 S. W. 773; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; by default; Harshman v. Knox Co., 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; Goebel v. Iffla, 111 N. Y. 177, 18 N. E. 649; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; on demurrer; Gould v. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; Schroers v. Fisk, 10 Colo. 599, 16 Pac. 285; or by divided court; Kolb v. Swann, 68 Md. 516, 13 Atl. 379; a judgment of dismissal entered under an agreement reciting a settlement that nothing is due; U. S. v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; or upon a hearing where the entry is not "expressly without prejudice"; Lyon v. Mfg. Co., 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. Ed. 839; or a simple dismissal with taxation of costs and award of execution; Rogers v. Riessner, 30 Fed. 525; State v. Superior Court, 62 Wash. 556, 114 Pac. 427; or dismissal for want of prosecution; Jones v. Turner, 81 Va. 709 (*contra*, Worst v. Sgitcovich [Tex.] 46 S. W. 72; United States Fastener Co. v. Bradley, 143 Fed. 523; the decree must be on the merits; Ex parte Loung June, 160 Fed. 254); or dismissal for failure in the proof of execution of a contract for breach of which an action is brought, even where the words, *without prejudice*, are added to the decree; Parsons v. Riley, 33 W. Va. 464, 10 S. E. 806; judgments in other states; Sweet v. Brackley, 53 Me. 346; Mutual Life Ins. Co. v. Harris, 97 U. S. 331, 24 L. Ed. 959; a judgment against the plaintiff on a counterclaim; Steves v. Frazee, 19 Ind. App. 284, 49 N. E. 385.

If the declaration have several counts and the jury finds for the plaintiff on one of them, this is equivalent to finding against the defendant on the other counts and the issues become *res judicata;* Downing v. R. Co., 70 Mo. App. 657.

"A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." Cromwell v. County of Sac, 94 U. S. 356, 24 L. Ed. 195.

The following will not operate as *res judicata:* A judgment on a plea in abatement in an action of attachment for rent is not *res judicata* on the trial on the merits; Caruthers v. Williams, 53 Mo. App. 181. A judgment ordering that the cause be filed away for want of prosecution is not final or a bar to a subsequent action; Nickell v. Fallen (Ky.) 23 S. W. 366. A judgment abating an action entered upon a verdict finding that plaintiff's powers as administrator had ceased pending the action, is not a bar to the subsequent revival of the action on plaintiff's reinstatement as administrator; Hill v. Bryant, 61 Ark. 203, 32 S. W. 506. A decree against the plaintiff without prejudice; Robinson v. Car & Foundry Co., 142 Fed. 170; Cassatt v. Coal Co., 150 Fed. 33, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; where the former judgment was on matter of form or on a plea to the jurisdiction; Bissell v. Spring Valley Township, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411, where a bill was dismissed, but the plaintiff could sue at law; Pendleton v. Dalton, 92 N. C. 185. So a judgment of recovery by a physician when set up in a subsequent suit for mal-practice; Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 45 L. R. A. 541, 71 Am. St. Rep. 469.

The decision of a motion or summary application is not to be regarded in the light of *res judicata*, or as so far conclusive upon the parties as to prevent their drawing the same matter in question again in the more regular form of an action; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491.

A judgment in a civil action is not admissible in a criminal proceeding, for the reason that the parties "are necessarily different, and the objects and results of the two proceedings are equally diverse;" State v. Bradnack, 69 Conn. 212, 37 Atl. 492, 43

L. R. A. 620; Britton v. State, 77 Ala. 202; *contra*, Dorrell v. State, 83 Ind. 357, where, in a prosecution for the unlawful removal of a fence, a judgment in a civil action between the defendant and the prosecuting witness was admitted in evidence. But this case was criticised in State v. Bradnack, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620, as founded upon an error which was not relieved by the instruction of the court to the jury that the evidence was not conclusive, but merited serious consideration. The Connecticut court cite a former decision of their own to the effect that, "a judgment is conclusive or is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect;" Bethlehem v. Watertown, 51 Conn. 494. See 11 L. R. A. (N. S.) 653, n.

A judgment in *habeas corpus* to obtain possession of a child is conclusive so long as the same conditions exist; Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256; and so upon the same state of facts in another jurisdiction; Slack v. Perrine, 9 App. D. C. 128. The doctrine is said to apply to *habeas corpus* proceedings to obtain the custody of a child; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; Willis v. Willis, 165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772; but not in another court where the welfare of the child requires it, though no change of circumstances is shown; In re King, 66 Kan. 695, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399.

In proceedings for the custody of a child the facts must be identical, and the court cannot say that they are so when the evidence of the former proceeding is not before it; People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013.

The doctrine does not apply to *habeas corpus* judgments for the remanding of a prisoner where a new state of facts exists; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672.

But it has been held that a judgment in *habeas corpus* proceedings is conclusive as to the person charged with unlawfully restraining another of his liberty, until reversed in some proper proceedings; State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; to the same effect, State v. Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968; a judgment does not affect a later application; In re Kopel, 148 Fed. 505.

It is universally held in this country that a judgment to work an estoppel must be a final judgment; and, if appealable, final on appeal, or the time for appeal be passed.

A plea of *res judicata* must aver that the former judgment has not been superseded, reversed or appealed from; Hornick v. Holtrup (Ky.) 76 S. W. 874; but it is also held that it is not demurrable if a plea fail to aver that a former judgment has not been appealed from; Fenn v. Roach & Co. (Tex.) 75 S. W. 361. If a supplemental bill set up a former judgment and does not allege that it was final, it is not demurrable, because, if not final, the trial should be continued until it becomes so; Theller v. Hershey, 89 Fed. 575. The effect of the former judgment will be suspended pending an appeal therefrom; Purser v. Cady, 120 Cal. 214, 52 Pac. 489. The doctrine of *res judicata* applies even though the amount in controversy in the former suit was so small that the party was not entitled to a review in an appellate court; Johnson Co. v. Wharton, 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429.

But in England a judgment is none the less effective as an estoppel although it is liable to be reversed on appeal; 13 Halsb. Laws of England 325.

Evidence of a former recovery is admissible under a plea of non assumpsit; Stone v. Stone, 2 Cra. C. C. 119, Fed. Cas. No. 13,488; Hempstead v. Stone, 2 Mo. 65; but it is also held that it is not available under a general denial; Louisville, N. A. & C. Ry Co. v Cauley, 119 Ind. 142, 21 N. E. 546; Jones v. Lavender, 55 Ga. 228. It may be specially pleaded in bar, or may be shown under the general issue; Kimball v. Hilton, 92 Me. 214, 42 Atl. 394. It cannot be given in evidence under the general issue, but must be pleaded specially; Coles v. Carter, 6 Cow. (N. Y.) 691; under a plea of not guilty in ejectment, the defendants can show *res judicata;* Bruner v. Finley, 211 Pa. 74, 60 Atl. 488. The better and usual practice is to plead the issue and set up fully the former judgment and record therein. The practice appears not to be uniform; see Big. Est. 761, with a reference to articles on Pleading Estoppel in Mich. L. Rev. (1911).

Unless the former record is presented at the hearing of the second case, effect will not be given to it as *res judicata*, but the court may take judicial notice of its own records and examine and consider the former record where the case was as to plaintiff splitting its cause of action; Bienville W. S. Co. v. Mobile, 186 U. S. 217, 22 Sup. Ct. 820, 46 L. Ed. 1132.

When the decree in the former case is general in its terms, the opinion in that case may be considered in order to determine what questions were presented and decided; D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 88 C. C. A. 606. But it is said that the courts are not bound to search the records of other courts and give effect to their judgment, and that who relies upon a former adjudication in another court must properly present it to the court in which he seeks to enforce it. Secondary proof will be received of a judgment when the record is lost; U. S. v. Price, 113 Fed. 851.

In order that the judgment in a former

case may be conclusive in a second suit between the parties, it must be shown either by the record or by extrinsic evidence that the same question was necessarily raised and determined in the former suit. If there be any uncertainty on this head on the record, the whole subject matter will be at large and open to a new contention unless extrinsic evidence be given to show the precise point involved and determined. If, upon the face of the record, anything is left to conjecture as to what was involved and decided, there is no estoppel when it is pleaded and nothing conclusive when it is offered in evidence; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.

Where a former judgment goes both to defects of form and also to the merits, a judgment which does not designate as between the two will be presumed to rest on the former. But if the judgment on demurrer is on the merits, it becomes *"res judicata"*; Bissell v. Spring Valley, 124 U. S. 225, 232, 8 Sup. Ct. 495, 31 L. Ed. 411.

Estoppel by *res judicata* operates as against both parties and privies; Embden v. Lisherness, 89 Me. 581, 36 Atl. 1101, 56 Am. St. Rep. 442.

Privity may be by *succeeding* to the position of another in respect of the subject of the estoppel (as an assignee), or by holding in *subordination* to that other (as landlord and tenant). It is a property, and not a personal relation. Big. Est. 158.

Besides privity arising out of property interests, there is a common instance of privity created by joining in the conduct of litigation. Where a third party has control of the litigation between other parties, he may be and usually is bound by the judgment; but where a third party successfully defended a patent case, employing counsel and paying the costs, he cannot use the judgment as *res judicata* without showing clearly that such fact was known to the plaintiff; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437; and so if the third party contributed money for the defense, but had no right to participate in the conduct of the case; Rumford Chemical Works v. Chemical Co., 215 U. S. 156, 30 Sup. Ct. 45, 54 L. Ed. 137.

Where a bank agreed with the attorney of a city that the suit to be brought by it against the city should abide the judgment in a test case it may claim the benefit of the judgment subsequently rendered against the city therein; Bank of Commerce v. Louisville, 88 Fed. 398.

Where there is concurrent jurisdiction at law and in equity, a decision in one court is *res judicata* as to the other; Ross v. Wood, 70 N. Y. 11. Where there is jurisdiction both of the cause and the parties a judgment of a court of general jurisdiction is conclusive, even though erroneous, until it is reversed upon appeal or vacated; 7 Co. 76; Fox v. Bldg. Fund Ass'n, 81 Va. 677; Adams v. Franklin, 82 Ga. 168, 8 S. E. 44. See Wiese v. Musical Fund Ass'n, 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; Shores v. Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308.

A decree on a bill by a stockholder for the benefit of himself and all other stockholders who come in, to enjoin the consummation of an agreement by the corporation, is conclusive in a subsequent suit by another stockholder for the same purpose and involving the same question, in the absence of fraud or collusion; Willoughby v. Stockyards Co., 50 N. J. Eq. 656, 25 Atl. 277, citing Hill v. Bain, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873; Dewey v. Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

The fact that a court is composed of several divisions does not prevent the judgment of one of the divisions from being *res judicata;* a change in a person holding an office does not destroy the effect of a judgment against such officer as *res judicata;* New Orleans v. Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202.

The United States cannot be estopped by a judgment against its agent even though the suit was conducted by and at the expense of the government; Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209; Tindal v. Wesley, 167 U. S. 223, 17 Sup. Ct. 770, 42 L. Ed. 137; nor is the state estopped by a judgment against its agent; Peck v. State, 137 N. Y. 376, 33 N. E. 317, 33 Am. St. Rep. 738; *contra,* Cunningham v. Shanklin, 60 Cal. 118. But it is held that the state may be estopped by a judgment for taxes; Newport & C. B. Co. v. Douglass, 12 Bush (Ky.) 673.

One who is not a party and only technically bound by a judgment, but who is fully cognizant of the proceedings and stands by and takes the benefit of them, is estopped by his conduct; [1896] 2 Ch. 788; L. R. 2 P. & D. 327.

"Estoppel is a rule of evidence; you cannot found a suit upon it;" [1891] 3 Ch. 82, per Bowen, L. J.

Where one of two joint tort-feasors is sued, a judgment in his favor cannot be set up as *res judicata* in a suit against another of them; Bigelow v. Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875.

In N. Y. Life Ins. Co. v. Chittenden, 134 Iowa, 613, 112 N. W. 96, 11 L. R. A. (N. S.) 233, 120 Am. St. Rep. 444, 13 Ann. Cas. 408, a life insurance company paid a policy to the administrator of the insured, who had disappeared more than seven years before; upon his reappearing, the company brought an action against the administrator for the proceeds of the policy, but it was held that the judgment was *res judicata* on the ques-

tion of the death of the insured and of the liability of the defendant.

If the effect of *res judicata* be disregarded in a case, it is held that the party may file a bill in equity; Monmouth Electric Co. v. Eatontown Tp., 74 N. J. Eq. 578, 70 Atl. 994.

See, generally, Wells, *Res Judicata*, etc.; Herman, Estoppel and *Res Adjudicata;* Chand, *Res Judicata;* Van Fleet, Former Adjudication; Duchess of Kingston's Case, 3 Sm. L. Cas., 2008; JUDGMENT; AUTREFOIS ACQUIT; COMITY.

RES MANCIPI. In Roman Law. Those things which might be sold and alienated, or of which the property might be transferred from one person to another.

The division of things into *res mancipi* and *res nec mancipi* was one of ancient origin, and it continued to a late period in the empire. *Res Mancipi* (Ulp. Frag. xix.) are *prædia in italico solo*, both rustic and urban; also, *jura rusticorum prædiorum* or *servitutes*, as *via, iter, aquæductus;* also slaves, and four-footed animals, as oxen, horses, etc., *quæ collo dorsove domantur.* Smith, Dict. Gr. & Rom. Antiq. To this list may be added children of Roman parents, who were, according to the old law, *res mancipi.* The distinction between *res mancipi* and *nec mancipi* was abolished by Justinian in his Code. *Id.;* Cooper, Inst. 442.

RES NOVA (Lat.). Something new; something not before decided.

RES NULLIUS (Lat.). A thing which has no owner. A thing which has been abandoned by its owner is as much *res nullius* as if it had never belonged to any one. Also things which are not the subject of private ownership.

The first possessor of such a thing becomes the owner; *res nullius fit primi occupantis.* Bowy. Com. 97.

RES PARAPHERNA. See PARAPHERNALIA; PARAPHERNAUX BIENS.

RES PERIIT DOMINO (Lat. the thing is lost to the owner). A phrase used to express that when a thing is lost or destroyed it is lost to the person who was the owner of it at the time. For example, an article is sold; if the seller has perfected the title of the buyer so that it is his, and it be destroyed, it is the buyer's loss; but if, on the contrary, the title has not vested in the buyer, then the loss falls on the seller. The cases are collected in Blackb. Sales (Canadian Ed.) 263.

RES PRIVATÆ. In Civil Law. Things the property of one or more individuals. Mackeldey, Civ. Law § 157.

RES PUBLICÆ. In Civil Law. Things the property of the state. Mackeldey, Civ. Law § 157.

RES RELIGIOSÆ. In Civil Law. Things pertaining to religion. Places where the dead were buried. Thevenot Dessaules, *Dict. du Dig. Chose.*

RES SACRÆ. In Civil Law. Things which had been publicly consecrated.

RES SANCTÆ. In Civil Law. Things which were especially protected against injury of man.

RES UNIVERSITATIS. In Civil Law. Things which belonged to cities or municipal corporations. They belonged so far to the public that they could not be appropriated to private use; such as public squares, market-houses, streets, and the like. Inst. 2. 1. 6.

RESALE. A second sale made of an article; as, for example, when A, having sold a horse to B, and the latter, not having paid for him, and refusing to take him away, when by his contract he was bound to do so, again sells the horse to C. The effect of a resale is, in this case, that B would be liable to A for the difference of the price between the sale and resale; 4 Bingh. 722; 4 Mann. & G. 898; Blackb. Sales 463. See SALE.

RESCEIT, RECEIT. The admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons: as, when an action is brought against a tenant for life or years, or any other particular tenant, and he makes default, in such case the reversioner may move that he may be received to defend his right and to plead with the demandant. Jacob, Law Dict.; Cowell.

The admittance of a plea when the controversy is between the same two persons. Co. Litt. 192.

RESCISSION OF CONTRACTS. The abrogation or annulling of contracts.

It may take place by mutual consent; Ans. Contr. 258; and this consent may be inferred from acts; 4 Mann. & G. 898; Goodrich v. Lafflin, 1 Pick. (Mass.) 57; Quincy v. Tilton, 5 Greenl. (Me.) 277; Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162. It may take place as the act of one party, in consequence of *a failure to perform* by the others; 2 C. B. 905; Wardens of Church of St. Louis v. Kirwan, 9 La. Ann. 31; Cunningham v. R. Co., 63 Hun 439, 18 N. Y. Supp. 600; White v. Hand, 76 Ga. 3; not so, ordinarily, where the failure is but partial; 4 Ad. & E. 599; 1 M. & W. 231; on account of *fraud*, even though partially executed; Pierce v. Wood, 23 N. H. 519. Misrepresentations not a part of the same transaction are no cause for rescinding the contract; Barnett v. Barnett, 83 Va. 504, 2 S. E. 733.

A contract cannot, in general, be rescinded by one party unless both parties can be placed in the same situation and can stand upon the same terms as existed when the contract was made; 1 M. & W. 231; Norton v. Young, 3 Greenl. (Me.) 30; Pittsburgh & N. A. Turnpike Co. v. Com., 2 Watts (Pa.) 433; Bell v. Keepers, 39 Kan. 105, 17 Pac.

785; Fairbanks, Morse & Co. v. Walker, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. (N. S.) 558. He must, upon the discovery of the fraud, announce his purpose and adhere to it. If he treat the property as his own, his right is lost; he has a reasonable time in which to make his election; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419.

The right may be waived by mere lapse of time; Veazie v. Williams, 3 Story 612, Fed. Cas. No. 16,907; see 6 Cl. & F. 234; or other circumstances; 9 B. & C. 59; Whitney v. Allaire, 4 Den. (N. Y.) 554; Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

The purpose to rescind, if on the ground of fraud, must be announced promptly, unconditionally and unevasively, upon the discovery of the fraud; Blank v. Aronson, 187 Fed. 241, 109 C. C. A. 327; there must be no vacillation of purpose; Richardson v. Lowe, 149 Fed. 625, 79 C. C. A. 317.

In case of a conditional sale or exchange, the party desiring to rescind must return or tender a return of all the property received by him under the terms of the sale or exchange, and within a reasonable time; Young v. Argo, 1 Marv. (Del.) 156, 40 Atl. 719, where it was held that the question as to what is a reasonable time is for the court under the circumstances of each case; it is said that the question is for the jury; Clark v. Steel Works, 53 Fed. 494, 3 C. C. A. 600.

If a party means to rescind a contract because of the failure of the other party to perform, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties; Hennessy v. Bacon, 137 U. S. 78, 11 Sup. Ct. 17, 34 L. Ed. 605.

The equity for the rescission and cancellation of agreements, deeds, and other instruments arises when a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation; Bisp. Eq. 31; U. S. v. Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450. The jurisdiction of equity is exercised upon the principle of *quia timet;* that is, for fear that such agreements, securities, deeds, and other instruments may be vexatiously or injuriously used against the party seeking relief, when the evidence to impeach them may be lost; or that they may throw a cloud or suspicion over his interest or title; or where he has a defence good in equity which cannot be made available at law. The cases in which this relief will be granted on account of misrepresentation and fraud may be divided into four classes: *first,* where there is actual fraud in the party defendant in which the party plaintiff has not participated; Smith v. Richards, 13 Pet. (U. S.) 26, 10 L. Ed. 42; *secondly,* where there is constructive fraud against public policy and the party plaintiff does not appear to have participated therein; *thirdly,* where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; *fourthly,* where there is a constructive fraud by both parties,—that is, where both parties are *in delicto,* but not *in pari delicto;* see 2 Story, Eq. Jur. § 694; Horton v. Moyers, 25 Ga. 89; Smith v. Elliott's Adm'r, 1 Pat. & H. (Va.) 307; Bisph. Eq. § 31. The court will decree that a deed or other solemn instrument shall be delivered up and cancelled, not only when it is voidable on account of fraud, but also when it is absolutely void, unless its invalidity appears upon the face of it, so that it may be defeated at any time by a defence at law; 2 Story, Eq. Jur. § 698; Field v. Holbrook, 6 Duer. (N. Y.) 597. To rescind an executed contract for alleged false representations, fraud must be made clearly to appear, and it must be shown that the complainant has been injured and deceived thereby; Union R. Co. v. Duel, 124 U. S. 173, 8 Sup. Ct. 433, 31 L. Ed. 417.

The ignorance or mistake which will authorize relief in equity must be an ignorance or mistake of material facts; Daniel v. Mitchell, 1 Stor. 173, Fed. Cas. No. 3562; and the mistake must be mutual; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. Ed. 633; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374; Riegel v. Life Ins. Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166; Weiner v. Rawson, 89 Ga. 619, 15 S. E. 813. If the facts are known but the law is mistaken, the same rule applies in equity as at law, that a mere mistake or ignorance of law, where there is no fraud or trust, is immaterial: *ignorantia legis neminem excusat;* Adams, Eq., 8th ed. 188. See Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418; IGNORANCE; MISTAKE.

Instruments may also be rescinded and canceled when they have been obtained from persons who were at the time under duress or incapacity; French's Heirs v. French, 8 Ohio 214, 31 Am. Dec. 441; Cook v. Toumbs, 36 Miss. 685; or by persons who stood in a confidential relation and took advantage of that relation; Thompson v. Lee, 31 Ala. 292; 8 Beav. 437; Mortland v. Mortland, 151 Pa. 593, 25 Atl. 150; Armstrong v. Logan, 115 Mo. 465, 22 S. W. 384; Smith v. Cuddy, 96 Mich. 562, 56 N. W. 89.

Gross inadequacy of consideration; Howard v. Edgell, 17 Vt. 9; Bond v. Watson, 22 Ga. 637; Matthews v. Crockett's Adm'r, 82 Va. 394; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; fraudulent misrepresentation and concealment; Boyce's Ex'rs v. Grundy, 3 Pet. (U. S.) 210, 7 L. Ed. 655; Norton v. Norton, 74 Ia. 161, 37 N. W. 129; Harper v. Harper, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583; hardship and unfairness; French's Heirs v. French, 8 Ohio, 214, 31 Am. Dec. 441; Bank of Republic v. Baxter, 31 Vt. 101; undue influence; Harding v. Wheaton, 2 Mas. 378, Fed. Cas. No.

6,051; are among the causes for a rescission of contracts in equity.

Reasonable time means before the lapse of a time, after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived. This statement reconciles the substance and language of the best English authorities; Pollock, Contracts, 630.

"In order that the remedy should not be lost by laches or delay, it is, if not universally, at all events ordinarily * * * necessary that there be sufficient knowledge of the facts constituting the title to relief;" L. R. 5 P. C. 241.

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge." And the knowledge must be actual, not merely possible or potential; "the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission;" Pence v. Langdon, 99 U. S. 581, 25 L. Ed. 420. In regard to acquiescence in the contract the nature of the property concerned is material; 8 D. M. & G. 150; if a party entitled to avoid a transaction has precluded himself by his acts or acquiescence in his life time, his representatives cannot dispute it afterwards; 3 D. F. & J. 535.

If before the election to rescind has been made an innocent third party has acquired an interest in the property or if in consequence of his delay, the possession even of the wrong-doer is affected, it will preclude the exercise of the right to rescind; L. R. 7 Ex. 34. An intention to rescind must be communicated to the other party. This can be done by instituting proceedings to have the contract set aside judicially, in which case the rescission when obtained relates back to the commencement of the proceedings; L. R. 4 H. L. 73; or if the other party is the first to sue on the contract, the rescission may be set up as a defense and this is itself a sufficient act of rescission without any prior declaration of an intention to rescind; L. R. 7 Ex. 36.

Apart from judicial proceedings the communication of the desire to rescind need not be formal, but it must be a distinct and positive rejection of the contract; L. R. 9 Eq. 263. But it seems that if notwithstanding the express repudiation the other party insists on treating the contract as in force, then judicial steps should be taken; Pollock, Contracts 619.

A party exercising his option to rescind is entitled to be restored so far as possible to his former position. The contract cannot be rescinded if the position of the parties has been changed so that the former state of things cannot be restored; Pollock, Contracts 621. In re Morgantown Tin Plate Co., 184 Fed. 109.

See Tarkington v. Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; ELECTION OF RIGHTS AND REMEDIES; PERFORMANCE; FRAUD; BREACH.

RESCOUS. An old term, synonymous with *rescue*, which see.

RESCRIPT. In Canon Law. A term including any form of apostolical letter emanating from the pope. The answer of the pope in writing. *Dict. Droit Can.*

In Civil Law. The answer of the prince, at the request of the parties, respecting some matter in dispute between them, or to magistrates, in relation to some doubtful matter submitted to him. They were binding on the court in that suit; originally, in some cases at least, they seem to have been binding as precedents. Gray, Nat. & Sources of Law 192.

The rescript was differently denominated according to the character of those who sought it. They were called *adnotations* or *subnotations*, when the answer was given at the request of private citizens; *letters* or *epistles*, when he answered the consultation of magistrates; *pragmatic sanctions*, when he answered a corporation, the citizens of a province, or a municipality. See CODE.

At Common Law. A counterpart.

In Massachusetts it is used to denote the statement of the decision of the supreme judicial court as an appellate tribunal, and the accompanying brief statement of the reasons for the decision sent to the court from which the case was brought.

RESCRIPTION. In French Law. A rescription is a letter by which the maker requests some one to pay a certain sum of money, or to account for him to a third person for it. Pothier, *Contr. de Change*, n. 225.

According to this definition, bills of exchange are a species of rescription. The difference appears to be this,—that a bill of exchange is given when there has been a contract of exchange between the drawer and the payee; whereas the rescription is sometimes given in payment of a debt, and at other times it is lent to the payee.

RESCUE. The forcibly and knowingly freeing another from arrest or imprisonment. 4 Bla. Com. 131. A deliverance of a prisoner from lawful custody by a third person. 2 Bish. Cr. Law § 1065; 1 Russ. Cr. § 597. Taking and setting at liberty, against law, a distress taken for rent, services, or damage feasant. Bacon, Abr. *Rescous.*

If the rescued prisoner was arrested for felony, then the rescuer is a felon; if for treason, a traitor; 3 P. Wms. 468; Cro. Car. 583; and if for a trespass, he is liable to a fine as if he had committed the original offence; Hawk. Pl. Cr. b. 5, c. 21. See U. S. v. Dodge, 2 Gall. 313, Fed. Cas. No. 14,975; Russ. & R. 432. If the principal be acquitted, the rescuer may nevertheless be fined for the misdemeanor in the obstruction and

contempt of public justice; 1 Hale, Pl. Cr. 598.

In order to render the rescuer criminal, it is necessary he should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he is in the custody of a private person; but if he be under the care of a public officer, then he is to take notice of it at his peril; 1 Hale, Pl. Cr. 606. See 1 Car. & M. 299.

A departure from an unlawful imprisonment or custody is not an escape; and one who, without violence, assists a person who is confined without authority of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape; People v. Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190; State v. Leach, 7 Conn. 452, 18 Am. Dec. 113. See BREACH OF PRISON; ESCAPE.

The rescue of cattle and goods distrained by pound-breach is a common-law offense and indictable; 7 C. & P. 233; Com. v. Beale, 5 Pick. (Mass.) 514.

In Maritime Law. The retaking by a party captured of a prize made by the enemy. There is still another kind of rescue which partakes of the nature of a recapture: it occurs when the weaker party, before he is overpowered, obtains relief from the arrival of fresh succors, and is thus preserved from the force of the enemy. 1 C. Rob. 224, 271; Halleck, Int. Law cxxxv

Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize; but the property is restored to the original owners by the rule of postliminium.

RESCUSSOR. The party making a rescue is sometimes so called; but more properly he is a rescuer.

RESEALING WRIT. The second sealing of a writ by a master so as to continue it, or cure it of an irregularity. Whart. Dict.

RESERVATION. The creation of a right or interest which had no prior existence as such in a thing or part of a thing granted, by means of a clause inserted by the grantor in the instrument of conveyance.

"The creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant;" Stone v. Stone, 141 Ia. 438, 119 N. W. 712, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797; Herbert v. Pue, 72 Md. 307, 20 Atl. 182; Blackman v. Striker, 142 N. Y. 555, 37 N. E. 484.

That part of a deed or instrument which reserves a thing not *in esse* at the time of the grant, but newly created. 2 Hilliard, Abr. 359.

The meaning of a reservation in a contract must be determined in every case by the particular facts of the case; Chicago, R. I. & P. Ry. Co. v. R. Co., 143 U. S. 596, 12 Sup. Ct. 479, 36 L. Ed. 277.

A reservation is distinguished from an exception in that it is of a new right or interest: thus, a right of way reserved at the time of conveying an estate, which may have been enjoyed by the grantor as owner of the estate, becomes a new right. State v. Wilson, 42 Me. 9. Sometimes the terms are used indiscriminately and what is designated by one in the deed is construed to be the other by the court; Wellman v. Churchill, 92 Me. 193, 42 Atl. 352; Stone v. Stone, 141 Ia. 438, 119 N. W. 712, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797. A reservation is never of a part of the real estate granted but something taken back out of it; while an exception is of some part of the estate not granted; Youngerman v. Board of Sup'rs, 110 Ia. 731, 81 N. W. 166; the former applies to something that did not exist before; the latter, where the subject already exists; Sheffield Water Co. v. Tanning Co., 225 Pa. 614, 74 Atl. 742.

An easement may be acquired by the grantor of a deed poll by a clause of reservation; and the technical distinction between reservation and exception will be disregarded, and the language used so construed as to effectuate the intention of the parties; Haggerty v. Lee, 50 N. J. Eq. 464, 26 Atl. 537.

See EXCEPTION.

A reservation may be of a life-estate; Colby v. Colby, 28 Vt. 10; Logan's Adm'r v. Caldwell, 23 Mo. 373; of a right of flowage; Moulton v. Faught, 41 Me. 298; right to use water; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219; Olmsted v. Loomis, 9 N. Y. 423; right of way; Hart v. Connor, 25 Conn. 331; Brown v. Thissell, 6 Cush. (Mass.) 254; Biles v. R. Co., 5 Wash. 509, 32 Pac. 211; a right of fishing; U. S. v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089; a ground rent, in Pennsylvania, and of many other rights and interests; 9 B. Monr. 163; Alcutt v. Lakin, 33 N. H. 507, 66 Am. Dec. 739; Meriwether v. Lewis, 9 B. Monr. (Ky.) 163; Sloan v. Furnace Co., 29 Ohio St. 568; Stockbridge Iron Co. v. Iron Co., 107 Mass. 290.

A reservation must always be for the grantor, and, if there are no words of limitation, for his life only, and it is never to a stranger; Engel v. Ayer, 85 Me. 448, 27 Atl. 352; Stone v. Stone, 141 Ia. 438, 119 N. W. 712, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797; Jackson v. Snodgrass, 140 Ala. 365, 37 South. 246; Haverhill Sav. Bk. v. Griffin, 184 Mass. 419, 68 N. E. 839, 20 L. R. A. (N. S.) 221, note; although to save it in some cases it has been held to be an exception; Bartlett v. Barrows, 22 R. I. 642, 49 Atl. 31; Bridger v. Pierson, 45 N. Y. 601; Martin v. Cook, 102 Mich. 267, 60 N. W. 679; or to operate by way of estoppel; Butler v. Gosling, 130 Cal. 422, 62 Pac. 596.

Of Public Lands. The public land laws of the United States provide for reservations or "reserves" of government land for certain public purposes; such as Indian reserva-

tions and those for military posts, and for the conservation of natural resources, such as forests, mines, water power and the like. The jurisdiction of a circuit court over crimes committed on military reservations extends to the whole of such reservations, whether used for military purposes or not; Benson v. U. S., 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

The land department of the United States has authority to withdraw or reserve public lands from sale, etc., and a grant by congress does not operate upon lands theretofore reserved for any purpose whatever. Lands withdrawn from sale by the land department are considered as reserved within the terms of this rule; Northern Pac. Ry. Co. v. Logging & Mfg. Co., 68 Fed. 993, 16 C. C. A. 97, 34 U. S. App. 66. An act for the sale of desert lands does not embrace alternate sections reserved to the United States along the lines of railroads for the construction of which congress has made grants of lands; U. S. v. Healey, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369. See LANDS, PUBLIC; LAND GRANT; INDIAN TRIBES; WOODS AND FORESTS.

RESERVE. The National Bank Act directs that all national banks in the sixteen largest cities shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per cent. of the aggregate amount of its notes in circulation and deposits. Fifteen per cent. is required of all other national banks.

When three-fourths of the national banks in any city of 25,000 inhabitants apply to the comptroller to be added to the reserve cities, he may grant their request and thereafter the banks in such city shall maintain the twenty-five per cent. reserve. Act of March 3, 1903.

When the reserve falls below the proper limit, the bank must not increase "its liabilities by making any new loans or discounts," otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend, till the limit is reached. On a failure to make good the reserve for thirty days after notice by the comptroller of the currency, the latter may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the bank. R. S. § 5191. See NATIONAL BANKS.

In Insurance Law. That part of the premiums on a policy, with the interest thereon, which is required to be reserved or set aside as a fund for the payment of the policy when it becomes due. Richards, Ins. L. 20.

An insurance company is deemed to be solvent when its reserved funds, invested at a specified rate of interest, will suffice to meet the payments on its policies as they shall mature. As a factor of safety, the rate of interest is usually fixed very low.

Under the statutes of many states insurance companies are required to deposit in each state where they do business securities approved by some state officer, usually an insurance commissioner, to an amount specified which is termed the reserve fund; Biddle, Ins. § 66. They are held not to apply to relief associations where the assessments are purely voluntary; 11 Ins. L. J. 859. The securities which compose a reserve fund are in the nature of a trust fund for the policy holders, and not a security for the general creditors; Falkenbach v. Patterson, 43 Ohio St. 359, 1 N. E. 757; Relfe v. Life Ins. Co., 76 Mo. 594; Moies v. Mut. Life Ins. Co., 12 R. I. 259; and a receiver appointed in case of the insolvency of a company is not entitled to control it, but securities are held in trust for distribution by the trustee; Cooke v. Warner, 56 Conn. 234, 14 Atl. 798. After the policy holders are satisfied, the securities, if the property of the company, may be applied for the benefit of general creditors; Moies v. Mut. Life Ins. Co., 12 R. I. 259.

In many states such fund is required as a prerequisite to permission to a foreign insurance company to do business in the state, and ordinarily the deposits required by such laws are for the benefit of domestic policy holders; In re Life Ass'n of America, 91 Mo. 177, 3 S. W. 833; Bockover v. Life Ass'n, 77 Va. 85; State v. Benton, 25 Neb. 834, 41 N. W. 793; 17 U. C. Ch. 160.

Another use of the term is its application to a fund sometimes called the safety fund and sometimes a reserve fund in policies issued by companies which provide for an assessment to meet the losses. Such fund is intended for the protection of living members by the use of the income for the payment of dues and assessments; 2 Joyce, Ins. § 1287. Where a reserve fund and the mortuary and benefit fund were to be raised by assessments, the latter being for the payment of death claims only and the former for the exclusive use of members, except that it might be used in payment of death claims when they exceed the experience table of mortality, it was held, upon dissolution, that the reserve fund was to be distributed exclusively among the holders of certificates in force, and that death claims had no right to share in it; In re Equitable Reserve F. L. Ass'n, 131 N. Y. 354, 30 N. E. 114.

In a policy on the Tontine system (see INSURANCE, subtitle, Tontine), where, in addition to the provision for the payment of death claims, is was provided that in case the policy holder survived the specified period and the policy remained in force, there should be a payment in cash or annuity bonds from a fund created by a certain class of policy holders consisting of those effecting insurance on the same plan and in the same year, the surplus and profits to be equitably apportioned among survivors of that class, it was held that the policy did not require a separate investment of these funds and that the consent of the assured to placing the dividends in a reserve fund did not extend

its obligations in that respect; Bogardus v. Life Ins. Co., 101 N. Y. 328, 4 N. E. 522.

The term reserve in life insurance is also applied to the fund accumulated out of premiums after the payment of expenses and other charges properly apportioned to each policy, and where a life policy provides that, in case of lapse for non-payment of premium, the net reserve, less indebtedness, shall be applied to the purchase of extended insurance, or, if the assured shall so elect within three months, to the purchase of a paid-up policy, and also that said indebtedness may be paid in cash, and the entire net reserve so applied, such indebtedness must be paid within the three months; Omaha Nat. Bank v. Life Ins. Co., 81 Fed. 935.

Paying to the insured the reserve on his life policy, taking no promise to repay it, but with an agreement that it will be extinguished automatically by a charge against his reserve, is a payment, not a loan; Parish Orleans v. Life Ins. Co., 216 U. S. 517, 30 Sup. Ct. 385, 54 L. Ed. 597.

RESERVE BANKS. See NATIONAL BANK.

RESET. The receiving or harboring an outlawed person. Cowell.

RESIANCE. A man's residence or permanent abode. Such a man is called a resiant. Kitch. 33.

RESIANT ROLLS. Those containing the resiants in a tithing, etc., which were called over by the steward on holding courts leet.

RESIDENCE. Personal presence in a fixed and permanent abode. Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208; Sears v. Boston, 1 Metc. (Mass.) 251.

A residence is different from a domicil, although it is a matter of great importance in determining the place of domicil. The essential distinction between residence and domicil is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases. The other has no such intent; the abiding is *animo manendi*. One may seek a place for the purposes of pleasure, of business, or of health. If his intent be to remain, it becomes his domicil; if his intent be to leave as soon as his purpose is accomplished, it is his residence; Brisenden v. Chamberlain, 53 Fed. 311. See Cambridge v. Charlestown, 13 Mass. 501; Hallowell v. Saco, 5 Greenl. (Me.) 143; People v. Platt, 50 Hun 454, 3 N. Y. Supp. 367; 59 L. J. 67; DOMICIL. But it has been held synonymous with domicil, as to appointment of a guardian; Cahon's Estate, 15 Pa. Co. Ct. Rep. 312. It is an element of domicil. See Appeal of Taney, 97 Pa. 74; Dicey, Dom. 1. Residence and habitancy are usually synonymous; Lee v. Boston, 2 Gray (Mass.) 490; 2 Kent 574, n. Residence indicates permanency of occupation, as distinct from lodging, or boarding, or temporary occupation, but does not include as much as domicil, which requires an intention combined with residence; Jefferson v. Washington, 19 Me. 293; 2 Kent 576. See Bartlett v. New York, 5 Sandf. (N. Y.) 44; People v. Tax Com'rs, 16 N. Y. Supp. 834. In a statute it was held not to mean business residence, but the fixed home of the party; 13 Reptr. 430 (Md.). See 15 M. & W. 433; Hanover Nat. Bk. v. Stebbins, 69 Hun 308, 23 N. Y. Supp. 529. It is a physical fact, while domicil is a matter of intention; *bona fide* residence means "residence with domiciliary intent"; Lyon v. Lyon, 13 Pa. Dist. R. 634, per Sulzberger, J.

Residence has been held to be more restricted than domicil as applied to homestead laws; Fulton v. Roberts, 113 N. C. 421, 18 S. E. 510.

An averment of residence is not equivalent to an allegation of citizenship; Grand Trunk Ry. Co. of Canada v. Twitchell, 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45. Residence and citizenship are wholly different things in connection with the jurisdiction of federal courts. One may remain a citizen of a state while residing temporarily in another state; Steigleder v. McQuesten, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986.

Within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; Wallace v. State, 147 Ind. 621, 47 N. E. 13. See KIDNAPPING; DOMICIL.

As to the qualification for holding offices, see OFFICER.

RESIDENT. One who has his residence in a place.

One is a resident of a place from which his departure is indefinite as to time, definite as to purpose; and for this purpose he has made the place his temporary home; Brisenden v. Chamberlain, 53 Fed. 311. See NON-RESIDENT.

RESIDENT MINISTER. In International Law. See MINISTER.

RESIDUARY ACCOUNT. In English Practice. The account which every executor and administrator, after paying the debts and particular legacies of the deceased, and before paying over the *residium*, must pass before the Board of Inland Revenue. 2 Steph. Com. 221.

RESIDUARY CLAUSE. The clause in a will by which that part of the property is disposed of which remains after satisfying previous bequests and devises. 4 Kent 541*; 2 Will. Exec., 7th Am. ed. *1316.

RESIDUARY DEVISEE. The person to whom the residue of a testator's real estate is devised after satisfying previous devises.

RESIDUARY ESTATE. What remains of a testator's estate after deducting the debts and the bequests and devises.

RESIDUARY LEGATEE. He to whom the residium of the estate is devised or be-

queathed by will. Rop. Leg.; Powell, Mortg. See LEGACY.

RESIDUE. That which remains of something after taking away a part of it: as, the residue of an estate, which is what has not been particularly devised by will.

What is left; the rest. Hulin v. Squires, 63 Hun 352, 18 N. Y. Supp. 309. What is left after all liabilities are discharged, and the objects of the testator carried into effect. Morgan v. Huggins, 48 Fed. 3.

A will bequeathing the general residue of personal property passes to the residuary legatee everything not otherwise effectually disposed of; and it makes no difference whether a legacy falls into the estate by lapse or is void at law, the next of kin is equally excluded; 15 Ves. 416; 2 Mer. 392. See Phelps v. Robbins, 40 Conn. 264.

Where a *residuary* legacy lapses, there is a *pro tanto* intestacy; Reed's Estate, 82 Pa. 428. Where the residue is not expressly disposed of and it does not appear by the will that the executors were intended to take it beneficially, they are to be deemed trustees for the next of kin; 8 Beav. 475; though previous to 1830, it was considered in the English courts that if the testator had named in his will an executor, but no residuary legatee, the executor should retain the residue of the personal estate for his own benefit; Schoul. Ex. & Ad. § 494. Under the statutes 2 Geo. IV. and 1 Wm. IV. c. 40, the executor is a trustee for the next of kin, unless it shall appear from the will that he is to take the residue beneficially; L. R. 7 H. L. 606; and he is not entitled to it by implication of law; *id.* See 12 Eng. Rul. Cas. 20; LEGACY. A legacy to the next of kin does not exclude his claim to the residue; Amb. 566; 12 Ves. 298.

RESIGNATION. See OFFICER; CLUB.

RESIGNATION BOND. **In Ecclesiastical Law.** A bond given by an incumbent to resign on a certain contingency. It may be conditioned to resign for good and sufficient reason, and therefore lawful, *e. g.* to resign if he take a second benefice, or on request, if a patron present his son or kinsman when of age to take the living, etc. Cro. Jac. 249, 274. But equity will generally relieve the incumbent; 1 Rolle, Abr. 443.

RESIGNEE. One in favor of whom a resignation is made. 1 Bell, Com. 125, n.

RESIST. To oppose by direct, active, and *quasi*-forcible means. State v. Welch, 37 Wis. 196, 201.

RESISTANCE (Lat. *re*, back, *sisto*, to stand, to place). The opposition of force to force. See ARREST; ASSAULT; OFFICER; PROCESS.

RESOLUTION. A solemn judgment or decision of a court. This word is frequently used in this sense in Coke and some of the more ancient reporters.

An agreement to a law or other thing adopted by a legislature or popular assembly. See *Dict. de Jurisp.*; ORDINANCE; JOINT RESOLUTION.

In Civil Law. The act by which a contract which existed and was good is rendered null.

Resolution differs essentially from rescission. The former presupposes the contract to have been valid, and it is owing to a cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning. Resolution may be by consent of the parties or by the decision of a competent tribunal; rescission must always be by the judgment of a court; 7 Troplong, *de la Vente*, n. 689; 7 Toullier 551.

RESOURCES. Money or any property that can be converted into supplies, capabilities of producing wealth, or to supply necessary wants; available means or capabilities of any kind. Ming v. Woolfolk, 3 Mont. 386.

RESPECTIVE, RESPECTIVELY. Words of severance. Occurring in a testamentary gift to more persons than one, their effect is to sort out the devisees or legatees so that they take as tenants in common; 31 L. J. Ch. 368. In court or in chambers *respectively*, as used in the Judicature Act, means *either* in court or in chambers; 53 L. J. Q. B. 428; 13 Q. B. D. 218.

RESPECTU COMPUTI VICECOMITIS HABENDO. A writ for respiting a sheriff's account addressed to the treasurer and barons of the exchequer. Reg. Orig. 139.

RESPITE. **In Civil Law.** An act by which a debtor who is unable to satisfy his debts at the moment transacts (*i. e.* compromises) with his creditors and obtains from them time or delay for the payment of the sums which he owes to them. La. Code 3051.

A *forced* respite takes place when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law.

A *voluntary* respite takes place when all the creditors consent to the proposal of the debtor to pay in a limited time the whole or a part of his debt.

A delay, forbearance, or continuation of time.

In Criminal Law. A reprieve. A temporary suspension of the execution of a sentence. See Mishler v. Com., 62 Pa. 60, 1 Am. Rep. 377. It differs from a pardon, which is an absolute suspension. See PARDON; REPRIEVE.

RESPITE OF HOMAGE. To dispense with the performance of homage by tenants who held their lands in consideration of performing homage to their lords. Cowell.

RESPONDEAT OUSTER (that he answer over). See ABATEMENT; JUDGMENT; OUSTER.

RESPONDEAT SUPERIOR. A phrase often used to indicate the responsibility of a principal for the acts of his servant or agent. MASTER AND SERVANT; PRINCIPAL AND AGENT.

RESPONDENT. The party who makes an answer to a bill or other proceeding in chancery; or to a libel in divorce.

In Civil Law. One who answers or is security for another; a fidejussor. Dig. 2. 8. 6.

RESPONDENTIA. In Maritime Law. A loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon. See Maitland v. Atlantic, Newb. 514, Fed. Cas. No. 8,980.

The contract is called *respondentia* because the money is lent mainly, or most frequently, on the personal responsibility of the borrower. It differs principally from bottomry, which see, in the following circumstances: bottomry is a loan on the ship, respondentia is a loan upon the goods. Conard v. Ins. Co., 1 Pet. (U. S.) 386, 7 L. Ed. 189. The money is to be repaid to the lender, with maritime interest, upon the arrival of the ship in the one case, and of the goods in the other. In most other respects the contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the borrower; in the latter, the lender has, in general, it is said, only the personal security of the borrower; Marsh. Ins. 734.

If any part of the goods arrive safely at the end of the voyage, the lender is entitled to have the proceeds applied to the payment of his debt. If the loan is made to the master, and not to the owners of the goods, the necessity for the loan and for the hypothecation of the cargo must be clearly shown, or the owners of the goods, and, consequently, the goods themselves, will not be bound. The ship and freight are always first to be resorted to to raise money for the necessity of the ship or the prosecution of the voyage; and it seems that a bond upon the cargo is considered by implication of law a bond upon the ship and freight also, and that unless the ship be liable in law the cargo cannot be held liable; The Constancia, 4 Notes of Cas. 285, 512, 677; 10 Jur. 845; 2 W. Rob. 83; 14 Jur. 96. See MASTER OF A SHIP.

If the contract clearly contemplates that the goods on which the loan is made are to be sold or exchanged, free from any lien, in the course of the voyage, the lender will have no lien on them, but must rely wholly upon the personal responsibility of the borrower. It has frequently been said by elementary writers, and without qualification, that the lender has no lien; 2 Bla. Com. 458; 3 Kent 354; but the form of bond generally in use in this country expressly hypothecates the goods, and thus, even when there is no express hypothecation, if the goods are still on board at the end of the voyage, it is not doubtful that a court of admiralty will direct the arrest of the goods and enforce against them the maritime lien or privilege conferred by the respondentia contract. There is, perhaps, no common-law lien, but this maritime lien only; but the latter will be enforced by the proper admiralty process. See the authorities cited in note to Abb. Shipp., 13th ed. 152, 154, 175; Atlantic Ins. Co. v. Conard, 4 Wash. C. C. 662, Fed. Cas. No. 627; form of respondentia bonds in Conkl. Adm. 263; 1 Pars. Mar. Law 437; Abb. Shipp. 455. See ADMIRALTY; MARITIME CAUSE; LIEN.

RESPONDERE NON DEBET (Lat. ought not to reply). The prayer of a plea where the defendant insists that he ought not to answer, as when he claims a privilege: for example, as being a member of congress or a foreign ambassador. 1 Chitty, Pl. *433.

RESPONSA PRUDENTIUM (Lat.). **In Roman Law.** Opinions given by Roman lawyers.

Before the time of Augustus, every lawyer was authorized, *de jure*, to answer questions put to him; and all such answers, *responsa prudentium*, had equal authority—not the force of law, but the opinion of a lawyer. Augustus was the first prince who gave to certain distinguished juris-consults the particular privilege of answering in his name; and from that period their answers acquired greater authority. Adrian determined in a more precise manner the degree of authority which these answers should have, by enacting that the opinions of such authorized juris-consults, when unanimously given, should have the force of law (*legis vicem*) and should be followed by the judges, and that when they were divided, the judge was allowed to adopt that which to him appeared the most equitable. The opinions of other lawyers held the same place they had before: they were considered merely as the opinions of learned men. Mackeldey, Man. Introd. § 43; Mackeldey, *Hist. du Dr. Rom.* §§ 40, 49; Hugo, *Hist. du Dr. Rom.* § 313; Inst. 1. 2. 8; *Institutes Expliquées*, n. 39.

RESPONSALIS. In Old English Law. One who appeared for another.

A person, without restrictions as to character, permitted by the judge to act for a party in his presence. Such a person was sometimes allowed by a justice to act on the appearance of the defendant, which, according to the old writs, was always in proper person. Lord Coke calls special attention to the difference between a responsalis and an

attorney; 2 Co. Inst. 249; In re Cooper, 22 N. Y. 68, per T. W. Dwight, *arguendo*.

In Ecclesiastical Law. A proctor.

RESPONSIBILITY. The obligation to answer for an act done and to repair any injury it may have caused.

One person—as, for example, a principal, master, or parent—is frequently responsible, civilly, for the acts of another.

Penal responsibility is always personal; and no one can be punished for the commission of a crime but the person who has committed it, or his accomplice.

RESPONSIBLE. Able to pay the sum which may be required of him; able to discharge an obligation. Webst. Dict.; Farley v. Day, 26 N. H. 527; People v. Dorsheimer, 55 How. Pr. (N. Y.) 119. A promise "to be responsible" for the debt of another is merely a guaranty, and not a suretyship; Bickel v. Auner, 9 Phila. (Pa.) 499; Gilbert v. Henck, 30 Pa. 209.

In an act directing municipal officers to award contracts to the lowest responsible bidder, responsible applies not only to pecuniary ability but also to judgment and skill; Interstate Vitrified Brick & P. Co. v. City of Philadelphia, 164 Pa. 477, 30 Atl. 383. See People v. Kent, 160 Ill. 655, 43 N. E. 760.

RESPONSIBLE GOVERNMENT. A term used in England and her colonial possessions to indicate an obligation to resign, on the part of the ministry, upon the declaration of a want of confidence by vote of the legislative branch of the colonial government. Mills, Col. Const. 27.

RESSEISER. The taking of lands into the hands of the crown, where a general livery or *ouster le main* was formerly misused. Whart.

REST. In computing compound interest, the date to which interest is computed and then added to the principal is so called.

RESTAUR, or RESTOR. The remedy or recourse which assurers have against each other, according to the date of their assurances; or against the master, if the loss arise through his default; also the remedy or recourse a person has against his guarantor, or other person, who is to indemnify him from any damage sustained. Whart.

RESTAURANT. An eating house. Lewis v. Hitchcock, 10 Fed. 6. See INN; INNKEEPER.

RESTITUTIO IN INTEGRUM. In Civil Law. A restoring parties to the condition they were in before entering into a contract or agreement, on account of fraud, infancy, force, honest mistake, etc. Calvinus, Lex. The going into a cause anew from the beginning. *Id.*

RESTITUTION. The placing back or restoring articles which have been lost by jettison: this is done, when the remainder of the cargo has been saved, at the general charge of the owners of the cargo; but when the remainder of the goods is afterwards lost, there is not any restitution. Stevens, Av. pt. 1, c. 1, s. 1, art. 1, n. 8. As to captured vessels, see RECAPTURE.

In Practice. The return of something to the owner of it or to the person entitled to it.

After property has been taken into execution, and the judgment has been reversed or set aside, the party against whom the execution was sued out shall have restitution; and this is enforced by a writ of restitution; Cro. Jac. 698; Duncan v. Kirkpatrick, 13 S. & R. (Pa.) 294. When the thing levied upon under an execution has not been sold, the thing itself shall be restored; when it has been sold, the price for which it is sold is to be restored; Bacon, Abr. *Execution* (Q); 1 Maule & S. 425.

"Pending an appeal from an order of the common pleas striking off the satisfaction of a judgment, the plaintiff in the judgment issued an execution, and the terre-tenant of the land was compelled to pay to the sheriff a large sum of money to prevent a sale of the land; the supreme court subsequently reversed the order striking off the satisfaction of the judgment; held, that the terre-tenant was entitled to a writ of restitution." Whitesell v. Peck, 176 Pa. 170, 35 Atl. 48. Whether restitution should be made in the progress of judicial procedure if the interest of the parties defendant are diverse, is a question of fact; Andrews v. Thum, 71 Fed. 763, 18 C. C. A. 308, 33 U. S. App. 393.

RESTITUTION EDICT. An edict issued in 1629, by Emperor Ferdinand II., requiring Protestants to restore to the Roman Catholic authorities all ecclesiastical property which they had appropriated at the peace of Passau in 1552.

RESTITUTION OF CONJUGAL RIGHTS. In Ecclesiastical Law. A compulsory renewal of cohabitation between a husband and wife who have been living separately. Unknown in the United States.

A suit may be brought in the divorce and matrimonial court for this purpose whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without sufficient reason, by which the party injured may compel the other to return to cohabitation; 3 Bla. Com. 94; 3 Steph. Com. 11; but a woman cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back; 14 P. Div. 26; and the rule requires a written demand for cohabitation, of a conciliatory character; *id.* A wife whose husband had refused to receive her because she had left her home on account of a disagreement with his children by a former marriage, was held entitled to a decree for the restitution of conjugal rights; [1896] P. 175; 1 Add. Eccl.

305; 3 Hagg. 619. Formerly a deed of separation afforded no bar to this suit, even though it in terms forbade such proceedings. But this rule is now changed; Schoul. Hus. & Wife § 482.

The "just cause" for withdrawing from cohabitation need not be sufficient ground of divorce; 94 L. T. 704. The plaintiff must write a preliminary request for cohabitation, which must be clear and friendly, though it may be peremptory; 85 L. T. 648.

See CRUELTY.

RESTITUTION OF STOLEN GOODS. At common law there was no restitution of goods upon an indictment, because it was at the suit of the crown only, therefore the party was compelled to bring an appeal of robbery in order to have his goods again; but a writ of restitution was granted by 21 Hen. VIII. c. 11, and it became the practice of the crown to order, without any writ, immediate restitution of such goods.

RESTITUTION, WRIT OF. A writ which lies, after the reversal of a judgment, to restore a party to all that he has lost by occasion of the judgment. 2 Tidd, Pr. 1186.

RESTITUTIONE EXTRACTI AB ECCLESIA. A writ which formerly lay to restore a man to the church, which he had recovered for a sanctuary being suspected of a felony. Reg. Orig.; Cowell.

RESTITUTIONE TEMPORALIUM. A writ addressed to the sheriff to restore the temporalities of a bishopric to the bishop elected and confirmed. Fitz. N. B. 169.

RESTRAINING. Narrowing down; making less extensive. For example, a *restraining statute* is one by which the common law is narrowed down or made less extensive in its operation. *Restraining powers* are the limitations or restrictions upon the use of a power imposed by the donor. *Restraining order* is an order granted on motion or petition, restraining the Bank of England or other public company from allowing any dealing with certain specified stock or shares. Hunt, Eq. pt. iii. c. 3, s. 2.

A temporary restraining order is distinguished from an interlocutory injunction in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction and its life ceases with the disposition of that motion and without further order of the court, while an interlocutory injunction is usually granted until the coming in of an answer or until the final hearing of the cause and stands as a binding restraint until rescinded by the further action of the court; High, Inj. § 3, quoted in Houghton v. Meyer, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. Ed. 432. See UNITED STATES COURTS.

RESTRAINT. The effect of restraint in the law is to be considered mainly with respect to trade, marriage, princes, and alienation, all of which are herein separately considered. As to restraint upon anticipation, see MARRIED WOMAN; and as to the execution of deeds or other documents under restraint, see DURESS.

RESTRAINT OF MARRIAGE. Conditions attached to gifts or bequests to a person who has never been married, in general restraint of marriage, are void; Chit. Const. 619; so is an agreement not to marry any one except a particular person; 4 Burr. 2225. The gift or bequest is good and the condition fails, but if the restraint is partial, with a gift over in case of marrying a Roman Catholic or a particular person or without the consent of a particular person, the condition is good, and so is a condition in restraint of a second marriage. See 1 Ch. D. 399; 1 Q. B. D. 279; 16 Ch. D. 188.

It is said that a condition in restraint of marriage is valid if it is a condition precedent; 2 Dick. 712. In 1 Q. B. D. 279, it was held to be the intention of the testator not to restrain marriage but to make provision for the devisee until marriage. See Poll. Contr. 307. A limitation until marriage is good; Wats. Comp. Eq. 1139, being construed as a provision until marriage and not a restraint on marriage. "The distinction between a bequest to which a condition is appended in restraint of marriage, and the limitation of an annuity or bequest to continue as long as a woman remains unmarried, has been fully recognized by our decisions." Hotz's Estate, 38 Pa. 422, 80 Am. Dec. 490; Kromer Estate, 22 Pa. Co. Ct. Rep. 327, 330. And see In re Appleby's Estate, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 591, 117 Am. St. Rep. 709, 10 Ann. Cas. 563.

The rule that a condition in restraint in marriage is void, does not apply to a second marriage; Herd v. Catron, 97 Tenn. 662, 37 S. W. 551, 37 L. R. A. 731. As to what is a condition in restraint of marriage, see 10 Harv. L. Rev. 1072; and as to contracts in restraint of marriage, 14 Harv. L. Rev. 614. See MARRIAGE.

RESTRAINT OF PRINCES AND RULERS. A phrase used in the exceptions to bills of lading, importing a limitation upon the liability of a ship-owner under the contract. The words apply only to the ruling power of a country and not to pirates or any lawless power; 4 Term 783; they apply not only to hostile acts, but to those committed by the government of which the assured is a subject, as the seizure of a vessel for use as a fireship; 2 Ld. Raym. 840; or the wrongful seizure of an English ship and cargo by a British ship of war; 2 E. & E. 160; L. R. 5 Q. B. 599; to a temporary embargo by a friendly government; 3 B. & S. 163; 32 L. J. Q. B. 50; a detention of a neutral vessel in a blockaded port; 7 L. R. Q. B. 404; or a siege; L. R. 9 C. P. 518. A reasonable apprehension of capture will justify delay under the usual exception of restraint of princes,

etc.; L. R. 5 P. C. 301; L. R. 3 A. & E. 435; 1 Maule & S. 352.

It does not include a seizure of the cargo by an armed mob; 4 Term 783, n.; or a remote danger of capture; 10 East 530; nor, it seems, a restraint sanctioned by municipal law of the ship-owner's country; 3 B. & S. 163; nor the process of a court of law; 23 L. T. 251.

Where goods contraband of war were shipped under a bill of lading containing this exception, it was held that the risk of the goods being seized amounted to a restraint of princes; [1896] 2 Q. B. 326.

Enforced obedience to lawfully prescribed quarantine regulations is a restraint of natural liberty of action devised by and proceeding from the people, and detention at quarantine is fairly included within an exception in a charter party which has reference to restraint of princes or rulers and people; The Progress, 50 Fed. 835, 2 C. C. A. 45, 3 U. S. App. 147.

See CHARTER PARTY; PERILS OF THE SEA; QUARANTINE.

RESTRAINT OF TRADE. Contracts operating for the restraint of trade are presumptively illegal and void on the ground of the policy of the law favoring freedom of trade; but the presumption of illegality may be rebutted by the occasion and circumstances; 2 Pars. Contr. 870. See U. S. v. Trans-Missouri Freight Ass'n., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73. Thus in agreements for the sale of the good-will of a firm, or the formation or dissolution of a partnership, provisions operating in restraint of trade are frequently inserted. See GOOD WILL. Their validity depends upon whether the restraint is such only as to afford a fair protection to the interests of the party in whose favor it is imposed; Leake, Contr. 633; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287. If reasonably necessary for the protection of the property sold it will be upheld; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; [1899] 1 Ch. D. 300. Whatever restraint is larger than is necessary for the protection of the party is void; therefore, the old rule was that the restraint must be limited in regard to space; 5 M. & W. 562; L. R. 15 Eq. 59. An agreement reasonable in regard to space may be unlimited in regard to the duration of time provided for; but where the question is as to whether the space is unlimited, the duration of the restraint in point of time may become an important matter; Leake, Contr. 634; 2 M. & G. 20. It has been said generally that where a covenant in restraint of trade is general, that is, without qualifications, it is bad, as being unreasonable and contrary to public policy. Where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable; and if reasonable, it is good in law; [1892] 3 Ch. 447.

The tendency of modern cases is not to adhere to any arbitrary or conventional rule as to time or space, and as to territory, it has even been said that "the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go"; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536; and in a later case a covenant by a partner, on sale of his interest in property and good will of the firm, manufacturing an article sold generally throughout the United States, not to engage in the same business without limitation as to time or space, was construed to limit the restraint to the United States and as so limited it was held reasonable and valid, there being no monopoly created, and the business being subject to active competition, so that no public interest was involved; Prame v. Ferrell, 166 Fed. 702, 92 C. C. A. 374. The case is rested upon the modern rule as stated in Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979, that if the public welfare is not involved "the question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable." This rule was applied in Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; [1894] App. Cas. 535; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; Harrison v. Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. L. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913, with a very full note on the validity of agreements for restraint, ancillary to a sale of the business, as affected by its territorial scope.

The English law on the subject may be fairly collected from the following group of cases. A contract in restraint of trade must have some consideration, whether under seal or not; Mitchell v. Reynolds, 1 Smith Lead. Cas. 421; the adequacy is not important; 6 A. & E. 438. Whether the terms are reasonable is a question for the judge; [1904] 1 K. B. 45. The opinions of other persons in the trade are inadmissible; [1899] 2 Ch. 13.

Restrictions may continue during the life of either party and need not be limited to the period during which the employer carries on his business (if made between employers); 6 A. & E. 454. As to the extent of area, the court will consider whether the restraint is greater than the protection of the party can possibly require; if it is, it is unreasonable; [1904] 1 K. B. 45. In some cases an unlimited restriction will be held valid; [1894] A. C. 535.

A covenant restraining parties from doing business with a particular class of persons may be sustained; 10 Q. B. 346. There is no absolute rule that a covenant in restraint of trade is void even though unlimited in extent; 14 Ch. D. 351; the question is whether the protection of the party reasonably requires it.

In the leading case of Maxim Gun, etc., Co. v. Nordenfelt, [1893] 1 Ch. 630, covenants in general and partial restraint of trade are discussed at large and it is held that the covenant in question as restricted to the gun and ammunition business, though unlimited to space and practically covering the remainder of the defendant's life, was under the circumstances, reasonable and ought to be enforced by injunction.

The decision in Mitchell v. Reynolds, *supra*, may be regarded as the first announcement of the rule in relation to the invalidity of contracts in restraint of trade; although their illegality had been declared in very early cases; Y. B. 2 Hen. V. 5, 26; and of a much earlier case it is said: It was an unlearned local court, in 1299 or 1300, that fined several chandlers of Norwich for having made a covenant among themselves that none should sell a pound of candles cheaper than another"; Sir F. Pollock in Genius of the Com. Law 96, citing Leet Jurisdiction in Norwich (Selden Soc.) p. 52. It is not an uninteresting fact in legal history that about six hundred years after this ancient case it was held in Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819, that an agreement of candle makers, to increase prices and decrease manufacture, was illegal and nonenforceable.

Mitchell v. Reynolds contains much more in the way of legal statement than is required for the decision of the precise point involved, which was that a reasonable restraint agreed to for a good consideration is valid, and it was afterwards remarked by Tindal, C. J., that when it was said by Parker, C. J., in Mitchell v. Reynolds, that " 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' those are only examples and not limits of the application of the rule which can only be, 'What is a reasonable restraint with reference to the particular case' "; Horner v. Graves, 7 Bing. 735. In this case it is worthy of note that the Chief Justice suggested a test of whether the restraint is reasonable or not which is still recognized as accurate, viz.: "Whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." More than sixty years after this case, the English rule was stated in the same terms, and it was said that the true test of validity is whether the contract is or is not reasonable; [1894] App. Cas. 535; and a more comprehensive statement is that a general covenant in restraint of trade, without qualifications, is bad, because unreasonable and contrary to public policy, but if partial, that is, subject to some qualification either as to time or place, then the question is whether it is reasonable, and if it is, it is legally valid; [1892] 3 Ch. 447. In Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, the existence of an absolute rule with respect to restraint unlimited as to space, was denied, but that question was left somewhat in doubt by the English court of appeal in 36 *id.* 351; see also 4 App. Cas. 674; so that by way of summing up a review of the English decisions, it is said that the question "whether there is an inflexible rule that contracts, the restraint of which extends throughout England, are null and void, is still a mooted one"; Patterson, Restr. of Trade 16. See, also, [1893] 1 Ch. 630; [1898] 1 Ch. 676.

In the United States it was early held that a covenant not to pursue an occupation in the state was in total restraint of trade and void; Chappel v. Brockway, 21 Wend. (N. Y.) 157; Taylor v. Blanchard, 13 Allen (Mass.) 370, 19 Am. Dec. 203; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; *contra*, Beal v. Chase, 31 Mich. 490; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850; and see Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, where it was held that the question as to what is a general restraint of trade does not depend on state lines, and a restraint is not necessarily general which embraces an entire state. See *infra* further as to this case.

The United States supreme court took the view that a restraint co-extensive with the state was not necessarily void; Oregon S. Nav. Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315, where the subject was discussed by Bradley, J., and in a later case it was said by Fuller, C. J., "The question is whether under the particular circumstances of the case, the nature of the particular contract involved in it, the contract is or is not unreasonable;" Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979. In Lange v. Werk, 2 Ohio St. 519, a covenant not to manufacture candles in the United States was held void, and in Watertown T. Co. v. Pool, 51 Hun (N. Y.) 157, 4 N. Y. Supp. 861, a similar contract as to space but limited to ten years in time, for the manufacture of thermometers, was held valid as a reasonable restriction. An agreement in a contract not to engage in the business of manufacturing or dealing in certain articles of commerce for a period of five years, and without any limitation of space, is held to be unlawful; Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; as was a contract, excluding the obligor from engaging in a useful trade everywhere and for all time; Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; and a contract of sale of fire alarm or police telegraph machines, with a covenant not to enter into competition with the purchaser for ten years without restriction as to place; Gamewell F. A. Tel. Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, and note, 39 Am. St. Rep. 458; but a contract unlimited territorially save by the words *so*

far as the law allows, is not void as being in conflict with public policy, nor as being too uncertain to be capable of being enforced; Hedge v. Lowe, 47 Ia. 137.

"The general common law rule can then best be stated as follows: Contracts in restraint of trade are in themselves, if nothing more appear to show them reasonable, bad in the eye of the law, but if from the peculiar circumstances of each case they appear to be reasonable and are founded upon a good consideration, they are valid." Patterson, Restr. of Trade 5; Morris Run C. Co. v. Coal Co., 68 Pa. 173, 8 Am. Rep. 159; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748, and a valuable note; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153, where Christiancy, C. J., applies substantially the same test quoted *supra* from Tindal, C. J., in 7 Bing. 735.

Contracts in general restraint of trade are void unless natural and not unreasonable for the protection of the parties; Chappel v. Brockway, *supra;* Maier v. Homan, 4 Daly (N. Y.) 168; Hedge v. Lowe, 47 Ia. 137, as such contracts impose too great a restraint on trade and are oppressive to one party without being of benefit to another; Heichew v. Hamilton, 3 G. Greene (Ia.) 596; Minturn v. Alexandre, 5 Fed. 119. Contracts for limited restraint are valid if entered into for good reasons, such as to afford fair protection to the purchaser of a business; Nobles v. Bates, 7 Cow. (N. Y.) 307; Jenkins v. Temples, 39 Ga. 655, 99 Am. Dec. 482, and it is said that one who has created a property by his skill or industry is at liberty, if it be necessary to make a market for the good will of the business, to sell his right of competition in the whole field covered by the business, and for a reasonable length of time; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650.

A contract not to carry on a trade in a particular town or county is valid; Grundy v. Edwards, 7 J. J. Marsh. (Ky.) 368, 23 Am. Dec. 409. Contracts in restraint of trade held to be valid are: Not to practise medicine within twelve miles of a place; Appeal of McClurg, 58 Pa. 51; not to engage in a certain business within sixty miles of a place for ten years; Whitney v. Slayton, 40 Me. 224; not to run a stage on a certain route; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; not to set up the business of an apothecary within twenty miles of a place; 6 Ad. & El. 438.

A contract not to sell oil within the state except in one city was held void; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193. An agreement never to engage in a certain trade in the city and county of San Francisco or state of California, was held too extensive in its restriction and void; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; as was a covenant not to run a steamboat belonging to a certain corporation or allow its machinery to be used on any other boat in any of the waters of certain states; Oregon Steam Nav. Co. v. Hale, 1 Wash. T. 283, 34 Am. Rep. 803. But the contract by the owner of a line of vessels running between New York and the West Indies, who had sold the good will thereof, to do no business with such ports within any place in the United States east of the Mississippi River, is not an unreasonable restraint of trade; Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573, approved in Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357. And for a collection of cases held either valid or void, see Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 755–759.

The conclusion from the cases is stated to be that the weight of authority in this country as in England is opposed to a fixed limit beyond which the restraint under a contract cannot extend; Patterson, Restr. of Trade 25. That there is no limitation as to time is no objection; 5 M. & W. 548 (where Parke, B., states clearly the reasons for applying a different rule to time from that relating to space); Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380; Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64; Geraty v. Druiding, 44 Ill. App. 441; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

An agreement to relinquish a business and not to carry it on thereafter, limited as to place but unlimited as to time, is not void; Webster v. Buss, 61 N. H. 40, 60 Am. Rep. 317; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; and the limit of space may be according to the nature of the contract; L. R. 1 Ch. 463; and a covenant not to engage in a certain business within a certain area, not greater than that covered by the business, is not injurious to the public; Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. L. 613, 71 Atl. 265, 24 L. R. A. (N. S.) 913. A covenant by one selling a business not to engage in the same business, is valid even if unlimited as to time or space, if it be necessary to protect the purchaser; Marshall Engine Co. v. Engine Co., 203 Mass. 410, 89 N. E. 548; and it has been held that no contracts are void as being in general restraint of trade when they operate simply to prevent a party from engaging or competing in the same business; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

But contracts for the limitation of competition in the operations of public service corporations are frequently held void upon grounds of public policy; Central New York Tel. Co. v. Averill, 55 Misc. Rep. 346, 105 N. Y. Supp. 378; Chicago G. L. & C. Co. v. Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Western Union Tel. Co. v. Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Central Transp. Co. v. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; West Virginia

Transp. Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Swigert v. Tilden, 121 Ia. 650, 97 N. W. 82, 63 L. R. A. 608, 100 Am. St. Rep. 374. And on the same principle the consolidation of public service corporations has been held illegal; People v. Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; Burrows v. Interborough Metropolitan Co., 156 Fed. 389. See 21 Harv. L. Rev. 533, and 21 *id.* 114, where the question of holding stock is considered.

Agreements to restrain rivalry and competition in bidding for public work are void, but an honest co-operation is not within the rule against combinations to stifle competition; Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410.

The tendency of recent adjudications was said, in a much cited case, to be now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances; Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

This case has been the subject of much discussion, and was said to be a departure from a well settled rule in Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736, where on a sale of good will, a covenant not to engage in the same business in the state or in the United States for twenty-five years was held void; and a similar case is Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346. On the other hand the New York case was approved in Southworth v. Davison, 106 Minn. 120, 118 N. W. 363, 19 L. R. A. (N. S.) 769, 16 Ann. Cas. 253, where it was said that: "The settled modern law, however, is, both in England and this country, that a limitation as to both time and place is unnecessary, if the agreement in other respects be reasonable, and not in conflict with public policy or the general welfare." In this case there was a limit of space—a "radius of five miles" from a town—but none of time. "The test question," said Sterrett, C. J., is whether the contract "is injurious to the public interests" and if so "it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious"; Nester v. Brewing Co., 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894, where it was also held that the rule is not confined to contracts respecting necessaries of life, and a combination of brewers to raise the price of beer was held unlawful; as was also a contract of stenographers to raise prices by preventing competition; More v. Bennett, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216; a by-law of a trade association requiring members to allow their bids to be increased six per cent. before they are submitted; Milwaukee M. & B. Ass'n v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97; and rules of a "club" of master plumbers intended to regulate prices and suppress competition; Hunt v. Co-Operative Club, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420.

There are cases in which municipal ordinances requiring work to be done by a certain class are held void as in restraint of trade by creating or encouraging monopoly; Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, both cases being efforts to discriminate in favor of union labor in city work.

Courts will not lend their aid to enforce the performance of a contract which they hold to be in restraint of trade, as contrary to public policy, on the ground that one side has performed the agreement, but will leave the parties in the plight in which their own illegal action placed them; Chicago, M. & St. P. R. Co. v. R. Co., 61 Fed. 993, 9 C. C. A. 659, 27 U. S. App. 1; Central Trans. Co. v. P. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979.

The reasonableness of such covenants and consequently whether they are in restraint of trade or not, is a question of law for the court and not of fact for the jury; 11 M. & W. 548; *id.* 653; 7 Bing. 743; Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427. And the question of reasonableness is to be determined with reference to the time when the contract was made unaffected by possible future contingencies; Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64; 7 Man. & Gr. 969.

Covenants of this character have been held divisible, partly valid and partly void; 11 M. & W. 653; Lange v. Werk, 2 Ohio St. 519; Appeal of Smith, 113 Pa. 579, 6 Atl. 251; Oregon S. Nav. Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621.

Where the restriction of a business is in accordance with public policy, the rule against such covenants does not apply, upon the ground that the reason ceasing, the rule also ceases. This is true in the case of patents, the object of granting which is to create a monopoly; Morse T. D. & M. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Billings v. Ames, 32 Mo. 265; trade secrets; L. R. 9 Eq. 345; Vickery v. Welch, 19 Pick. (Mass.) 523; intoxicating liquors; Harrison v. Lockhart, 25 Ind. 112; but in case of a business in which competition is particularly beneficial to the public interest, the tendency is to view with disfavor any restrictions. This principle has been applied to the manufacture of gas; Chicago G. L. & C. Co. v. Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; pipe lines; West Virginia Transp.

Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; telegraphing; Western Union Tel. Co. v. Tel. Co., 65 Ga. 160, 38 Am. Rep. 781.

From the cases above referred to it is apparent that the common law doctrine avoiding contracts in restraint of trade was evolved largely out of covenants by which one individual restricted himself from engaging in a certain business within a specified limit of space or time. The purpose of such covenants was of course to eliminate the competition of the individual who was a party to the covenant. The modern cases with respect to restraint of trade group themselves about combinations on a larger scale and more comprehensive in their results, intended to suppress competition, as nearly as may be, and to create monopolies.

While the strictness of the ancient rule with respect to what was then termed restraint of trade has thus been relaxed, the mischief against which that rule was directed has taken a new form, and the creation of monopolies and restrictions upon competition is now accomplished under the guise of what are termed trusts, pooling agreements, and the like. The distinguishing feature of these attempts to stifle competition is a combination of persons engaged in any particular business under agreements for controlling the output of manufacturing establishments, and lessening the amount of goods placed upon the market, and stipulating for prices of goods sold. The term *trust* is derived from the means frequently employed to carry out these combinations, the stock of the various corporations or the property of the various concerns which become parties to a combination being in some cases assigned to trustees to control and manage in execution of the agreement.

It has been maintained that the rules governing contracts in restraint of trade are not applicable to trusts because persons constituting trusts become partners, and, as is well known, partners are not subject to these rules; see 3 Political Sci. Quart. 592; and the same writer is doubtful whether the offence of engrossing, forestalling, or regrating ever existed independently of the statutes 5 & 6 Edw. IV. ch. 14, and when these statutes were repealed courts had no authority to punish offenders; *id.* See 4 Harv. L. Rev. 128.

The use of the term "trust" has long survived the termination of its practical use in this connection, but its adoption in statutes and judicial decisions seems to require its acceptance as a term clothed with a legal signification quite removed from the original meaning which led to its use in this connection. See *infra.*

Of late years the suppression of monopolies has been the principal source of litigation respecting the restraint of trade and one of the match trust cases held that the court would of its own motion take notice of an illegal contract which came before it for adjudication and leave the parties where they had placed themselves. If the contract was void as against public policy, the court would not enforce it while executory, nor relieve a party from loss occasioned by part performance. The subject of monopoly was discussed very forcibly by Sherwood, C. J., and they were declared to be odious and dangerous to the maintenance of free government; he contended that all combinations between persons or corporations for the purpose of raising or controlling the price of merchandise or any of the necessaries of life, are monopolies and intolerable, and ought to receive the condemnation of all courts; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, and note.

A combination, contract or understanding, the direct and necessary effect of which is to stifle or restrict competition in trade or business, violates the state anti-trust statute, whatever the intention of the parties; but one of which the main purpose and effect is to foster trade and increase the business of those who make and operate it and only indirectly and remotely restricts competition, is not "a combination and conspiracy in restraint of trade" within the anti-trust statutes nor is one for the purpose of fixing and determining the value of wages or other charges for personal services; nor one for regulating fairly the methods of business and providing rules for fair dealing among its members; State v. Board, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260, with note on combinations to control the price of labor, etc., as violations of anti-trust acts.

The purchase of a controlling interest in the stock of a competing company for the purpose of preventing competition is unlawful even though there are other concerns in the same business which would prevent a complete monopoly; Dunbar v. Tel. Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Ann. Cas. 57; particularly where the public policy of the state as expressed in the Constitution is against all monopolies; s. c. on final hearing, *id.* 238 Ill. 456, 87 N. E. 521.

The question of the illegality with respect to combinations of capital has arisen in the variety of cases which, however, may be to some extent classified, and such a classification has been suggested which divides them into simple combinations, trusts, and corporate combinations. Eddy, Combinations § 580.

The first class, of simple combinations, includes those agreements between persons engaged in the same business for the purpose of controlling the operation of the business in the common interest but without surrendering to the individual the control of the business by the owner. The second class of trusts, originated, as above stated, in the effort to devise a scheme for circumventing the established rules of law invalidating contracts or agreements in restraint of trade.

Both of these classes have been appropriately termed the looser forms of combination which were effectually disposed of by the federal and state anti-trust acts, discussed *infra*, which have driven those seeking to form combinations on or near the border line of legality into the third class above denominated "corporate combinations." In short the simple combination and the trust have practically disappeared, and where it is sought to form a combination in the direction of controlling prices, establishing a monopoly and either destroying or reducing competition, now universally, it may be said, resort is had to incorporation. Very many of these combinations under the old system have been declared illegal, and of these there may be cited by way of illustration the following: Agreements among coal companies for dividing the coal from particular districts, the business being controlled by a committee; Morris Run Coal Co. v. Coal Co., 68 Pa. 173, 8 Am. Rep. 159; or one to control the coal market; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; or one consisting of all retail coal dealers in a state except one, to fix and maintain a uniform price; People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; a milk exchange to regulate price; People v. Milk Exch., 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; an association of wholesale druggists and manufacturers of proprietary medicines to control prices; John D. Park & Sons Co. v. Druggists Ass'n, 50 N. Y. Supp. 1064; a contract between the grain dealers of a town to suppress competition and control prices; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; a candle manufacturers' association comprising ninety-five per cent. of the manufacturers of certain kinds of candles, to increase price and decrease outputs; Emery v. Candle Co., *supra*; a contract between five cotton seed oil mills to fix prices and abolish markets and guarantee profits; Texas Standard Cotton Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274, 15 L. R. A. 598, 29 Am. St. Rep. 690; an agreement between dealers in cotton bagging not to sell for a given price without the consent of a majority; Marsh v. Russell, 66 N. Y. 288; India Bagging Ass'n v. Kock & Co., 14 La. Ann. 168 (but a contract granting the exclusive right to sell bags and bagging for a certain period is valid unless part of a conspiracy to create a monopoly; Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102); one of nearly, if not all, of the canal boat owners to regulate freight and passenger rates; Stanton v. Allen, 5 Denio (N. Y.) 434, 49 Am. Dec. 282; and one between rival steamboat lines to operate jointly and suppress competition; Leslie v. Lorillard, 40 Hun (N. Y.) 392; Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; an association of salt producers to regulate prices and control the business of the individual members; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; a combination of saw-mill owners to increase prices and limit output; Santa Clara Val. M. & L. Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; an agreement of tobacco warehouse owners for pooling receipts and controlling the business of the individual members; Hoffman v. Brooks, 6 Ohio Dec. 1215, 23 Am. L. Reg. N. S. 648; one of sheep buyers for pooling commissions and restricting sales to butchers who were members of a certain association; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; a combination of wire cloth manufacturers who agreed to maintain certain prices; De Witt Wire Cloth Co. v. Wire Cloth Co., 16 N. Y. Supp. 384; an agreement by several manufacturers for the control, through a trustee, of manufacturing and selling carbons for electric lighting; Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46; one by the grocery men of a town to abandon in favor of a single firm the buying and selling of butter; Chapin v. Brown, 83 Ia. 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; one of producers of blue stone to control prices through one company acting as an agent for sales; Cummings v. Bluestone Ass'n, 15 App. Div. 602, 44 N. Y. Supp. 787.

The cases above cited vary greatly both in facts and the statements of the reasons why they have been held illegal, and these differences make it impossible to deduce from them any general rule of decision which might serve to determine in advance whether the given contract would be held lawful or not.

The cases generally show in the main a purpose not willfully to do an unlawful act but to unite for mutual benefit and the only general conclusion that can be reached from a consideration of all the cases is that the courts are disposed to treat an agreement intended to raise or maintain prices or control a particular business either at large or in specified localities or to establish a monopoly, as unlawful and non-enforceable either by suit upon it or defense under it. This general disposition of the courts will be found to be illustrated in many of the foregoing cases and is well stated in Nester v. Brewing Co., 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894, where a combination of brewers in Philadelphia known as the "Brewers' Pool" was held to be against public policy and void, because the court found as a fact that its object was to enable the 45 brewers of Philadelphia to regulate and control the sale and price of beer in Philadelphia and Camden County, New Jersey, and that it was a combination in restraint of trade tending to destroy competition and create a monopoly in an article of daily consumption. The court considered the test in these and all like cases to be whether there was a contract in restraint of trade which was injurious to the

public interest and if so it was void without respect to the degree of injury inflicted, it being enough to know that the natural tendency of such contracts was injurious. So after all it would seem that the courts with practical unanimity, where no federal or state statute directly applies, have determined to apply to combinations of persons engaged in the same business for the control of markets and prices, practically the same general principle which had been gradually evolved in England and in this country as to the legality or illegality of contracts restraining an individual from the pursuit of any particular vocation, that is to say, that the circumstances of each particular case will be regarded by the court, and the case determined by the consideration whether in that case the agreement is to be considered reasonable and not against public policy. See GOOD WILL.

In a discriminating effort to classify the cases and to find in them a rule of decision, Harmon, J., in holding void a pooling agreement of tobacco warehousemen of Cincinnati for fixing prices, limiting the freedom of parties to it, and providing penalties for breaches of it, said: "The presumption is always against the validity of such agreements and certainly where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies, the law, while it may not punish, will not enforce them;" Hoffman v. Brooks, 6 Ohio Dec. 1215, 23 Am. L. Reg. N. S. 648, where there is also an extended and useful note on the subject by Elisha Greenhood.

As will be shown elsewhere in this title the apparently conclusive construction of the words restraint of trade by the United States supreme court in the Standard Oil and American Tobacco Cases practically applies the same rule as has been reached through a long series of decisions in both countries with respect to such contracts at common law.

The origin of the form of combination known as trusts was in an effort to avoid the effect of the decision that the direct combination or agreement of persons and corporations was illegal. The term was originally correctly used, as the agreements from which it took its name were in the nature of pooling agreements by which the different parties of the combination deposited their stock with trustees giving them the right to vote it and control the corporations included in the trust, the separate owners receiving certificates of the trustees defining their respective interests; after that method was practically abandoned the term *trust* continued to be applied popularly to every method of effecting a combination in trade. Cook, Trusts 4.

The form of combination originally termed a *trust* was so dealt with by the courts as to result in its abandonment as unsafe and unreliable, and the creation of incorporated combinations has taken its place; the constituent members of the combination being usually corporations of different states they were readily assailed in their home states, and through such attacks upon one of its members, the trust was in many cases practically destroyed. The first case which was the subject of extended litigation was (1889) People v. Sugar Refining Co., 121 N. Y. 586, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. This trust was a combination of sugar refiners and was formed by the transfer of their stock to a board by whom shares were issued, which were divided among the constituent corporations and distributed to their stockholders according to their interests. It was provided in the agreement that it should be secret and the absolute management and control was vested in the board. The objects to be the promotion of economy and the reduction of the cost of production and to give to each the benefit of appliances and processes used by the others for the purpose of improving the quality and diminishing the cost of the product; protection against labor troubles, and against lowering the standard of a product; and generaly to promote the interests of the parties. The defendant was a corporation of New York and the proceeding was *quo warranto* for forfeiture and dissolution. The grounds on which relief was sought included allegations that the defendant, as a party to a combination injurious to trade, was guilty of criminal conspiracy; that the trust was a monopoly; and that the acts of the corporation in transferring its control amounted to a violation of its obligations to exercise its own corporate franchises. Judgment was rendered against the corporation upon several grounds, among which was that the combination was illegal as tending to monopoly in restraint of trade. The other grounds of the decision were based on the violation of corporate obligations, the transfer of its duties, obligations and powers being held to be unlawful and good ground for forfeiture of the charter. The decision was affirmed on appeal first by the supreme court and then by the court of appeals; the final decision was rested upon the violations by the corporation of the principles of law covering such bodies. A few of these so-called "trusts" will suffice to illustrate the system which, though practically obsolete, forms an important chapter in the struggle of centuries against the illegal restraint of trade by suppression of competition and creation and maintenance of monopolies.

The original Standard Oil Trust was created by the organization of a corporation in each of four states, Ohio, New York, Pennsylvania and New Jersey. The assets and business in each state were transferred to the corporation of that state and payment made

in its stock; and it was provided that no stock of the corporation should ever be issued except to trustees, to be held for the purpose of the trust, who had complete power of management. In Ohio, the attorney general proceeded by petition in the nature *quo warranto* and upon the ground that the object of the organization was to establish a monopoly. The association was held to be contrary to public policy and void; State v. Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. The result of this case was the abandonment of the original trust and the subsequent operation of the Oil Trust through the New Jersey corporation as a holding company. The history of the transaction is given in the opinion of the supreme court, Standard Oil Co. of N. J. v. U. S., 221 U. S. 1, 38, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

The American Preservers' Trust was formed by the assignment of at least a majority of the stock in seven corporations engaged in the same business, and after the trust was succeeded by a corporation, one of the original parties to it who refused to transfer his business and assets was sued in replevin; the trust agreement was held to be an illegal contract in providing for a combination in restraint of trade contrary to public policy. Bishop v. Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317. Where a Missouri corporation became a party to a trust agreement, an injunction to restrain it from doing business separately was denied, upon the ground that the organization was contrary to law and that the Missouri corporation had no right to become a party to such an association; American Preservers' Trust v. Mfg. Co., 46 Fed. 152.

The Cotton Seed Oil Trust was formed of four corporations whose property and management was turned over to a committee and by it operated. Another corporation subsequently admitted under the terms of the agreement endeavored to withdraw from it, and in an action by the last mentioned company to gain possession of its property, the contract between the corporations was held void as being a partnership which the corporations under their charters had no power to make; Mallory v. Oil Works, 86 Tenn. 598, 8 S. W. 396.

The Chicago Gas Trust was formed of four independent companies and a new corporation was organized to operate the business, not by manufacturing companies, but by holding a majority of the shares of the four constituent companies. Upon an information in the nature of *quo warranto*, the corporation filed demurrers to determine its power to acquire and hold the stock of the other corporations and the demurrers were sustained upon the general grounds that the action of the Gas Trust was *ultra vires*, suppressed competition and established a monopoly which was opposed to public policy and unlawful. It was further held that when a corporation is organized under general statute, if the statement of its objects show necessarily a creation of a monopoly it will be void, as is also the creation of one corporation to control all others engaged in the same business; People v. Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319.

The Nebraska Distilling Company to unify the control and management of distilleries, was a Nebraska corporation. Under *quo warranto*, it was held that the trust agreement was in restraint of trade, destructive of competition and created a monopoly, and therefore was contrary to public policy and void; State v. Distilling Co., 29 Neb. 700, 46 N. W. 155; Distilling & C. F. Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200.

The American Cattle Trust was a voluntary association in New York to receive and hold, through trustees, the stock of corporations engaged in the business of handling and selling cattle, etc. In a suit by one who had exchanged his stock in a constituent corporation for trust certificates, and who sought to recover his stock, the relief prayed for was granted and the trust held to be illegal; Gould v. Head, 38 Fed. 886.

Incorporated Trusts.—As a result of the almost continuous series of decisions affirming the invalidity of direct combinations of individual owners and of combinations through the medium of trusts, according to the original use of that term, there followed the effort, still in progress, to accomplish the result of creating combinations which would stand the test of the law by means of incorporation. In these cases the courts proceeded to apply the same general principles which had been decided with relation to the preceding forms of combination; and where it has appeared that the corporation itself, or in agreement with other individuals or corporations whose business was acquired by it, was intended to create a monopoly, destroy competition and increase or control prices, the combination has been held void, and contracts furthering its objects and purposes have not been enforced; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457 (where the question arose upon the suit by one of the parties to the combination for an account in equity, which was refused); Merz Capsule Co. v. Capsule Co., 67 Fed. 414 (1895) (where one of the parties, after agreeing to do so, refused to join in the combination and the agreement was declared void as a conspiracy in restraint of trade among the several states within the Sherman act); American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721 (where one of the vendors of his business refused to comply with the contract and having tendered back the stock of the trust corporation, resumed his business, and the relief was refused upon the ground that the agreement was an attempt to create a monopoly, which could not be en-

couraged by the court of equity); Western Wooden Ware Ass'n v. Starkey, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686 (where a corporation created for the purpose of monopolizing the business sought to enjoin persons from carrying on the same business in several states upon a contract to sell all their assets and business, which was held void as against public policy being made not for the purpose of continuing the business of those who have sold out but of destroying it in order to create a monopoly and the injunction was refused); Harding v. Glucose, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189 (where an agreement of a company which had agreed to sell to a trust corporation was declared illegal as part of the arrangement to create an illegal combination, and an injunction was granted on the application of a stockholder in one of the vendor corporations).

In many cases corporations formed to take the place of illegal trust combinations previously existing were either held invalid or abandoned because of the general attitude of the courts towards them. The corporations so formed were declared to be illegal combinations to restrain production and control prices; Strait v. Harrow Co., 18 N. Y. Supp. 224; National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462 (reversed, but on a technical point only, *id.*, 163 N. Y. 505, 57 N. E. 764); National Harrow Co. v. Hench, 76 Fed. 667; National Lead Co. v. Paint Store Co., 80 Mo. App. 247; Distilling & C. F. Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; Olmstead v. Cattle-Feeding Co., 73 Fed. 44. In the Standard Oil Case, White, C. J., said that "the first and second sections of the law, when taken together, embrace every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

During all this period of struggle in the courts against the modern development of the efforts to stifle freedom of trade and establish monopoly there was proceeding *pari passu* a popular movement to curb the prevailing tendencies to those ends by the legislative branches of the federal and state governments.

In many modern state constitutions, following generally that of Illinois, 1870, there are efforts to prevent combinations to suppress competition. Most of these are directed against such attempts by railroad companies either through unjust discriminations or consolidation of competing lines. There are constitutional provisions on this subject in several states, among which are Alabama, Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Michigan, Massachusetts, Nebraska, Pennsylvania, Texas, and West Virginia. A summary of them will be found in Spelling, Trusts & Monopolies § 89, note. They are usually considered as declaratory of the common law, as that of Colorado was expressly decided to be; Atchison, T. & S. F. R. Co. v. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291. Of the same character are state statutes directed against restraint of trade generally, which add but little to the limitations of the common law. The difficulty in dealing with the subject by state legislation is inherent. The great trusts cannot be reached by legislation within the states, inasmuch as their operations are not circumscribed by state boundaries. On the other hand attempts to deal with the subject by congress are hampered and obstructed by the constitutional limitation that federal legislation can deal only with interstate and foreign commerce; nevertheless an attempt was made by what was known as the anti-trust act of July 2, 1890, 26 Stat. L. 209.

This statute is commonly known as the "Sherman Anti-Trust Act," though Senator Sherman was not the author of it. Who was responsible for its present form was not known until the publication of Senator Hoar's Autobiography (Vol. II, p. 363), where he gives the facts, prefaced by the remark: "In 1890 a bill was passed which was called the Sherman Act for no other reason that I can think of except that Mr. Sherman had nothing to do with it whatever." A bill was introduced by Senator Sherman, not dealing with the domestic question except as admitting imports to compete with trust-made goods, free from tariff duties. This bill was referred to the judiciary committee by which the subject was at first considered with scant favor. Finally, however, a substitute was reported and passed by the senate, and as the result of conference was agreed to by the house. This substitute, which became, without change, the present law, was drawn by Senator Hoar, who was a member of the subcommittee to which the original bill was referred. Senator Sherman, however, was the original mover of the legislation, without regard to the form in which it finally passed; and, according to established practice in such case, the bill became known as the Sherman Act. He earnestly and ably advocated its passage at every stage. It passed the House unanimously and the Senate with but one negative vote. It may be added that Senator Edmunds, in a private letter, afterwards published, mentioned the fact that the bill as finally passed was drawn by a single hand and not thereafter amended. See Walker's Hist. of the Sherman Act; Thornton's Sherman Anti-Trust Act.

The act was a result of the growing public sentiment against combinations of capital then mainly utilized in the forms of trusts and the use of that term, which originated

at the time when the trust form was used, is continued, though, as above stated, without reason since the practical abandonment of the trust form of combinations and has been applied popularly to corporations created to serve the purposes which were originally accomplished by means of trusts. The Sherman act was the result of painstaking efforts in Congress to cope with what was universally considered to be an evil to be remedied and it occupied the attention of congress more or less continuously from the original introduction of the bill on December 4, 1889, until its passage by the senate with one dissenting vote and the house by a unanimous vote. It was approved July 2, 1890. Section 1 declares to be illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states, and penalizes any person who shall make such a contract or engage in such combination or conspiracy. Section 2 makes it a penal offense to monopolize or attempt to monopolize, or combine or conspire to monopolize, any part of such trade or commerce, and section 3 applies it to the Territories and the District of Columbia. Section 4 vests the jurisdiction of violations of the act in certain courts of the United States. Section 5 provides for making parties of persons not residing in the district in which the court is held, where the ends of justice require it. Section 6 provides for the forfeiture, seizure and condemnation of any property under any contract, or by any combination or pursuant to any conspiracy, mentioned in the act. Section 7 authorizes a suit by any person injured in consequence of the violation of the act, with treble damages therefore. Section 8 provides that the word person shall include corporation.

The question of the constitutionality of this act was early raised and settled by the supreme court. The objection was made that arbitrarily to deprive a citizen of his general liberty of contract by general statute, was a deprivation of liberty without due process of law and therefore unconstitutional. To this the court replied: "The question is, for us, one of power only and not of policy. We think the power exists in congress and that the statute therefore is valid." U. S. v. Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The constitutionality of such legislation was also discussed at length and affirmed by the same court in Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

"The clear and positive purpose of the statute," it was said in U. S. v. Coal Dealers' Ass'n, 85 Fed. 252, "must be understood to be that trade and commerce within the jurisdiction of the federal government shall be absolutely free and no contract or combination will be tolerated that impedes or restricts their natural flow and freedom." This statement of the purpose of the act by Morrow, J., seemed to be not only apt, but fully warranted by the language of the supreme court in U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, when, in response to the objection that the act did not mean what its language imported, but only to declare illegal contracts in unreasonable restraint of trade, the court said: "When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which is omitted by congress."

It was settled in an early case that a contract made for and in behalf of a state by its officers, under the South Carolina dispensary act vesting in a state a monopoly in the purchase and sale of alcoholic liquors, was not within the act, the state being neither a corporation nor a person, but a sovereign; Lowenstein v. Evans, 69 Fed. 908.

The question was soon raised whether the Sherman act applied to railroads, the objection being made, in cases where it was proposed to apply it, that the regulation of their traffic was provided for by the interstate commerce act. The supreme court, however, in two cases held that the act was applicable to such companies, and that there was no inconsistency between the two federal statutes. Trans-Missouri Freight Ass'n and the Traffic Ass'n Cases, *supra*.

It was held in U. S. v. Debs, 64 Fed. 724, that the federal court might, under the Sherman act, sustain a bill in equity to enjoin a combination or conspiracy which would interrupt interstate transportation and when an injunction issued to restrain the prosecution of such a combination was violated and the defendants imprisoned for contempt, the supreme court refused to discharge them on *habeas corpus*. The petition was denied on other grounds, but the court said that it was not to be understood that they dissented from the conclusions of the lower courts in reference to the scope of the act. Other cases sustaining the view taken in the Debs case are: U. S. v. Amalgamated Council, 54 Fed. 994, 26 L. R. A. 158; U. S. v. Cassidy, 67 Fed. 698.

The first case in the Supreme Court involving this statute was U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, in which it was sought to restrain and dissolve what was known as the Sugar Trust; the supreme court affirmed a decree dismissing the bill upon the ground that, although the control of the manufacture of a commodity involves the control of its

disposition this is a secondary or indirect control and the commerce through which the commodity is distributed "succeeds to manufacture and is not a part of it." The court said that: "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article passes from the control of the state and belongs to commerce."

"The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries, and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations."

Prior to the Standard Oil and Tobacco Cases, *infra*, this case had been the only one which has interrupted a continuous line of decisions gradually working out an accepted construction of the act, but during that time the court has been endeavoring to distinguish it from other cases in which the result reached has been generally treated as inconsistent with it, as for example Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, where it is difficult for any ordinary mind to see wherein the cases differ, or the case of Swift & Co. v. U. S., 196 U. S. 395, 25 Sup. Ct. 276, 49 L. Ed. 523, where Holmes, J., defined commerce among the states as "not a technical legal conception, but a practical one, drawn from the course of business," a distinction which seems to have been overlooked in the Knight Case. And in Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, there was another rather ineffectual effort to distinguish it from the earliest case, which has the distinction of being usually cited for such a purpose. The explanation may be, and probably is, that at the outset the disposition of the court was to limit the scope of the act, and this was done to an extent which could not be logically followed.

In U. S. v. Coal Dealers' Ass'n, *supra*, an incorporated association of coal dealers in San Francisco, for the purpose of controlling the coal trade in that city, was held illegal under the anti-trust act. Similar rulings are U. S. v. Coke Co., 46 Fed. 432, 12 L. R. A. 753; U. S. v. Hopkins, 82 Fed. 529. This latter decision was reversed in Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290. The combination was of commission men doing business at the stock yards, receiving, buying and selling and handling live stock from different states. The court below treated the agreement as being made "to control and monopolize the entire business of buying and selling live stock at the Kansas City stock yards. It is clearly a combination to restrict, control and monopolize that class of trade and commerce." But the supreme court treated the agreements as in effect operating "in furtherance of and in aiding commerce by providing for it facilities conveniences, privileges or services, but which do not directly relate to charges for its transportation or to any other trade form of interstate commerce."

This distinction and its reasoning is difficult to follow in the light of other decisions made by it upon the act, but the opinion concludes: "It follows from what has been said that the complainants have failed to show the defendants guilty of any violations of the act of congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them and relating to the conduct of their business are in restraint of any such commerce. Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange and whether such refusal is justifiable or not, are questions not open for discussion here. As defendants' actions or agreements are not a violation of the act of congress, the complainants have failed in their case, and the order for the injunction must be reversed."

In Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, the question involved was the legality of a live stock exchange composed of the purchasers of cattle (whereas in the Hopkins Case the members of the association were commission men merely), and it was alleged that the members of the exchange in the Anderson Case unlawfully and oppressively refused to purchase cattle from a member who dealt with another member of the stockyards, not a member of the exchange. The agreement was held valid mainly upon the ground that it did not, upon its face, operate as a restraint upon interstate commerce and there was no evidence to show that it did so in fact. In determining that the agreement was not in restraint of interstate trade, the court said: "It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any

event indirect and incidental, and not its purpose or object."

A contract of a railroad company having certain connecting lines to be used for its business is not a violation of the act; Prescott & A. C. R. Co. v. R. Co., 73 Fed. 438. This case does not present the question of what would be the effect of an agreement in the interchange of business to the exclusion of other lines in order to control interstate commerce, but only follows out the doctrine that the railroad company not being bound to contract for carriage beyond its own line may make a selection among different agencies for that work; Atchison, T. & S. F. R. Co v. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; and may make certain discriminations between certain connecting lines with respect to demanding prepayment of freight or refusing to advance charges in the case of some connecting lines and not of others; Gulf, C. & S. F. R. Co. v. S. S. Co., 86 Fed. 407, 30 C. C. A. 142. The same general principle was applied to express companies; Southern Indiana Exp. Co. v. Exp. Co., 92 Fed. 1022, 35 C. C. A. 172.

The legal remedy under the act is not affected by the dissolution of an illegal combination pending an appeal in a case brought against it; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

In a case arising under the Sherman act, congress is authorized by the constitution to confer upon any federal court jurisdiction to summon the proper parties to a suit to a hearing and decree wherever they reside or are found within the national dominion of the nation, although beyond the limits of the district of the court; U. S. v. Oil Co., 152 Fed. 290.

It was held in Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, that the act is violated as well by a corporate combination as by a voluntary association, and thereby was ended a somewhat generally accepted but (as now held) erroneous opinion which led to the adoption of corporate fusion as a refuge from the settled decision as to the illegality of the voluntary combinations and trusts. Probably nowhere can there be found a more lucid statement of the construction of the act, before then generally accepted, as to the safety of the incorporated combination than in the dissenting opinion of Holmes, J.

In Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, a combination of packers, having for its purpose the avoidance of competition and control both of prices and credit to dealers, was held illegal. So also in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, a combination of the same character respecting wall paper was held illegal under the act, and the illegality was held to be a valid defence in an action for merchandise bought under such agreement; and in W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, a similar combination of manufacturers of tiles, mantels and grates was held illegal and a recovery by a person injured was sustained under Sec. 7 of the act.

In Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, a combination of trade-unionists to conduct a boycott was held to be within the act, and so it was said, was any combination whatever which essentially obstructs the free flow of interstate commerce or restricts the liberty of a trader to engage in it.

Acts done in a foreign country are not punishable under the act, though they might be if done here; American Banana Co. v. Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.

Three other cases, cited *supra*, may be properly enumerated as completing the list of Supreme Court decisions which should be read in order to gain an accurate understanding of the state of the law as construed by that court up to the beginning of the year 1911. These cases were all of exchanges of some sort, in all of which the transactions were held not to be within the anti-trust act, mainly as not showing restraint of interstate commerce; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Board of Trade of Chicago v. Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

Taking the cases as a whole in addition to points stated and not here repeated, they established the constitutionality of the act and that it embraces railroads; the illegality of any direct restraint of interstate trade, whether reasonable or unreasonable, or whether it destroy or affect competition among members of the conbination as well as of strangers to it. What is a direct restraint is frequently a leading question, and while it must be to some extent substantial and a proximate result of the combination, no rule has been established to determine whether it is either; each case must stand or fall by its own circumstances. It is enough to invalidate the agreement that it gives power to control prices, whether it actually raises them or not; and the restraint forbidden need not amount to total suppression, but merely decrease of competition. The act embraces corporations, private manufacturers and dealers. These conclusions are gathered from a consideration of the whole line of cases cited, but a good summary of previous decisions is given in the opinion of the court in the Northern Securities Co. v. U. S., *supra*.

There is no substantial change in the points established, except that created by the cases of Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and U. S. v. Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632,

55 L Ed. 663, in which it is held that the words "restraint of trade" in the Sherman act are used in their common law sense and are to be read so as to make the first and second sections of the act prohibit only unreasonable or undue restraints of interstate trade or attempts to monopolize the same in any and every form.

Both corporations were held to be guilty of an unreasonable restraint of trade and to be illegal combinations under both the first and second sections of the act. The opinion of the court in the first case contains an extended argument to sustain the position that unless a combination amounts to an unreasonable restraint of trade it is not invalid under the act, although, as the particular case under consideration is held to be unreasonable, it is forcibly suggested by Harlan, J., in his dissenting opinion in the second case, that as, under any construction of the act, the combination was held unlawful, the discussion of what might have been the result if it were held reasonable is *obiter dictum*. The opinion in the first case, reaffirmed in the second, goes at length into the discussion of the common law rule as to restraints which as appears in this title was so well settled that a simple statement that the statute was to be construed as applying to interstate trade, the common law rules and definitions as to restraints and monopolies would seem to have accomplished the apparent purpose of the decision.

In addition to the discussion of the effect of reasonable restraints, which was, under the view taken in either case, unnecessary, the striking feature of the opinions in these cases is the effort "to show that the construction was not in conflict with prior decisions." It is thus characterized by an extremely friendly critic who approves of the decision as one which, if frankly admitted to be "a substantial change from the previous interpretation," it would be, "under all the circumstances, not sufficient reason for withholding general approval." The quotations are from an analysis of the two opinions by Robert L. Raymond in 25 Harv. L. Rev. 31, which supplements a paper by the same author on "The Federal Anti-Trust Act," in 23 *id.* 353. This writer says in the later of these papers, at page 43: "It is not necessary to discuss former cases, nor to quote from opinions of the court to show that the rule previously adopted was that all direct or substantial restraints of competition, whether reasonable or not, are illegal. The fact is obvious from a study of the previous cases, and it is not worth while to emphasize it."

The truth of this statement of the result of the decisions is readily verified by reference to the original statement by the court of its construction of the act in the Trans-Missouri Freight Case, as quoted in the dissenting opinion therein, of White, J., who proceeded to controvert it in a discussion of the common law rule and the policy of not construing the act as an extension of it. He has continued his dissent, expressed from time to time with the remarkable ability and force which always characterizes his opinions, until at length he has been able to fortify them with a majority of the court. That he recognized that the law had been settled in opposition to his views clearly appeared when in his dissenting opinion in the Northern Securities Case, 193 U. S. at page 373, 24 Sup. Ct. 436, 48 L. Ed. 679, he thus replied to the suggestion that it did not follow that such power as was deprecated "would ever be exerted by congress" by this statement of the law as determined: "The first suggestion is at once met by the consideration that it has been decided by this court that, as the anti-trust act forbids any restraint, it therefore embraces even reasonable contracts or agreements."

Even the briefest statement of the acceptance by the courts of the doctrine that the Sherman Act was not a mere application of the common law to interstate trade would be utterly beyond present limits, but it is proper, if not necessary, in connection with the cases of 1911 to note what nearly all of the judges who then concurred in those decisions, had before that judicially declared to be the law.

In his dissenting opinion in the Northern Securities Case, Holmes, J., said that the statute "hits 'every' contract or combination of the prohibited sort, great or small," (the quotation marks are his) and that the natural inclination to assume that it was directed against certain great combinations cannot be carried out. And in the same opinion he said of the Joint Traffic and Trans-Missouri Freight Cases: "I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge."

In U. S. v. Addyston Pipe & Steel Co., 54 U. S. App. 723, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, Taft, J. (with the concurrence of Harlan, J., then, and Lurton, J., later, in the supreme court) said, in answer to the contention that the combination would have been valid at common law, that it was sufficient to point to the decision in the Trans-Missouri Freight Case, "in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not." On appeal this question was not raised or referred to, but the decree was affirmed with a restriction of the injunction to interstate trade, correcting a supposed inadvertence.

Lurton, J., speaking directly for himself, said that the supreme court cases made it clear that the legality of a contract as imposing only reasonable restraint was not a defence against an action under the Sherman

Act upon a contract whose dominant purpose was a direct restraint of interstate trade; Atlanta v. Pipeworks, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721.

Of the members of the court who sat in the Standard Oil and Tobacco Cases, Justices Holmes, White, Harlan, Day and McKenna concurred (at least did not dissent) in the statement of Fuller, C. J., in the opinion of the court in Loewe v. Lawlor, *supra*, which cited the Trans-Mo. Freight, Joint Traffic and Northern Securities Cases as holding "that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law." The first named case is quoted as replying to the assertion that such agreements as that under consideration were not void at common law, that "the answer to the statement now is to be found in the terms of the statute under consideration," and the last case, it is said, declares "illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states."

In Chesapeake & O. F. Co. v. U. S., 115 Fed. 610, 53 C. C. A. 256, Day, J. (then a circuit judge), in an opinion concurred in by Lurton and Severens, JJ., stated his understanding of the decisions to be that at common law only contracts in unreasonable restraint of trade were non-enforceable, but that the act of congress prohibited "all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contracts would have been illegal at common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are delared illegal if in restraint of trade or commerce among the states," citing the Trans-Mo. Freight Case, the Joint Traffic Case, and the Addyston Pipe Case.

To this enumeration of six out of nine Justices who sat in the Standard Oil and Tobacco Cases whose previous judicial opinions have been cited, it should be added that Van Devanter, J., sat in the first of these cases below and concurred in the opinion of the court by Sanborn, J. (in which Hook and Adams, JJ., also concurred), to the effect that if the necessary effect of a contract, combination, etc., is to restrict free competition in interstate or foreign commerce, "it is a contract, combination or conspiracy in restraint of that trade, and it violates the law. The parties to it are presumed to intend the inevitable result of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute." U. S. v. Oil Co., 173 Fed. 177.

Thus it appears that of the justices who concurred in the Standard Oil and Tobacco decisions, Hughes and Lamar, JJ., seem alone to have approached the cases as *res integra*.

It may be added to this judicial history (which seems essential to a proper understanding of these much discussed decisions) that in the Tobacco Case, tried below, before Lacombe, Coxe, Ward and Noyes, JJ., it was said that the Sherman act as construed "by successive majorities of the supreme court," condemns every combination in restraint of interstate trade which by its necessary operation destroys or restricts competition. One opinion expresses a doubt whether the supreme court may not have gone too far and construed too broadly, and suggests that possibly it should be amended to confine the illegality to "unreasonable restraint," and concludes, "but these are all legislative, and not judicial questions;" U. S. v. Tobacco Co., 164 Fed. 700.

In this connection it is worth while to note the impression made upon eminent English law writers respecting the construction of the Sherman act in the Trans-Missouri Freight Ass'n and Traffic Ass'n cases. The subject of combinations in the law of England and other countries was critically considered in the "Report of a Royal Commission on Shipping Rings," a term applied to sea carriage combinations of ship owners. The report contains papers on the subject by Rt. Hon. Arthur Cohen, K. C., the chairman of the commission, and Sir John Macdonell. Mr. Cohen says: "It was held by a majority of the supreme court in the important case of U. S. v. Freight Ass'n, 166 U. S. 290 [17 Sup. Ct. 540, 41 L. Ed. 1007], that the Sherman act applies equally to all contracts tending to create a monopoly, *whether or not they are reasonable or whether or not they are unlawful at common law.*" (Italics in the original.)

Sir John Macdonell says: "As to the Sherman act, the supreme court has held that it is directed not merely against contracts or combinations in restraint of trade which are unreasonable. 'All contracts are included in such language, and no exception can be added without placing in the Act that which has been omitted by congress.' (U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 328 [17 Sup. Ct. 540, 41 L. Ed. 1007].) The supreme court has in terms stated that this act applies to 'every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations,' and that 'the act is not limited to restraints of inter-state and international trade that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce' (Northern Securities Co. v. U. S., 193 U. S. 331 [24 Sup. Ct. 436, 48 L. Ed. 679], Harlan, J.)." Then after stating that there was

no decision expressly upon the point whether a contract to give a "deferred rebate" would be a breach of the act, and after referring to some American authority that it might not be such if the restraint were reasonable, this conclusion is reached: "Without venturing to state a decided opinion upon a question still open, it seems most probable that such contract, if carried out by a combination of ship-owners and if in any way restraining trade, would come within the Sherman act." 10 Journ. Soc. of Comp. Legislation 144, 149, 170.

There have been some allusions to the Standard Oil and Tobacco Cases by the supreme court since they were decided. In U. S. v. R. Ass'n, 224 U. S. 383, 395, 32 Sup. Ct. 507, 56 L. Ed. 810, it is said that whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of congress, as construed and applied in those cases, "will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted." And again in the same case the court quoted from the Standard Oil Case that it must not be overlooked in applying a remedy "that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

In U. S. v. R. Co., 226 U. S. 61, 86, 33 Sup. Ct. 53, 57 L. Ed. 124, a quotation was made from the Standard Oil Case to the effect that "it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." And both cases were cited to the effect that if the act complained of contravened the provisions of the anti-trust act, it was no defence to say that it was legal in the state where made and within corporate powers conferred by state authority. In the same case citations of similar cases were made with respect to the remedy to be applied.

In U. S. v. Reading Co., 226 U. S. 324, 369, 33 Sup. Ct. 90, 57 L. Ed. 243, the Standard Oil Case was cited to the point that the act did not forbid or restrain the power to make normal and usual contracts, and that the words "restraint of trade" should be given a meaning that would not destroy the individual right of contract and render difficult if not impossible any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect.

In U. S. v. R. Co., 226 U. S. 470, 474, 33 Sup. Ct. 162, 57 L. Ed. 306, it was said that the Standard Oil and Northern Securities Cases were not, in view of the different situation, to be followed in reorganizing the constituent parts of the combination therein declared to be unlawful.

In U. S. v. Patten, 226 U. S. 525, 542, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, the Standard Oil Case is quoted as authority for the position that a conspiracy to corner a staple commodity which is normally the subject of interstate commerce, is a violation of section I of the statute, thus: "The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups, as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense." And again in the same case, both the former cases were cited to sustain the proposition that the conspiracy in question was a violation of the anti-trust act, because it tended to inflict public injury.

In Nash v. U. S., 229 U. S. 373, 376, 33 Sup. Ct. 780, 57 L. Ed. 1232, both cases are said "to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

In connection with the supposed overruling of the Trans-Missouri Freight Case in the Standard Oil Case, an allusion to the former in a subsequent case is of importance.

In Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107, a case decided after the Standard Oil Case, the court refers to U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, as an authority and makes this emphatic statement with respect to the efficiency of the Sherman law in which it says there "is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained. This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.' U. S. v. Tobacco Co., 221 U. S. 106, 181 [31 Sup. Ct. 632, 55 L. Ed. 663]. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the

courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results. U. S. v. Freight Ass'n, 166 U. S. 290 [17 Sup. Ct. 540, 41 L. Ed. 1007]; Armour Packing Co. v. U. S., 209 U. S. 56, 62 [28 Sup. Ct. 428, 52 L. Ed. 681]."

It has been held in cases involving the construction of the act that under section 7, a private person has no remedy in equity, but only an action at law; Block v. Distributing Co., 95 Fed. 979; Southern Indiana Exp. Co. v. Exp. Co., 88 Fed. 659; and that an action at law will lie for damages caused by a combination illegal under the act; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; Lowry v. Grate Ass'n, 106 Fed. 38; but the action can only be maintained by the person who actually suffers damage; Ames v. Tel. Co., 166 Fed. 820; and the complaint need only state facts showing that the defendant committed one or more of the offenses condemned by the act, to the injury of the plaintiff; People's Tobacco Co. v. Tobacco Co., 170 Fed. 396, 95 C. C. A. 566. A combination, to be within the act, need not in terms relate to interstate commerce, if its purpose and effect are necessarily to restrain it; Gibbs v. McNeeley, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; and if the necessary effect of a combination is but incidentally and indirectly to restrain interstate commerce, while its chief result is to foster the trade and increase the business of the contracting parties, "it does not fall under the ban of the act"; Sanborn, J., in Union Pac. Coal Co. v. U. S., 173 Fed. 737, 97 C. C. A. 578; Virtue v. Package Mfg. Co., 179 Fed. 115, 102 C. C. A. 413; Whitwell v. Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; Field v. Pav. Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; it must be the dominant purpose of the contract and not a merely insignificant and incidental interference; Cincinnati, P., B. S. & P. P. Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428.

It has been held: that "trade" and "commerce" are synonymous, and that "monopolize" means to engross or control the market; U. S. v. Patterson, 55 Fed. 605; that the act did not apply to restraint of interstate commerce by a state; Lowenstein v. Evans, 69 Fed. 908; but that a municipal corporation is a *person* within the meaning of sections 7 and 8; Chattanooga F. & P. Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241.

The act of February 12, 1913, provides that every combination, etc., shall be void if made between two or more persons or corporations, either of whom, as principal or agent, has engaged in importing any article, if it is in restraint of trade or to increase the market price of any imported article or of any manufacture into which such article is intended to enter. The act prescribes a penalty of fine or imprisonment or either and for a seizure of the property by the United States.

The act of March 4, 1913, provides that the sums thereunder appropriated shall not be expended in the purchase of steel, machinery, etc., from any corporation, etc., which has combined to monopolize interstate or foreign commerce.

By act of August 24, 1912, no vessel engaged in the coastwise or foreign trade of the United States shall be permitted to enter or pass through the Panama Canal if owned, chartered or controlled by any person or company doing business in violation of the anti-trust act of July 2, 1890. Suit may be brought by any shipper or the Attorney General of the United States. Questions of fact may be determined by any court of the United States having competent jurisdiction in any cause to which the owners or operators of such ships may be parties.

See TRADE COMMISSION, FEDERAL; Act of Oct. 15, 1914 (Clayton Act).

A patentee has the right to reserve to himself, as part of his monopoly, the control of the price at which dealers may retail the patented product to buyers; The Fair v. Mfg. Co., 166 Fed. 117, 92 C. C. A. 43. The owner of a patented article can charge such price as he may choose and sell it upon condition that the buyer on a resale shall charge a certain price for such article; Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. Any conditions which are not in their very nature illegal in regard to patent property, imposed by the patentee, and agreed to by the licensee, for the right to manufacture or sell the article, are valid; and the fact that the conditions in the contracts keep up the monopoly does not render them illegal. The prohibition imposed upon the licensees in this case was a reasonable one, which excluded them from making such articles (here harrows) as were made by others who were manufacturing and selling other machines under other patents. But it would be unreasonable to prohibit them from using any patents legally obtained by them and not infringing patents owned by others. It was also held that there was nothing which violates the Sherman act in the agreement that the patent owner would not license any other person to manufacture or sell any harrow of the peculiar style and construction then used or sold by the licensees: *id.*

Contracts by which a number of patents covering similar inventions are assigned by the several owners to one of the parties, which grants licenses under them to all the others, are not violations of the Sherman act, because of provisions intended to protect and keep up the patent monopoly; U. S. Consol. S. R. Co. v. Griffin & Skelley Co., 126 Fed. 364, 61 C. C. A. 334. To the same effect, although all the manufacturers of the article in the United States were licensees; Indiana Mfg. Co. v. Threshing Mach. Co., 154 Fed. 365, 83 C. C. A. 343.

A system of contracts between the owner of a patent for rubber-tire wheels and its licensees, fixing uniform prices and the percentage of the whole output which should be made and sold by each licensee, and providing that the business of all should be supervised by commissioners appointed by the licensor, is not rendered invalid by a provision for the accumulation of a fund by them to use in the purchase of tires from any or all of the licensees which should be sold to the trade to the best interest of all licensees; Rubber Tire Wheel Co. v. Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336.

Complainant sold his patented machine with a license restriction that it should only be used in connection with certain unpatented articles made by him. With knowledge of such license agreement, defendant sold to the vendee of the patented machine an unpatented article described in the license restriction; it was held that defendant's act constituted contributory infringement of the patent, and that while an absolute and unconditional sale operates to pass the patented article outside of the boundaries of the patent, a patentee, by a conditional sale, may so restrict the use of his vendee within specific boundaries of time, place or method as to make prohibited uses outside of those boundaries an infringement; Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. A patentee may not by notice regulate the price at which future sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid the agent of the patentee the full price asked for the article sold; Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041.

A trade agreement involving the right of all parties thereto to use a certain patent, which transcends the right to a monopoly of the patent and controls the output and price of goods to all those using the patent, is illegal under the Sherman act. While rights conferred by patents are definite and extensive, they do not give a universal license against positive prohibitions any more than any other rights do. A trade agreement under which manufacturers, formerly competitive, combined and restricted themselves to certain rules and regulations among others limiting the output of their product and quantity, vendees and price, was held illegal under the act; Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, distinguishing Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, supra.

The owner of a copyright cannot qualify future sales by his vendee or limit or restrain future sales at a specified price, and a notice in the book that a sale at a different price will be treated as an infringement is invalid. There are differences between the patent and copyright statutes in the extent of the protection granted by them and the rights of a patentee are not necessarily to be applied as an analogy to those under a copyright; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086.

Neither the patent statute nor the copyright act was intended to authorize agreements in unlawful restraint of trade; Straus v. Publishers' Ass'n, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, where it was held that agreements between book publishers and sellers restricting the sales to booksellers only who would maintain the price of copyrighted books and would not sell to any one who would cut the price, went beyond any fair and legal means to protect prices and was manifestly illegal under the Sherman act and that it was not justified as to copyrighted books under the copyright act.

A system of contracts between manufacturers and wholesale and retail merchants, by which the manufacturers attempted to control the prices for all sales by all dealers, wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer should pay, is in restraint of trade and invalid both at common law and, so far as it affects interstate commerce, under the Sherman act. Such agreements are not excepted from the general rule because they relate to proprietary medicines manufactured under a secret process but not under letters patent; nor is a manufacturer entitled to control prices on all sales of his own products in restraint of trade. The bill was filed to enjoin price cutting and to enjoin the defendant from inducing regular customers of the plaintiff to break their contract with the plaintiff; Dr. Miles M. Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (Holmes, J., dissented, saying: "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get"). To the same effect, John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

The owner of a secret process is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it was communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade; *id.*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. See TRADE SECRET.

An infringer of a patent cannot defend in a suit in equity by setting up a violation of the Sherman act in the acquisition and management of the patents by the complainant; Otis

Elevator Co. v. Geiger, 107 Fed. 131; nor can the infringer of a trademark; Northwestern Consol. M. Co. v. William Callam & Son, 177 Fed. 785.

A party to an illegal combination is not thereby deprived of his right of action upon a contract in itself legal; The Charles v. Wisewall, 74 Fed. 802; Connolly v. Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; Continental W. P. Co. v. Louis Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486.

There being no federal statute of limitations applicable to section 7 of the Sherman act, suits under it are subject to the state statutes; Atlanta v. Pipe Co., 101 Fed. 900. In actions for treble damages under section 7, the parties are entitled to a jury trial; Meeker v. R. Co., 162 Fed. 354. Acts committed without the territory of the United States are not violations of the act; American Banana Co. v. Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. One member of an unlawful combination cannot have relief in equity against other persons who interfere with its illegal purpose, since he does not come in with clean hands; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; but any one or more members of a combination in violation of the act may be sued under section 7, for sales at an excessive price whether he or they made the sale or not; Chattanooga F. & P. W. v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241, affirming Atlanta v. Pipeworks, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721, which reversed Atlanta v. Pipe Co., 101 Fed. 900.

The act applies to combinations of laborers; Workingmen's A. Council v. U. S., 57 Fed. 85, 6 C. C. A. 258; Waterhouse v. Comer, 55 Fed. 150, 19 L. R. A. 403; Loewe v. Lawlor, 208 U. S. 283, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *contra*, U. S. v. Patterson, 55 Fed. 605; and it gives jurisdiction of torts committed by laborers in strikes; Thomas v. R. Co., 62 Fed. 803; In re Certain Merchandise, 64 Fed. 577 (but in reviewing this decision the supreme court withheld any expression of opinion on this point; In re Debs, 158 U. S. 577, 15 Sup. Ct. 900, 39 L. Ed. 1092). The right of action at law has been sustained where one corporation having obtained control of two other independent companies, used it to the damage of a rival business concern; Monarch Tobacco Works v. Tobacco Co., 165 Fed. 774; a combination to restrict production of woodenware and increase prices was held illegal both under the act and at common law, and the contract was held not enforceable; Cravens v. Carter-Crume Co., 92 Fed. 479, 34 C. C. A. 479; as also were combinations to advance the prices of a manufactured article by parcelling out territory to restrict competition; Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; or by agreement to sell only to members of a dealers' association except at higher prices; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608. A combination of thirty-five factories in twelve states was held unlawful, but, because it would contribute towards completing it, the appointment of a receiver was refused; American B. & M. Co. v. Klotz, 44 Fed. 721.

Contracts held void under the act: A stipulation in a sale of books not to sell at less than the publisher's price; Bobbs-Merrill Co. v. Straus, 139 Fed. 155; a combination by a drug trust to fix an arbitrary minimum price for retailers; Loder v. Jayne, 142 Fed. 1010; Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984, and note, 9 Ann. Cas. 294; an effort by the proprietor of a secret formula to prevent the sale of the medicine at less than the price fixed by him; John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135; the purchase of a large block of stock and securing proxies to control a competitive company; Bigelow v. Min. Co., 167 Fed. 704 and 167 Fed. 721, 94 C. C. A. 13; an agreement between the owners of different patents which so operated as to restrain all competition between them in the sale of the patented articles; Blount Mfg. Co. v. Mfg. Co., 166 Fed. 555.

The act was not violated by a discrimination in favor of certain railroads in accepting through freight; Prescott & A. C. R. Co. v. R. Co., 73 Fed. 438; rules of a local live stock exchange regulating rates of commissions and prohibiting dealings between members and non-members were held not to be in restraint of interstate commerce; Hopkins v. U. S., 171 U. S. 579, 19 Sup. Ct. 40, 43 L. Ed. 290; Anderson v. U. S., 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300 (these decisions have been criticized as applications by the Supreme Court to this act of the doctrine *de minimis non curat lex*; Walker, Hist. Sherm. Law 136).

Contracts held to be no violation of the act: Between a board of trade and the telegraph companies to communicate buying and selling prices to some members and not to others; Board of Trade of Chicago v. Stock Co., 198 U. S. 245, 25 Sup. Ct. 637, 49 L. Ed. 1031, on *certiorari* to Christie G. & S. Co. v. Board of Trade, 125 Fed. 166, 61 C. C. A. 11, which reversed Board of Trade of Chicago v. Stock Co., 121 Fed. 608; for refusing to sell merchandise to all persons at the same price, there being no duty to sell to plaintiff at any price; Phillips v. Cement Co., 125 Fed. 593, 61 C. C. A. 19; for providing that the purchaser under a contract of sale of merchandise should not sell or ship it outside of a given state; *id.*, 125 Fed. 593, 61 C. C. A. 19; for catching, buying, or selling fish in the vicinity of certain cities in different states; Davis v. A. Booth & Co., 113 Fed. 31, 65 C. C. A. 269; for the sale of boats, providing that the purchaser should refrain for five years from the business of transportation on the

Ohio river; Cincinnati, P., B. S. & P. P. Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; for the sale of a patent upon condition that, with written consent of a majority of parties to the license contract, an effort might be made on behalf of all parties to crush competition; Rubber Tire Wheel Co. v. Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336, reversing *id.*, 142 Fed. 531; giving an exclusive privilege of transporting milk over a certain railroad; Delaware, L. & W. R. Co. v. Kutter, 147 Fed. 51, 77 C. C. A. 315; a combination of commercial brokerage companies which, although it had the effect of suppressing a certain amount of competition in interstate business, was substantially an acquisition of most of the business done at a single point in one state; Arkansas Brokerage Co. v. Dunn & Powell, 173 Fed. 899, 97 C. C. A. 454, 35 L. R. A. (N. S.) 464.

Indictments have been held insufficient: Where the restraint was only mutual and not extraneous; U. S. v. Greenhut, 50 Fed. 469 (the same conclusion being reached by three other judges in extradition proceedings; In re Corning, 51 Fed. 205; In re Terrell, 51 Fed. 213; In re Greene, 52 Fed. 104); where the agreement did not practically create a monopoly; U. S. v. Nelson, 52 Fed. 646; but in the Addyston Pipe Case, Taft, J., with Harlan and Lurton, JJ., concurring, enjoined merely mutual restraint of a combination as within the act; U. S. v. Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, reversing *id.*, 78 Fed. 712, and this was unanimously affirmed by the supreme court in Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Indictments have been sustained under the act for being a party to a combination in restraint of interstate commerce; U. S. v. Cassidy, 67 Fed. 698; against a corporation engaged in interstate commerce for conspiracy and against its officers, as being themselves engaged in interstate commerce by reason of conducting the corporate business; U. S. v. MacAndrews & Forbes Co., 149 Fed. 823.

The offenses indictable under the act include "restraints of trade aimed at compelling third parties and strangers, involuntarily, not to engage in the course of interstate commerce or trade, except on conditions that the combination imposes"; U. S. v. Naval Stores Co., 172 Fed. 455.

On indictment the original conspiracy to violate the act and the first overt act must have been within the period of the statute of limitations; U. S. v. Kissel, 173 Fed. 823. On indictment for a combination to drive a dealer out of business by refusing to sell him coal unless he would conform to directions about the retail price, the combination must be proved, as in the absence of it such refusal to sell is not unlawful; Union Pac. C. Co. v. U. S., 173 Fed. 737, 97 C. C. A. 578. Injunctions have been granted at the suit of the United States, against a combination to regulate the output and fix prices of coal, where the contract was clearly directed against interstate commerce; U. S. v. Coke Co., 46 Fed. 432, 12 L. R. A. 753 (and such combinations were dissolved; U. S. v. Coal Dealers' Ass'n, 85 Fed. 252; Chesapeake & O. F. Co. v. U. S., 115 Fed. 610, 53 C. C. A. 256); a combination to arrest the operation of railroads engaged in interstate commerce; U. S. v. Elliott, 62 Fed. 801; and one to prevent competition in the purchase of live stock for meats; Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, affirming U. S. v. Swift & Co., 122 Fed. 529.

State Anti-Trust Laws.—Many of the states have statutes known as anti-trust laws intended to prevent combinations to limit or control prices and production, which like the federal anti-trust law declare such combinations illegal and provide for the punishment of those making them as for a misdemeanor. In states where there are what might be termed general anti-trust laws, there will be found a strong resemblance between them in their scope and terms. In those statutes the offence is described as entering directly or indirectly into any combination pool, trust, conspiracy, agreement, confederation, arrangement, contract or understanding. In all the statutes heretofore passed, either all or some of these words are used to express the transaction which is forbidden and penalized. In some of the states, as, for example, Ohio and Texas, the statute defines a trust and then proceeds to declare any such to be unlawful and to provide for proceedings in *quo warranto* against any corporation or association which may be guilty of violation of the act and also for the criminal prosecution of violators of the act. The exact language of the Ohio statute on this subject is as follows: "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either any or all of the following purposes: 1. To create or carry out restrictions in trade or commerce. 2. To limit or reduce the production, or increase or reduce the price, of any commodity or merchandise. 3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or commodity. 4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state. 5. To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in

any manner to keep the price of such article, commodity or transportation at a fixed or graduated number, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchaser or consumer in the sale or transportation of any such article or commodity, or which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any way be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void." And the Texas statute is, with two or three slight and unimportant verbal differences, identical. The identity of the two statutes leads to the almost necessary conclusion that one was copied from the other. Other states have defined the term *trust*, having apparently the same general ideas in view, although the Mississippi statute includes within its definition "to issue, own or hold the certificates of any stock of any trust or combine," to place the control, to any extent, of business or of the products or earnings, thereof, in the power of trustees by whatever name called." Both of which acts cover transactions legitimately within the true and original meaning of the term *trust*. This statutory adoption of the term would seem to make necessary the assumption that the word *trust* is now to be incorporated in the law with a new meaning far removed from its original meaning and entirely disconnected from it except for the casual use of the trust form as an instrument for carrying out the originally large combinations of capital against which the entire body of anti-trust legislation so called is directed. If this new definition of the term is to be accepted it will be found to be applied in statutes in popular use and occasionally by courts to mean general combinations, agreements, understandings, or conspiracies expressed or implied between persons, corporations, firms or associations or one or more of them having for their object restraint of trade, control of prices and of commodities or their production or output, suppression of competition in production, importation, manufacturing, transportation, sale or purchase of commodities, or what was known at common law as engrossing and forestalling.

In some of the states it is to be noted that the anti-trust acts are specifically confined to corporations. In many of them there are specific acts respecting labor organizations, many of them being discriminations in favor of labor organizations as against combinations of capital and in others prohibition of boycotting, blacklisting, and prohibiting employees from being members of labor unions or discriminations against them on that account. See LABOR UNION; LABOR LAWS; BOYCOTTING; BLACKLIST.

The Texas anti-trust act of May 25, 1899, defined *monopoly* as follows: "A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, assets, property, trade, custom, skill or acts, or of any other thing or possession, by or between persons, firms, or corporations, or associations of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a monopoly as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations amalgamations, affiliations, consolidations, or incorporations of capital, skill, credit, property, assets, custom, trade, or other valuable thing or possession, whether affected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade, or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this act if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly' as defined in this section is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations, or association of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act."

In addition to the decisions above noted as to combinations or agreements looking to the suppression of competition, many others may be referred to by way of illustration.

The Illinois act of July 1, 1893, which declares contracts in violation of its provisions void but excepts agricultural products or live stock, was held to be class legislation rendering the entire act void as in conflict with the 14th amendment; Connolly v. Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and see, as to the Texas anti-trust law of 1889 Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748.

Trusts have been held illegal in the case of: the business of manufacturing and sell-

ing preserves; Bishop v. Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; in the manufacture and sale of distillery products; Distilling & C. F. Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; brewers who combined to lease "all the cooling room capacity for cooling beer" in a town, to prevent competition (and in this case it was held that the parties could not recover for non-performance of the contract); Houck v. Brewing Ass'n, 88 Tex. 184, 30 S. W. 869; a combination to control the price and production of a floating-spring tooth harrow which is held to be an instrument of such general use and utility as to render such a combination a violation of public policy; National H. Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462.

A similar combination between a corporation and its stockholders, although it did not combine with any other corporation, was void within the Illinois anti-trust act; Ford v. Milk Shippers' Ass'n, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. An agreement for buying and selling coal at prices fixed by an association organized to control them is void so far as it is not executed, but not so as to deny to the seller his remedy for non-payment for coal delivered under the contract; Drake v. Siebold, 81 Hun 178, 30 N. Y. Supp. 697. A contract not to sell beer except to one company, which, in its turn, contracts not to sell beer to any other party in the vicinity, is a combination in violation of the Texas statute; Texas Brewing Co. v. Templeman, 90 Tex. 277, 38 S. W. 27; Fuqua v. Brewing Co., 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241. Where a masons' and builders' association, by its laws or rules, required all who competed for any contract or job to bring their bids for examination and have six per cent. added to the lowest before it should be submitted in competition, is contrary to public policy; Milwaukee M. & B. Ass'n v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St Rep. 97.

In Montana, where water rights are of great importance in connection with mining, a contract to control them is void; Ford v. Gregson, 7 Mont. 89, 14 Pac. 659. What are known as "corners" in the necessaries of life have been held void as violating the law against the creation of monopolies; State Bk. v. Chapelle, 40 Mich. 447; Wright v. Crabbs, 78 Ind. 487; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; and this is true whether the agreement on which they are based is temporary or permanent; *id.* So also the courts hold void expedients for buying up or cornering particular stocks in the market, by whatever means the result is accomplished; Vanderbilt v. Bennett, 19 Abb. N. C. (N. Y.) 460; Woodruff v. R. Co., 30 Fed. 91; so of a combination of mill-owners designed to control the output of cotton seed oil; Texas S. Q. Co. v. Adoue, 83 Tex. 650, 19 S. W. 274, 15 L. R. A. 598, 29 Am. St. Rep. 690.

There are other cases in which the courts have held combinations of this general character valid, as in Central S. R. Co. v. Cushman, 143 Mass. 353, 9 N. E. 629 (shade rollers).

A corporation organized for the purpose of acquiring patents and granting licenses thereunder covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois; Edison E. L. Co. v. Electric Co., 53 Fed. 592, 3 C. C. A. 605; Columbia W. Co. v. Wire Co., 71 Fed. 302; on the ground that patents cannot be subjected to state laws.

A contract to refrain from forming a corporation for the construction of waterworks in a specified city and from carrying on such work in order that the other party to the contract might obtain a corporation for such purpose and conduct the business without competition, is not void as against public policy; Oakes v. Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

A contract by which three out of four persons engaged in manufacturing oleomargarine consolidate, in order to stop sharp competition and agree not to engage separately in the business for five years, is not void; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784.

An agreement to raise the price of lumber fifty cents a thousand feet is not a restraint upon trade unless it involves the absorption of the entire traffic; U. S. v. Nelson, 52 Fed. 646. The by-law of the Associated Press, which provides that no member of it "shall receive or publish the regular news dispatches of any other news association covering a like territory and organized for a like purpose," is not void as unreasonable and in restraint of trade; Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741. In California it is held that the law against unlawful restraint of trade is not violated by an agreement by an association of stevedores to control prices, unless it appears that the entire business of the city is controlled by it and that the prices are unreasonable or the restriction prevents fair competition; Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81.

In some cases the question of the constitutionality of the state anti-trust acts has been raised and it has been argued that their application in many cases would be a violation of the constitutional rights secured by the 14th amendment of the federal constitution and the due process of law and the equal protection of the laws provision of state constitutions. It has been objected that the enforcement of these laws would result in the deprivation of the liberty of contract secured by the constitu-

tions and that they are not a legitimate exercise of the police power, under which it has been sought to justify them, also that they unjustly discriminate between individuals and classes.

Without attempting to enumerate all the cases which have arisen upon these statutes a few of them may be stated by way of illustration:

Statutes which prohibit combinations or trusts are constitutional and such combinations or agreements are against public policy and void at common law and as a matter of American common law irrespective of whether or not there is statute on the subject; State v. Packing Co., 173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515.

The constitutionality of the Texas act was sustained in the Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936, aff'd *id.*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657. See Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748.

The Ohio statute has been held constitutional; State v. Gage, 72 Ohio 210, 73 N. E. 1078; as was also a Michigan statute; Bingham v. Brands, 119 Mich. 255, 77 N. W. 940; and a Massachusetts statute prohibiting sales upon condition that purchasers of the goods should not deal elsewhere, but allowing the appointment of sole agents; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842. A California statute prohibiting combinations in restraint of trade was held constitutional and not in conflict with the penal code defining criminal conspiracies; People v. Butchers' Protective Ass'n, 12 Cal. App. 471, 107 Pac. 712. Other cases in which the state statutes have been held to be constitutional are State v. Oil Co., 218 Mo. 1, 116 S. W. 902; State v. Oil Co., 95 Miss. 6, 48 South. 300; State v. Oil Co., 111 Minn. 85, 126 N. W. 527; State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852; but a state statute prohibiting combinations of fire insurance companies was held unconstitutional; Niagara F. Ins. Co. v. Cornell, 110 Fed. 816.

The prohibition of monopolies is within the police power of the state legislature; Opinion of the Justices, 193 Mass. 605, 81 N. E. 142; State v. Lumber Co., 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N. S.) 804; State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L. R. A. (N. S.) 1287, 130 Am. St. Rep. 671.

In most of the cases cited the decisions have rested upon the doctrine that the prohibition of combinations in restraint of trade, and monopolies resulting therefrom, as contained in the state anti-trust laws are valid as exercised under the police powers of the state, or, as is said in one case, the analogous power of the state. Knight & Jillson Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146.

The statute of Illinois was said not to supersede the common law with respect to combinations in restraint of trade; People v. Ins. Co., 126 Ill. App. 636; and in another state court it was said that the state statutes indicate a policy to extend, rather than to restrict, the common law rules as to restraint of trade and monopolies; Stewart v. Lumber Co., 56 Fla. 570, 48 South. 19, 24 L. R. A. (N. S.) 649.

It is not a legal defence to an action for goods sold and delivered or service rendered, that the seller or person rendering service is a member of an illegal trust or combination, since the illegality is collateral to the contract of sale and does not taint it; National Distilling Co. v. Importing Co., 86 Wis. 352, 56 N. W. 861, 39 Am. St. Rep. 902; The Charles E. Wisewall, 74 Fed. 802; and it is no defense to an action by a milkshippers' association for goods sold that it is an illegal corporation under the Illinois act of June 11, 1891; Chicago M. S. Ass'n v. Ford, 46 Ill. App. 576.

It is no defense to an action for compensation due from the federal government for mail service over a leased line that the leases were void because operated by a combination intended to prevent competition; Southern Pac. Co. v. U. S., 28 Ct. Cl. 77.

A purchaser of river craft cannot invoke the Sherman act as a defense to an action for the purchase money because of his covenant to maintain rates, which was not declared by the contract to enter into the consideration of the sale, especially when the rates applied primarily to domestic and not to interstate business; Cincinnati, P., B. S., & P. P. Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428.

See other cases *supra*.

See POOL; VOTING TRUST; LEASE.

Where a retailer bought Ajello pianos and sold them at cost, in order to attract customers to his store, it was held that the maker had no cause of action; [1898] 1 Ch. 274. See 15 Harv. L. Rev. 427, on "Competition and the Law," by Prof. Bruce Wyman.

RESTRAINT ON ALIENATION. A provision in a settlement to the special use of a married woman without power of alienation, which is valid as an exception to the general rule against any restraint on alienation. It is in force only during marriage; Snell, Eq. 290; 11 Ch. D. 645.

A restriction, by way of devise over, against all alienation during a limited time upon an estate in fee, is void; Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721. See PERPETUITY; SPENDTHRIFT TRUST; MARRIED WOMAN.

RESTRICTIVE INDORSEMENT. See INDORSEMENT.

RESTS. A term used in computing interest especially on mortgages and in trust ac-

counts. It consists in striking a balance of the account, at the end of any fixed period, upon which interest is allowed, thus giving the benefit of compound interest. 3 Pars. Contr. § 151.

RESULTING TRUST. A trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.

All trusts created by implication or construction of law are often included under the general term implied trusts; but these are commonly distinguished into implied or resulting and constructive trusts; *resulting* or *presumptive* trusts being those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; *constructive* trusts, such as are raised independently of any such intention, and which are forced on the conscience of the trustee by equitable construction and the operation of law. Story, Eq. Jur. § 1095; 1 Spence, Eq. Jur. 510; 2 *id.* 198; 3 Swanst 585; Ross v. Hegeman, 2 Edw. Ch. (N. Y.) 373; Thomas v. Walker, 6 Humphr. (Tenn.) 93.

Where, upon a purchase of property, the conveyance of the legal estate is taken in the name of one person, while the consideration is paid by another, the parties being strangers to each other, a resulting or presumptive trust immediately arises, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds; Baker v. Vining, 30 Me. 126, 50 Am. Dec. 617; Livermore v. Aldrich, 5 Cush. (Mass.) 435; Partridge v. Havens, 10 Paige Ch. (N. Y.) 618; Strimpfler v. Roberts, 18 Pa. 283, 57 Am. Dec. 606; Hellman v. Messmer, 75 Cal. 166, 16 Pac. 766; Carter v. Challen, 83 Ala. 135, 3 South. 313; Price v. Kane, 112 Mo. 412, 20 S. W. 609; and if he conveys the property to the *cestui que trust*, such conveyance is good as against the creditors of the trustee; Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218.

Resulting trusts are raised by the law from the presumed intention of the parties, and the natural equity that one who furnishes the means for the acquisition of property should enjoy its benefits. But it cannot arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child, as under such circumstance the relation to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, for in such cases arises the contrary presumption of an advancement for the grantee's benefit; Jackson v. Jackson, 91 U. S. 125, 23 L. Ed. 258.

Where land is bought by a husband with the separate property of a married woman, and the title is taken in his name, a trust results to her, in the absence of any agreement to the contrary; Ross v. Hendrix, 110 N. C. 403, 15 S. E. 4; Lloyd v. Woods, 176 Pa. 67, 34 Atl. 926. But where a wife gives to her husband money from her father's estate, without any agreement for its investment, or that he should be accountable to her for it, and he subsequently informed her that he has invested it in land for her, when, in fact, he has not done so, but has taken the title in his own name, no resulting trust therein was created in favor of the wife; Nashville Trust Co. v. Lannom's Heirs (Tenn.) 36 S. W. 977.

To establish a resulting trust in one person of land purchased in the name of another, to whom title is conveyed, it is essential that the party setting up the trust shall have paid, or become bound for the purchase-money on his own account, and as part of the original transaction of purchase; Harvey v. Pennypacker, 4 Del. Ch. 445; payment by way of loan to the nominal purchaser raises no resulting trust; *id.* It is a latent equity, which cannot prejudice a *bona fide* holder for value; Gray v. Corbit, 4 Del. Ch. 135.

The fact that a conveyance is voluntary, especially when accompanied by other circumstances indicative of such an intention, it is said, may raise a resulting trust. See 2 Vern. 473; Philbrook v. Delano, 29 Me. 410; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240.

Where a voluntary; 1 Atk. 188; disposition of property by deed; Stevens v. Ely, 16 N. C. 493; or will is made to a person as trustee, and the trust is not declared at all; 3 Sim. 538; or is ineffectually declared; 1 Myl. & C. 286; Ralston v. Telfair, 17 N. C. 255; or does not extend to the whole interest given to the trustee; King v. Mitchell, 8 Pet. (U. S.) 326, 8 L. Ed. 962; Benning v. Benning's Ex'r, 14 B. Monr. (Ky.) 585; 3 H. L. C. 492; or it fails either wholly or in part by lapse or otherwise; Dashiell v. Attorney General, 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572; Hawley v. James, 5 Paige (N. Y.) 318; Kerlin v. Campbell, 15 Pa. 500; 10 Hare 204; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir at law or next of kin, according to the nature of the estate.

A resulting trust must arise at the time the title is taken. No subsequent oral agreement or payment will create it; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46; McDevitt v. Frantz, 85 Va. 740, 8 S. E. 642; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091. Where a father was induced to execute an absolute deed of his land to one of his children, by fraudulent representations that the grantee would hold it in trust for the other children, and subsequently without fraud executed another deed to the same grantee for the same land, the latter deed

passed the title free from any trust in favor of the other children, as the fraud in procuring the first deed created a resulting trust in favor of the father, the express trust being void, as not being in writing, and the second deed carried the father's equitable interest; Thompson v. Marley, 102 Mich. 476, 60 N. W. 976.

The property may be personal or real; Union Bank v. Baker, 8 Humphr. (Tenn.) 447; Leiper v. Hoffman, 26 Miss. 615; 2 Beav. 454. Parol evidence is admissible to prove a resulting trust in land; Myers v. Jackson, 135 Ind. 136, 34 N. E. 810; Seiler v. Mohn, 37 W. Va. 507, 16 S. E. 496; Howard v. Howard, 52 Kan. 469, 34 Pac. 1114. One who buys shares of stock with his own money does not become trustee for another, though he tells him that the purchase is made for his benefit and he expects to be reimbursed by him; 18 U. S. App. 293. Resulting trusts cannot be declared upon doubtful evidence, nor upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon to establish the trust; Adams v. Burns, 96 Mo. 361, 10 S. W. 26; Murphy v. Hanscome, 76 Ia. 192, 40 N. W. 717; Henslee v. Henslee, 5 Tex. Civ. App. 367, 24 S. W. 321.

The statute of frauds has no application to a trust resulting from the purchase of property with funds of another; Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523; Barnett v. Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98.

RESULTING USE. A use raised by equity for the benefit of a feoffor who has made a voluntary conveyance to uses without any declaration of the use. 2 Washb. R. P. 100.

The doctrine, at first limited to the case of an apparently voluntary conveyance with no express declaration, became so extended that a conveyance of the legal estate ceased to imply an intention that the feoffee should enjoy the beneficial interest therein; and if no intent to the contrary was expressed, and no consideration proved or implied, the use always resulted to the feoffor; 2 Washb. R. P. 100. And if part only of the use was expressed, the balance resulted to the feoffor; 2 Atk. 150; 2 Rolle, Abr. 781; Co. Litt. 23 *a*. And, under the statute, where a use has been limited by deed and expires, or cannot vest, it results back to the one who declared it; Reformed Dutch Church v. Veeder, 4 Wend. (N. Y.) 494; Sewall v. Cargill, 15 Me. 414; Ashhurst v. Given, 5 W. & S. (Pa.) 323. And see Cro. Jac. 200; Tudor, Lead. Cas. Eq. 258; 2 Washb. R. P. 132.

RESUMMONS. A second summons calling upon a person to answer an action where the first summons is defeated. 2 Chitty, Arch. Pr. 1347.

RESUMPTION. The taking again by the crown of land or tenements, which, on false suggestion, had been granted by letters patent. Whart. Dict.

RETAIL. To sell by small parcels, and not in the gross. Com. v. Kimball, 7 Metc. (Mass.) 308.

RETAILER OF MERCHANDISE. One who deals in merchandise by selling it in smaller quantities than he buys,—generally with a view to profit. U. S. v. Mickle, 1 Cra. C. C. 268, Fed. Cas. No. 15,763.

RETAIN. To continue to hold; to keep in possession. To keep is a synonym for retain. Richardson v. Scevers' Adm'r, 84 Va. 269, 4 S. E. 712.

In Practice. To engage the services of an attorney or counsellor to manage a cause. See RETAINER.

RETAINER. The act of withholding what one has in one's own hands, by virtue of some right. See EXECUTORS AND ADMINISTRATORS.

"If an executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and rests in himself; that is, he has them as his own proper goods in satisfaction of his debt and not as executor." Plowden 184. See O. W. Holmes, Early Engl. Executors in 9 Harv. L. Rev. 42; 3 Sel. Essays in Anglo-Amer. L. H. 737. This doctrine has lately been applied where the debt due by an insolvent testator to his executor greatly exceeded the value of the assets, and it was held that the executor was entitled to retain them in specie in payment of his debt; [1898] 1 Q. B. 282, discussing 9 Mod. 268; but not if he is an undischarged bankrupt; [1911] 1 K. B. 327.

In Practice. The act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.

The retaining fee.

A general retainer merely gives a right to expect professional service when requested. It binds the person retained not to take a fee from another against his retainer; but to do nothing except what he is asked to do, and for this he is to be distinctly paid; Rhode Island Exch. Bk. v. Hawkins, 6 R. I. 206.

In English practice a much more formal retainer is usually required than in America. Thus it is said by Chitty, 3 Pr. 116, note m, that, although it is not indispensable that the retainer should be in writing, unless required by the other side, it is very expedient. It is therefore recommended, particularly when the client is a stranger, to require from him a written retainer, signed by himself; and, in order to avoid the insinuation that it was obtained by contrivance, it should be witnessed by one or more respectable persons. When there are several plaintiffs, it should be signed by all, and not by one for himself and the others, especially if they are trustees or assignees of a bankrupt or insolvent. The retainer should also state whether it be given for a general or a qualified authority. See Osborn v. Bank, 9 Wheat. (U. S.) 738, 830, 6 L. Ed. 204; Jackson v. Stewart, 6 Johns. (N. Y.) 34; Henck v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 567. The existence of the relation of solicitor and client between parties may be inferred from their acts,

although the solicitor has not received any express retainer; [1891] 1 Ch. 337.

The effect of a retainer to prosecute or defend a suit is to confer on the attorney all the powers exercised by the forms and usages of the courts in which the suit is pending; Bell v. Hutchinson, 2 McCord (S. C.) 409; Lewis v. Sumner, 13 Metc. (Mass.) 269. He may receive payment; Langdon v. Potter, 13 Mass. 320; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Dudett v. Cunningham, 39 Me. 386; may bring a second suit after being nonsuited in the first for want of formal proof; Scott v. Elmendorf, 12 Johns. (N. Y.) 315; may sue a writ of error on the judgment; Grosvenor v. Danforth, 16 Mass. 74; may discontinue the suit; Gaillard v. Smart, 6 Cow. (N. Y.) 385; may restore an action after a *nol. pros.;* Reinholdt v. Alberti, 1 Binn. (Pa.) 469; may claim an appeal, and bind his client in his name for the prosecution of it; Adams v. Robinson, 1 Pick. (Mass.) 462; may submit the suit to arbitration; Buckland v. Conway, 16 Mass. 396; McElreath v. Middleton, 89 Ga. 83, 14 S. E. 906; may sue out an alias execution; Cheever v. Mirrick, 2 N. H. 376; may receive livery of seisin of land taken by an extent; Pratt v. Putnam, 13 Mass. 363; may waive objections to evidence, and enter into stipulation for the admission of facts or conduct of the trial; Alton v. Gilmanton, 2 N. H. 520; and for release of bail; Hughes v. Hollingsworth, 5 N. C. 146; may waive the right of appeal, review, notice, and the like, and confess judgment; Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468; may agree to the entry of a judgment; Devenbaugh v. Nifer, 3 Ind. App. 379, 29 N. E. 923; In re Maxwell, 66 Hun 151, 21 N. Y. Supp. 209; may waive a jury trial; Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399. But he has no authority to execute a discharge of a debtor except upon the actual payment of the full amount of the debt; 8 Dowl. 656; Derwort v. Loomer, 21 Conn. 245; Walker v. Scott, 13 Ark. 644; Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; nor to satisfy a judgment for a less sum than is due; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734; and that in money only; Nolan v. Jackson, 16 Ill. 272; Everett v. Sherfey, 1 Ia. 360; nor to release sureties; Givens v. Briscoe, 3 J. J. Marsh. (Ky.) 532; Varnum v. Bellamy, 4 McLean 84, Fed. Cas. No. 16,886; nor to enter a *retraxit;* Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; nor to act for the legal representatives of his deceased client; Wood v. Hopkins, 3 N. J. L. 689; and ordinarily one retained to collect a debt has no right to compromise it; Martin v. Cap. Ins. Co., 85 Ia. 643, 52 N. W. 534; Willard v. Gas Fixture Co., 47 Mo. App. 1; Brockley v. Brockley, 122 Pa. 1, 15 Atl. 646. An attorney's authority to appear for his client ceases after the entry of final judgment, except that he may take the necessary steps to collect the judgment; Cruikshank v. Goodwin, 66 Hun 626, 20 N. Y. Supp. 757.

There is an implied contract on the part of an attorney who has been retained, that he will use due diligence in the course of legal proceedings; but it is not an undertaking to recover a judgment; Hall v. Kerr, Wright (Ohio) 446. See 7 C. & P. 289; Babbitt v. Bumpus, 73 Mich. 331. An attorney is bound to act with the most scrupulous honor; he ought to disclose to his client if he has any adverse retainer which may affect his judgment or his client's interest; but the concealment of the fact does not necessarily imply fraud; Williams v. Reed, 3 Mas. 405, Fed. Cas. No. 17,733. See Weeks, Att. at Law.

RETAINING A CAUSE. Under the English Judicature Acts of 1873 and 1875, a cause brought in a wrong division of the High Court of Justice may be *retained* therein, at the discretion of the court or a judge.

RETAINING FEE. A fee given to counsel on being consulted, in order to insure his future services. See RETAINER.

RETAKING. The taking one's goods, wife, child, etc., from another, who without right has taken possession thereof. See RECAPTION; RESCUE.

RETALIATION. See LEX TALIONIS.

RETENEMENTUM. Detaining, withholding, or keeping back. Cowell.

RETIRE. As applied to bills of exchange, this word is ambiguous. It is commonly used of an indorser who takes up a bill by handing the amount to a transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when a bill is taken up or retired at maturity, it is in effect paid, and all the remedies on it extinguished; Byles, Bills, 93, 195, 263, 296; Dan. Neg. Inst. 12.

RETIRING BOARD. In case an army officer has become physically incapacitated, the secretary of war, under the direction of the president, may assemble a retiring board of not more than nine nor less than five officers; two-fifths shall be selected from the Medical Corps. The members, except those of the Medical Corps, shall be seniors in rank to the person whose disability is enquired of. R. S. § 1246.

RETORNA BREVIUM. In Old English Law. The return of writs by sheriffs and bailiffs, which is only a certificate delivered to the court on the day of return, of that which he hath done touching the execution of their writ directed to him: this must be indorsed on back of writ by officer; 2 Lilly, Abr. 476. Each term has return days, fixed, as early as 51 Hen. III., at intervals of about a week, on which all original writs are re-

turnable. The first return day is regularly the first day in the term; but there are three days' grace. 3 Bla. Com. 278.

RETORNO HABENDO. A writ issued to compel a party to return property to the party to whom it has been adjudged to belong, in an action of replevin. See DE RETORNO HABENDO REPLEVIN.

RETORTION, RETORSION. An act by which a government imposes the same hard treatment on the citizens or subjects of a state that the latter has used towards the citizens or subjects of the former, for the purpose of obtaining the removal of obnoxious measures. Vattel, liv. 2, c. 18, § 341. An act of retaliation in kind when a nation has failed in courtesy or friendship. Instances of retortion usually arise in discriminating duties or restrictions upon commercial intercourse; Snow, Int. Law 78. It is equivalent to retaliation and may be either amicable or vindictive. The former, *retorsion de droit*, is a remedy for a departure from any international courtesy, done in an unfriendly, but not an illegal manner. The latter, *retorsio facti*, implies the infliction of the same amount of evil on an aggressive state that it has inflicted on the state aggrieved; Risley, Law of War 57. This is a purely belligerent act; *id.*

The term is more properly applied to retaliation for unfriendly and inequitable acts on the part of foreign states and should not be extended to embrace illegal acts or international delinquencies. 2 Opp. §§ 29–33.

RETOUR SANS PROTÊT. A request or direction by the drawer of a bill of exchange, that in case the bill should not be honored by the drawee, it may be returned without protest, by writing the words "*retour sans protêt*" or "*sans pais.*" Should such request be made, it is said that a protest as against the drawer, and perhaps as against the indorsers, is unnecessary; Byles, Bills, 15th ed. 216.

RETRACT (Lat. *re*, back, *traho*, to draw). To withdraw a proposition or offer before it has been accepted. See LETTER; OFFER.

After pleading guilty, a defendant will, in certain cases where he has entered that plea by mistake or in consequence of some error, be allowed to retract it. But where a prisoner pleaded guilty to a charge of larceny, and sentence has been passed upon him, he will not be allowed to retract his plea and plead not guilty; 9 C. & P. 346; Dig. 12. 4. 5.

RETRAXIT (Lat. he has withdrawn). **In Practice.** The act by which a plaintiff withdraws his suit. It is so called from the fact that this was the principal word used when the law entries were in Latin.

Voluntary renunciation by plaintiff in open court of his suit and cause of action. Tate v. Bank, 96 Va. 765, 32 S. E. 476. At common law it was made in open court; Rincon W. & P. Co. v. Water Co., 115 Fed. 543.

A *retraxit* differs from a nonsuit—the former being the act of the plaintiff himself, for it cannot even be entered by attorney; 8 Co. 58; Lowry v. McMillan, 8 Pa. 157, 163, 49 Am. Dec. 501; Barnard v. Daggett, 68 Ind. 305; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; and it must be after declaration filed; Lowry v. McMillan, 8 Pa. 163, 49 Am. Dec. 501; while the latter occurs in consequence of the neglect merely of the plaintiff. A *retraxit* also differs from a *nolle prosequi*. The effect of a *retraxit* is to end the litigation; Waldron v. Angleman, 71 N. J. L. 166; Bac. Abr. *Nonsuit* (A); Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; U. S. v. Parker, 120 U. S. 95, 7 Sup. Ct. 454, 30 L. Ed. 601; *nolle prosequi* is not a bar even in a criminal prosecution; Com. v. Wheeler, 2 Mass. 172. See Com. Dig. *Pleader* (X 2).

RETRIBUTION. That which is given to another to recompense him for what has been received from him: as, a rent for the hire of a house.

A salary paid to a person for his services.

The distribution of rewards and punishments.

RETROACTIVE. See RETROSPECTIVE.

RETROCESSION. In Civil Law. When the assignee of heritable rights conveys his rights back to the cedent, it is called a retrocession. Erskine, Inst. 3. 5. 1.

RETROSPECTIVE. Looking backward. Having reference to a state of things existing before the act in question.

This word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts; and they are therefore called *retrospective laws*. These laws are generally unjust, and are to a certain extent forbidden by that article in the constitution of the United States which prohibits the passage of *ex post facto* laws, or laws impairing the obligation of contracts. See EX POST FACTO LAW; IMPAIRING THE OBLIGATION OF CONTRACTS; CONSTITUTION OF UNITED STATES. They are invalid in that respect only so far as they contravene the 5th amendment; Plummer v. R. Co., 152 Fed. 210.

The 14th amendment contains no prohibition of a retrospective legislation as such, and therefore, now, as before, the mere fact that a statute is retrospective in its operation does not make it repugnant to the federal constitution, the only limitation is that it shall not be *ex post facto*.

A general law for the punishment of offences, which endeavors to reach, by its retrospective operation, acts previously committed, as well as to prescribe a rule of conduct for the citizen in future, is void in as far as it is retrospective; Jaehne v. New York, 128 U. S. 189, 9 Sup. Ct. 70, 32 L. Ed.

398; but statutes affecting remedies are entirely at the discretion of the legislature.

A statute of limitations which provides that in all civil suits in which the cause of action shall have arisen within the state, the defendant, who shall have become a nonresident of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state, if retrospective in its effect, is constitutional and applies to the trial of issues pending when the act was passed; Bates v. Cullum, 177 Pa. 633, 35 Atl. 861, 34 L. R. A. 440, 55 Am. St. Rep. 753.

Legislation which concerns merely modes of procedure, applies to pending suits whether the act so specify or not; Lane v. White, 140 Pa. 99, 21 Atl. 437.

A statutory amendment allowing, as of right, but one new trial in ejectment is not unconstitutional as retrospective legislation, when applied to a pending action in which there has been one new trial long after the date of the act; Campbell v. Min. Co., 83 Fed. 643, 27 C. C. A. 646.

In the absence of constitutional prohibition against it, retrospective legislation is usually valid if not subject to the objection that it impairs vested rights. Where there is a constitutional prohibition, much legislation otherwise valid will fail; as, for example, the deed of a person of unsound mind could not in such case be ratified; Routsong v. Wolf, 35 Mo. 174. Retrospective statutes which have been held valid are: One validating a married woman's power of attorney; Dentzel v. Waldie, 30 Cal. 138; authorizing the insertion in a deed of the name of a married woman which was omitted by mistake; Goshorn v. Purcell, 11 Ohio St. 641; or validating an unauthorized conveyance of a married woman of her separate estate; Appeal of Jones, 57 Pa. 369; prohibiting the defence to a suit on a contract that it was made on Sunday, unless the defendant restores whatever of value he received under the contract; Berry v. Clary, 77 Me. 482, 1 Atl. 360; rendering a bond valid which when executed was invalid because not bearing the proper stamp; State v. Norwood, 12 Md. 195; curing a defective conveyance; Newman v. Samuels, 17 Ia. 528; confirming a conveyance defectively executed; Dulany's Lessee v. Tilghman, 6 Gill & J. (Md.) 461; remedying irregularities in legal procedure and assessments of property for taxation; White v. U. S., 191 U. S. 552, 24 Sup. Ct. 171, 48 L. Ed. 295; giving validity to past deeds which were before ineffectual; McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012; validating a defective power of attorney; Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. Ed. 124; changing the law by providing that the rents and profits of a married woman's estate shall not be subject to her husband's debts and contracts even as against a previous judgment against the husband; Baker's Ex'rs v. Kilgore, 145 U. S. 487, 12 Sup. Ct. 943, 36 L. Ed. 786; a constitutional provision that property should not be subject to execution upon judgments theretofore rendered for acts done during the "war of the rebellion"; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; taking away a statutory right to sue a city for damages by a mob, though a claim under such statute had been converted into a judgment; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; giving effect to a mortgage which was invalid under the provisions of prior laws; Gross v. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795; validating bonds of the territory of Arizona; Utter v. Franklin, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. Ed. 498, followed in West Side Belt R. Co. v. Construction Co., 219 U. S. 92, 31 Sup. Ct. 196, 55 L. Ed. 107, where a state act permitting foreign corporations to register and thereafter to sue on contracts made before registration was held valid.

The naked legal title to land is not a vested interest in the sense of a property right which the courts will protect from retrospective legislation intended to divest it; Diamond State I. Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240, where the land involved was the property of a dissolved corporation.

The legislature has power to pass curative acts which do not deprive one of vested rights; Downs v. Blount, 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076, as to cure a defective conveyance by retroactive legislation; Newman v. Samuels, 17 Ia. 528; or to confirm conveyances defectively executed; Dulany's Lessee v. Tilghman, 6 Gill & J. (Md.) 461.

The right to pass retrospective laws, with the exceptions above mentioned, exists in the several states, according to their own constitutions, and they become obligatory if not prohibited by the latter; Hess v. Werts, 4 S. & R. (Pa.) 364; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291. See Satterlee v. Matthewson, 2 Pet. (U. S.) 414, 7 L. Ed. 458; Stein v. Sav. Ass'n, 18 Ind. 237, 81 Am. Dec. 353.

An instance may be found in the laws of Connecticut. In 1795 the legislature passed a resolve setting aside a decree of a court of probate disapproving of a will, and granted a new hearing: it was held that the resolve, not being against any constitutional principle in that state, was valid; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648. And in Pennsylvania a judgment was opened by the act of April 1, 1837, which was held to be constitutional; Braddee v. Brownfield, 2 W. & S. (Pa.) 271.

Under a New York statute which provides that no person should practice medicine in

the state who had ever been convicted of a felony, it was held that the statute applied to persons convicted before its passage; People v. Hawker, 152 N. Y. 234, 46 N. E. 607.

Laws should never be considered as applying to cases which arose previously to their passage, unless the legislature have clearly declared such to be their intention; State v. Bermudez, 12 La. 352. See Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; 1 Kent 455; Code 1. 14. 7; Story, Const. § 1393; 3 C. B. 551; Eakin v. Raub, 12 S. & R. (Pa.) 330.

Nothing but clear and express words will give such effect to it; 4 H. & N. 76; White v. U. S., 191 U. S. 545, 24 Sup. Ct. 171, 48 L. Ed. 295; so of criminal acts; [1891] 2 Q. B. 148.

There is a strong presumption that an act was not meant to act retrospectively; U. S. Fidelity & Guaranty Co. v. U. S., 209 U. S. 306, 28 Sup. Ct. 537, 52 L. Ed. 804.

Rules of court affecting procedure only apply to pending causes; Laukhuff's Estate, 39 Pa. Super. Ct. 117.

RETURN. An official statement by an officer of what he has done in obedience to a command from a superior authority, or why he has done nothing, whichever is required. State v. Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Persons who are beyond the sea are exempted from the operation of the statute of limitations of some states, till after a certain time has elapsed after their *returning*. See Hall v. Little, 14 Mass. 203; Ruggles v. Keeler, 3 Johns. 263, 3 Am. Dec. 482; 2 W. Bla. 723; 3 Litt. 48; Pancoast's Lessee v. Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520.

When a member of parliament has been elected to represent a certain constituency, he is said to be *returned*, in reference to the return of the writ directing the proper officer to hold the election. In this country, election *returns* are the statements or reports of the balloting at an election, by the proper officers.

To come or go back to the same place; to revisit. First Soc. of Waterbury v. Platt, 12 Conn. 186.

RETURN-DAY. A day appointed by law when all writs are to be returned which have issued since the preceding return-day. The sheriff is, in general, not required to return his writ until the return-day. After that period he may be ruled to make a return. See RULE DAY; CRASTINUM; TERM.

RETURN OF PREMIUM. A repayment of a part or the whole of the premium paid. Policies of insurance, especially those on marine risks, not unfrequently contain stipulations for a return of the whole or a part of the premium in certain contingencies; 2 Phill. Ins. xxii. sect. xi.; but in the absence of any such stipulation, in a case free of fraud on the part of the assured, if the risk does not commence to run, he is entitled to a return of it, if paid, or an exoneration from his liability to pay it, subject to deduction settled by stipulation or usage; and so, *pro rata*, if only a part of the insured subject is put at risk; 2 Phill. Ins. ch. xxii. sect. i.; and so an abatement of the excess of marine interest over the legal rate is made in hypothecation of ship or cargo in like case; *id.* sect. vii.

RETURN OF WRITS. A short account, in writing, made by the sheriff, or other ministerial officer, of the manner in which he has executed a writ. Steph. Pl. 24.

It is the duty of such officer to return all writs on the return-day: on his neglecting to do so, a rule may be obtained on him to return the writ, and if he do not obey the rule he may attached for contempt. See 19 Com. Dig. *Return*.

A return of service by a state sheriff may be questioned upon removal to a federal court; the latter court may determine upon affidavits whether the service conferred jurisdiction; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272.

A marshal's return of service is conclusive on the parties, but where it does not show jurisdictional facts it can be set aside by a rule; Jackson v. Amusement Co., 131 Fed. 134.

While the physical acts of the sheriff could not be controverted, the legal conclusion could be; the proper method is by a rule to quash; Higham v. Travelers' Ass'n, 183 Fed. 846.

While it is true that a sheriff's return cannot be contradicted, yet a court may inquire into the facts where the return is not full or explicit, and this may be done by a rule; Park Bros. & Co. v. Boiler Works, 204 Pa. 453, 54 Atl. 334.

That a return cannot be controverted, see Newcomb v. R. Co., 182 Mo. 687, 81 S. W. 1069.

RETURNUM AVERIORUM. A judicial writ, similar to the *retorno habendo*. Cowell.

RETURNUM IRREPLEGIABILE. A judicial writ addressed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained, and so found by verdict; it is granted after a nonsuit in a second deliverance. Reg. Judic. 27.

REUS (Lat.). **In Civil Law.** A party to a suit, whether plaintiff or defendant. *Reus est qui cum altero litem contestatam habet, sive id egit, sive cum eo actum est.*

A party to a contract. *Reus credendi* is he to whom something is due, by whatever title it may be: *reus debendi* is he who owes, for whatever cause. Pothier, Pand. lib. 50. *Reus stipulandi*, a party to a stipulation;

reus promittendi, the debtor or obligor to the stipulation. Where there were several creditors or several debtors jointly entitled to, or jointly liable under, a stipulation they were respectively called *correi*.

See MENS REA; INTENT.

REVE. The bailiff of a franchise or manor; an officer in parishes within forests who marks the commonable cattle. Cowell.

REVELAND. In Domesday Book we find land put down as thane-lands, which were afterwards converted into revelands, *i. e.* such lands as, having reverted to the king upon death of his thane, who had it for life, were not since granted out to any by the king, but vested in charge upon account of the reve or bailiff of the manor. Spelm. Feuds, c. 24. It seems pretty clear that reeveland is, properly, land attributed to the sheriff while exercising his duty, in fact, a kind of office-endowment. Vinogradoff, English Society 372. *Reveland*, according to Maitl. Domesd. Book 169, is obscure.

REVELS. Sports of dancing, masking, etc., formerly used in princes' courts, the inns of court, and noblemen's houses, commonly performed by night; there was an officer to order and supervise them, who was entitled the "master of the revels." Cowell.

REVENDICATION. In Civil Law. An action by which a man demands a thing of which he claims to be owner. It applies to immovables as well as movables, to corporeal or incorporeal things. Merlin, *Répert.*

By the civil law, he who has sold goods for cash or on credit may demand them back from the purchaser if the purchase-money is not paid according to contract. The action of *revendication* is used for this purpose. See an attempt to introduce the principle of revendication into our law; 2 Hall, Law Journ. 181.

Revendication, in another sense, corresponds very nearly to the *stoppage in transitu* of the common law. It is used in that sense in the *Code de Commerce*, art. 577. Revendication, says that article, can take place only when the goods sold are on the way to their place of destination, whether by land or water, and before they have been received into the warehouse of the insolvent (*failli*) or that of his factor or agent authorized to sell them on account of the insolvent. See Dig. 14. 4. 15; 18. 1. 19. 53; 19. 1. 11.

REVENUE. The income of the government arising from taxation, duties, and the like; and, according to some correct lawyers, under the idea of revenue is also included the proceeds of the sale of stocks, lands, and other property owned by the government. Story, Const. § 877.

Internal revenue. The revenue raised by the United States from all sources of taxation except duties on imports. By revenue is also understood the income of private individuals and corporations.

See TAXATION.

A bill establishing rates of postage is not a bill for raising revenue, within the meaning of the constitution; but post-office laws may be revenue laws without being laws for raising revenue; U. S. v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464. See Davenport City v. Dows, 15 Wall. (U. S.) 390, 21 L. Ed. 96; Warner v. Fowler, 4 Blatchf. 311, Fed. Cas. No. 17,182.

REVENUE LAWS. Laws made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government. U. S. v. Mayo, 1 Gall. 398, Fed. Cas. No. 15,755. See U. S. v. Hill, 123 U. S. 686, 8 Sup. Ct. 308, 31 L. Ed. 275.

No country ever takes notice of the revenue laws of another; 1 Cowp. 343, per Lord Mansfield; 3 D. & R. 190.

Under the constitution of the United States revenue bills must originate in the house of representatives; Const. art. 1, § 7. See MONEY BILLS.

REVENUE SIDE OF THE EXCHEQUER. That jurisdiction of the court of exchequer, or of the exchequer division of the high court of justice, by which it ascertains and enforces the proprietary rights of the crown against the subjects of the realm. The practice in revenue cases is not affected by the orders and rules under the Judicature Act of 1875.

REVERSAL. In International Law. A declaration by which a sovereign promises that he will observe a certain order, or certain conditions, which have been once established, notwithstanding any changes that might otherwise cause a deviation therefrom; as, for example, when the French court consented for the first time, in 1745, to grant to Elizabeth, the Czarina of Russia, the title of empress, it exacted as a *reversal* a declaration purporting that the assumption of the title of an imperial government by Russia should not derogate from the rank which France had held towards her.

Letters by which a sovereign declares that by a particular act of his he does not mean to prejudice a third power. Of this we have an example in history: formerly the emperor of Germany, whose coronation, according to the golden bull, ought to have been solemnized at Aix-la-Chapelle, gave to that city, when he was crowned elsewhere, reversals, by which he declared that such coronation took place without prejudice to its rights, and without drawing any consequences therefrom for the future.

In Practice. The decision of a superior court by which the judgment, sentence, or decree of the inferior court is annulled.

After a judgment, sentence, or decree has been rendered by the court below, a writ of error may be issued from the superior to the

inferior tribunal, or an appeal taken, when the record and all proceedings are sent to the appellate court. When, on the examination of the record, the appellate court gives a judgment different from the inferior court, they are said to reverse the proceeding.

REVERSE, REVERSED. A term frequently used in the judgments of an appellate court, in disposing of the case before it. It then means "to set aside, to annul, to vacate." Laithe v. McDonald, 7 Kan. 254.

REVERSION. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. The return of land to the grantor and his heirs after the grant is over. Co. Litt. 142 *b;* 2 Bla. Com. 175; 4 Kent 354. See CONDITION; CONDITIONAL FEE; BASE FEE.

The reversion is a vested interest or estate and arises by operation of law only. In this latter respect it differs from a remainder, which can never arise except either by will or deed; Cruise, Dig. tit. 17; 4 Kent 345; 19 Vin. Abr. 217. A reversion is said to be an incorporeal hereditament; 4 Kent 354; 1 Washb. R. P. 37, 47; Snell's Ex'rs v. Snell, 38 N. J. Eq. 124. The possibility of reverter in the grantor of a qualified or determinable fee is not void for remoteness; First Universalist Soc. v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; as to the reversion or remainder in lands confiscated by the United States because of the owners engaging in the rebellion, see Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. See REMAINDER; LIMITATION.

In some cases land taken under the right of eminent domain for a specific purpose reverts to the former owner when that purpose has ceased. See EMINENT DOMAIN; ESCHEAT.

A street railway leasing its property for 999 years cannot be said to have a reversion in the property, which amounts to anything substantial. It rests upon a false analogy with the English land laws; Thirteenth & Fifteenth St. P. R. Co. v. Broad St. R. T. R. Co., 31 Pa. Co. Ct. R. 103, per Sulzberger, J.

Improvements on the roadbed by a lessee railroad company roadbed leased for 999 years are for the benefit of the lessee; Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

REVERSIONARY INTEREST. The interest which one has in the reversion of lands or other property. The residue which remains to one who has carved out of his estate a lesser estate. See REVERSION. An interest in the land when possession shall fail. Cowell.

REVERSIONARY LEASE. One to take effect *in futuro*. See LEASE.

REVERTER. Reversion. A possibility or reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate. See 1 Washb. R. P. 63.

REVEST. To replace one in the possession of anything of which he has been divested, or put out of possession. 1 Rop. H. & W. 353.

REVIEW. In Practice. A second examination of a matter. For example, by the laws of Pennsylvania, the courts having jurisdiction of the subject may grant an order for a view of a proposed road; the reviewers make a report, which, when confirmed by the court, would authorize the laying out of the same. After this, by statutory provision, the parties may apply for a review or second examination, and the last viewers may make a different report. For the practice of reviews in chancery, see BILL OF REVIEW.

The criticism of a publication. See CRITICISM; LIBEL.

REVIEW, COURT OF. In England. A court of appeal in bankruptcy cases, established in 1832 and abolished in 1847. Robson, Bkcy.

REVIEWER, REVIEWEE. Terms used in the caption of a case in Vermont in substantially the same sense as appellant and appellee. Sumner v. Wentworth, 1 Tyler 42.

REVILING CHURCH ORDINANCES. An offence against religion punishable in England by fine and imprisonment. 4 Steph. Com. 208. See BLASPHEMY.

REVISED STATUTES OF THE UNITED STATES. The Revised Statutes were enacted June 22, 1874, and, when printed in 1875, embraced the laws, general and permanent in their nature, in force December 1, 1873. A second edition was completed in the latter part of 1878, and includes only the specific amendments passed by the forty-third and forty-fourth congresses, with references to some other acts. The period from 1874 to 1880 is provided for by a supplement published in 1881. See Preface to Supplement to Rev. Stat. A second edition of the supplement, covering the legislation from 1874 to 1891, and embracing the matter in the Supplement to the Revised Statutes of 1881, was prepared and published under the direction of congress by Chief Justice Wm. A. Richardson of the Court of Claims. Volume 2 of the Supplement covers legislation down to March 4, 1901. Subsequent legislation is found in Statutes at Large, vols. 32 to 37. Vol. 37 covers the 63d Congress, 1911-1913.

Transactions subsequent to the enactment of the Revised Statutes must be determined by the law as there found, and not by the earlier statutes incorporated therein. In cases of ambiguity or uncertainty, the previous statutes may be referred to to elucidate the legislative intent, but where the language is clear, the Revised Statutes must govern. The second edition is neither a new revision nor a new enactment; it is only a new pub-

lication, a compilation containing the original law with certain specific alterations and amendments made by subsequent legislation incorporated therein according to the judgment of the editor, who had no discretion to correct errors or supply omissions; Wright v. U. S., 15 Ct. Cl. 80. Sections of a statute re-enacted in the Revised Statutes are to be given the same meaning they had in the original, unless a contrary intention is clearly manifested; U. S. v. Le Bris, 121 U. S. 278, 7 Sup. Ct. 894, 30 L. Ed. 946; the Revised Statutes are merely a compilation of the statutes of the United States, and resort may be had to the original statute to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law; U. S. v. Lacher, 134 U. S. 626, 10 Sup. Ct. 625, 33 L. Ed. 1080; and this is specially so where the act authorizing the revision directs marginal references as in this case; Barrett v. U. S., 169 U. S. 227, 18 Sup. Ct. 327, 42 L. Ed. 723, where some historical matter relating to the subject is found. "They must be treated as the legislative declaration of the statute law on the subjects embraced, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised, to see if congress erred in that revision, but may do so when necessary to construe doubtful language." Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601; U. S. v. Commercial Co., 74 Fed. 145.

An intention to alter the scope and purpose of an existing law cannot be imputed to congress because it placed in the Revised Statutes in two separate sections portions of what was a single section of the original act; Anderson v. Steamship Co., 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047.

See STATUTES AT LARGE.

REVISING ASSESSORS. **In English Law.** Two officers formerly elected to assist the mayor in revising the parish burgess lists, but now abolished and the duties transferred to the revising barristers.

REVISING BARRISTERS. **In English Law.** Barristers appointed to revise the list of voters for county and borough members of parliament, and who hold courts for that purpose throughout the country.

An appeal lies on questions of law to the King's Bench Division of the High Court of Justice.

REVIVAL. **Of Contracts.** An agreement to renew the legal obligation of a just debt after it has been barred by the act of limitation or lapse of time is called its revival.

In Practice. The act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force.

When a judgment is more than a day and a year old, no execution can issue upon it at common law; but till it has been paid, or the presumption arises from lapse of time that it has been satisfied, it may be revived and have all its original force, which was merely suspended. This may be done by a *scire facias* or an action of debt on the judgment. See SCIRE FACIAS; and as to ABATEMENT AND REVIVAL, see that title.

REVIVE. To bring again to life, to reanimate, to renew; to bring into action after a suspension. Lindsey v. Lyman, 37 Ia. 207.

REVOCATION. The recall of a power or authority conferred, or the vacating of an instrument previously made.

An act of the mind demonstrated by some outward and visible sign. Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

Revocation of grants. Grants may be revoked by virtue of a power expressly reserved in the deed, or where the grant is without consideration or in the nature of a testamentary disposition; 3 Co. 25.

Voluntary conveyances, being without pecuniary or legal consideration, may be superseded or revoked, in effect, by a subsequent conveyance of the same subject-matter to another for valuable consideration. And it will make no difference that the first conveyance was meritorious, being a voluntary settlement for the support of one's self or family, and made when the grantor was not indebted, or had ample means besides for the payment of his debts. And the English cases hold that knowledge of the former deed will not affect the rights of a subsequent purchaser; 9 East 59; 4 B. & P. 332; 18 Ves. 84. See, also, the exhaustive review of the American cases, in note to Sexton v. Wheaton, 1 Am. Lead. Cas. 36.

It is generally held that a voluntary conveyance which is also fraudulent, is void as to subsequent *bona fide* purchasers for value with notice; but if not fraudulent in fact, it is only void as to those purchasing without notice. See Bisp. Eq. 257; Elliott v. Horn, 10 Ala. 348, 352, 44 Am. Dec. 488; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 557, 7 Am. Dec. 348; Hudnal v. Wilder, 4 McCord (S. C.) 295, 17 Am. Dec. 744; FRAUDULENT CONVEYANCE.

The fact that the voluntary grantor subsequently conveys to another, is regarded as *prima facie* evidence that the former deed was fraudulent as to subsequent purchasers without notice, or it would not have been revoked; Cathcart v. Robinson, 5 Pet. (U. S.) 265, 8 L. Ed. 120; Bank of Alexandria v. Patton, 1 Rob. (Va.) 500, 544.

In some of the states, notice of the voluntary deed will defeat the subsequent purchaser; Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Baltimore v. Williams, 6 Md. 242; Hudnal v. Wilder, 4 McCord (S. C.) 295, 17 Am. Dec. 744; Corprew v. Arthur, 15 Ala. 525. But in other states the

English rule prevails; Doyle v. Sleeper, 1 Dana (Ky.) 531; Freeman v. Eatman, 38 N. C. 81, 40 Am. Dec. 444.

If one bail money or other valuables to another, to be delivered to a third person on the day of marriage, he may countermand it at any time before delivery over; 1 Dy. 49. But if such delivery be made in payment or security of a debt, or for other valuable consideration, it is not revocable; 1 Stra. 165. And although the gift be not made known to the donee, being for his benefit, his assent will be presumed until he expressly dissents; 3 Co. 26 *b;* 2 Salk. 618.

Powers of appointment to uses are revocable if so expressed in the deed of settlement. But it is not indispensable, it is said, that this power of revocation should be repeated in each successive deed of appointment, provided it exist in the original deed creating the settlement; 4 Kent 336; 1 Co. 110 *b*; 2 Bla. Com. 339.

It has been said that the power of revocation does not include the appointment of new uses; 2 Freem. 61; Pr. in Ch. 474.

A voluntary deed of trust, without power of revocation, made with a nominal consideration, and without legal advice as to its effect, when there was evidence that its effect was misunderstood by the grantor, will be set aside in equity; Garnsey v. Mundy, 24 N. J. Eq. 243; s. c. 13 Am. L. Reg. N. S. 345, and note by Mr. Bispham. In a similar case it was held that the mere omission of counsel to advise the insertion of a power of revocation is not a ground to set aside the deed; but that this omission and the absence of the power are circumstances tending to show that the act was not done with a deliberate intent. The deliberate intent of a party to tie his hands should clearly appear. In the absence of such an intent the omission of a power to revoke is *prima facie* evidence of mistake. The mistake being one of fact mixed with legal effects, equity will relieve; Appeal of Russell, 75 Pa. 269; the earlier English cases seem to have insisted upon the presence of a power of revocation in voluntary settlements; L. R. 8 Eq. 558; 14 *id.* 365; but in a later case it was held that the absence of such a power was merely a circumstance of more or less weight, according to the other circumstances of each case; L. R. 8 Ch. Ap. 430. A reserved right of revocation is not inconsistent with the creation of a valid trust; Mize v. Nat. Bank, 60 Mo. App. 358.

A quitclaim deed from a trustee to the donor of the trust will not revoke the trust, though made solely for that purpose, since a completed trust, without reservation of power to revoke, can only be revoked by the consent of all the beneficiaries; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065. See Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659.

Powers of sale and of substitution of trustee in a mortgage or deed of trust are coupled with an interest so that they are not revoked by the death of the grantor, although the mortgage or deed of trust is a mere right to resort to the thing for the payment of the debt, and the mortgagee or trustee has no estate, legal or equitable, in the thing conveyed; Frank v. Mortgage Co., 86 Miss. 103, 38 South. 340, 4 Ann. Cas. 54, 70 L. R. A. 135, with full note on the revocation by death of power of sale in a mortgage or deed of trust.

A power of sale of an ancestor's land, for the purpose of an amicable division among the heirs, is revoked by the death of one of the parties, although it contains a provision that it shall not be revoked by death, and authorizes the payment of the salary and expenses of the agent out of the proceeds of the property; Weaver v. Richards, 144 Mich. 395, 108 N. W. 382, 6 L. R. A. (N. S.) 855, and note. That case is put squarely upon the doctrine that the interest which will protect a power after the death of the person creating it, must be an interest in the thing itself. And a contract placing one's property in another's hands to manage and sell, which is to continue after the death of the donor, is nevertheless terminated by the death of the donor; Mills v. Smith, 193 Mass. 11, 78 N. E. 765, 6 L. R. A. (N. S.) 865.

The American courts, following Brown v M'Gran, 14 Pet. (U. S.) 479, 10 L. Ed. 550, hold that the consignee of goods for sale, who has incurred liability or made advances upon the faith of the consignment, acquires a power of sale which, to the extent of his interest, is not revocable or subject to the control of the consignor. But if orders are given by the consignor, contemporaneously with the consignment and advances, in regard to the time and mode of sale, and which are, either expressly or impliedly, assented to by the consignee, he is not at liberty to depart from them afterwards. But if no instructions are given at the time of the consignment and advances, the legal presumption is that the consignee has the ordinary right of factors to sell, according to the usages of the trade and the general duty of factors, in the exercise of a sound discretion, and reimburse the advances out of the proceeds, and that this right is not subject to the interference or control of the consignor. See Cotton v. Hiller, 52 Miss. 7; Mooney v. Musser, 45 Ind. 115.

The right of the factor to sell in such case is limited to the protection of his own interest, and if he sell more than is necessary for that purpose contrary to the order of his principal, he is liable for the loss incurred; Weed v. Adams, 37 Conn. 378.

The case of Parker v. Brancker, 22 Pick. (Mass.) 40, seems to go to the length of holding that where the consignment is to sell at a limited price the consignee may after notice sell below that price, if necessary, to reimburse advances. But to this extent the American rule has not gone; 1 Pars. Contr., 8th

ed. 70. See, also, Frothingham v. Everton, 12 N. H. 239; Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345.

The English courts do not hold such a power irrevocable in law; 3 C. B. 380; 5 *id.* 895. In the last case, Wilde, C. J., thus lays down the rule. It may furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor shall have an irrevocable authority to sell in case the principal made default. But it would be an inference of fact, not a conclusion of law. The fact that the agent has incurred expense in faith of the authority being continued, and will suffer loss by its revocation, is a ground of recovery against the principal, but does not render the power irrevocable. A pledge of personal property to secure liabilities of the pledgor, with an express power of sale, confers such an interest in the subject-matter that it will not be revoked by his death; Knapp v. Aloord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241. But a power to pledge or sell the property of the constituent and from the avails to reimburse advances made on liabilities incurred by the appointee is not so coupled with an interest as to be irrevocable; Hunt v. Rousmanier's Adm'r, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76. The interest must exist in the subject-matter of the power, and not merely in the result of its exercise, to become irrevocable; Rochester v. Whitehouse, 15 N. H. 468; McDonald v. Black's Adm'r, 20 Ohio, 185, 55 Am. Dec. 448. Hence, if one give a letter of credit agreeing to accept bills to a certain amount within a limited time, the letter is revoked by death, and bills drawn after the death and before knowledge thereof reaches the drawer cannot be enforced against the estate of such deceased party; Michigan State Bk. v. Leavenworth's Estate, 28 Vt. 209.

As to the revocation of a submission to arbitrators, see ARBITRATION AND AWARD.

Revocation of offer.—An offer may be revoked at any time before acceptance, even though a definite time for acceptance is specified, unless there is a distinct contract for a definite time, founded on a distinct consideration; Pollock, Contr. 27. Such revocation can take effect only when it is communicated to the other party, before acceptance; *id.* 30.

A general proposal by public advertisement may be revoked by an announcement of equal publicity, such as an announcement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked; Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697, said in Pollock, Contr. 23, to be judicial legislation.

See OFFER; ACCEPTANCE; LETTER.

The power of a partner to contract in the name of the firm may be revoked, by injunction out of chancery, where there is a wanton or fraudulent violation of the contract constituting the association; Bisp. Eq. 426; 1 Story, Eq. Jur. § 673. This will sometimes be done on account of the impracticability of carrying on the undertaking; 1 Cox, Ch. 213; 2 V. & B. 299. So, too, such an injunction might be granted on account of the insanity or permanent incapacity of one of the partners; 1 Story, Eq. Jur. § 673. But insanity is not alone sufficient to produce a dissolution of the partnership; 2 My. & K. 125. See PARTNERSHIP.

An oral license to occupy land is, where the statute of frauds prevails, revocable at pleasure, unless permanent and expensive erections have been made by the licensee in faith of the permission. In such case a court of equity will decree a conveyance on equitable terms, in conformity with the contracts of the parties, or else require compensation to be made upon equitable principles; Trenton W. P. Co. v. Chambers, 9 N. J. Eq. 471; Redfield, Railw. 106; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675.

For the law in regard to the revocation of wills, see WILLS; and as to the revocation of authority of agents, see PRINCIPAL AND AGENT.

REVOCATIONE PARLIAMENTI. An ancient writ for recalling a parliament. 4 Inst. 44.

REVOCATUR (Lat. it is recalled). A term used to denote that a judgment is annulled for an error in fact. The judgment is then said to be recalled, *revocatur;* not *reversed,* which is the word used when a judgment is annulled for an error in law; Tidd, Pr. 1126.

REVOLT. The endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. U. S. v. Tappan, 11 Wheat. (U. S.) 419, 6 L. Ed. 509.

According to Wolff, revolt and rebellion are nearly synonymous; it is the state of citizens who unjustly take up arms against the prince or government. Wolff, *Droit de la Nat.* § 1232. See REBELLION.

By Cr. Code, § 292, if any one of the crew of an American vessel, on the high seas or other waters, within the admiralty and maritime jurisdiction of the U. S., endeavors to make a revolt, etc., or conspires, etc., so to do, or incites, etc., any other of the crew to disobey lawful orders, or to neglect their duty, or assembles such others in a mutinous manner, or makes a riot, or unlawfully confines the master, etc., he is punishable by a fine of not over $1,000, or imprisonment for not over five years, or both. By § 293, if any one of the crew, etc., usurps the command of the vessel, or deprives the master of authority, or resists his authority, or transfers the same to one not entitled thereto, he is punishable by a fine of not over $2,000, and imprisonment for not over ten years. Foreign seamen on American vessels are punishable under this section; 1 N. Y. Leg. Obs. 88. If, before a voyage is begun, the seamen for good reason believe that the vessel is un-

seaworthy, they may resist an attempt to compel them to go to sea in her, without being guilty of revolt; 1 Sprague 75.

Revolts on shipboard are to be considered as defined by the last-mentioned act; 1 W. & M. 306.

A confederacy or combination must be shown; 2 Sumn. 582; 1 W. & M. 305. The vessel must be properly registered; 3 Sumn. 342; must be pursuing her regular voyage; 2 Sumn. 470. The indictment must specifically set forth the acts which constitute the crime; Whart. Prec. § 1061, n.

REWARD. The offer of recompense given by authority of law for the performance of some act for the public good, which, when the act has been performed, is to be paid. The recompense actually so paid.

The offer may be made to an individual; Franklin v. Heiser, 6 Blatchf. 426, Fed. Cas. No. 5,054; or by public, oral statement, poster, or newspaper; Hayden v. Souger, 56 Ind. 46, 26 Am. Rep. 1; Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142; its acceptance and performance create a valid contract; Poll. Contr. 11; Ans. Contr. 31; Pierson v. Morch, 82 N. Y. 503; Kasling v. Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; Cummings v. Gann, 52 Pa. 484; such performance being sufficient consideration; Ryer v. Stockwell, 73 Am. Dec. 634; 4 B. & Ad. 621. The offer, not being a contract until performance, may be withdrawn prior thereto; Harson v. Pike, 16 Ind. 140; Biggers v. Owen, 79 Ga. 658, 5 S. E. 193; Freeman v. Boston, 5 Metc. (Mass.) 57; Ryer v. Stockwell, 14 Cal. 137, 73 Am. Dec. 634; that the claimant was ignorant of the withdrawal, where the offer and withdrawal were by public advertisement, is immaterial; Shuey v. U. S., 92 U. S. 75, 23 L. Ed. 697. See REVOCATION.

The offer of a reward may contain such terms as the party sees fit to prescribe; Arnis v. Conner, 43 Ark. 337; provided they are lawful; Bish. Contr. § 467; Smith v. Arnold, 106 Mass. 269; and substantial performance is usually sufficient; Besse v. Dyer, 9 Allen (Mass.) 152, 85 Am. Dec. 747.

Where a reward was for an "arrest," furnishing information that led to an arrest was not enough; M'Claughry v. King, 147 Fed. 465, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216, 8 Ann. Cas. 856; Kinn v. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012; Williams v. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; the arrest must be legal; Moore v. Peace (Ky.) 97 S. W. 762; Morris v. Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 389.

A reward may be offered by the government or by a private person; Furman v. Parke, 21 N. J. L. 310; by a railroad company; Central R. & B. Co. v. Cheatham, 85 Ala. 292, 4 South. 828, 7 Am. St. Rep. 48; but not by the District of Columbia; Baker v. Washington, 7 D. C. 134; nor by municipal corporations, unless authorized by statute; Butler v. McLean, 32 Ill. App. 397; Loveland v. Detroit, 41 Mich. 367, 1 N. W. 952; Gale v. South Berwick, 51 Me. 174; Hawk v. Marion Co., 48 Ia. 472; Board of Com'rs of Grant Co. v. Bradford, 72 Ind. 455, 37 Am. Rep. 174; *contra*, York v. Forscht, 23 Pa. 391. But where the selectmen of a town offered a reward in excess of that authorized by statute, it was held good for the lawful amount; In re Kelly, 39 Conn. 159; and such officials are personally liable for the excess; Lee v. Trustees of Flemingsburg, 7 Dana (Ky.) 29; *contra*, Huthsing v. Bousquet, 2 McCrary 152, 7 Fed. 833.

Any one who complies with the terms of the offer, if not guilty of fraud, may recover the reward; Hassan v. Doe, 38 Me. 45; Blain v. Exp. Co., 69 Tex. 74, 6 S. W. 679; Means v. Hendershott, 24 Ia. 78; although not embraced in the description of the persons to whom it was originally proposed; First Nat. Bk. v. Hart, 55 Ill. 62; 64 L. T. 594; but not for apprehending a person who has been admitted to bail; Marking v. Needy, 8 Bush (Ky.) 22; nor one discharged from arrest by the committing magistrate; Board of Sup'rs of Itawamba Co. v. Candler, 62 Miss. 193. The owners of a proprietary medicine offered a reward to any one who used it and then contracted influenza; held a contract with one who met the conditions; [1893] 1 Q. B. 256. Where a prize is offered in a county competition, one who meets the conditions may recover; 39 Wash. L. R. 18.

One may recover a reward offered by his employers; Chicago & A. R. Co. v. Sebring, 16 Ill. App. 181; but not if he is morally bound to furnish the information; Burke v. Wells, Fargo & Co., 50 Cal. 218; or it is his official duty to do so; Morris v. Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398; Smith v. Whildin, 10 Pa. 39, 49 Am. Dec. 572. And a reward offered by the state for the capture of a criminal cannot be claimed by an officer whose official duty it is to make the arrest; the rule being founded on public policy, it is opposed to opening the door to any inducement for public officers to delay arrests until rewards are offered; Smitha v. Gentry (Ky.) 45 S. W. 515, 42 L. R. A. 302, where it was held that no one could have any property right in a reward until it was earned by making the arrest, so that where, by sharp practice in making use of information derived over the telephone, one person secured the reward and prevented another, who really gave the information, from obtaining the benefit of it, the latter had no right of action. But it is held that a promise to pay a reward to a police constable is binding because there might be some information which he was not bound, in the discharge of his ordinary duty, to give; 11 A. & E. 856.

A reward was offered by the defendant for the arrest of a criminal. A police officer made the arrest, but the prisoner broke away from him and in the pursuit surrendered to

the plaintiff. The defendant voluntarily paid the reward to the officer. Plaintiff on a suit for a share of the reward was held not entitled to any part of it; Stair v. Heska Amone Congregation (Tenn.) 159 S. W. 840.

An offer of a reward is not void as against public policy, because made for conviction of offences afterwards to be committed; Wilmoth v. Hensel, 151 Pa. 200, 25 Atl. 86, 31 Am. St. Rep. 738.

It is held to be necessary that the person performing the service should know of the offer when he did so; Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Broadnax v. Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057; Williams v. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; *contra*, Everman v. Hyman, 3 Ind. App. 459, 29 N. E. 1140; Russell v. Stewart, 44 Vt. 170; 12 C. B. N. S. 740; 104 E. C. L. 740; Drummond v. U. S., 35 Ct. Cl. 356; Eagle v. Smith, 4 Houst. (Del.) 293; but if the reward was offered by statute the party need not allege knowledge; Board of Com'rs of Clinton County v. Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780, 1 Ann. Cas. 283.

Where a reward was offered for the return of a lost pocketbook, it was held that the fact that the pocketbook was found before the finder heard of the reward was irrelevant, and also that the finder had a lien on the article for the offered reward; MacFarlane v. Bloch, 59 Or. 1, 115 Pac. 1056, Ann. Cas. 1913B, 1275.

The person first complying with the terms of the offer is entitled to the reward; 4 B. & Ad. 621; U. S. v. Simons, 7 Fed. 709; U. S. v. George, 6 Blatch. 406, Fed. Cas. No. 15,198; and where the offer is for information, the whole of which is furnished in fragments by different persons, the reward may be equitably apportioned; Janvrin v. Exeter, 48 N. H. 86, 2 Am. Rep. 185; Fargo v. Arthur, 43 How. Pr. (N. Y.) 193; and so as to the recovery of property; Hawk v. Marion County, 48 Ia. 472; Deslondes v. Wilson, 5 La. 397, 25 Am. Dec. 187; Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142.

The finder of lost property is not entitled to a reward, if there was no promise of one by the owner; Watts v. Ward, 1 Or. 86, 62 Am. Dec. 299. See FINDER.

REX (Lat.). A king.

RHANDIR. A part in the division of Wales before the Conquest; every township comprehended four gavels, and every gavel had four rhandirs, and four houses or tenements constituted every rhandir. Tayl. Hist. Gav. 69.

RHODE ISLAND. One of the original thirteen states of the United States of America; its full style being, "The State of Rhode Island and Providence Plantations."

Its territory lies between Massachusetts and Connecticut, in the southwest angle of that portion of the territory of the former state which was known as the colony of New Plymouth, and is situated at the head and along both shores of the Narragansett Bay, comprising the islands in the same, the principal of which is Rhode Island, placed at the mouth of the bay. The settlement was commenced as early as June, 1636, on the present site of the city of Providence, by five men under Roger Williams. Williams founded his colony upon a compact which bound the settlers to obedience to the major part "only in civil things"; leaving to each perfect freedom in matters of religious concernment, so that he did not, by his religious practices, encroach upon the public order and peace. A portion of the Massachusetts colonists, who were of the antinomian party, after their defeat in that colony, settled on the island of Aquetnet, now Rhode Island, where they associated themselves as a colony on March 7, 1638. These settlements, together with one "at Shawomet, now Warwick, made by another sect of religious outcasts, under Gorton, in 1642-3, remained under separate voluntary governments until 1647, when they were united under one government, styled "The Incorporation of Providence Plantations in the Narragansett Bay in New England," by virtue of a charter granted in 1643.

This colony remained under this charter, which, upon some provisions, was confirmed by Cromwell in 1655, until after the restoration, when a new charter was procured from Charles II., in the fifteenth year of his reign, under which a new colonial government was formed on the 24th of November, 1663, which continued, with the short interruption of the colonial administration of Sir Edmund Andros, down to the period of the American revolution.

In the general assembly of the colony, on the first Wednesday of May, 1776, in anticipation of the declaration of independence, an act was passed which absolved the colonists from their allegiance to the king of Great Britain, and which ordered that in future all writs and processes should issue in the charter name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations," instead of the name of the king. The old colonial charter, together with a bill of rights adopted by the general assembly, remained the sole constitution of state government until the first Tuesday in May, 1843, when a state constitution framed by a convention assembled in November, 1842, and adopted by the people of the state, went into operation. Sundry amendments have been made.

RHODIAN SEA-LAW. A code of maritime laws adopted by the people of Rhodes, who had by their commerce and naval victories obtained the sovereignty of the sea, about nine hundred years before the Christian era. There is reason to suppose this code has not been transmitted to posterity, at least not in a perfect state. The Roman jurists borrowed from them. Scrutton, Roman Law Influence, § 4. See CODE; Ashburner on Rhodian Sea-Law, who is of opinion (p. cxii) that it was probably put together by a private hand between A. D. 600 and A. D. 800, and could not have been much later.

RIAL. A piece of gold coin current for ten shillings in the reign of Henry VI.

RIBAUD. A rogue; a vagrant.

RIBBONMEN. Associations or secret societies formed in Ireland, having for their object the dispossession of landlords and political purposes. See Whart. Law Lex.

RIDER. A schedule or small piece of paper or parchment added to some part of a record or policy of insurance; as, when on the reading of a bill in the legislature a new clause is added, this is tacked to the bill on

a separate piece of paper, and is called a rider.

A new and unrelated provision added to an appropriation bill for the purpose of coercing the executive to approve of obnoxious legislation, or bring the wheels of government to a stop for want of funds. It is used in a general way of an unrelated provision added to any bill.

Even though it may have become a modern practice in Congress to adopt independent legislation by attaching riders to appropriation bills, the courts are not relieved from the duty of interpreting the statute; Pennington v. U. S., 231 U. S. 631, 34 Sup. Ct. 269, 58 L. Ed. 410.

RIDING. In English Law. An ascertained district; part of a county. This term has the same meaning in Yorkshire that division has in Lincolnshire. 4 Term 459. See TRITHING.

RIDING ARMED. The offense of riding or going armed with dangerous or unusual weapons. It is a misdemeanor; 4 Steph. Com., 11th ed. 203.

RIDING CLERK. One of the Six Clerks in chancery, who, in his turn, for one year kept the controlment books of all grants that passed the Great Seal. Whart. Dict.

RIENS. A French word which signifies *nothing*. See the following titles. It sometimes signifies not, as, *rien culpable*, not guilty.

RIENS EN ARRIÈRE (L. Fr. nothing in arrear). A plea which alleges that there is nothing remaining due and unpaid of the plaintiff's demand. It is a good plea, and raises the general issue in an action for rent. 2 Wm. Saund. 297, n. 1; 2 Ld. Raym. 1503; Gould, Pl. 286; McKelv. Pl. 38.

RIENS PASSE PER LE FAIT (L. Fr. nothing passed by the deed). A plea which avoids the effect of a deed where its execution cannot be denied, by asserting that nothing passed thereby: for example, an allegation that the acknowledgment was before a court which had not jurisdiction.

RIENS PER DESCENT. A plea by an heir sued for the debt of his ancestor that he had no lands by descent from the ancestor. Chitty, Prec. 433.

RIER, or REER-COUNTY. Close county, in opposition to open county. It appears to be some public place which the sheriff appoints for the receipt of the king's money after the end of the county court. Fleta says it is *dies crastinus post comitatum*. Encyc. Lond.

RIFFLARE. To take away anything by force.

RIGGING THE MARKET. A term of the stock exchange denoting the practice of inflating the price of given stocks or enhancing their quoted value by a system of pretended purchasers, designed to give the air of an unusual demand for such stocks. L. R. 13 Eq. 447.

RIGHT. A well-founded claim. If people believe that humanity itself establishes or proves certain claims, either upon fellow-beings, or upon society or government, they call these claims human rights; if they believe that these claims inhere in the very nature of man himself, they called them inherent, inalienable rights; if people believe that there inheres in monarchs a claim to rule over their subjects by divine appointment, they call the claim divine right, *jus divinum;* if the claim is founded or given by law, it is a legal right. The ideas of claim and that the claim must be well founded always constitute the idea of right. Rights can only inhere in and exist between moral beings; and no moral beings can coexist without rights, consequently without obligations. Right and obligation are correlative ideas. The idea of a *well-founded* claim becomes in law a claim founded in or established by the law: so that we may say a right in law is an *acknowledged* claim.

Men are by their inherent nature moral and social beings; they have, therefore, mutual claims upon one another. Every well-grounded claim on others is called a right, and, since the social character of man gives the element of mutuality to each claim, every right conveys along with it the idea of obligation. Right and obligation are correlative. The consciousness of all constitutes the first foundation of the right or makes the claim well grounded. Its incipiency arises instinctively out of the nature of man. Man feels that he has a right of ownership over that which he has produced out of appropriated matter, for instance, the bow he has made of appropriated wood; he feels that he has a right to exact obedience from his children, long before laws formally acknowledge or protect these rights; but he feels, too, that if he claims the bow which he made as his own, he ought to acknowledge (as correlative obligation) the same right in another man to the bow which he may have made; or if he, as father, has a right to the obedience of his children, they have a corresponding claim on him for protection as long as they are incapable to protect themselves. The idea of rights is coexistent with that of authority (or government); both are inherent in man; but if we understand by government a coherent system of laws by which a state is ruled, and if we understand by state a sovereign society, with distinct authorities to make and execute laws, then rights precede government, or the establishment of states, which is expressed in the ancient law maxim: *Ne ex regula jus sumatur, sed ex jure quod est, regula fiat.* See GOVERNMENT. We cannot refrain from re-

ferring the reader to the noble passage of Sophocles, Œdyp. Tyr. 876 *et seq.*, and to the words of Cicero, in his oration for Milo: *Est enim hæc, judices, non scripta sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti sed facti; non instituti sed imbuti sumus.*

As rights precede government, so we find that now rights are acknowledged above governments and their states, in the case of international law. International law is founded on rights, that is, well-grounded claims which civilized states, as individuals, make upon one another. As governments come to be more and more clearly established, rights are more clearly acknowledged and protected by the laws, and right comes to mean a claim acknowledged and protected by the law. A legal right, a constitutional right, means a right protected by the law, by the constitution; but government does not create the idea of right or original rights; it acknowledges them; just as government does not create property or values and money, it acknowledges and regulates them. If it were otherwise, the question would present itself, whence does government come? whence does it derive its own right to create rights? By compact? But whence did the contracting parties derive their right to create a government that is to make rights? We would be consistently led to adopt the idea of a government by *jus divinum*,—that is, a government deriving its authority to introduce and establish rights (bestowed on it in particular) from a source wholly separate from human society and the ethical character of man, in the same manner in which we acknowledge revelation to come from a source not human.

Rights are claims of moral beings upon one another: when we speak of rights to certain things, they are, strictly speaking claims of persons on persons,—in the case of property, for instance, the claim of excluding others from possessing it. The idea of right indicates an ethical relation, and all moral relations may be infringed; claims may be made and established by law which are wrong in themselves and destitute of a corollary obligation; they are like every other wrong done by society or government; they prove nothing concerning the origin or essential character of rights. On the other hand, claims are gradually more clearly acknowledged, and new ones, which were not perceived in early periods, are for the first time perceived, and surrounded with legislative protection, as civilization advances. Thus, original rights, or the rights of man, are not meant to be claims which man has always perceived or insisted upon or protected, but those claims which, according to the person who uses the term, logically flow from the necessity of the physical and moral existence of man; for man is born to be a man,—that is, to lead a human existence. They have been called inalienable rights; but they have been alienated, and many of them are not perceived for long periods. Lieber, in his Political Ethics, calls them primordial rights: he means rights directly flowing from the nature of man, developed by civilization, and always showing themselves clearer and clearer as society advances. He enumerates, as such especially, the following: the right of protection; the right of personal freedom,—that is, the claim of unrestricted action except so far as the same claim of others necessitates restriction: these two rights involve the right to have justice done by the public administration of justice, the right of production and exchange (the right of property), the right of free locomotion and emigration, the right of communion in speech, letter, print, the right of worship, the right of influencing or sharing in the legislation. All political civilization steadily tends to bring out these rights clearer and clearer, while in the course of this civilization, from its incipiency, with its relapses, they appear more or less developed in different periods and frequently wholly in abeyance: nevertheless, they have their origin in the personality of man as a social being.

Publicists and jurists have made the following further distinction of rights:—

Rights are *perfect and imperfect.* When the things which we have a right to possess, or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demand his property which is withheld from him, the right that supports his demand is a perfect one, because the thing demanded is or may be fixed and determinate; but if a poor man ask relief from those from whom he has reason to expect it, the right which supports his petition is an imperfect one, because the relief which he expects is a vague, indeterminate thing. Rutherforth, Inst. c. 2, § 4; Grotius, lib. 1. c. 1, § 4.

Rights are also *absolute and qualified.* A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property when it has been intrusted to his care and which has been unlawfully taken out of his possession.

Rights might with propriety be also divided into *natural and civil rights;* but as all the rights which man has received from nature have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected;

these are the political rights which the humblest citizen possesses.

Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights, —which is not the case with political rights; for an alien, for example, has no political, although in the full enjoyment of his civil, rights.

These latter rights are divided into *absolute and relative.* The absolute rights of mankind may be reduced to three principal or primary articles: the *right of personal security*, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; the right of *personal liberty*, which consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct, without any restraint unless by due course of law; the right of *property*, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. 1 Bla. Com. 124–139.

The *relative rights are public or private:* the first are those which subsist between the people and the government; as, the right of protection on the part of the people, and the right of allegiance which is due by the people to the government; the second are the reciprocal rights of husband and wife, parent and child, guardian and ward, master and servant.

Rights are also divided into *legal and equitable.* The former are those where the party has the legal title to a thing; and in that case his remedy for an infringement of it is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not, in general, in that of the *cestui que trust;* 8 Term 332; 1 Saund. 158, n. 1; 2 Bing. 20. The latter, or equitable rights, are those which may be enforced in a court of equity by the *cestui que trust.*

RIGHT CLOSE, WRIT OF. An abolished writ which lay for tenants in ancient demesne, and others of a similar nature, to try the right of their lands and tenements in the court of the lord exclusively. 1 Steph. Com. 224.

RIGHT HEIRS. The heirs of the testator at common law, who, if more than one, take as tenants in common. 47 L. J. Ch. 714; 35 W. R. 356.

RIGHT HONOURABLE. Used to designate a member of the British privy council.

RIGHT OF ACTION. The right to bring suit in a case. Also sometimes used in the same sense as right *in* action, which is identical with chose in action (*q. v.*).

RIGHT OF APPEAL. This is not limited to a right of appeal by statute, but includes a case where a judge has given leave to appeal. 46 L. J. Q. B. 226; 2 Q. B. D. 125.

RIGHT OF COMMON. See COMMON.

RIGHT OF HABITATION. In Louisiana. The right of dwelling gratuitously in a house the property of another. La. Civ. Code, art. 623; 3 Toullier, c. 2, p. 325; 14 *id.* n. 279, p. 330; Pothier, n. 22–25.

RIGHT OF LIEN. The word lien is of the same origin as the word liable, and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty. Appeal of Wood, 30 Pa. 277. See LIEN.

RIGHT OF POSSESSION. The right to possession which may reside in one man, while another has the actual possession, being the right to enter and turn out such actual occupant: *e. g.* the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents. 2 Bla. Com. *196.

RIGHT OF PROPERTY. The abstract right (*merum jus*) which remains after the actual possession has been so long gone that the right of possession is also lost, and the law will only allow recovery of the land by a writ of right. It, together with possession and right of possession, makes a perfect title; *e. g.* a disseisor has naked possession, the disseisee has right of possession and right of property. But after twenty years without entry the right of possession is transferred from the disseisee to the disseisor; and if he now buys up the right of property which alone remains in the disseisee, the disseisor will unite all three rights in himself, and thereby acquire a perfect title. 2 Bla. Com. *197.

RIGHT OF SALE. A contractual right of sale of an article constitutes the taker of such right an agent for the sale of the article, but does not bind the giver to supply the article; 6 L. R. Ir. 319.

RIGHT OF SEARCH. See SEARCH, RIGHT OF; PRISONER.

RIGHT OF WAY. See EASEMENT; WAY; RAILROAD.

RIGHT PATENT. The name of an ancient writ, which Fitzherbert says, "ought to be brought of lands and tenements, and not of an advowson, or of common, and lieth only of an estate of fee-simple, and not for him who has a lesser estate, as tenant in tail, tenant in frank-marriage, or tenant for life." Fitzh. N. B. 1.

RIGHT, PETITION OF. See PETITION OF RIGHT.

RIGHT TO BEGIN. **In Practice.** The party who asserts the affirmative of an issue has the right to begin and reply, as on him is the burden of proof. The substantial affirmative, not the verbal, gives the right; 1 Greenl. Ev. § 74. See OPENING AND CLOSING.

RIGHT, WRIT OF. See WRIT OF RIGHT.

RIGHTS, BILL OF. See BILL OF RIGHTS.

RIGOR MORTIS. Cadaveric rigidity. The peculiar rigidity which takes place in the muscles of the body within five or six hours after death and which remains till putrefaction ensues. The muscles lose their translucency and elasticity, and there is found to have occurred in them a coagulation of their plasma or tissue juice. Both chemically and physically the process differs materially from the ordinary rigidity of contraction.

RING. A current term to designate a combination of persons, usually for the attainment of a selfish aim or purpose; especially a clique formed for controlling a market, or local or state politics. See RESTRAINT OF TRADE.

RING-DROPPING. **In Criminal Law.** A phrase applied in England to a trick frequently practised in committing larcenies. It is difficult to define it; it will be sufficiently exemplified by the following cases. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich brilliant diamond ring." They offered to leave the ring with the prosecutor if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to a larceny; 1 Leach 273. In another case, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him. This was also held to be larceny; 1 Leach 314; 2 East, Pl. Cr. 679.

RINGING THE CHANGES. A trick practised by a criminal, by which, on receiving a good piece of money in payment of an article, he pretends it is not good, and, changing it, returns to the buyer a spurious coin. See 2 Leach Cr. Law Rep. 644.

RINGS-GIVING. The giving of golden rings by a newly-created sergeant-at-law to every person of rank at court, from the princes of the blood, through the lords in parliament and the justices and barons of the courts, down to the meanest clerk of common pleas, to each one according to his dignity. The expense was not less than forty pounds English money. Fortesque 190; 10 Co. Introd. 23.

RIOT. A tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. Hawk. Pl. Cr. c. 65, § 1. See Shouse v. Com., 5 Pa. 83; Fisher v. State, 78 Ga. 258.

"An unlawful assembly which has actually begun to execute the purpose for which it is assembled, by a breach of the peace, and to the terror of the public or a lawful assembly, may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled." Steph. Dig. Cr. Law, art. 77.

An unlawful assembly is an assembly of three or more persons who meet together for a common purpose in such a manner that a breach of the peace may be apprehended from their conduct. Police authorities may disperse an unlawful assembly, but may only use slight force, unless there is reason to apprehend immediate violence on the part of the mob; Odgers, C. L. 156. As soon as an unlawful assembly starts from its place of meeting to carry out its purpose, it becomes a rout; as soon as it begins to carry out that purpose in violence and in obvious defiance of the authorities, it becomes a riot.

There are five necessary elements of a riot; three persons at least; a common purpose; execution or inception of that purpose; an attempt to help one another by force if necessary; force or violence displayed in such a manner as to alarm one person having reasonable courage; [1907] 2 K. B. 860.

In England it is an indictable misdemeanor for a person to refuse to take part in suppressing a riot when called upon to do so by a justice of the peace or constable. A justice of the peace must read the statutory proclamation, if necessary, and take whatever subsequent steps are necessary to disperse the rioters. After the lapse of an hour from the reading of the riot act, or, because of violence by the mob, within the hour, it is the duty of the civil authorities to stop the riot at whatever cost; and deadly weapons may then be used. Rioting, after the lapse of an hour, was a felony; Odgers, C. L. 161.

There must be proved—*first*, an unlawful assembling; State v. Renton, 15 N. H. 169; for if a number of persons lawfully met together, as, for example, at a fire, or in a theatre or a church, should suddenly quarrel and fight, the offense is an affray, and

not a riot, because there was no unlawful assembling; but if three or more being so assembled, on a dispute occurring, form into parties with promises of mutual assistance, which promises may be express, or implied from the circumstances, then the offense will no longer be an affray, but a riot; the unlawful combination will amount to an assembling within the meaning of the law. In this manner any lawful assembly may be converted into a riot: State v. Snow, 18 Me. 346; 1 Camp. 328; Solomon v. Kingston, 24 Hun (N. Y.) 562. Any one who joins the rioters after they have actually commenced is equally guilty as if he had joined them while assembling.

Secondly, proof must be made of actual violence and force on the part of the rioters, or of such circumstances as have an apparent tendency to force and violence, and calculated to strike terror into the public mind; 2 Camp. 369. See Sanders v. State, 60 Ga. 126; State v. Kempf, 26 Mo. 429. The definition requires that the offenders should assemble of their own authority, in order to create a riot; if, therefore, the parties act under the authority of the law, they may use any necessary force to enforce their mandate, without committing this offense. See, State v. Brooks, 1 Hill (S. C.) 362; State v. Hughes, 72 N. C. 25.

Thirdly, evidence must be given that the defendants acted in the riot and were participants in the disturbance; Scott v. U. S., Morr. (Ia.) 142. It is sufficient if they be present encouraging or giving countenance, support, or acquiescence to the act; Williams v. State, 9 Mo. 270. See Co. 3d Inst. 176; 4 Bla. Com. 146; Com. Dig. Women and infants above, but not those under, the age of discretion are punishable as rioters; 1 Russ. Cr. *387.

In a case growing out of the riots in Pittsburg in 1877, under a statute making a county liable for the property "situated" therein, when destroyed by a mob, the liability was held to attach to property owned by a nonresident of the state, in transit in possession of a common carrier; County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 35 Am. Rep. 670.

In the absence of a statute giving a remedy, municipal corporations are not liable for damages resulting in loss of life from the acts of a mob or riotous assemblage, no matter what the negligence of the city officials may have been; City of New Orleans v. Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329, 23 U. S. App. 533. As to suppression of a riot by militia, see 36 Am. L. Rev. 935. See RIOT ACT; MOB; UNLAWFUL ASSEMBLY; PUBLIC MEETING; AFFRAY; MARTIAL LAW; Borgar; Wise, Riot Law; 3 B. & Ad. 94, the leading case as to the duty of a magistrate.

RIOT ACT. The stat. 1 Geo. I. st. 2, c. 5. It forbade the unlawful assembling of twelve persons or more to the disturbance of the peace. If they continue together for one hour after the sheriff, mayor, etc., has commanded them to disperse, such contempt shall be felony. Stat. 24 & 25 Vict. c. 97, s. 11, requires that, in order to constitute felony, the riotous act must consist in demolishing, or beginning to demolish, some building; Moz. & W.; Cox & S. Cr. Law 104.

By statute 1 Geo. I., the Riot Act, which is directed to be read in a loud voice by a justice of the peace or other person authorized by the act, is to be in the following words or in words of like effect: "Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George for preventing tumults and riotous assemblies. God save the King."

Persons who wilfully obstruct or hinder the reading of the proclamation are guilty of felony, and if the proclamation would have been read had it not been prevented by the interference of any person or persons, any twelve or more persons who remain together after the proclamation would have been read, are guilty of felony, as if the act had been read. See 21 St. Tr. 485.

RIOTOUSLY. In Pleading. A technical word, properly used in an indictment for a riot, which of itself implies violence. 2 Sess. Cas. Sc. 13; 2 Stra. 834; 2 Chitty, Cr. Law 489.

RIPA (Lat.). The banks of a river, or the place beyond which the waters do not in their natural course overflow.

An extraordinary overflow does not change the banks of the river. Pothier, Pand. lib. 50. See BANKS; RIVER; RIPARIAN PROPRIETORS.

RIPARIAN NATIONS. Those that possess opposite banks or different parts of banks of the same river.

RIPARIAN PROPRIETORS. Those who own the lands bounding upon a watercourse. Tyler v. Wilkinson, 4 Mas. 397, Fed. Cas. No. 14,312.

"One whose land is bounded by a navigable stream." Potomac Steamboat Co. v. Steamboat Co., 109 U. S. 672, 686, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070. In its common law sense, the owner of the *ripa* or bank of a stream not navigable. Gough v. Bell, 22 N. J. L. 441. An owner of land bounded generally on a stream. Bardwell v. Ames, 22 Pick. (Mass.) 333. It is said that the meaning of the term has been needlessly extended from rivers and streams to the shores of the sea; Com. v. Roxbury, 9 Gray (Mass.) 451. If it is necessary to express it by a single adjective, the term *littoral* proprietor as used in Boston v. Lecraw, 17 How. (U. S.) 426, 15 L. Ed. 118, is more accurate.

Land, to be riparian, must have the stream flowing over it or along its borders; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. Mere contiguity of quarter sections with another quarter section does not make the former riparian, although all are owned by the same person, where they were granted by separate patents, though issued to the same individual but based upon separate entries; Boehmer v. Irr. Dist., 117 Cal. 19, 48 Pac. 908.

Each riparian proprietor owns that portion of the bed of the river (not navigable) which is adjoining his land *usque ad filum aquæ;* or, in other words, to the thread or central line of the stream; Hargr. Tracts 5; 3 Dane, Abr. 4; King v. King, 7 Mass. 496; Canal Com'rs v. People, 5 Wend. (N. Y.) 423; Griffin v. Kirk, 47 Ill. App. 258; Kaukauna Co. v. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004.

The technical title to the beds of navigable rivers of the United States is either in the states in which the rivers are situated or the riparian owners, depending on the local law. The title of the riparian owner is a qualified one and subordinate to the public right of navigation and subject to the absolute power of congress over the improvement of navigable rivers; U. S. v. Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063. Where the middle of a stream is the boundary between states or private landowners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534; but where a navigable stream suddenly changes its course, the owner of the shore does not acquire title to the abandoned channel; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 30.

Where one had obtained title by adverse possession of land bounded by a stream, it was held that he had not acquired title to the middle line of the stream; Stanberry v. Mallory, 101 Ky. 49, 39 S. W. 495, 72 Am. St. Rep. 389.

As to the rights of riparian owners over the bed of navigable waters between high and low water-mark, the decisions are somewhat conflicting, although the general rule is that the riparian owner holds the right of access to the water, subject to the right of the state to improve navigation; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738.

The raising over abutting property, by the improvement of the river, of water to a depth sufficient for navigation, vests a right of navigation in the public; Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745. Where the United States, to improve navigation, built a pier on submerged land, away from, but in front of, an owner's land, by which he lost access to navigability, such act is not within the prohibition of the constitution as to taking property for public use without just compensation; Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126.

That the riparian owner has a right of action where his access to the water is cut off by a structure erected between high and low water mark, by a corporation acting under its charter, see L. R. 5 H. L. 418; Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984; Delaplaine v. R. Co., 42 Wis. 214, 24 Am. Rep. 394; *contra*, Tomlin v. R. Co., 32 Ia. 106, 7 Am. Rep. 176; Lansing v. Smith, 8 Cow. (N. Y.) 146; Stevens v. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269. Where, by the action of the sea, the sea front was cut off between certain points, and a beach formed outside the mainland, divided from it by a navigable bay, the title to the new formation was held to be in the owners of the part cut off; Murphy v. Norton, 61 How. Pr. (N. Y.) 197. See Bristol v. Carroll Co., 95 Ill. 84. An owner does not lose his property in the soil by submersion or avulsion if he afterwards reclaims it by natural or artificial means, nor does the length of time during which the soil was submerged bar his rights; Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185. Land lost by submergence may be regained by reliction unless the submergence has been followed by such a lapse of time as to preclude the identity of the land from being established. If, after a submergence, the water disappears from the land either by gradual retirement or by the elevation of the land by natural or artificial means, the proprietorship returns to the original owner; Mulry v. Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206; Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459. If an island forms on the land submerged, it belongs to the original owner; *id.*

The title to an island in a navigable stream arises from the title to the submerged land on which it is formed; Norton v. Whiteside, 188 Fed. 356. Where the United States, in improving the navigation of a stream, transferred the channel to the opposite side of an island in the bed of a stream, this changed the title to the island to the opposite riparian owner; *id.*

Where the land of the riparian owner ended in an almost perpendicular bank from five to six feet high, to the foot of which the bed of the river reached, often rising some height above it, and by accretion caused by the planting of trees in the river a short distance from the bank by one who owned the bed of the river and a separate fishery, the accretion was held to be the property of the latter, and not of the riparian owner; [1896]

2 Ch. 1, practically reversing [1896] 1 Ch. 78. In the leading case of Gould v. R. Co., 6 N. Y. 522, it was held, Edmonds, J., dissenting, that "whatever rights the owner of the land has in the river, or in its shore below high-water mark, are public rights, which are under the control of the legislative power, and any loss sustained through the act of the legislature affecting them is *damnum absque injuria*." Government grants for lands bordering upon navigable waters extend only to high-water mark; Niles v. Cedar Point Club, 85 Fed. 45, 29 C. C. A. 5.

Where an act granted to a city the rights possessed by the state in the shore and soil under the Mobile River, it was held valid, and that the rights of the riparian proprietors were neither enlarged nor restricted by such act; Mobile Transportation Co. v. Mobile, 187 U. S. 487, 23 Sup. Ct. 174, 47 L. Ed. 266.

A mere grant of a right to erect wharves will not carry title beyond the land actually appropriated; Morris Canal & Banking Co. v. R. Co., 16 N. J. Eq. 419; Walsh v. Dock Co., 77 N. Y. 448; such a grant does not convey an absolute title which may be separated from the upland so as to cut off the riparian rights of the owner of such land; Shepard's Point Land Co. v. Atlantic Hotel, 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937.

A conveyance of ferry ways consisting of permanent structures of wood and stone is held to include the land owned and used with them; Gerrish v. Gary, 120 Mass. 132; a statute giving the right to construct and maintain wharves to the channel of a certain river is a legislative grant of the right to the soil as far as the channel; Hastings v. Grimshaw, 153 Mass. 497, 27 N. E. 521, 12 L. R. A. 617.

One riparian owner cannot build out into the stream, so as to injure the land of another riparian owner, even when armed with a license granted under act of parliament; L. R. 1 App. Cas. 662. The owner of lands situated on the sea cannot maintain ejectment for that portion of a wharf constructed on his land, which extends below low-water mark; Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634.

The owner of both sides of a stream above tide-water has a right to the ice formed between his boundaries; 14 Chic. Leg. News 83. The intervention of a public road between an estate and a river does not prevent the owner of the estate from being considered as the front or riparian proprietor, when nothing susceptible of private ownership exists between the road and river; Delachaise v. Maginnis, 44 La. Ann. 1043, 11 South. 715. A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent; Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761.

A riparian owner may generate electricity from the water power and convey it to non-riparian property; Mentone Irr. Co. v. Power Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222. He may divert the water of a stream at a point on his property, carry it by an artificial channel to a point of use and return it to the stream on his property, if his use does not injure others who have a right to the water; Mentone Irr. Co. v. Power Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222.

The right of a riparian owner to use water for irrigation is limited to riparian lands; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181. In the east it is held that such right is confined to drinking and other domestic purposes and watering animals on the riparian lands; Williams v. Wadsworth, 51 Conn. 277. A riparian owner cannot divert water from a stream to sell it to others; McCarter v. Water Co., 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, affirmed in Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Ir. L. R. 21 Eq. 560 (where there is a substantial diminution of the water); but it has been held that a riparian owner may take water from a stream and sell it to the inhabitants of a city, the only question being as to the reasonableness of the use; Jones v. Aqueduct, 62 N. H. 489. Many cases, however, take the opposite ground; Lord v. Water Co., 135 Pa. 122, 19 Atl. 1007, 8 L. R. A. 202, 20 Am. St. Rep. 864; Penrhyn Slate Co. v. Power Co., 84 App. Div. 92, 82 N. Y. Supp. 547; Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779; Osborn v. Norwalk, 77 Conn. 663, 60 Atl. 645. Cases hold that water cannot be diverted for the purpose of supplying railroad locomotives: Clark v. R. Co., 145 Pa. 438, 22 Atl. 989, 27 Am. St. Rep. 710; Garwood v. R. Co., 83 N. Y. 400, 38 Am. Rep. 452; or to a pond to form ice for sale; Samuels v. Armstrong, 46 Misc. Rep. 481, 93 N. Y. Supp. 24; or by a public institution, being a riparian owner, to supply a large number of its inmates; Salem Mills Co. v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; Bank of Hopkinsville v. Asylum for Insane, 108 Ky. 357, 56 S. W. 525; L. R. 7 H. L. 705.

The right of a riparian proprietor to use the water for irrigating purposes has been held not to be limited to the tract of land bordering on the stream as first segregated and sold by the government, but to extend to lands lying back of such tracts and purchased by him from other persons; Jones v. Conn, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, where it was said the only thing necessary to entitle one to the right of a riparian proprietor is to show that the body of land owned by him borders upon a stream. This being established, the law

gives him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water, and the effect of its use over the rights of other riparian proprietors. He is entitled to a reasonable use of water which is defined as any use that does not work actual, material and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor; Kinney, Irrigation, § 276.

Among other rights to which such an owner is entitled are access to the navigable part of the river from the front of his lot; the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules or regulations as the legislature may impose; Potomac Steamboat Co. v. Steamboat Co., 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070.

An injunction will lie to restrain land owners on one side of a stream from maintaining a levee upon the bank thereof whereby the flood waters of the stream are made to overflow unnaturally the land of others on the opposite side of the stream; Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214. One proprietor cannot for his own benefit change or obstruct the ordinary course of water in a stream to the injury of other proprietors; O'Connell v. Ry. Co., 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246; and he may not deflect the stream into a new channel; Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534. Such owner may construct an embankment to protect his land from flood water but not so in times of ordinary floods, as to cause an overflow and injure other proprietors; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429. A railroad company in constructing such an embankment is bound to anticipate and provide not only for the ordinary blow, but for floods at long periods; Ohio & M. Ry. Co. v. Ramey, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; see to the same effect West v. Taylor, 16 Or. 165, 13 Pac. 665; Illinois Cent. R. Co. v. Bom, 76 S. W. 352, 25 Ky. L. Rep. 709; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82.

The owner's right of access is subordinated to the power of Congress over interstate commerce; Slingerland v. Contracting Co., 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494; Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; Gibson v. U. S., 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; and to changes in the condition of the public property made under a paramount authority of the government in the interest of better navigation; Home for Aged Women v. Com., 202 Mass. 422, 89 N. E. 124, 24 L. R. A. (N. S.) 79; Sage v. New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592.

Where a canal company was authorized, but not required by statute, to divert the waters of a stream, which they did for forty years, it was held that the lower riparian proprietors had no right to insist that the diversion should be continued for their benefit; Gould, Waters § 340; Lake Drummond C. & W. Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527, where the doctrine was said to be that where the proprietor of an upper tenement constructs and maintains for his own benefit an artificial waterway or any artificial structure affecting the flow of water, and such structure invades no rights of the lower proprietor, and gives indication that it is for a temporary purpose or a specific purpose which may at any time be abandoned, the upper proprietor is under no obligation to maintain the structure and the conditions produced from it by lapse of time, though the incidental effect has been to confer a benefit on the lower owner. Nor in such case does the lower proprietor acquire any right which rests only on prescription. But, *contra* in Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332, where a mill company acquired a right to maintain a dam by prescription, it was said that during the time such right was maturing a reciprocal right in the riparian owners to insist that it be maintained, or at least that no overt act be taken for its removal, was also maturing, which ripened and became equal to the right of the mill company upon the completion of the prescriptive period. The reciprocal right thus created was not merely a personal one, but a right appurtenant to the lands. Where the owners of a dominant tenement established an artificial channel so as to divert water naturally flowing upon the servient tenement, and such diversion was continued for more than twenty years, mutual and reciprocal rights were held to have been acquired by prescription, exempting the dominant owner from restoring the water to its original course, and releasing the servient estate from the burden of the drainage; Cleveland, C., C. & St. L. R. Co. v. Drainage Dist., 213 Ill. 86, 72 N. E. 684.

Riparian rights are abrogated in Nevada and the doctrine of prior appropriation prevails; Anderson Land & S. Co. v. McConnell, 188 Fed. 818.

A riparian proprietor owns driftwood; Yuba Consol. Goldfields v. Hilton, 16 Cal. App. 228, 116 Pac. 712.

See RIVER; LAKES; LOGS; WATERCOURSE; WATERS; IRRIGATION.

RIPTOWELL, or REAPTOWEL. A gratuity or reward given to tenants after they had reaped their lord's corn, or done other customary duties. Cowell.

RIPUARIAN LAW. A code of laws of the Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, who were collectively known by the name Ripuarians, and their laws as Ripuarian law.

RISE. Used of a court when it terminates its session.

RISKS AND PERILS. In Insurance. Those causes against loss from which the insurer is to be protected in virtue of the contract for insurance.

The risk or peril in a life policy is death; under a fire policy, damage by fire; and under a marine policy, by perils of the seas, usually including fire; and under a policy upon subjects at risk in lake, river, or canal navigation, by perils of the same. See INSURABLE INTEREST; INSURANCE; POLICY; WARRANTY.

Under a marine insurance the risks are from a certain place to a certain other, or from one date to another. The perils usually insured against as "perils of the seas" are—fire, lightning, winds, waves, rocks, shoals, and collisions, and also the perils of hostile capture, piracy, theft, arrest, barratry, and jettisons. 1 Phill. Ins. § 1099. But a distinction is made between the extraordinary action of perils of the seas, for which underwriters are liable, and wear and tear and deterioration by decay, for which they are not liable; 1 Phill. Ins. § 1105. See PERILS OF THE SEA.

Perils of lakes, rivers, etc., are analogous to those of the seas; 1 Phill. Ins. § 1099, n.

Underwriters are not liable for loss occasioned by the gross misconduct of the assured or imputable to him; Biddle, Ins. 981; but if a vessel is seaworthy, with suitable officers and crew, underwriters are liable for loss though occasioned through the mistakes or want of assiduity and vigilance of the officers or men; 1 Phill. Ins. § 1049; Beach, Ins. 922. Underwriters are not answerable for loss directly attributable to the qualifications of the insured subject, independently of the specified risks; 1 Phillips, Ins. c. xiii. sect. v.; or for loss distinctly occasioned by the fraudulent or gross negligence of the assured.

Insurance against illegal risks—such as trading with an enemy, the slave-trade, piratical cruisers, and illegal kinds of business—is void; 1 Phill. Ins. §§ 210, 691. Policies usually contain express exceptions of some risks besides those impliedly excepted. These may be—in *maritime insurance*, contraband and illicit, interloping trade, violation of blockade, mobs and civil commotions; in *fire policies*, loss on jewelry, paintings, sculpture, by hazardous trades, etc.; in *life policies*, loss by suicide, risk in certain climates or localities, and in certain hazardous employments without express permission; 1 Phill. Ins. §§ 55, 63, 64. See Loss; TOTAL LOSS; AVERAGE; PERILS OF THE SEA.

RITUAL LAW. See ECCLESIASTICAL LAW.

RIVAGE. In French law, the shore, as of the sea. In English law, a toll anciently paid to the crown for the passage of boats or vessels on certain rivers. Cowell.

RIVER. A natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide. Woolrych, Wat. 40; State v. Gilmanton, 14 N. H. 467.

A body of flowing water; a running stream of no specific dimensions, larger than a brook or rivulet, and pent on either side by walls or banks. Board of Com'rs v. Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687.

Overflow waters that continue in a general course, although without defined banks, back into the water course from which they started or into another water course, do not become surface waters, but remain a part of the water course; Town of Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214.

Rivers are either public or private. Public rivers are divided into navigable and non-navigable,—the distinction being that the former flow and reflow with the tide, while the latter do not. Both are navigable in the popular sense of the term; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Com'rs of Canal Fund v. Kempshall, 26 Wend. (N. Y.) 404; 4 B. & C. 602.

At common law, the bed or soil of all rivers subject to the ebb and flow of the tide, to the extent of such ebb and flow, belongs to the crown; and the bed or soil of all rivers above the ebb and flow of the tide, or in which there is no tidal effect, belongs to the riparian proprietors, each owning to the centre or thread,—*ad filum aquæ*, which see,—where the opposite banks belong to different persons; Daveis 149; 5 B. & Ald. 268. In this country the common law has been recognized as the law of many of the states,—the state succeeding to the right of the crown; Ingraham v. Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Com'rs of Canal Fund v. Kempshall, 26 Wend. (N. Y.) 404; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Adams v. Pease, 2 Conn. 481; Stuart v. Clark's Lessee, 2 Swan (Tenn.) 9, 58 Am. Dec. 49; Walker v. Board, 16 Ohio, 540. See Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018. But in some states the common-law distinction founded on the tide is not recognized, and it is held that the ownership of the bed or soil of all rivers navigable for any useful purpose of trade or agriculture, whether tidal or fresh-water, is in the state; Shrunk v. Nav. Co., 14 S. & R. (Pa.) 71; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Cates Ex'rs v. Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699; McManus v. Carmichael, 3 Ia. 1; Com'rs of Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126; Saunders v. R. Co., 71 Hun (N. Y.) 153, 23 N. Y. Supp. 927. See Shively v Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. At common law,

the ownership of the crown extends to high-water mark; Ang. Tide-Wat. 69; 3 B. & Ald. 967; and in several states this rule has been followed; Gould v. R. Co., 12 Barb. (N. Y.) 616; Bell v. Gough, 23 N. J. L. 624; Com. v. Alger, 7 Cush. (Mass.) 53; Simons v. French, 25 Conn. 346; New Jersey Zinc & Iron Co. v. Canal & Banking Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133; Hoboken v. R. Co., 124 U. S. 656, 8 Sup. Ct. 643, 31 L. Ed. 543; but in others it has been modified by extending the ownership of the riparian proprietor, subject to the servitudes of navigation and fishery, to low-water mark; Lehigh Valley R. Co. v. Trone, 28 Pa. 206; Thurman v. Morrison, 14 B. Monr. (Ky.) 367; Lessee of Blanchard v. Porter, 11 Ohio, 138; Webb v. Demopolis, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; unless these decisions may be explained as applying to fresh water rivers; 2 Smith, Lead. Cas. 224.

In Wisconsin the riparian ownership extends to the thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels; Kaukauna Water Power Co. v. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004. In Michigan, a grant of land bounded by a stream, whether navigable or not, carries with it the bed of the stream to the centre line thereof; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85.

The banks of public rivers are private property of the adjacent owners as fully as their other land. The public has no right to land upon them or upon the shore adjacent thereto; Wetmore v. White Lead Co., 37 Barb. (N. Y.) 70. There is no right of way along the margin of lakes and navigable rivers unless acquired by express grant or prescription; Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102. One floating his property down a stream has no right, without a license, to use the banks of the stream to aid him; Olson v. Merrill, 42 Wis. 203. The right to raft timber does not carry with it the right to deposit it upon private property preparatory to being rafted; Compton v. Hankins, 90 Ala. 411, 8 South. 75, 9 L. R. A. 387, 24 Am. St. Rep. 823; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Smith v. Atkins, 110 Ky. 119, 60 S. W. 930, 53 L. R. A. 790, 96 Am. St. Rep. 424. The banks of a river are not subject to the servitude of use by navigators. They cannot land on the banks against the will of the owner except in case of peril, in which case vessels may land, either boat or cargo, at any point that safety may require; Ensminger v. People, 47 Ill. 384, 95 Am. Dec. 495.

Upon the acquisition of territory by the U. S., whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the title and dominion over land under tide water passes to the United States for the benefit of the whole people and in trust for the several states; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331.

In England, many rivers originally private have become public, as regards the right of navigation, either by immemorial use or by acts of parliament; Woolr. Wat. 40. In this country, all rivers, whether tidal or fresh-water, are of common right, navigable highways, if naturally capable of use for the floating of vessels, boats, rafts, or even logs, or "whenever they are found of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market;" Browne v. Scofield, 8 Barb. (N. Y.) 239; Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Scott v. Willson, 3 N. H. 321; People v. St. Louis, 5 Gilman (Ill.) 351, 48 Am. Dec. 339; Stuart v. Clark's Lessee, 2 Swan (Tenn.) 9, 58 Am. Dec. 49; Depew v. Board, 5 Ind. 8. As to the navigability of rivers, see NAVIGABLE WATERS. The state has the right to improve all such rivers, and to regulate them by lawful enactments for the public good; McCullough v. Wall, 4 Rich. (S. C.) 69, 53 Am. Dec. 715; Moor v. Veazie, 31 Me. 361; Board of Com'rs. v. Pidge, 5 Ind. 13. Any obstruction of them without legislative authority is a nuisance, and any persons having occasion to use the river may abate the same, or if injured thereby, may receive his damages from its author: Minturn v. Lisle, 4 Cal. 180; Arundel v. M'Culloch, 10 Mass. 70; Missouri River Packet Co. v. R. Co., 1 McCrary 281, 2 Fed. 285; Seaman v. Mayor, 80 N. Y. 239, 36 Am. Rep. 612; Garitee v. Mayor, 53 Md. 422; Meyers v. St. Louis, 8 Mo. App. 266. See BRIDGE. One who seeks to abate an obstruction in a navigable stream and for an injunction must allege and show that the commerce for which he would utilize the stream is lawful; Spokane Mill Co. v. Post, 50 Fed. 429. By the ordinance of 1787, art. 4, relating to the northwestern territory, it is provided that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, shall be common highways and forever free; Comr's of Homochitto River v. Withers, 29 Miss. 21, 64 Am. Dec. 126.

Congress has absolute power over the navigable waters of the U. S. and may declare what constitutes obstruction thereto. The act of March 1, 1893, created a California *débris* commission and prohibited hydraulic mining "directly or indirectly injuring the navigability" of the Sacramento and San Joaquin river systems; the commission may, on petition, grant permission to mine. The act is intended to prohibit such mining until such permission is granted; North Bloomfield Gravel Min. Co. v. U. S., 83 Fed. 2, 27 C. C. A. 395.

To bring obstructions and nuisances in navgable waters within a state within the cognizance of the federal courts, there must be

a federal statute directly applicable to such streams; U. S. v. Boom Co., 81 Fed. 658, 26 C. C. A. 547.

Rivers, when naturally unfit for public use, as above described, are called private rivers. They are the private property of the riparian proprietors, and cannot be appropriated to public use, as highways, by deepening or improving their channels, without compensation to their owners; Walker v. Board of Public Works, 16 Ohio 540; Munson v. Hungerford, 6 Barb. (N. Y.) 265. See WATER-COURSE.

A river, then, may be considered—as private in the case of shallow and obstructed streams; as private property, but subject to public use, when it can be navigated; and as public, both with regard to its use and property. Some rivers possess all these qualities. The Hudson is mentioned as an instance; in one part it is entirely private property; in another, the public have the use of it; and it is public property from the mouth as high up as the tide flows; Munson v. Hungerford, 6 Barb. (N. Y.) 265.

Where the citizens of a state through which the upper waters of a river ran diverted a substantial part of the water for irrigation, in a bill filed by a lower state on the same river against the upper state, it was held that it did not appear that there had been more than an equitable use of the water in the upper state; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

See BOUNDARIES; FISHERY; RIPARIAN PROPRIETORS; POLLUTION; IRRIGATION.

In International Law. A river which is entirely within a state is part of its territory. Where a river forms a boundary between two states and flows to the ocean, it is "now generally considered that the right of navigation, for commercial purposes, is common to all the states inhabiting the different parts of its banks; but this is a right of innocent passage only, subject to the regulations of the abutting state. These rights have usually been adjusted by treaty; the Rhine is free in its whole navigable length, under the Congress of Vienna; and so of most of the other large rivers of Europe. In 1795, the free navigation of the Mississippi was secured to the United States by treaty. After much controversy, the St. Lawrence was, in 1871, stipulated to be free to the United States for the purposes of commerce, from the point where it ceased to be a boundary between it and Canada, to the sea, subject to the regulations of Great Britain or Canada, not inconsistent with such privilege. See 1 Halleck, Int. L., Baker's ed. 171.

Levees. The construction and maintenance of levees is an important subject of legislation in the states bordering on the Mississippi river and its tributaries. Such statutes usually provide for the construction of levees by some public authorities or under delegated power of eminent domain, and provide for a charge on the land benefited thereby for making and repairing the same. This tax is usually a lien on the land and applies to all lands lying within a certain specified distance of the Mississippi river. It has been held that such taxation is constitutional and that the power, whether exercised for general or local purposes, belongs to the legislature and is not subject to interference from the court; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508. The legislature has power to impose local taxation for such purposes, and laws imposing taxes upon certain districts, whether the citizens affected are of the same political division, subdivision, or district or not, are constitutional; Alcorn v. Hamer, 38 Miss. 652.

The building of the levees is a proper subject of legislation and a general tax may be levied therefor; State v. Clinton, 26 La. Ann. 564; Police Jury v. Tardos, 22 La. Ann. 58. In Louisiana, it has been made a criminal offense to cut levees; Laws 1875, 49. Crevasses in the district, do not release the owner of the land from the levee tax; there is in such case a greater necessity for its payment; Templeton v. Morgan, 16 La. Ann. 440. Every sovereign state may construct and maintain levees; Cubbins v. River Com'n, 204 Fed. 299.

See DRAINAGE DISTRICT; ASSESSMENT.

See RIPARIAN PROPRIETORS.

RIXA (Lat.). **In Civil Law.** A dispute; a quarrel. Dig. 48. 8. 17.

RIXATRIX (Lat.). A common scold.

ROAD. A passage through the country for the use of the people. Respublica v. Arnold, 3 Yeates (Pa.) 421. It is frequently used as a synonym of railroad; Central R. Co. v. Ry. Co., 46 N. J. L. 292; Parker v. R. Co., 33 Fed. 699; as when a charter power to take stock in companies for making "roads" to a city was held to authorize a subscription to the stock of a railroad; Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760.

A state statute imposing a duty of two days' labor in every year on each person for the purpose of keeping roads in repair is not unconstitutional; Haney v. Com'rs of Bartow Co., 91 Ga. 770, 18 S. E. 28; Dennis v. Simon, 51 Ohio St. 233, 36 N. E. 832. As to the constitutionality of an act authorizing the establishment of a private way over property of another, see EMINENT DOMAIN, and also Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287, where such an act was held unconstitutional. See HIGHWAY; WAY; STREET; DEDICATION; EASEMENT.

In Maritime Law. An open passage of the sea, which, from the situation of the adjacent land and its own depth and width, affords a secure place for the common riding

and anchoring of vessels. Hale, *de Port. Mar.* p. 2, c. 2. This word, however, does not appear to have a very definite meaning; 2 Chitty, Com. Law 4, 5. Often called "roadstead"; 2 Hugh. 17.

ROADBED, ROADWAY. The roadbed of a railroad "is the foundation upon which the superstructure of a railroad rests;" the roadway is the right of way which has been held to be the property liable to taxation; Appeal of North Beach & M. R. Co., 32 Cal. 499, cited in Santa Clara Co. v. R. Co., 118 U. S. 413, 6 Sup. Ct. 1132, 30 L. Ed. 118. The roadbed does not include ends of ties of unusual length; Standard Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427. A space of 10 ft. between railroad tracks is not the roadbed; Meadows v. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427.

ROBBATOR. A robber. Bract.

ROBBER. One who commits a robbery. One who feloniously and forcibly takes goods or money to any value from the person of another by violence or putting him in fear.

ROBBERY. The felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear. 4 Bla. Com. 243; U. S. v. Wilson, Baldw. 102, Fed. Cas. No. 16,730. See Brown v. State, 33 Neb. 354, 50 N. W. 154.

In this offence the kind and value of the property taken is not material, but it must be of some value, however slight, to the person robbed; Wesley v. State, 61 Ala. 287; State v. Burke, 73 N. C. 83; State v. Howerton, 58 Mo. 581.

Robbery, by the common law, is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was by violence, or by putting in fear, in addition to the averments that are necessary in indictments for other larcenies; 1 Leach 195; Com. v. Humphries, 7 Mass. 242.

By "taking from the person" is meant not only the immediate taking from his person, but also in his presence when it is done with violence and against his consent; 1 Hale, Pl. Cr. 533; Kit v. State, 11 Humphr. (Tenn.) 167; Whart. C. L. 847. The taking must be by violence or putting the owner in fear; but both these circumstances need not concur; for if a man should be knocked down, and then robbed while he is insensible, the offence is still a robbery; Com. v. Snelling, 4 Binn. (Pa.) 379. And if the party be put in fear by threats and then robbed, it is not necessary there should be any greater violence; Com. v. Martin, 17 Mass. 359. The violence or putting in fear must be at the time of the act or immediately preceding; 1 C. & P. 304.

A person taking property from another under a *bona fide* claim of right, and with the purpose of applying it to the payment of a debt from the latter to himself, is not guilty of robbery, for in such case the *animus furandi* is lacking; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

One who is present and aids and abets a robbery is punishable as a principal, though he receives none of the money, and the amount taken is immaterial; State v. Brown, 104 Mo. 365, 16 S. W. 406.

ROE, RICHARD. A fictitious person who often appeared in England, prior to 1852, in certain actions. See EJECTMENT; PLEDGES.

ROGATORY LETTERS. See LETTERS ROGATORY.

ROGUE. A French word, which in that language signifies proud, arrogant. In some of the ancient English statutes it means an idle sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants. Although the word rogue is a word of reproach, yet to charge one as a rogue is not actionable; M'Clurg v. Ross, 5 Binn. (Pa.) 219. See Idol v. Jones, 13 N. C. 162; Caldwell v. Abbey, Hard. (Ky.) 529.

ROGUES' GALLERY. A court will not compel the delivery to one convicted of murder and afterwards, on a new trial, acquitted, of Bertillon measurements and photographs of him taken while in prison; In re Molineux, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104. See PRISONER.

RÔLE D'ÉQUIPAGE (Fr.). The list of a ship's crew; the muster roll.

ROLL. A schedule of parchment which may be turned up by the hand in the form of a pipe or tube. Jacob, Law Dict.; Colman v. Shattuck, 2 Hun (N. Y.) 502.

In early times, before paper came in common use, parchment was the substance employed for making records, and as the art of bookbinding was but little used, economy suggested as the most convenient mode the adding of sheet to sheet, as was found requisite, and they were tacked together in such a manner that the whole length might be wound up together in the form of rolls. The following list of English rolls is from 2 Holdsw. Hist. E. L.:

The *Pipe Rolls (q. v.)* are the oldest records: Later, in the Exchequer, are the Memoranda Rolls (1199-1848); Originalia Rolls (1236-1837), recording the estreats or extracts transmitted from the Chancery to the Exchequer; the Liberate Rolls (1201-1436), containing the list of writs of Liberate, Allocate and Computate issued by the Chancery; the Wardrobe and Household Accounts (1199-1806), containing the accounts of the king's personal expenses and of the army, navy and civil service; the Receipt Rolls, containing an account of money received (superseded by the pells of issue and receipt, (which were journals of daily expenditure and receipt); Scutage Rolls (1215-1347), containing the accounts of the scutage *(q. v.)*. Also there were other later subsidy rolls, containing accounts of later form of direct taxation.

Among *Chancery* enrollments the most important were the Charter Rolls (1199-1515); the Patent Rolls (1202 to the present day); and Close Rolls (1205 to the present day). By Charters the king's most solemn acts were declared; by Letters Patent his more public directions were promulgated, and by Letters Close his commands were addressed

to one or more specified individuals, closed and sealed.

Other *Chancery* Rolls were the Fine or Ablate Rolls (1199-1641), containing payments to the king by way of ablate or fine for the grant of privileges or by way of amercement.

The *Plea Rolls* of Richard I., John and Henry III. consist of two series: the Curia Regis Rolls—cases heard before the Bench or Coram Rege; the Assize Rolls—cases heard before the itinerant justices. The Plea Rolls contain our only first hand information of the actual working of the Curia Regis in its early days—the earliest authoritative statements of the common law.

Parliamentary Rolls. The earliest is 1305, but there exist extracts of some earlier rolls. It is not certain that all the later rolls exist. In the 14th century they became the record of the proceedings of Parliament. They ceased in 1503.

The *Statute Rolls.* The earliest of these now extant (called the Great Roll of the Statutes) begins with the Statute of Gloucester, 1278. From 1278 to 1468 (except 1431 to 1445) there are six of these rolls in a regular series. Their place was taken by Enrollment of Acts of Parliament Certified into Chancery (from 1483 to the present day) or by the original acts which exist in an almost regular series from 1497 to the present day. In the mediæval period the Statute Rolls are neither accurate nor perfect.

The records of a court or office.

ROLL OF A MANOR. See COURT ROLLS; COPYHOLD.

ROLLING STOCK. Rolling stock has been held in some cases to be a fixture, so far as to pass under a mortgage of the realty; Elizabethtown & P. R. Co. v. Elizabethtown, 12 Bush (Ky.) 233; Farmers' Loan & Trust Co. v. Ry. Co., 3 Dill. 412, Fed. Cas. No. 4,669. Where essential to the operation of the road, it is held to pass under a mortgage of the railroad; Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486. A mortgage of a railroad afterwards to be built, and of the rolling stock appurtenant to such road, attaches to the rolling stock as soon as it is acquired; Pennock v. Coe, 23 How. (U. S.) 117, 16 L. Ed. 436; Scott v. R. Co., 6 Biss. 529, Fed. Cas. No. 12,527; Jones, Railr. Sec. 147. It is not essential that the rolling stock should be especially mentioned in the mortgage; general words are enough. For instance, a mortgage of a line of a railroad "with all the revenue or tolls thereof" covers rolling stock; State v. Ry. Co., 18 Md. 193. See also Meyer v. Johnston, 53 Ala. 237; Pullan v. R. Co., 4 Biss. 35, Fed. Cas. No. 11,461. See FUTURE ACQUIRED PROPERTY.

Rolling stock has been held to be subject to execution as a chattel; Midland Ry. Co. v. Stevenson, 130 Ind. 97, 29 N. E. 385; and to attachment; Hall v. Carney, 140 Mass. 131, 3 N. E. 14; so, when not in use; Boston, C. & M. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; but where a company is insolvent or the equipment is mortgaged, it has been held not subject to execution; Loudenschlager v. Benton, 3 Grant, Cas. (Pa.) 384. It is held that it may be sold for taxes as personal property, notwithstanding a statute declaring it to be a fixture; Chicago & N. W. Ry. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458; and see Neilson, Benton & O'Donnell v. R. Co., 51 Ia. 714, 3 N. W. 779. It is held to be a chattel in Williamson v. R. Co., 29 N. J. Eq. 311, 323. The better opinion is said to be that it is personalty; 3 Wood, Rys. 1961, citing Dubuque v. R. Co., 39 Ia. 56; Pacific R. Co. v. Cass Co., 53 Mo. 17; Hoyle v R. Co., 54 N. Y. 315, 13 Am. Rep. 595; Boston, C. & M. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

Locomotive engines fit for use only in the construction work of railroads are not rolling stock; In re Ferguson Contracting Co., 183 Fed. 880.

It is held that a mortgage of rolling stock should be recorded as a chattel mortgage; Williamson v. R. Co., 29 N. J. Eq. 311; but it has also been held that chattel mortgage acts do not apply; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111. The constitutions of some states provide that rolling stock shall be considered personal property and shall be liable to execution and sale.

Of late years railroad companies have secured large quantities of rolling stock on deferred periodical payments, commonly known as the "car trust" plan. The contracts in some instances are drawn as *leases* from the builder or owner to the railroad company. In other cases they take the form of conditional sales. The earliest car trust was created in Pennsylvania in 1868. It is probable that the form of a lease or hiring of the cars, with a reservation of title in the former owner, was rendered necessary in that state because of the rule in that state (recently much modified, see SALES) that a reservation of title under a conditional sale of a chattel is void as against the vendee's creditors, when the vendee is in possession. The weight of authority would seem to hold that such contracts, though drawn in the form of bailments, if the aggregate of all the installments is really the purchase price and the contract gives the "bailee" an option to purchase when all the payments have been made, are, in legal effect, conditional sales. It was said in Hervey v. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003, in holding such a contract to be a conditional sale: "Nor is the transaction changed by giving it the form of a lease. In determining the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties." So in Whitcomb v. Woodworth, 54 Vt. 544, the "hire" of an organ was held to be a conditional sale. To the same effect is Heryford v. Davis, 102 U. S. 235, 26 L. Ed. 160. See Meyer v. Car Co., 102 U. S. 1, 26 L. Ed. 59, where the court considered it unnecessary to decide the question. In McGourkey v. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079, where the cars were "leased" and payments, called rentals, were to be made of "lease warrants," with an option to buy for one dollar when they were all paid, it was held a bargain and sale with re-

tention of a lien in the vendor. In Ladley v. U. S. Expr. Co., 3 Super. Ct. (Pa.) 149, a "lease" or purchase on the installment plan was held to be a conditional sale. So of the sale of a clock upon weekly payments, the aggregate of which amounted to the price of the article; Com. v. Harmel, 166 Pa. 89, 30 Atl. 1036, 27 L. R. A. 388; but see Wheeler & Wilson Mfg. Co. v. Heil, 115 Pa. 487, 8 Atl. 616, 2 Am. St. Rep. 575. In Case v. L'Oeble, 84 Fed. 582, it was held that whether a contract for the sale of fixed machinery was a bailment or a conditional sale depended upon the intent of the parties. The contract there was held a bailment. See SALES.

Statutes have been passed in nearly all the states and territories providing that conditional sales or contracts of leasing or hiring of railroad equipment shall be valid if duly acknowledged and recorded, and the name of the vendor or lessor placed on both sides of each car. Most of these acts are substantially uniform in their language. There is some diversity among them as to the place of record, some specifying the county where the principal office of the vendee is, others the counties through which its line runs, and still others the office of the secretary of state. Many of these acts were passed through the instrumentality of Joseph I. Doran, Esq., in 1881 to 1883, and the others were passed in 1891 and subsequently, by the efforts of the present editor. The Utah act is not uniform; such acts did not pass in California, Idaho, or Nevada.

The lien on, or title to, cars thus sold is not subordinate to the lien of the company's mortgage; Fosdick v. Car Co., 99 U. S. 256, 25 L. Ed. 344; even if the contract has not been recorded; Meyer v. Car Co., 102 U. S. 1, 26 L. Ed. 59.

Contracts of this kind usually contain a clause that the vendor or lessor may retake the property on default in the payment of installments. Statutes in some of the states forbid the retaking of chattels sold under the installment plan except upon the condition of refunding the purchase-money paid, less a certain proportion to cover the depreciation. See Weil v. State, 46 Ohio St. 450, 21 N. E. 643.

There is a conflict of authority as to the right of the vendor to collect unpaid purchase-money after retaking the property. Some cases hold that the retaking excludes further recovery; other cases hold that the remedies are not inconsistent. See Cole v. Hines, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455, where the cases are collected. The fact that the property has been destroyed after possession has passed to the conditional vendee or lessee does not relieve him from making the periodical payments; Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; Burnley v. Tufts, 66 Miss. 48, 5 South. 627, 14 Am. St. Rep. 540; *contra*, Ascue & Hinchman v. Aultman & Co., 2 Willson, Civ. Cas. Ct. App. (Tex.) § 497. See also Swallow v. Emery, 111 Mass. 355.

Usually a clause is inserted covering this ground, and the contract provides that the vendor, upon retaking, shall sell the property and credit the proceeds on the unpaid installments, holding the vendee for the residue then remaining unpaid.

The usual lease notes or warrants given to cover the periodical payments have been held to be negotiable instruments; Chicago Ry. Equipment Co. v. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

A car trust association is an association of capitalists formed to buy and sell rolling stock, usually for a particular road. The members furnish the funds to buy the property and the association delivers it to the railroad company, usually through the intervention of a trustee, under a conditional sale (sometimes in the form of a lease), the purchase-money being payable in a series of years, by installments, and the title to pass in the railroad company upon the payment of the final installment. The trustee issues certificates to the members of the association indicating the amount of their investment. The railroad company pays the installments with interest to the trustee, who distributes to the holders of the certificates. In Mills v. Hurd, 29 Fed. 410, such an association was held an unincorporated association resembling those partnerships which are not dissolved by the death or bankruptcy of a member, or by the assignment of a member's interest, and such as are referred to in Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. Ed. 126. They are analogous to mining partnership; Skillman v. Lachman, 23 Cal. 206, 83 Am. Dec. 96. See PARTNERSHIP. They are said to be unincorporated joint stock associations with transferable shares; Poll. Contr. 222.

As to the status of car trust cars under railroad receiverships, see LEASE; MORTGAGE; RECEIVER; RECEIVERS' CERTIFICATES.

See a pamphlet by Davis & Browne, and a paper by the present editor in Am. Bar Asso. Reports (1885); 1 Foster, Fed. Pr. 781.

Cars of other companies in use on a railroad are materials furnished for its operation, and claims for their loss when destroyed are properly payable by the receivers as operating expenses; Grand Trunk Ry. Co. v. R. Co., 88 Fed. 636.

A railroad company receiving the cars of other companies to be hauled in its trains is bound to inspect such cars before putting them on its trains, and is responsible for the consequence of defects in them which might have been discovered by a reasonable inspection; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

See SAFETY APPLIANCE ACT; RAILROAD.

ROLLING STOCK (OF RAILWAYS) PROTECTION ACT. The act of 35 & 36

Vict. c. 50, passed to protect the rolling stock of railways from distress or sale in certain cases.

ROLLS. See ROLL.

ROLLS, MASTER OF THE. See MASTER OF THE ROLLS.

ROLLS OFFICE OF THE CHANCERY. An office in Chancery Lane, London, which contains rolls and records of the high court of chancery, of which the master of the rolls is keeper.

ROLLS OF THE PIPE. See PIPE ROLL.

ROMAN CATHOLIC CHARITIES ACT. The stat. 23 & 24 Vict. c. 134, providing a method for enjoying estates given upon trust for Roman Catholics, but invalidated by reason of certain of the trusts being superstitious or otherwise illegal. 3 Steph. Com. 76. See SUPERSTITIOUS USES; CHARITIES.

ROMAN CATHOLIC CHURCH. The juristic personality of the Roman Catholic Church, with the right to sue and to take and hold property has been recognized by all systems of European law from the fourth century. It was formally recognized between Spain and the Papacy and by Spanish laws from the beginning of the settlements in the Indies, also by our treaty with Spain in 1898, whereby its property rights were solemnly safeguarded; Municipality of Ponce v. Roman Catholic Church in Porto Rico, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068. To the same effect as to the Philippines; Santos v. Roman Catholic Church, 212 U. S. 463, 29 Sup. Ct. 338, 53 L. Ed. 599.

That a municipality in Porto Rico may have furnished some of the funds for building or repairing churches cannot affect the title thereto of the Roman Catholic Church, to whom such funds were thus irrevocably donated; Municipality of Ponce v. Roman Catholic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068.

See RELIGIOUS SOCIETIES; CATHOLIC SUPREMACY ACT.

ROMAN-DUTCH LAW. This law, as it prevails in South Africa, was derived from (1) the privileges granted by the counts of Holland and other feudal superiors; (2) collections of customary law and the municipal ordinances of the towns; (3) judicial decisions; (4) formulas of process; (5) legal treatises and *projets de loi;* (6) ordinances of the counts; and (7) codifications of provincial law.

It is said to be more Dutch than Roman; it has in the most part to be sought in the writings of the great Dutch jurists of the seventeenth and eighteenth centuries, but in case of doubt the *Corpus Juris Civilis* was the ultimate resort. The English law of evidence was introduced and English decisions and imperial legislation were strongly against the Dutch tradition. Each jurisdiction decides the cases in its own way in accordance with local usage and the traditions of its courts; judicial decisions are freely cited there; they are never cited in Ceylon. See Wessels' History of the Roman-Dutch Law, who complains of "the heterogeneous mass of legal systems" now prevalent in South Africa. See 10 Journal of Soc. of Comp. Leg. 261.

ROMAN LAW. See CIVIL LAW.

ROME PENNY, ROME SCOT, or ROME FEOH. See PETER PENCE.

ROMNEY MARSH. A tract of land in the county of Kent, England, containing twenty-four thousand acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry III.; from which laws all commissioners of sewers in England may receive light and direction. 3 Steph. Com. 347; 3 Bla. Com. 73; [1892] 1 Q. B. 840.

ROOD OF LAND. The fourth part of an acre.

ROOT. The part of a tree or plant under ground from which it draws most of its nourishment from the earth. See TREE.

In a figurative sense, *root* is used to signify the person from whom one or more others are descended. See CONSANGUINITY; LINE.

ROTA (Lat.). A court. A celebrated court of appeals at Rome, of which one judge must be a German, one a Frenchman, two Spaniards, and eight Italians. Encyc. Brit. Its decisions had great weight, but were not law, although judged by the law. There was also a celebrated rota at Genoa about the sixteenth century, or before, whose decisions in maritime matters form the first part of *Stracha de Merc.* See Ingersoll's Roccus.

ROTULI PIPÆ. See PIPE ROLLS.

ROTULI SCACCARII. Exchequer rolls. See SCACCARIUM; ROLL.

ROTURIER. In Old French Law. One not noble. *Dict. de l'Acad. Franç.* A free commoner; one who did not hold his land by homage and fealty, yet owed certain services. Howard, *Dict. de Normande.*

ROUT. A disturbance of the peace by persons assembled together with an intention to do a thing which if executed would have made them rioters, and actually making a motion towards the execution of their purpose. Hawk. Pl. C. 516.

It generally agrees in all particulars with a riot, except only in this: that it may be a complete offence without the execution of the intended enterprise; *id.* c. 65, s. 14; 1 Russ. Cr. 253; 4 Bla. Com. 140. Where a number of persons met, staked money, and agreed to engage in a prize-fight, it was held a rout; 2 Speers 599. Not less than three assembled persons are sufficient to constitute the offence; 2 Bish. Cr. L. § 1186. See RIOT; SEDITION.

ROUTOUSLY. A technical word, properly used in indictments for a rout as descriptive of the offence. 2 Salk. 593.

ROYAL ASSENT. See LE ROI LE VEUT; VETO.

ROYAL BURGHS. Boroughs incorporated in Scotland by royal charter. Bell.

ROYAL COURTS OF JUSTICE. The buildings in London together with all the additions thereto, erected under the statute 28 & 29 Vict. c. 48, 49.

ROYAL FISH. See FISH ROYAL.

ROYAL GRANTS. Conveyances of record in England. They are of two kinds: letters patent and letters close; 2 Bla. Com. 346. The latest royal grant of American lands was effective over a prior royal grant; People v. Van Rensselaer, 5 Seld. 297.

See PATENT.

ROYAL HONORS. In diplomatic language, by this term is understood the rights enjoyed by every empire or kingdom in Europe, by the pope, the grand duchies of Germany, and the Swiss confederation, to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other states public ministers of the first rank, as ambassadors, together with other distinctive titles and ceremonies. Vattel, Law of Nat. b. 2, c. 3, § 38; Wheat. Int. Law pt. 2, c. 3, § 2.

ROYAL MINES. See MINES AND MINING.

ROYAL TITLES ACT, 1901. The title of the sovereign is "By the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

ROYALTY. A payment reserved by the grantor of a patent, mining lease, etc., and payable proportionately to the use made of such right. 1 Ex. Div. 310. See PATENT.

RUBRIC. The title or inscription of any law or statute; because the copyists formerly drew and painted the title of laws and statutes in red letters (*rubro colore*). Ayliffe, Pand. b. 1, t. 8; *Dict. de Jur.*

The directions in the Book of Common Prayer of the Church of England are so called, being, in the authorized version of 1662, printed in red letters.

RUDENESS. An impolite action, contrary to the usual rules observed in society, committed by one person against another. This is a relative term, which it is difficult to define, and must be considered with reference to the station in life which the parties occupy; 2 Hagg. Eccl. 731. See BATTERY.

RULE. A regulation or formula to which conduct must be conformed. See GENERAL RULES.

An order or direction. See ORDER.

To establish by direction; to determine; to decide.

RULE ABSOLUTE. If, upon the hearing of a rule to show cause, the cause shown should be decided insufficient, the rule is made absolute, *i. e.* the court makes final order for the party to perform the requirements of the rule. See RULE NISI.

RULE DAY. The regularly appointed day on which to make orders to show cause returnable. See RULES.

In the United States circuit court it was formerly the first Monday of each month, on which subpœnas were to be made returnable, and answers and replications filed.

RULE DISCHARGED. A term indicating that the court has refused to take the action sought by the rule, or has decided that the cause shown against the rule is deemed sufficient.

RULE IN SHELLEY'S CASE. See SHELLEY'S CASE, RULE IN.

RULE NISI. A rule obtained on motion *ex parte* to show cause against the particular relief sought. Notice is served on the party against whom the rule is obtained, and the case is then heard like other motions, except that the party showing cause is entitled to open and reply. The rule is made absolute unless (*nisi*) good cause is shown against it; 3 Steph. Com. 680.

RULE OF COURSE. A rule which a court authorizes their officers to grant without formal application to a judge.

RULE OF COURT. An order made by a court having competent jurisdiction.

Rules of court are either general or special; the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

Disobedience to these is punished by giving judgment against the disobedient party, or by attachment for contempt.

See RULES OF PRACTICE.

RULE OF LAW. A general principle of law, recognized as such by authorities. It is called a rule because in new cases it is a rule for their decision; it embraces particular cases within general principles; 1 Bla. Com. 44; Ram, Judgm. 30; 3 B. & Ad. 34; 1 B. & C. 86; 4 Maule & S. 348. See MAXIM.

RULE OF 1756. The rule first enforced by Great Britain in 1756 that neutrals were not to be allowed in time of war to engage in commerce, such as coasting-trade and trade with the colonies of a belligerent, from which they were excluded in time of peace. The rule is also enforced by the United States and Japan. A proposal made at the London Naval Conference of 1908–1909 to incorporate the *Rule of 1756* into the body of international law met with opposition and the Declaration of London (*q. v.*) merely states (Art. 57) that "the case where a neutral vessel is en-

gaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule," namely, that the neutral or enemy character of a vessel is determined by the flag which it is entitled to fly. 2 C. Rob. 186; 4 *id.* App.; 1 Kent 82.

RULE OF THE ROAD. See NAVIGATION RULES; HIGHWAY; BICYCLES. See 12 Encycl. Engl. Laws.

RULE OF 1793. The rule enforced by Great Britain in 1793 that when a commerce which had previously been considered a nominal monopoly is thrown open by a belligerent state, in time of war, to all nations, by a general regulation, neutrals have no right to avail themselves of the concession, and their entrance on such trade is a breach of the impartiality they are bound to observe. It differs from the *Rule of 1756* (*q. v.*) in that the latter contemplates the granting by the belligerent of a special license to a particular neutral state. 2 Halleck, Int. L. 302.

RULE TO PLEAD. A rule of court requiring defendant to plead within a given time, entered as of course by the plaintiff on filing his declaration, or thereafter. On defendant's failure to put in his plea accordingly, a judgment in the nature of a judgment by default may be entered against him. In England, under the common-law Procedure Act of 1852, the rule to plead is abolished, a notice to plead indorsed on the declaration being sufficient. The Judicature Act of 1875 allows the defendant eight days for his defense after the delivery of the statement of claim.

RULE TO SHOW CAUSE. An order made by the court, in a particular case, upon motion of one of the parties calling upon the other to appear at a particular time before the court, to show cause, if any he have, why a certain thing should not be done.

This rule is granted generally upon the oath or affirmation of the applicant; but upon the hearing the evidence of competent witnesses must be given to support the rule, and the affidavit of the applicant is insufficient. See RULE ABSOLUTE; RULE NISI.

RULES. Certain limits without the actual walls of the prisons, where the prisoner, on proper security previously given to the proper authority, may reside. These limits are considered, for all legal and practical purposes, as merely a further extension of the prison walls. So used in America. See 3 Bibb 202. The rules or permission to reside without the prison may be obtained by any person not committed criminally; 2 Stra. 845; nor for contempt; *id.* 817; by satisfying the marshal or warden or other authority of the security with which he may grant such permission.

Proceedings in an action out of court, and in vacation time. See Southall's Adm'r v. Bank, 12 Gratt. (Va.) 312.

Rules is used in the plural to indicate rule day: Thus "May Rules." See Steam-Gauge & Lantern Co. v. Meyrose, 27 Fed. 215.

RULES OF PRACTICE. Certain orders made by the courts for the purpose of regulating the practice of members of the bar and others.

Every court of record has an inherent power to make rules for the transaction of its business; which rules they may from time to time change, alter, rescind, or repeal. While they are in force, they must be applied to all cases which fall within them; they can use no discretion, unless such discretion is authorized by the rules themselves. Rules of court cannot, of course, contravene the constitution or the law of the land. Thompson v. Hatch, 3 Pick. (Mass.) 512; Clarke v. Magruder, 2 Harr. & J. (Md.) 79; Fullerton v. Bank, 1 Pet. (U. S.) 604, 7 L. Ed. 280; Boas v. Nagle, 3 S. & R. (Pa.) 253.

General rules are binding upon the court as well as upon the parties, except where in the original rule or body of rules there is power to exercise discretion in particular cases; Quynn v. Brooke, 22 Md. 288; Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; Magnuson v. Billings, 152 Ind. 177, 52 N. E. 803; Coyote G. & S. M. Co. v. Ruble, 9 Or. 121 (containing an elaborate discussion of the subject); so of rules of appeal; Taylor v. Leesnitzer, 31 App. D. C. 92; Royal Neighbors of America v. Simon, 135 Ill. App. 599. In many of the above cases the violation of its rule by the court was held to be reversible error. In Southern Pac. Co. v. Hamilton, 54 Fed. 474, 4 C. C. A. 441, it is said to be within the power of a court to suspend its rules. In the following cases there is a disposition to relax the operation of general rules where their enforcement would work injustice. An examination of many of them will show that what is said is *obiter*, while in others of them the rules in question are those of pleading and practice merely; Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 56 N. W. 576; Lance v. Bonnell, 165 Pa. 46; Eastman v. Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Southern Pac. Co. v. Johnson, 69 Fed. 559, 16 C. C. A. 317; McNeish v. Oats Co., 57 Vt. 316. Rules were held binding in Hagar v. Mead, 25 Cal. 599, and Hanson v. McCue, 43 Cal. 178; but cases in People v. Williams, 32 Cal. 280, Pickett v. Wallace, 54 Cal. 147, and Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789, are conflicting with those cases. See note to 8 Del. Ch. 446.

A settled practice of printing the records in patent cases and taxing it as costs has the effect of a rule of court; Detroit Heating & Lighting Co. v. Kemp, 182 Fed. 847.

RULES OF THE ROAD. See NAVIGATION, RULES OF.

RUMOR. A general public report of certain things, without any certainty as to their truth.

In general, rumor cannot be received in evidence; but when the question is whether such rumor existed, and not its truth or falsehood, then evidence of it may be given. See LIBEL; EVIDENCE.

RUMP PARLIAMENT. A name given to the Parliament that assembled on May 6, 1659, and dissolved October 15, 1659.

RUN. A watercourse of a small size. 2 Bibb 354. The word is sometimes used interchangeably with creek. Watts v. Lindsey, 7 Wheat. (U. S.) 162, 5 L. Ed. 423.

RUNNING ACCOUNT. An open account. See 2 Pars. Contr. 351; ACCOUNT; MERCHANTS' ACCOUNTS; LIMITATIONS.

RUNNING AT LARGE. A term applied to animals estray, wandering apparently without owner or keeper, and not confined to any certain place. In Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496, a hound, in close pursuit of a fox, and out of sight and hearing of its master, was held not to be within the meaning of a statute permitting any one to kill a dog "running at large off the premises of the owner or keeper, without a collar with the keeper's name on it." Animals *escaping* from the owner's premises cannot be said to be running at large; the phrase implies permission or assent, or at least some fault, on the owner's part; Coles v. Burns, 21 Hun (N. Y.) 249; but *contra*, Welsh v. R. Co., 53 Ia. 632, 6 N. W. 13. See Thompson v. Corpstein, 52 Cal. 653. Where cattle, while being driven along a public highway, escaped, without negligence on the part of the driver and went upon adjoining, unfenced lands, it was held the landowner could recover for the trespass; Wood v. Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912.

An animal running on the range where it was permitted to run by its owner has been held not an estray, especially where the owner was known to the person taking it up; Shepherd v. Hawley, 4 Or. 206; Walters v. Glats, 29 Ia. 437. An owner is liable to a penalty for cattle lying about on a highway, but not when they are being driven and lie down only for a short time; 3 Q. B. 345.

See ANIMAL; FENCE; ESTRAY; POUND.

RUNNING DAYS. Days counted in succession, without any allowance for holidays. The term is used in settling laydays or days of demurrage, which see.

RUNNING OF THE STATUTE OF LIMITATIONS. A metaphorical expression, by which is meant that the time mentioned in the statute of limitations is considered as passing. See LIMITATIONS.

RUNNING POLICY. One which contemplates successive insurance and provides that the object of the policy may be from time to time defined by additional statements or indorsements. Cal. Civ. Code § 2597.

RUNNING WITH THE LAND. A technical expression applied to covenants real which affect the land. See COVENANT.

RURAL DEANERY. A subdivision of an arch-diocese.

RURAL SERVITUDE. See SERVITUDE.

RUSE DE GUERRE (Fr.). Literally, a trick in war. A stratagem. It is said to be lawful among belligerents, provided it does not involve treachery and falsehood. Grotius, *Droit de la Guerre*, liv. 3, c. 1, § 9.

RUSTICUM JUDICIUM. A rough judgment or decision, applied in maritime law when the blame for a collision is undiscoverable. 3 Kent 231.

RUTA (Lat.). **In Civil Law.** The name given to those things which are extracted or taken from land: as, sand, chalk, coal, and such other things. Pothier, Pand. l. 50.

RYOT. In India. A peasant, subject, or tenant of house or land. Whart. Dict.

S

S. C. Same case; supreme court.

S S. A collar formerly worn on state occasions by the Lord Chief Justice of England, and of the Common Pleas and the Lord Chief Baron—now only by the first named of these (*q. v.*).

The origin and history of this collar have given rise to much learned discussion. The letter "S" on the chain is accounted for in various ways as representing Souvenir or Soverayne of the *ter sanctus* of the Salisbury Liturgy. It appears to have originated with John of Gaunt. It became the badge of the Lancastrians and was worn by Henry V. The first Judge to wear it was Sir Richard Newton, Chief Justice of the King's Bench under Henry VI. It was still worn by the Chiefs of the three courts until 1875. It was worn by Lord Russell as Lord Chief Justice of England and has been by his successors. Inderwick, "King's Peace" 175. See 136 Law Times 73. It was formerly the badge of the House of Lancaster. Oxford Dict. *s. v.* Collar.

As to ss as used in notarial acts, etc., see SCILICET.

SABBATH. A name sometimes used for Sunday (*q. v.*). The Jewish sabbath is Saturday.

Sabbath and Sunday are used indiscriminately to denote the Christian Sabbath, Sunday; State v. Drake, 64 N. C. 591.

SABBATH-BREAKING. The desecration of the Lord's day. State v. Popp, 45 Md. 432. See SUNDAY.

SABBULONARIUM. A gravel pit, or liberty to dig gravel and sand; money paid for the same. Cowell.

SABINIANS. A sect of lawyers whose first chief was Atteius Capito, and the second Cælius Sabinus, from whom they derived their name. *Clef des lois Rom.*

SABLE. The heraldic term for black. It is called *Saturn* by those who blazon by planets, and *Diamond* by those who use the names of jewels. Engravers commonly represent it by numerous perpendicular and horizontal lines crossing each other. Whart. Law Lex.

SAC, SAK. An ancient privilege, which a lord of a manor claimed to have in his court, of holding plea in causes of trespass arising among his tenants, and imposing fines touching the same.

A term which seems to mean a cause or matter before a court what in later Latin was termed *placitum*. *Soc* seems to have the same meaning. It is apparently derived from a word which means seeking; 1 Holdsw. Hist. E. L. 11; Maitland, Domesday 84, 259.

SACABURTH, SACABERE (from *sac*, cause, and *burh*, pledge). He that is robbed and puts in surety to prosecute the felon with fresh suit. Britton, c. 15, 29; Bracton, l. 3, c. 32; Cowell.

SACCUS CUM BROCHIA. A service or tenure of sending a sack and a broach (pitcher) to the sovereign for the use of the army. Bract. l. 2, c. 16.

SACQUIER. In Maritime Law. The name of an ancient officer, whose business was to load and unload vessels laden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise. Laws of Oleron, art. 11, published in an English translation in 1 Pet. Adm. XXV. See ARRAMEUR; STEVEDORE.

SACRAMENTALES (L. Lat. *sacramentum*, oath). *Compurgatores*, which see. Jurors. Law Fr. & Lat. Dict.

SACRAMENTUM (Lat.). **In Civil Law.** A gage in money laid down in court by both parties that went to law, returned to him who had the verdict on his side, but forfeited by the party who was cast, to the exchequer, to be laid out *in sacris rebus*, and therefore so called. Varro, lib. 4. *de Ling. Lat.* c. 36.

An oath, as a very sacred thing. Ainsworth, Dict.; Vicat, Voc. Jur.

Sacramentum Fidelitatis. The oath of fealty. See FEALTY.

The oath taken by soldiers to be true to their general and country. *Id.*

SACRAMENTUM DECISIONIS (Lat.). The voluntary or decisive oath of the civil law, where one of the parties to a suit, not being able to prove his case, offers to refer the decision of the cause to the oath of his adversary, who is bound to accept or make the same offer on his part, or the whole is considered as confessed by him. 3 Bla. Com. 342.

SACRILEGE, SACRILEGIUM. The act of stealing, from the temples or churches dedicated to the worship of God, articles consecrated to divine uses. Ayliffe, Parerg. 476; Cowell. It is a statutory offence in England. Also, the alienation to laymen of property given to pious uses. Par. Ant. 390.

SADISM. That state of sexual perversion in man in which the sexual inclination manifests itself by the desire to beat, to maltreat, humiliate and even to kill the person for whom the passion is conceived. 3 Witth. & Beck, Med. Jur. 739.

SÆVITIA (Lat.). Cruelty. To constitute *sævitia* there must be such a degree of cruelty as to endanger the party's suffering bodily hurt. 1 Hagg. Cons. 35; Hill v. Hill, 2 Mass. 150; French v. French, 4 Mass. 587.

SAFE. A metal receptacle for the preservation of valuables. See INSURANCE.

SAFE-CONDUCT. A written permission given by a belligerent government, or one of its naval or military commanders, enabling an enemy subject to go to a particular place for a particular object. Risley, Law of War 156.

A distinction is sometimes made between a *passport*, conferring a general permission to travel in the territory belonging to, or occupied by, the belligerent, and a *safe-conduct*, conferring permission upon an enemy subject or others to proceed to a particular place for a defined object. II Opp. § 218.

Passports and *safe-conducts* are not binding upon the other belligerent; they may also be withdrawn by the belligerent granting them on grounds of military expediency, in which case the persons holding them must be allowed to withdraw in safety. They may be given for an indefinite period or for a limited time.

The grantor of the safe-conduct tacitly pledges himself to protect the holder of it and to punish any person subject to his command who may violate it. Should the holder be detained beyond the time limited, by illness or some cause over which he has no control, he should still be protected, but if he otherwise exceeds the limited time, he is subject to the ordinary rules of war or to penalties, if such are imposed by the law of the place; Risley, L. of War 156.

For a limited territory, they may be framed by a commander; but when general, they must proceed from the supreme authority.

The name of an instrument given to the captain or master of a ship to proceed on a particular voyage: it usually contains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship.

The act of Congress of April 30, 1790, s. 27, punishes the violation of any safe-conduct or passport granted under the authority of the United States, on conviction, with imprisonment, not exceeding three years, and a fine at the discretion of the court.

See PASSPORT; 18 Viner, Abr. 272.

SAFE DEPOSIT COMPANY. A company which maintains vaults for the deposit and safe-keeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company. It was formerly the custom for banks to accept gratuitously the custody of boxes containing securities for their customers; but this custom has been discontinued since the establishment of companies making that their special business. The relation of the company to the depositor is rather that of bailor and bailee, though it has been said that there is a resemblance to the relation of landlord and tenant, but that it exists merely in form; 9 Harv. L. Rev. 131; but a case of joint renting, cited *infra*, seems to the contrary. The reasons given for the relation of bailor and bailee are that by analogy to the case of an agreement for board and lodging, there is no interest acquired by the depositor in the real estate, and the agreement of the company for safe-keeping established the relation of bailor and bailee; *id.* 132. This view has been sustained in the courts; Roberts v. Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. Rep. 718. In the latter case the plaintiff had an allotment of space in a storage house for the safe-keeping of household furniture under an agreement that the same would be securely kept and guarded. The action was brought to recover damages for the loss of the property by theft committed by persons in charge of the building, and the relation of the parties was described by Earl, J., as "a species of bailment like that existing in the case of a depositor in a safe deposit company who hires a box for his valuables and keeps the key." In such case he says further, that the company, without special contract, would be held to at least ordinary care, the duty of which would arise from the nature of the business and the relation of the parties.

From this relation springs naturally the obligation and liability of the company, and where the contract was that the depositor was to "keep a constant and adequate guard and watch over and upon the safe," and the bonds were stolen, there being no evidence that the vault was broken or the lock tampered with, it was held to throw upon the company the burden of showing whether it was guilty of negligence, and that question was properly left to the jury; Safe Deposit Co. of Pittsburgh v. Pollock, 85 Pa. 391, 27 Am. Rep. 660.

Where property was taken from the safe under a search warrant against the depositor, the description in which did not actually correspond with the property taken, the company was held liable for not resisting so far as it was able to do, and contenting itself with a mere protest; Roberts v. Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. Rep. 718. The burden of proof in actions against such companies for damages on account of negligence is, in accordance with the general rule in similar cases, upon the plaintiff unless, as in the Pennsylvania case above cited, there is *prima facie* evidence of negligence on the part of the defendant which demands an explanation and a *prima facie* case is made by the bailor when he shows such loss or damage to the chattels as ordinarily does not happen if such care as the law requires has been exercised; Arnot v. Branconier, 14 Mo. App. 431; Collins v. Bennett, 46 N. Y. 490; 9 Harv. L. Rev. 134.

The relation of the renter of a box is that of bailor and bailee; National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430; or that of a landlord of an office building and his tenant; People ex rel. Glynn v. Deposit Co., 159 App. Div. 98, 143 N. Y. Supp. 849.

An important question arises as to the position and duty of the company where legal proceedings are taken against the property of the depositor, and the conclusion from an examination of the subject is thus stated: "The extent of their duty is reached in satisfying themselves beyond question that the process is legal and regular; and that, this being so, the company is exempt from all responsibility for the subsequent acts of the officer under it; . . . that the company cannot be subjected to garnishment or trustee process; that the only process by which property deposited with it can be reached is through seizure by the sheriff under direct attachment; also that the company is not liable for property of third persons taken from the safe of the debtor, either as his property or because confused with this property." 9 Harv. L. Rev. 135. That there can be no garnishment in such case would seem to arise from the principle that to be subjected to it, a bailee must have more than constructive possession; as, in the case of baggage in transportation, horses in a livery stable, etc.; Waples, Attachment § 453. The point was directly decided with respect to a safe deposit company in Gregg v. Hilson, 8 Phila. (Pa.) 91; and as to a locked trunk deposited in a bank vault in Bottom v. Clarke, 7 Cush. (Mass.) 487.

It is held *contra* that a safe deposit company may be garnished for the contents of a sealed package in the box of a customer although it is ignorant of the contents, if the statute provides a method by which the court can ascertain such contents; Tillinghast v. Johnson, 34 R. I. 136, 82 Atl. 788.

The property in the safe may be seized under a direct attachment; U. S. v. Graff, 67 Barb. (N. Y.) 304; Roberts v. Deposit Co., 123 N. Y. 57, 25 N. E. 294, 9 L. R. A. 438, 20 Am. St. Rep. 718. The officer may be directed in the order of attachment to open the safe, and the company's officers may be required to give such assistance as will not lead to a breach of trust; 9 Harv. L. Rev. 139. It has been held that an officer may force the door of a warehouse if refused admittance by those in charge of it; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; and in the case of a safe deposit company the officers and representatives of the company were not allowed to be present at the time of the opening of the safe by the sheriff; U. S. v. Graff, 67 Barb. (N. Y.) 304.

In case of a joint rental of a safe by two or more persons, they were treated as cotenants of real estate, and a renewal of the lease obtained by one of the renters in his own name was held to inure to the benefit of the co-tenants; Hackett v. Patterson, 16 N. Y. Supp. 170. Where one co-tenant abstracted, without authority, a stock certificate and transferred it to an innocent purchaser for value, it was held that it had not been intrusted to the possession of the wrongdoer either directly or by implication, and he was not authorized to remove it from the box and the transfer passed no title; Bangor Electric Light & P. Co. v. Robinson, 52 Fed. 520.

A state may regulate the incidents of distribution of property within the state belonging to decedents and prescribe times and conditions for delivery thereof by safe deposit companies; and a statute operating to seal safe deposit boxes for a reasonable period after the death of the renter, is not unconstitutional; nor can a surviving joint renter of such box object, the statute having been in force when the contract was made; Nat. Safe Dep. Co. v. Stead, Atty.-Gen. of Ill., 232 U. S. 58, 34 Sup. Ct. 209, 58 L. Ed. ——, affirming 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430.

SAFE LOADING PLACE. A place where a vessel can be rendered safe for loading by reasonable measures of precaution. 14 Q. B. D. 105; 54 L. J. Q. B. 121.

SAFE-PLEDGE. A surety given that a man shall appear upon a certain day. Bracton, l. 4, c. 1.

SAFEGUARD. A protection of the king to one who is a stranger, who fears violence from some of his subjects for seeking his right by course of law. Reg. Orig. 26.

A notification by a belligerent commander that buildings or other property upon which the notification is posted up are exempt from interference on the part of his troops. Holland, Laws and Customs of War 44.

The term is likewise used to describe a guard of soldiers who are detailed to accompany enemy subjects or to protect certain enemy property. Soldiers on this duty are inviolable on the part of the other belligerent; if they fall into the hands of the other belligerent they must be sent back in safety to their own army., II Opp. § 219.

SAFELY. "Safely and securely" in a declaration in bailment means with due care. 15 L. J. C. P. 182.

SAFETY APPLIANCE ACT. The act of Congress of March 2, 1893, provides that after January 1, 1898, it shall be unlawful for common carriers in interstate commerce by railroad to use locomotive engines not equipped with power driving-wheel brakes and appliances for operating the train brake system, or to run a train that has not a sufficient number of cars in it so equipped that the engineer on the locomotive can control its speed without requiring hand brakes; and to haul or use on its line any car in in-

terstate traffic "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 3 provides that a carrier may refuse to receive from connecting lines or shippers any cars not sufficiently equipped.

Section 4 provides that it shall be unlawful for any railroad to use any car in such traffic which shall not have grab irons in the ends and sides of each car.

Section 5 provides that the Interstate Commerce Commission shall fix a standard for all such carriers as to the height of drawbars for freight cars, and that no cars, loaded or unloaded, shall be used in such traffic, which have not complied with the standard.

Section 8 provides that any employee who may be injured by any locomotive, etc., in use contrary to the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment after the unlawful use, etc., had been brought to his knowledge.

An amendment (April 14, 1910) provides that cars subject to the act must be equipped with secure sill steps and sufficient hand brakes, to be designated by the Interstate Commerce Commission, with the provision that if a car properly equipped shall have become defective while in use, it may be hauled from the place where the defect was first discovered to the nearest repair point without liability to a penalty, if such repairs cannot be made except at such point, but such hauling is at the sole risk of the carrier; and in such case defective cars cannot be hauled by chains in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or perishable freight.

In St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, it was held that legislative power is not unconstitutionally delegated by the section of the act which provides that the American Railway Association shall designate to the Interstate Commerce Commission the standard height of drawbars.

The act extends to a stock yard company whose tracks are exclusively on its own premises, but which, with its own locomotives, hauls loaded cars to the transfer tracks of connecting interstate commerce lines; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103; and to a terminal company which transfers cars from the lines of one interstate carrier to those of another; U. S. v. Terminal Co., 144 Fed. 861; also to a railroad the tracks of which are wholly within a county but which shifts between trunk lines cars en route from one state to another; Belt R. Co. of Chicago v. U. S., 168 Fed. 542, 93 C. C. A. 666, 22 L. R. A. (N. S.) 582.

Locomotive engines are covered by "any car" as used in the act; and are required to have automatic couplers; Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; and (under the amendment of 1903) standard height of drawbars; Southern Ry. Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. ——; a steam shovel car is within the act; Schlemmer v. Ry. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; so is the tender of a switch engine placing cars in interstate commerce in a yard siding; Philadelphia & R. Ry. Co. v. Winkler, 4 Pennewill (Del.) 387, 56 Atl. 112; and a dining car which is in constant use while waiting for the making up of a train for its next interstate trip; Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

The act as amended embraces all locomotives, cars and similar vehicles used on any railway that is a highway of commerce and is not confined exclusively to vehicles engaged in such commerce; Southern Ry. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72. It is immaterial whether a car is full or empty; Johnson v. Ry. Co., 178 Fed. 643, 102 C. C. A. 89; Louisville & N. R. Co. v. U. S., 186 Fed. 280, 108 C. C. A. 326.

An inspector is not bound to inform a carrier of defects in its appliances; Norfolk & W. Ry. Co. v. U. S., 191 Fed. 302, 112 C. C. A. 46.

In Larabee v. R. Co., 182 Mass. 348, 66 N. E. 1032, it was held that a locomotive tender was not a car; so in Blanchard v. Ry. Co., 139 Mich. 694, 103 N. W. 170; automatic coupler acts do not apply to electric street railway cars; 24 Oh. C. C. 67.

The duty under the act to equip cars used in moving interstate traffic with couplers coupling automatically by impact which can be uncoupled without any necessity for men going between the ends of the cars, is absolute; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Chicago Junction R. Co. v. King, 169 Fed. 372, 94 C. C. A. 652; it is not a matter of due diligence, but of absolute duty; Delk v. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; nor is the carrier's duty complete by supplying automatic couplers in the first instance. They must at all times be kept in such condition that they may be operated without the necessity of men going between the ends of the cars to couple and uncouple them; Southern R. Co. v. Snyder, 205 Fed. 868, 124 C. C. A. 60; Johnson v. Southern Pac. R. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. The failure of the coupler to work sustains a charge of negligence; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204. It is no defense that one side will couple; U. S. v. R. Co., 157 Fed. 893; U. S. v. Southern Pac. Co., 167 Fed. 699; nor for the carrier to show that a car with a defective coupler was moved without its knowledge; U. S. v. Southern Pac. Co., 167 Fed.

699; nor that it employed competent inspectors and repairers to care for such safety appliances; U. S. v. Southern R. Co., 135 Fed. 122; nor that the lowering of a draw bar was due to the breaking of a king pin and not to any defect of its own; Atchison, T. & S. F. R. Co. v. U. S., 198 Fed. 637, 117 C. C. A. 341; nor that the grab iron was lost or the coupling became defective so recently as to make it impossible, with ordinary care, to replace or repair them; U. S. v. R. Co., 167 Fed. 198.

Every car in a train in interstate commerce is impressed with an interstate character; U. S. v. R. Co., 167 Fed. 198.

The penalty in the act is civil; Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

The act took away from the carrier the defence of assumption of risk by the employé, but did not affect that of contributory negligence; Schlemmer v. R. Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596.

The scope of the act was fully considered in St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; see Chicago, B. & Q. R. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

SAID. Before mentioned.

In contracts and pleadings it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term *said* or *aforesaid*, or by some similar term; otherwise the latter description will be ill for want of certainty. Com. Dig. *Pleader* (C 18); Gould, Pl. § 63. Adopted in Brown v. State, 28 Tex. App. 379, 13 S. W. 150.

The reference of the word said is to be determined, in any given case, by the sense. *Same* refers to the next antecedent, but in the interpretation of a written instrument, the word *said* does so only when the plain meaning requires it; 2 Kent 555; Wilkinson v. State, 10 Ind. 373.

SAILING. It is sometimes important, in the construction of a charter party, or marine insurance policy, to know when a vessel commenced her voyage, and to this end to determine what constitutes a *sailing*. It has been held that *complete* readiness for the sea, with the intention of proceeding at once on the voyage, is sufficient, though head winds should prevent any actual progress; Bowen v. Hope Ins. Co., 20 Pick. (Mass.) 275, 32 Am. Dec. 213; see Pedersen v. Pagenstecher, 32 Fed. 842; but the word sail is held to be a technical word and to mean to start on a voyage; 34 L. J. C. P. 195; so a ship which drew out from its wharf and anchored in a river, whence it proceeded the next day, sailed on the latter day; [1898] 1 Q. B. 27.

Where a ship was ready for sea, and had made a measurable progress by towage, but not by sails, to the mouth of the harbor, she was held by Cadwalader, J., to have sailed; The Francesca Curro, 4 Wkly. Notes Cas. (Pa.) 415; s. c. 2 Cadw. Dec. 520.

A ship by quitting her moorings on or before the day named, in a state ready for sea, with a *bona fide* intention of prosecuting the voyage, has sailed, notwithstanding her progress was soon after delayed by an unforeseen event; but if she was not ready for sea when she quit her moorings this is evidence that there was no such *bona fide* intention, any appearance to the contrary notwithstanding; it will be held that she had not sailed; Maclachlan, Merch. Shipp. 414.

If the vessel quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is, nevertheless, a sailing; 3 B. & Ad. 514. There can be no "sailing" without a clear intention on the part of the master to proceed directly on his voyage; [1898] 1 Q. B. 27. Moving from the wharf into the stream may be enough; *id.* See 37 Am. L. Reg. N. S. 201, an article by Erskine Hazard Dickson; Maclachlan, Mer. Ship. 414.

As advanced freight is frequently made payable at or within a certain time after *final sailing* from the *port* of loading, there has been much discussion as to the meaning of both of these terms. In the leading English case, Parke, B., considered that final sailing "meant more than if the word sailing were used alone," that it had reference to the particular port of Cardiff, out of which the vessel sailed, meaning a final departure and being out of the limits of the artificial port, at sea, ready to proceed upon her voyage; 23 L. J. Ex. 169. Where the ship left the harbor to anchor in the roadstead and lie there until the crew should be completed, without the intention of returning to the harbor, it was held that she had not sailed; 24 L. J. Q. B. 340; so also where the master took the vessel out of the port and left her in the roads under easy sailing, while he returned ashore to complete her papers; 26 *id.* 239. "Final sailing I apprehend means getting clear of the port for the purpose of proceeding on the voyage;" Lindley, L. J., in 9 Q. B. D. 679.

SAILING INSTRUCTIONS. Written or printed directions, delivered by the commanding officer of a convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet in case of dispersion by storm, by an enemy, or by any other accident.

Without sailing instructions no vessel can have the full protection and benefit of convoy. Marsh. Ins. 368.

SAILORS. Seamen; mariners. See SEAMEN; SHIPPING ARTICLES.

ST. MARTIN LE GRAND, COURT OF. An ancient court in London, of local importance, formerly held in the church from which it took its name.

SAIO. A tip-staff or sergeant-at-arms. Cowell; Cunningham.

SAISIE-ARRÊT. In French Law. An attachment of property in the hands of a third person.

SAISIE-EXECUTION. In French Law. A writ of execution by which the creditor places under the custody of the law the movables of his debtor, which are liable to seizure, in order that out of them he may obtain payment of the debt due by him. La. Code of Pract. art. 641; Dalloz, Dict. It is a writ very similar to the *fieri facias* of the common law.

SAISIE-FORAINE. In French Law. A permission given by the proper judicial officer to authorize a creditor to seize the property of his debtor in the district which he inhabits. Dalloz, Dict. It has the effect of an attachment of property, which is applied to the payment of the debt due.

SAISIE-GAGERIE. In French Law. A conservatory act of execution, by which the owner or principal lessor of a house or farm causes the furniture of the house or farm leased, and on which he has a lien, to be seized, in order to obtain the rent due to him. It is similar to the *distress* of the common law. Dalloz, Dict.

SAISIE-IMMOBILIÈRE. In French Law. A writ by which the creditor puts in the custody of the law the immovables of his debtor, that out of the proceeds of their sale he may be paid his demand.

SAK AND SOC. See SAC.

SALADIN'S TENTH. A tax imposed in England and France, in 1188, by Pope Innocent III., to raise a fund for the crusade undertaken by Richard I. of England and Philip Augustus of France, against Saladin, Sultan of Egypt, then going to besiege Jerusalem. Encyc. Lond.; Whart.

SALARY. A reward or recompense for services performed.

It is usually applied to the reward paid to a public officer for the performance of his official duties. (Adopted in 24 Fla. 29.)

Salary is also applied to the reward paid for the performance of other services; but if it be not fixed for each year it is called honorarium. Pothier, Pand. According to M. Duvergier, the distinction between honorarium and salary is this. By the former is understood the reward given to the most elevated professions for services performed; and by the latter the price of hiring of domestic servants and workmen; 19 Toullier, n. 268, p. 292, note.

There is this difference between salary and price; the former is the reward paid for services or for the hire of things; the latter is the consideration paid for a thing sold; *Leç Elem.* § 907. Salary seems to denote a higher degree of employment and is suggestive of a larger compensation for more important services than wages, which indicates inconsiderable pay; Meyers v. New York, 69 Hun 291, 23 N. Y. Supp. 484. See also 42 Alb. L. J. 332; Com. v. Butler, 99 Pa. 542; where salary is regarded as a per annum compensation, while wages are defined as compensation paid or to be paid by the day, week, etc.

"Wages and salary seem to be synonymous convertible terms, though use and general acceptation have given to the word 'salary' a significance somewhat different from the word 'wages' in this, that the former is understood to relate to position or office, to be the compensation given for official or other service as distinguished from 'wages,' the compensation for labor;" Bell v. Live Stock Co. (Tex.) 11 S. W. 344, 3 L. R. A. 642. Wages and salary have also been held to be synonymous in other cases; Com. v. Butler, 99 Pa. 535, 542; Morse v. Robertson, 9 Hawaii, 195, 197; White v. Hayden, 126 Cal. 621, 59 Pac. 118; there is no substantial difference in the application of exemption acts; Freem. Ex. § 234, where the subject is discussed at length, giving the language of state statutes. It has been held that the salary of a public official is in no fair sense wages; People v. Myers, 11 N. Y. Supp. 217; and is not exempt from garnishment under a statute exempting wages; McLellan v. Young, 54 Ga. 399, 21 Am. Rep. 276. Salary is suggestive of a larger compensation or higher degree of employment than wages, which indicates inconsiderable pay, in an act providing that no honorably discharged Union soldier receiving a salary shall be removed except for cause shown; Meyers v. New York, 69 Hun, 291, 23 N. Y. Supp. 484; People v. Brookfield, 13 Misc. Rep. 566, 34 N. Y. Supp. 674, where a laborer receiving $2 per day was held not to receive a salary. "Wages of laborers" means earnings of a laborer by manual toil; Smith v. Brooke, 49 Pa. 147; "wages of employees" in an order authorizing payment of wages by a receiver does not cover services of counsel for special purposes; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023.

SALE. An agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

"A contract by which property is transferred from the seller to the buyer for a fixed price in money paid or agreed to be paid by the buyer." De Bary v. Dunne, 172 Fed. 940.

There is a fundamental distinction between a contract to sell in the future and a present sale—often expressed by "executory" and "executed" sales. It depends upon

whether the property in the goods is transferred. If transferred, there is a sale though the price be not paid; if not transferred, it is a contract of sale, even though the price be paid; Williston, Sales, § 2. Conditional sales constitute an intermediate class—the assent to the transfer, though not the transfer, being given at the time the bargain is made. Such partake more of the nature of sales than of contracts of sale, the title being transferred by force of the original bargain; *id.* § 6.

An executed sale is both a contract and a conveyance.

The Uniform Sales Act, governing the sales of personal property, has been passed in Arizona, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Rhode Island, Wisconsin and Alaska. It followed substantially the English Act of 1893, but with important changes.

This contract differs from a barter or exchange in this that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. Mitchell v. Gile, 12 N. H. 390; Stevenson v. State, 65 Ind. 409; Loomis v. Wainwright, 21 Vt. 520. See PRICE. It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim, and not for a price; and from bailment, because there the agreement is for the return of the subject-matter, in its original or an altered form, while in sale it is for the return of an equivalent in money; L. R. 3 P. C. 101; Frost v. Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; and see Hunt v. Wyman, 100 Mass. 198; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

An *absolute* sale is one made and completed without any condition whatever.

A *conditional* sale is one which depends for its validity upon the fulfillment of some condition. The term is usually confined to sales in which the seller retains the title until the payment of the price.

A *forced* sale is one made without the consent of the owner of the property, by some officer appointed by law, as by a marshal or a sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold; it merely transfers the rights of the person as whose property it has been seized. This kind of a sale is sometimes called a judicial sale.

A *private* sale is one negotiated and concluded privately between buyer and seller, and not made by advertisement and public outcry or auction. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

A *public* sale is one made at auction to the highest bidder. Auction sales sometimes are voluntary, as when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual rules relating to sales apply; or they are involuntary or forced when the same rules do not apply.

A *voluntary* sale is one made freely without constraint by the owner of the thing sold; this is the common case of sales, and to this class the general rules of the law of sale apply.

A *sale in gross* is one without regard to quantity. Yost v. Mallicote's Adm'r., 77 Va. 616.

An offer to sell imposes no obligations until accepted according to its terms; and an offer rejected cannot be afterward accepted; Minneapolis & St. L. R. Co. v. Rolling Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376. See OFFER.

Parties. As a general rule, all persons *sui juris* may be either buyers or sellers; Story, Sales § 9. See PARTIES. But no one can sell goods and convey a valid title to them unless he be owner or lawfully represent the owner; *nemo dat quod non habet;* Benj. Sales § 6; 2 Ad. & E. 495; Klein v. Seibold, 89 Ill. 540; Bearce v. Bowker, 115 Mass. 129. And even an innocent purchaser from one not the owner, or his proper representative, acquires no valid title; 13 M. & W. 603; Benj. Sales § 6; Pease v. Smith, 61 N. Y. 477.

An innocent purchaser of property from a bailee for hire acquires no title, and on disposing of the property is liable to the bailor for its value; Miller Piano Co. v. Parker, 155 Pa. 208, 26 Atl. 303, 35 Am. St. Rep. 873. But see MARKET OVERT. Another exception is that one not the owner, even a thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery, provided the buyer has been guilty of no fraud in taking them. The *bona fide* holder of such negotiable instruments, and also of bank-notes, or money, lost or stolen, who has paid a valuable consideration or furnished an equivalent, can retain title against any former owner; even against one from whom such chattel has been stolen; Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Roth v. Colvin, 32 Vt. 125; Hall v. Hale, 8 Conn. 336; 3 Burr. 1516; 5 B. & Ad. 909; Benj. Sales (4th ed.) § 15. So (*arguendo*) of coupon bonds of the ordinary kind; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857, disapproving Gill v. Cubit, 3 B. & C. 466; and approving Goodman & Harvey, 4 Ad. & El. 870; also a lost or stolen bill or note; *arguendo* in Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892; but otherwise of a lost or stolen bill of lading; *id.*

Where two parties in good faith buy the same property, the one first receiving pos-

session is entitled to hold it; Thomas v. Ramsey, 47 Mo. App. 84.

There is a class of persons who are incapable of purchasing except *sub modo*, as infants, insane persons and drunkards; Benj. Sales § 21; and *another class*, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers while that relation exists; such as trustees, guardians, assignees of insolvents, and, generally, all persons who, by their connection with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like.

Statute of Frauds. Sec. 17 provides: No contract for the sale of any goods, wares, and merchandise for the prices of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents hereunto lawfully authorized. In the United States a corresponding provision has been passed in all the states but Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia. The language of these statutes is not uniform and is often not quite the same in meaning as that of the English statute.

By the Sales Act: (1) A contract to sell or a sale of any goods or choses in action of the value of $500 ($100 in Connecticut and to $2,500 in Ohio) or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or held, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. (2) The provisions of this section apply to every such contract or sale notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. (3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Contracts for work and labor have never been within the terms of statutes of frauds and to determine whether there is such contract, the following rule was stated by Blackburn, J., in 1 B. & S. 272: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." This rule has been carried to the extent of holding that a contract to paint a portrait is a contract for the sale of goods; 1 Cab. & E. 287. The rule most commonly adopted in America is what is known as the Massachusetts rule as stated by Shaw, C. J., in Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256, as follows: "When the contract is a contract of sale either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement; Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; Crockett v. Scribner, 64 Me. 447; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; Meincke v. Falk, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722.

The vegetable products of the earth have been classified as *fructus naturales* and *fructus industriales*. In the former class are included everything which grows spontaneously or without animal cultivation, such as trees or grass. In the second class are included crops which are the subject of yearly planting and cultivation. By an arbitrary rule, *fructus industriales* are treated in every case as goods, whether matured or not at the time when by the terms of the bargain they were to be sold; Bryant v. Crosby, 40 Me. 9; Whitmarsh v. Walker, 1 Metc. (Mass.) 313; Kerr v. Hill, 27 W. Va. 576; Bull v. Griswold, 19 Ill. 631. It has been held that a crop of peaches or other orchard fruit is to be classed as *fructus industriales;* Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Smock v. Smock, 37 Mo. App. 56. Water when separated from a stream or lake becomes personalty; Jersey City v. Harrison, 71 N. J. L. 69, 58 Atl. 100. Ice which has been cut is personal property; Higgins

v. Kusterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160. Minerals when severed from the realty become goods. Manure is (till the time when mixed with the soil) an incident of the real estate of such peculiar character that while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it; Strong v. Doyle, 110 Mass. 92. If the contract is to sell and deliver a house, even though the house is at the time of the bargain affixed to the realty, it is a contract for the sale of goods, for the parties contract to buy and sell a house separated from the realty and moved from its foundations; Long v. White, 42 Ohio St. 59. The decisions are conflicting upon the question as to whether choses in action are within the statute. Shares of stock, bonds and mortgages have been held within the statute; Banta v. Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Greenwood v. Law, 55 N. J. L. 168, 26 Atl. 134, 19 L. R. A. 688; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459. The sale of an undivided share of goods is within the statute; Gerndt v. Conradt, 117 Wis. 15, 93 N. W. 804. See FRAUDS, STATUTE OF; EXCHANGES.

Subject-Matter of the Contract. Potential possession. In Grantham v. Hawley, Hob. 132, it was held that in certain cases a seller might transfer title to goods which he did not then own. The case related to a future crop of corn and it was held that a buyer of the corn from a lessee of the land had a better title than the reversionary owner of the lease, though at the time of the litigation the lessee's estate had ended. The court said: "And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. But a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for then he hath it neither actually or potentially."

In this country this doctrine has received frequent recognition in the cases of the transfer of crops to be thereafter grown. It is held in most of the states where the question has arisen that the owner of land may mortgage a future crop; Briggs v. U. S., 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711; Weil v. Flowers, 109 N. C. 212, 13 S. E. 761; in a few states, however, the crop must be actually planted; Redd v. Burrus, 58 Ga. 574; Cole v. Kerr, 19 Neb. 553, 26 N. W. 598; Cudworth v. Scott, 41 N. H. 456. If the legal title to a future crop passes, it would seem that a man might mortgage the crops on his land any number of years in advance, and the fact that the mortgage must be recorded is immaterial, for the purchaser may have no means of knowing where the record is and hence in some states a limitation of time is imposed. Thus in Alabama, Arkansas, Minnesota, and South Carolina, the statutes prohibit such mortgages made either prior to the 1st of January preceding the planting of the crop, or more than a year before its planting. In the absence of such a statute, it has been held that an unlimited grant of the future crops is invalid; Shaw v. Gilmore, 81 Me. 396, 17 Atl. 314. This doctrine has been applied occasionally to transfers of the future young of animals; Andrews v. Cox, 42 Ark. 473, 48 Am. Rep. 68. The doctrine is considered objectionable since it means that when the goods come into existence, title to them passes free from any defects of title due to rights which have accrued since the time of the original bargain; Williston, Sales, § 133.

By the Sales Act: (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in the act called future goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. (3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

The English Sale of Goods Act makes no distinction between one class of future goods and another; and so it may be assumed that the doctrine of potential possession is abolished. The Sales Act aims to abolish the doctrine altogether from the law of sales, whatever may be the rule in regard to mortgages.

Undivided shares. In Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334, the buyer bought 6,000 bushels of wheat from two piles, aggregating 6,249 bushels, but of which the quantity had not been determined. The seller signed a receipt acknowledging that he held 6,000 bushels subject to the order of the buyer, and the buyer paid a portion of the price. The court held that title passed to the purchaser. The line of reasoning followed by the court was that it was possible for two or more persons to own goods confused in an undistinguishable mass of undetermined amount, and the parties, if they so intended, could by agreement bring about such ownership. England denies the possibility of transferring title to a specified portion of a mass; 13 East 522. In America this doctrine has received its fullest application in grain elevators; Woodward v. Semans, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; James v. Plank, 48 Ohio St. 255, 26 N. E. 1107; Young v. Miles, 23 Wis. 643.

By the Sales Act: (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer becomes an owner

in common with the owner or owners of the remaining shares. (2) In the case of fungible goods there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight and measure is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods, unless a contrary intent appears.

Destruction of the Subject of the Sale. There must be a thing which is the *object* of the sale; for if the thing sold at the time of the sale had ceased to exist, it is clear there can be no sale; Benj. Sales § 76; 5 Maule & S. 228; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. Ed. 633; Thompson v. Gould, 20 Pick. (Mass.) 139. Where the thing does not exist at the date of the contract the sale is void; as where, unknown to the parties, corn on a vessel not yet arrived, had, before the sale, been sold at an intermediate port; 5 H. L. C. 673. Where, after the sale, and without fault of the seller, the thing sold perished, the seller is released; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325; but it is otherwise if property has passed, though the goods were left in the seller's possession; 32 L. J. Q. B. 164. On a contract of future sale, if the subject-matter perish before property has passed, the contract is avoided. It is evident, too, that no sale can be made of things not in commerce: as, the air, the water of the sea, and the like.

By the Sales Act: (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void. (2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale, (a) as avoided; (b) as transferring the property in all the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

The above rules govern in the case of destruction of goods contracted to be sold before the risk passes to the buyer.

The *price.* To constitute a sale, there must be a *price* agreed upon. The presumption is that where the price is not definitely ascertained, the title remains in the vendor until a computation has been made; Blackb. Sales 122; Warren v. Buckminster, 24 N. H. 336; Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234. But this may be rebutted by proof that the parties intended to have the right of property vest in the purchaser at once; Chapman v. Shepard, 39 Conn. 413; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334. Upon the maxim *id certum est quod reddi certum potest*, a sale may be valid although it is agreed that the price for the thing sold shall be determined by a third person; Brown v. Bellows, 4 Pick. (Mass.) 179. A contract of sale is valid though no time of payment is agreed on, the law implying payment on delivery; Lamont v. Le Fevre, 96 Mich. 175, 55 N. W. 687.

By the Sales Act: (1) The price may be fixed by the contract or may be left to be fixed in such a manner as may be agreed, or it may be determined by the course of dealing between the parties. (2) The price may be made payable in any personal property. (3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, the act does not apply. (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. See PRICE.

Conditions and Warranties. See CONDITIONS; WARRANTY.

Transfer of Property between Buyer and Seller. The property is presumed to pass when the contract is made if the goods are identified, and nothing remains to be done other than delivery of the goods and payment of the price; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Richardson v. Ins. Co., 136 N. C. 314, 48 S E. 733; Com. v. Hess, 148 Pa. 98, 23 Atl. 977, 17 L. R. A. 176, 33 Am. St. Rep. 810. If there is something to be done by the seller to put the goods into a deliverable state, the natural inference is that the parties do not intend an immediate transfer of title. The rule, however, is but one of presumption and if the parties intend that the property shall pass and clearly manifest that intention, their intention will be effectual; Paine v. Young, 56 Md. 314; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270. Delivery of the goods to the buyer would almost certainly indicate such an intention if it were not expressly stated that the property was retained; Bank of Huntington v. Napier, 41 W. Va. 481, 23 S. E. 800; Trigg Co. v. Bucyrus Co., 104 Va. 79, 51 S. E. 174. Payment of the whole price or of a considerable part of it would also seem some evidence of an intention to make an immediate transfer; Butterworth v. McKinly, 11 Humph. (Tenn.) 206. But it is no evidence if the payment is small, and apparently intended merely to bind the bargain; Elgee

Cotton Cases, 22 Wall. (U. S.) 180, 22 L. Ed. 863.

Formerly if something remained to be done in the way of weighing or measuring in order to determine the price, the property would not pass even though the goods were specified; 6 East 614. This rule has been generally adopted: Jones v. Pearce, 25 Ark. 545; Wesoloski v. Wysoski, 186 Mass. 495, 71 N. E. 982; Gilman & Sanborn v. Hill, 36 N. H. 311; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Pike v. Vaughn, 39 Wis. 499; and this presumption has been applied although the weighing or measuring was to be done by the buyer; Pinkham v. Appleton, 82 Me. 574, 20 Atl. 237; Pittsburgh, C. & St. L. R. Co. v. Noel, 77 Ind. 110. In other states, however, there is a general presumption that the property passes when all the terms of the bargain are fixed, although the buyer is subsequently to weigh or measure the goods in order to complete the calculation of the price; Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Hagins v. Combs, 102 Ky. 165, 43 S. W. 222; Day v. Gravel, 72 Minn. 159, 75 N. W. 1. Where the rule exists that the property presumably does not pass if something remains to be done to ascertain the price, the rule is everywhere merely one of presumption, which will yield to evidence showing an intent to transfer the property immediately; Wheelock v. Starkweather, 146 Mich. 53, 108 N. W. 1085; Wadhams v. Balfour, 32 Or. 313, 51 Pac. 642.

Non-payment of the price is little or no evidence of an intention to retain the ownership. This is because cases where the buyer pays in advance and trusts the seller to perform his contract later are unusual, but cases where the seller transfers the property and gives the buyer credit for the price are so common that it is not a safe assumption that such a transaction was not intended. Where there is a "sale or return," or "sale on approval," it is a question of fact in every case whether the parties intended to make approval a condition, without which the property should not pass, or whether their intent was that the property should pass at once with the right to return the goods. Sometimes it is expressly provided that the seller shall retain title; Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118. Sometimes the contract may be put in the form of a bailment or lease, thus clearly indicating that the seller is to retain title until the buyer's option is exercised; Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774. The use of the word "return" itself ordinarily implies a previous transfer of the property; Frye v. Burdick, 67 Me. 408. Whereas if it is agreed that goods shall be delivered on trial, or on approval, the language indicates that the buyer's approval is a condition precedent to the transfer of the property. Frequently the bargain of the parties will fix the time within which the buyer must return the goods; Butler v. School Dist., 149 Pa. 351, 24 Atl. 308. If the buyer fails to exercise the right thus given him, his title cannot thereafter be avoided; Stevens v. Hertzler, 109 Ala. 423, 19 South. 838. If the contract does not fix a time, the law adopts the rule of the time that is reasonable under the circumstances.

Rules for Ascertaining Intention. By the Sales Act: Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties: 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. 3. (a) When goods are delivered to the buyer "on sale or return" or on other terms indicating an intention to make a present sale, but to give to buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time. (b) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not do so but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, the property, thereupon, passes to the buyer. (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, with the exception provided for in rule 5, and where seller has reserved the right of possession or property. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price

before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents. 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Subsequent Appropriation. In the cases of unascertained or future goods there must be some act of appropriation of the goods to the buyer, other than mere completion or preparation, and the act of appropriation should be assented to by both parties. The buyer may make the proposition by requesting the seller subsequently to appropriate goods to him, or the seller may make it by appropriating goods to the buyer and subsequently securing the latter's assent. It is immaterial which party by the terms of the contract is to make the appropriation; 1 Taunton 318; 5 B. & A. 942; 6 B. & C. 388; 10 Bing. 512; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117. To be distinguished from cases where the seller is subsequently to appropriate goods to the buyer are cases where the buyer furnishes the materials upon which the seller is to do the work. Where both furnish goods, then the proportion of goods furnished by one party or the other furnishes the best evidence of their intention as to subsequent appropriation in the absence of a direct expression of it; West Jersey R. R. Co. v. Trenton Car Works, 32 N. J. L. 517. Appropriation of the goods to the buyer can only be binding if made in accordance with authority previously given or if subsequently assented to by him. If, therefore, goods are appropriated by the seller which are not in conformity with the authority given, the property will not pass. The lack of conformity may be in kind or quantity. Where goods are necessarily appropriated in parts or instalments, the law takes the view, that presumptively the buyer does not intend to become owner of anything until there can be final appropriation of the whole; 4 M. & W. 775. The commonest and most important illustration of the transfer of the property in goods by subsequent appropriations by the seller, arises where the seller in fulfillment of a contract with, or an offer from, the buyer, delivers goods to a carrier for shipment to the buyer. That the property passes on delivery to the carrier, under these circumstances, was settled indeed before the general rules of the appropriation by the seller had been completely formulated; 1 Atk. 245, 248; 3 B. & P. 582. It is a common practice to send goods to the buyer marked "*C. O. D.*" See C. O. D. It has been held by some authorities that the effect of this is to retain title in the seller until the price is paid; U. S. v. Cline, 26 Fed. 515; State v. U. S. Express Co., 70 Ia. 271, 30 N. W. 568; Hardy v. Am. Express Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731. The weight of authority, however, supports the view that possession only is to be retained by the seller until the price is paid and that the property passes immediately on delivery to the carrier, assuming that the circumstances are such that the property would pass were it not for the requirement of payment of the price before delivery; U. S. v. Adams Ex. Co., 119 Fed. 240; Carthage v. Duvall, 202 Ill. 234, 66 N. E. 1099; State v. Intoxicating Liquors, 98 Me. 464, 57 Atl. 798; Higgins v. Murray, 73 N. Y. 252; Norfolk, etc., R. Co. v. Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611; Com. v. Fleming, 130 Pa. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. Rep. 763. Where goods are shipped "f. o. b." this means that the seller shall bear all expenses until the goods are delivered at the place where they are to be "f. o. b." and the presumption that the property is to pass then is applicable; Fruit Dispatch Co. v. Sturges, 73 Ohio St. 351, 78 N. E. 1125; a distinction is taken between "deliver f. o. b." and "bill f. o. b.," the latter not necessarily imposing on the seller the duty to deliver; Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928. As to reservation of right of possession or property when goods are shipped, see BILLS OF LADING; STOPPAGE IN TRANSITU.

Sale by Auction. By Sales Act: (1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale. (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. (3) A right to bid may be reserved expressly by or on behalf of the seller. (4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or to induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer. See AUCTION.

Risk of Loss. By Sales Act. Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, except that—(a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk

from the time of such delivery. (b) Where the delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Where goods are delivered to the buyer but title is retained by the seller until the price is paid, the buyer immediately acquires the right to use the goods as his own and it would seem to follow that if the goods are accidentally destroyed or injured, the buyer must stand the loss. The decisions are, however, in conflict, but the weight of authority sustains the view here expressed; Chicago Ry. Equipment Co. v. Bank, 136 U. S. 268, 283, 10 Sup. Ct. 999, 34 L. Ed. 349; Burnley v. Tufts, 66 Miss. 48, 5 South. 627, 14 Am. St. Rep. 540; American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54; Whitlock v. Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214; La Valley v. Ravenna, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, 112 Am. St. Rep. 898, 6 Ann. Cas. 684; Osborn v. Lumber Co., 91 Wis. 526, 65 N. W. 184; *contra*, Arthur & Co. v. Blackman, 63 Fed. 536; American Soda Fountain Co. v. Blue, 146 Ala. 682, 40 South. 218; Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 565; Sloan v. McCarty, 134 Mass. 245. Doubtless the question of risk may be settled by the parties in any way they please, and some of the apparently conflicting decisions may be reconciled on this basis. See BILLS OF LADING; RES PERIT DOMINO.

Transfer of Title between Buyer and Seller. No one but the owner can give title. If the owner is by his conduct precluded from denying the seller's authority to sell, the buyer may acquire a valid title although the seller has neither title nor authority to transfer title. See ESTOPPEL; FACTOR.

A cash sale is a kind of a sale where the payment of the price is a condition of the transfer of title to the buyer; Williston, Sales, 543.

A common kind of transaction where the transfer of the property in goods is conditional on the buyer's performance of his promise is where the buyer is by the terms of the bargain to give negotiable paper. The usual case is where a bill of lading for the goods is sent forward by the seller with a draft for the price attached. Payment or acceptance of the draft is a condition precedent to the buyer's right to the possession of the bill of lading. See C. O. D.

See MARKET OVERT.

Conditional Sales. As in every other kind of contract, so in a contract to sell, there may be inserted such conditions as the parties agree upon. The typical case of conditional sale is a sale in which the transfer of title is conditional upon payment of the price. Though sales upon other conditions may readily be imagined, the practice of selling goods with a retention of the title until payment of the price is so common that the ordinary meaning of the term "conditional sale" is confined to sales upon this particular condition. The seller is not estopped by his conduct in delivering possession of the goods to the buyer upon such a bargain from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter; [1895] 1 Q. B. 653; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Lorain Steel Co. v. Street R. Co., 187 Mass. 500, 73 N. E. 646; Clayton v. Hester, 80 N. C. 275; Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; Baals v. Stewart, 109 Ind. 371, 9 N. E. 403. The effect of the decisions sustaining the seller's title is modified in many jurisdictions by recording acts, and in some jurisdictions, a *bona fide* purchaser from the buyer is protected; Van Duzor v. Allen, 90 Ill. 499; Lincoln v. Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446; Dearborn v. Raysor, 132 Pa. 231, 20 Atl. 690; Greer v. Church, 13 Bush (Ky.) 430. In Louisiana a conditional sale is wholly impossible; Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 South. 193. See *infra*. In Harkness v. Russell, *supra*, Bradley, J., discussed the cases fully.

Creditors of the seller, after the property has been delivered to the buyer, can have no right to take the property from the possession of the buyer, at least while he is in no default upon his contract. The buyer's right is a property right and the seller's creditors, no more than the seller, can disturb it, though the seller also has an interest in the property which should be subject to sale on execution; McMillan v. Larned, 41 Mich. 521, 2 N. W. 662. The buyer's creditors, apart from estoppel or statute, can take no greater right than the buyer had. The interest of the buyer may be subjected to the claims of creditors; Newhall v. Kingsbury, 131 Mass. 445, but not the goods as such. In some jurisdictions, the rights of a buyer's creditors have been treated in the same way as a mortgagor's creditors, namely, pay the portion of the price remaining due and by so doing acquire the right to treat the full ownership as belonging to the buyer; Bingham v. Vandegrift, 93 Ala. 283, 9 South. 280; Hervey v. Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673; Towner v. Bliss, 51 Vt. 59; United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056; Pearne v. Coyne, 79 Conn. 570, 65 Atl. 973. An assignee for the benefit of creditors under a common law assignment can stand in no better position than an individual creditor; Adams v. Lee, 64 N. H. 421, 13 Atl. 786; Gayden v. Tufts, 68 Miss. 691, 10 South. 53; Campbell Printing Press & Mfg. Co. v. Walker, 114 N. Y. 7, 20 N. E. 625. By the express terms of the Bankruptcy Act, the trustee takes all the property "which might have been levied upon and sold under judicial process against" the bankrupt. In each case the

question must depend upon the rights which the state law gives to creditors; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

Conditional sales have become very common and are so deceptive both to purchasers from the buyer and to the buyer's creditors, since the buyer not only has possession of the property but ordinarily is entitled to use it and does use it as if it were his own, that recording acts have been passed in many states. The purpose of these acts is to give notice to the public of the seller's title and to invalidate that title unless the bargain is in writing and a record of it made. Such statutes have been passed in more than one-half of the states. In England the Factors' Act of 1889 has absolutely invalidated all conditional sales where the buyer has possession as against purchasers, whether by absolute sale or by mortgage or pledge, reaching, as to such parties, the same result that has been reached in a few jurisdictions without the aid of statute.

There can be no estoppel if a purchaser or creditor has notice. In the case of a purchaser, notice is important when he has entered into a bargain for the purchase of the goods. So far as the creditor is concerned, the time when notice is important might well be held not to be when the levy is made, but when the debt was created, if its creation was subsequent to the conditional sale; Vanmeter v. Estill, 78 Ky. 456.

Risk of loss and gain is upon the buyer, under the Sales Act, and was so held in Chicago Ry. Equipment Co. v. Bank, 136 U. S. 268, 283, 10 Sup. Ct. 999, 34 L. Ed. 349; American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54; Osborn v. Lumber Co., 91 Wis. 526, 65 N. W. 184; Whitlock v. Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. (N. S.) 1214; Topp v. White, 12 Heisk. (Tenn.) 165; *contra*, Arthur & Co. v. Blackman, 63 Fed. 536; Bishop v. Minderhout, 128 Ala. 162, 29 South. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134; Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 565; Sloan v. McCarty, 134 Mass. 245. Doubtless the question of risk may be settled by the parties in any way they please, and some of the apparently conflicting decisions may be reconciled on this basis. See a discussion in American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54.

A conditional sale is distinguished from a so-called lease, in that the latter contemplates only the use of the property for a limited time, and its ultimate return to the lessor; whereas the former contemplates the ultimate ownership by the buyer together with the use in the meantime. Sellers desirous of making conditional sales of their goods, but who do not wish openly to make a bargain in that form, have resorted to the device of making contracts in the form of leases either with options to the buyer to purchase for a small consideration at the end of the term, provided the so-called rent has been duly paid, or with a stipulation that if the rent throughout the term is paid, the title shall thereupon vest in the lessee. Such transactions are leases only in name. Statutes and courts have disregarded the form of the transaction and hold such leases subject to the rules governing conditional sales; Heryford v. Davis, 102 U. S. 235, 26 L. Ed. 160; Manson v. Dayton, 153 Fed. 258, 82 C. C. A. 588; Warren v. Liddell, 110 Ala. 232, 20 South. 89; Hine v. Roberts, 48 Conn. 267, 40 Am. Rep. 170; Lucas v. Campbell, 88 Ill. 447; Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682.

A conditional sale and a chattel mortgage are in essence the same, but are different in form, and by virtue of this difference they have been given different names. Accordingly, statutes providing for the recording of chattel mortgages are not generally held to cover conditional sales; White Sewing Machine Co. v. Conner, 111 Ky. 827, 64 S. W. 841.

In Pennsylvania on a sale of chattels, if the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such agreement, as respects creditors, is fraudulent. This principle was fully established in Clow v. Woods, 5 S. & R. (Pa.) 275, 9 Am. Dec. 346, the opinion by Gibson, J., and Martin v. Mathiot, 14 S. & R. (Pa.) 214, 16 Am. Dec. 491, the opinion by Tilghman, C. J.; but if the possession is transferred under an express contract of bailment, the transaction is not fraudulent as to creditors, though there is a superadded executory agreement for the sale of the property to the bailee, upon the payment of a certain price; Stoddart v. Price, 143 Pa. 537, 22 Atl. 811; Kelley Springfield Road Roller Co. v. Schlimme, 220 Pa. 413, 69 Atl. 867, 123 Am. St. Rep. 707. The question of importance in Pennsylvania in cases of this kind is whether the transaction is a conditional sale or a bailment.

See CONFLICTS OF LAWS.

Delivery to the Buyer and Retention of Possession by Seller. By the Sales Act: Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of goods to make the same.

Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such re-

tention of possession, is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

In England retention of possession by the seller is at most, evidence tending to show fraud. The doctrine in regard to fraudulent retention of possession was originally based on the statute, 13 Eliz. c. 5, which had reference only to creditors. The statutes of many states and the decisions of others, have treated retention as fraudulent against subsequent purchasers from the seller, as well as against creditors. On account of the variety of statutes and decisions, reference should be had to the law of the jurisdiction that is desired.

In early times delivery was necessary to transfer property between buyer and seller, but in England delivery is no longer necessary; L. R. 2 C. P. 38, 51. In this country, although the decisions are not uniform, and although the doctrine has been much confused with the related doctrine of retention of possession in fraud of creditors, it has generally been held that delivery is necessary to perfect a buyer's rights either against such purchasers or the seller's attaching creditors. In view of the many differences or matters of detail in the law on this subject in the several states, reference should be had to the law of the particular jurisdiction in question.

Documents of Title. See BILLS OF LADING; WAREHOUSE RECEIPTS; NEGOTIABLE INSTRUMENTS.

Contractual Obligations of the Parties. 1. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale. Delivery and payment, unless otherwise agreed are concurrent conditions under the Sales Act. Whether it is for the buyer to take possession of the goods, or the seller to send them to the buyer, is a question depending in each case on the contract between them. Apart from such, the place of delivery is the seller's place of business, or if he does not have one, then his residence; Bliss Co. v. Gas Light Co., 149 N. Y. 300, 43 N. E. 859; but in case of specific goods which, to the knowledge of the parties, at the time the bargain was made, were in some other place, then that place is the place of delivery; Hatch v. Oil Co., 100 U. S. 124, 25 L. Ed. 554. 2. If goods are to be sent to the buyer and no time is specified, then they must be sent within a reasonable time. 3. If the goods are in the hands of a third party, the seller fulfills his obligation to deliver when the third party acknowledges to the buyer that he holds the goods on his behalf; but as against all others than the seller, the buyer shall be regarded as having received delivery from the time when such third person has notice of the sale. Where the seller is under a contract to deliver a specified quantity of goods, and tenders a smaller quantity, the buyer may reject the tender; Cleveland Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Inman, Akers & Inman v. Elk Cotton Mills, 116 Tenn. 141, 92 S. W. 760. The buyer may, however, accept the offer, though defective; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. Where the seller delivers or offers to deliver a larger quantity than ordered or contracted for, it may conceivably be supposed that the seller is making his offer merely in lieu of the smaller quantity, and to make sure of the sufficiency of the offer, but not expecting to be paid for more than the order or contract required. In such a case the buyer would ordinarily have no just ground of objection; Shrimpton & Sons v. Warmack, 72 Miss. 208, 16 South. 494. But if more than a slight difference exists, then this must be regarded as a new offer by the seller. The buyer may accept the goods or the buyer may separate from the goods sent such a quantity as was ordered or contracted for, and reject the rest; Rommel v. Wingate, 103 Mass. 327; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270. The buyer may, however, reject the offer altogether; Barton v. Kane, 17 Wis. 37, 84 Am. Dec. 728; Norrington v. Wright, 115 U. S. 188, 205, 6 Sup. Ct. 12, 29 L. Ed. 366. The preceding rules may be controlled by custom or agreement.

See DIVISIBLE CONTRACTS; BREACH; PERFORMANCE.

Where the seller is under a contract to sell goods to the buyer and ship them to him, usually the seller has thereby fulfilled all his obligations under the contract, but where bills of lading are issued by the carrier, the question is necessarily affected by the rules governing such documents. See BILLS OF LADING.

Buyer's rights. 1. Right to examine the goods. The buyer is entitled to examine the goods in order to decide whether he will become owner, and until the examination is completed, or waived, the property will not pass; McNeal v. Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441. A refusal on the part of the seller to allow opportunity for inspection justifies the buyer in refusing to fulfill the contract; Charles v. Carter, 96 Tenn. 607, 36 S. W. 396.

Where, by the terms of the bargain, the property was to pass before delivery to the buyer, "the buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract; Brigham v. Hibbard, 28 Ore. 386, 388. Where the property is transferred and the goods paid for without opportunity for inspection, in such cases the right of inspection is that of a condition subsequent, enabling the buyer to

return the goods of which he has already become owner, and to recover money which he has already paid; Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243. Where goods are taken into the buyer's possession and examination is deferred for his convenience until an indefinite time in the future, title passes, subject to the right of the buyer to throw back the title if the goods are not what the bargain required; Doane v. Dunham, 79 Ill. 131. If it is necessary, in order to determine whether goods conform to the contract or order, the buyer may test them even though the test involves the destruction of a portion of the goods; Lucy v. Monflet, 5 H. & N. 229; Philadelphia Whiting Co. v. Lead Works, 58 Mich. 29, 24 N. W. 881. A reasonable time is allowed for inspection but if the buyer fails to inspect them, he thereby waives the condition, and is thereafter to be treated as having assented to take or keep title to the goods. Since it is the duty of the seller to afford opportunity for examination, it would seem that the seller must bear the expense of affording such opportunity, but the expense of the inspection itself is another matter. The buyer need not inspect unless he likes, and if he chooses to do so he must bear the cost; Lincoln v. Gallagher, 79 Me. 189, 8 Atl. 883. If on inspection, however, it appears that the goods were not what the contract called for, it would seem to be a proper element of damage in an action against the seller for breach of his contract that reasonable expense had been incurred in examining the goods and testing their insufficiency. There are many decisions to the effect that a carrier must allow the buyer a reasonable opportunity to inspect them, and this right of inspection is a condition precedent to the obligation to pay freight; Old Colony R. Co. v. Wilder, 137 Mass. 536; Sloan v. R. Co., 126 N. C. 487, 36 S. E. 21; Union R. R. & Transp. Co. v. Riegel, 73 Pa. 72. The place of inspection is *prima facie* the place where the goods are delivered to the buyer; Holt v. Pie, 120 Pa. 425, 440, 14 Atl. 389. By the Sales Act, the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. But the acceptance of the goods does not indicate a release of liability for defective performance; Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Frith v. Hollan, 133 Ala. 583, 32 South. 494, 91 Am. St. Rep. 54; Best v. Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570. However, in some jurisdictions, acceptance of title waives right of damages for inferior quality; Staiger v. Soht, 191 N. Y. 527, 84 N. E. 1120; Miller v. Moore, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; Jones v. McEwan, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399.

See RESCISSION.

Rights of the seller. If an unpaid seller retains both title and possession of the goods, there can be no question as to his legal capacity to deal effectively with them. It is fundamental that unless the buyer and seller make a contrary agreement, the seller is entitled to the price at the same time that he transfers possession of the goods. Accordingly the seller always has a lien on the goods which he sells, until payment or tender of the price, unless the terms of the bargain indicate a contrary agreement. The various terms which indicate a contrary agreement may all be summed up in the single expression of sale on credit. But even where the parties agree upon a sale on credit, the seller's lien may revive, as for instance where the buyer has failed to take possession of the goods until the term of credit has expired and the price becomes due; Leahy v. Lobdell, 80 Fed. 665, 26 C. C. A. 75. The insolvency of the buyer also revives the lien of the seller, even though the time for payment of the price has not yet arrived; McElwee v. Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Wanamaker v. Yerkes, 70 Pa. 443. When part of the goods are delivered the seller has a lien upon the remainder for whatever portion of the price is unpaid; Ware River R. R. Co. v. Vibbard, 114 Mass. 447, 458; Williams v. Moore, 5 N. H. 235. The lien is lost by delivery to the buyer; Thompson v. Conover, 32 N. J. L. 466; or to an agent or bailee for the buyer; Schmertz & Blakely v. Dwyer, 53 Pa. 335, 338; or where the goods are already in the possession of the buyer at the time of the bargain; 12 A. & E. 632. The seller may waive his lien either by express agreement to that effect or by such conduct as estops him from asserting it. See ESTOPPEL.

As to seller's right to stoppage in transitu, see STOPPAGE IN TRANSITU; BILLS OF LADING.

Resale by the seller. The well recognized doctrine in the United States is thus stated in Tuthill v. Skidmore, 124 N. Y. 148, 153, 26 N. E. 348: "When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of any express power, the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu* or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a pur-

chaser with a good title; Dustan v. McAndrew, 44 N. Y. 72. His right is very nearly that of a pledgee, with power to sell at a private sale in case of default; the vendee having become insolvent and refused payment of the notes given for the purchase price of the property which remained in the vendor's possession, the vendor has a right to retain it as security, for the lien was revived as against the vendee and his attaching creditor; in accord, Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394; Arnold v. Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357. As to the manner in which the sale should be made, the law is satisfied with a fair sale made in good faith according to established business methods, with no attempt to take advantage of the vendee; Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; and in every case it is a question of fact whether the resale complies with this requirement; *id.* In some cases it has been held that in order to bind the buyer by a resale, the seller must have given notice of his intention to make a resale; Ingram v. Wackernagel, 83 Ia. 82, 48 N. W. 998; Waples v. Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 722; but by the weight of authority there is no such absolute requirement; Ullmann v. Kent, 60 Ill. 271; Redmond v. Smock, 28 Ind. 365; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. A resale of the goods involves an assertion by the seller that his obligation is terminated. The seller has the right to resell when the buyer is in default, and such default must be of an essential or material character; his default generally consists in failure to take the goods and pay for them. However, the delay of a day or an hour in a mercantile contract is not always fatal, and, generally, if the buyer's default consists merely in delay, the seller must wait a reasonable time before reselling the goods. What is a reasonable time will vary accordingly to the nature of the goods and the circumstances of the case. If goods are perishable, or of rapidly fluctuating value, the reasonable time will be very short. The seller may charge, in his account against the buyer, all reasonable expenses occurred in making the resale; Hill v. McKay, 94 Cal. 5, 29 Pac. 406. He cannot, however, make a charge for his own services in connection with the resale; Penn v. Smith, 93 Ala. 476, 9 South. 609; Gehl v. Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666. If the resale is for a higher price than that for which the original buyer was bound, the seller has the right to keep the profit; Warren v. Buckminster, 24 N. H. 336. This is expressly so provided in the Sales Act.

Rescission by the seller. "The seller, upon the buyer's default, whether the latter is insolvent or not, and whether his conduct is such as to show a settled determination to repudiate the contract or not, may, although title has passed to the buyer, elect to keep the property as his own and recover damages for the buyer's breach; Mechem, Sales, § 1681. By the Sales Act: 1. An unpaid seller having a right of lien or having stopped the goods *in transitu*, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in making payments for an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of contract or sale. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

When goods are subject to a legal lien, as they are when an unpaid seller is in possession of them, a subsequent buyer can acquire only such right as the original buyer, from whom he bought them, had; Keeler v. Goodwin, 111 Mass. 490; Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899.

Generally there can be no doubt that an unpaid seller may choose any of the remedies against the goods which the law allows; namely, a right to hold them, to resell them on account of the buyer, or to resume the property in the goods.

Remedies of the seller on the contract. Where the property in the goods has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Doremus v. Howard, 23 N. J. L. 390. The general rule of the English law and of many of the states denies an action for the price unless the property has passed; Moody v. Brown, 34 Me. 107. 56 Am. Dec. 640; McCormick Harvesting Machine Co. v. Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; Puritan Coke Co. v. Clark, 204 Pa. 556, 54 Atl. 350; American Hide & Leather Co. v. Chalkley, 101 Va. 458, 463, 44 S. E. 705. If the reason why the property in the goods has not passed to the buyer is because the buyer wrongfully refused to take title when offered to him, the seller, according to the weight of authority, may recover the full purchase price; Kinkead v. Lynch, 132 Fed. 692; Ames v. Moir, 130 Ill. 582, 22 N. E. 535; Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612; Gordon v. Norris, 49 N. H. 376; Van

Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Haynes v. Brown, 18 Okl. 389, 89 Pac. 1124. Some jurisdictions restrict the application of this doctrine to cases where the goods contracted for are of a peculiar kind, not readily salable on the market and as to which, therefore, a market price cannot readily be fixed; River Spinning Co. v. Atlantic Mills, 155 Fed. 466; Black River Lbr. Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Ballentine v. Robinson, 46 Pa. 177. Where the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract; Krebs Hop Co. v. Livesley, 51 Or. 527, 92 Pac. 1084; but it is a defense to such an action that the seller at any time before judgment has manifested an inability to perform the contract or sale on his part or an intention not to perform it, such as where he becomes insolvent; Lennox v. Murphy, 171 Mass. 370, 373, 50 N. E. 644; Pardee v. Kanady, 100 N. Y. 121, 2 N. E. 885; Lancaster Bank v. Huver, 114 Pa. 216, 6 Atl. 141; or makes a voluntary transfer to a third person of the property; Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787; Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229, 86 Am. St. Rep. 735; or a repudiation; Ripley v. McClure, 4 Ex. 345.

Conditional sales present the only class of cases where it is at all usual for the buyer to agree to pay the price before he acquires title to the property. The buyer, relying on his possession of the goods as sufficient to secure him for such portion of the price as he may pay before the property passes to him, is content to pay part of the price in advance. It is generally provided in such contracts that on default of the buyer, the seller may reclaim possession of the goods, and even in the absence of such a provision, it has been held to be implied; Ryan v. Wayson, 108 Mich. 519, 66 N. W. 370. If the seller exercises his right to reclaim the goods, it is generally held an election to rescind the contract, and thereafter an action for the price or any unsatisfied balance of it, is not allowed; Aultman & Co. v. Olson, 43 Minn. 409, 45 N. W. 852; Kelley Springfield Road Roller Co. v. Schlimme, 220 Pa. 413, 69 Atl. 867, 123 Am. St. Rep. 707. A seller should be allowed all the means that he has contracted for in order to get the price of the goods, and most courts do not compel the seller to account for any payment which he has received if he reclaims the goods because of the buyer's default; Fleck v. Warner, 25 Kan. 492; Lorain Steel Co. v. St. Ry. Co., 187 Mass. 500, 73 N. E. 646; Morgan v. Kidder, 55 Vt. 367. However, some cases hold that if the contract does not provide for the forfeiture of such payments as have been made before default, they may be recovered by the buyer, with only such deduction as is fair compensation for the use of the goods; Hill v. Townsend, 69 Ala. 286; Pierce v. Staub, 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N. S.) 785, 112 Am. St. Rep. 163; Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79. And a few cases have also held that in an action brought to reclaim possession, the seller must either tender the portion of the price which has been paid, subject to proper reduction for temporary use, or that a money judgment will be rendered in which an equitable reduction is made from the value of the goods; Hays v. Jordan & Co., 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 N. E. 1033.

If the buyer, without lawful excuse, fails to accept goods which he agreed to buy, he is liable on ordinary principles of contract for this breach of obligation. The amount of the plaintiff's recovery in such an action should be such a sum of money as will put him in as good a position as he would have been in had the defendant performed his legal obligation.

As to the effect of repudiation before the time for performance, see ANTICIPATORY BREACH; BREACH; PERFORMANCE.

Rescission by the seller. When the goods have not been delivered, and the buyer has repudiated the contract or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach, the seller may totally rescind the contract or sale by giving notice of his election so to do to the buyer. It will generally be more favorable for a seller, if the buyer makes default, not to rescind the contract, but merely to rely on such default as his own excuse for not performing and sue the buyer for his default on the contract. Though the seller who has elected, for due cause, to rescind a contract, cannot thereafter sue upon it, he is entitled to recover the value of whatever he has delivered to the buyer by invoking the principles of *quasi*-contract. See QUASI-CONTRACT.

Remedies of the buyer. Where the buyer has fully performed all his own obligations under the contract which are precedent or concurrent with the seller's obligation to deliver the goods, and the property in the goods has passed to the buyer, then upon a failure to deliver, the seller is guilty of both a tort and a breach of contract, for he is detaining or converting without just excuse the property which belongs to the buyer, and he is also violating his contractual duty as seller. See CONVERSION; TROVER.

The amount of the buyer's recovery for the seller's failure to deliver the goods when the property has passed, whether he sues in contract or in tort, is *prima facie* the market value of the goods at the time and place when delivery should have been rendered;

and if the price has been paid, such is the recovery actually allowed; Deere v. Lewis, 51 Ill. 254; Hill v. Smith, 32 Vt. 433. The ordinary rule is that of confining the plaintiff's damages to the value of the goods at the time of the defendant's breach of duty, but it has often been urged that the value of the goods at the time of the wrongful conversion or refusal to deliver may not fully compensate the buyer for the wrong done him. Accordingly, in some jurisdictions, especially in regard to the sale of stocks and other articles of rapidly fluctuating value, the rule has been suggested that the plaintiff ought to receive damages based on the highest market price up to the time of trial; Wright v. Bank, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356. However, the United States Supreme Court qualified the rule by allowing only the highest intermediate value up to such time after the owner has received notice of the conversion as is reasonably needed to enable him to replace the converted property; Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658.

Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is identical with that of the seller where the buyer refuses acceptance, which has been considered *supra*. Where the seller repudiates and makes material default, the buyer may rescind the contract and recover the price or any part of it that he may have paid; 3 Bing. 724.

Courts of equity have very closely restricted their jurisdiction in regard to the specific performance of contracts for the sale of personal property, and it has been held that for breach of contracts for the sale of goods, damages are, as a rule, an adequate remedy. In a few exceptional cases specific performance has been granted, as for slaves; Womack v. Smith & Tinsley, 11 Humph. (Tenn.) 478, 54 Am. Dec. 51; works of art; Falcke v. Gray, 4 Drew. 651; valuable documents of various kinds; McMullen v. Vanzant, 73 Ill. 190; Dock v. Dock, 180 Pa. 14, 36 Atl. 411, 57 Am. St. Rep. 617. By the Sales Act, where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit on the application of the buyer, direct that the contract shall be performed specifically without giving the seller the option of retaining the goods on payment of damages. See EQUITY; SPECIFIC PERFORMANCE.

Remedies of the buyer for breach of warranty by the seller. The buyer may at his election keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution of the price; Bradley v. Rea, 14 Allen (Mass.) 20; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414; or keep the goods and maintain an action or counterclaim for damages; or refuse to accept the goods and maintain an action for the breach of warranty; or rescind the contract or sale; Hodge v. Tufts, 115 Ala. 366, 22 South. 422; Upton Mfg. Co. v. Huiske, 69 Ia. 557, 29 N. W. 621; Horner v. Parkhurst; 71 Md. 110, 17 Atl. 1027; Byers v. Chapin, 28 Ohio St. 300; Optenberg v. Skelton, 109 Wis. 241, 85 N. W. 356; but, *contra*, the buyer is denied any right of rescission of an executed sale for breach of warranty in Woodruff v. Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33; Wulschner v. Ward, 115 Ind. 219, 222, 17 N. E. 273; Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; Eshleman v. Lightner, 169 Pa. 46, 32 Atl. 63; Hulet v. Achey, 39 Wash. 91, 80 Pac. 1105. Not simply in regard to rescission for breach of warranty but in regard to rescission of contracts generally, it is the law that the party seeking to rescind cannot do so if he has obtained a benefit under the contract which he cannot restore; Wald's Pollock, Contracts (3d Ed.), 342. See RESCISSION.

The buyer must act promptly with reference to the election of his remedies which are mutually exclusive, for if the buyer elects the remedy of rescission he is thereby precluded from bringing an action for damages; Mundt v. Simpkins, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670. The general measure of damage for breach of warranty of quality is the difference between the value of the article actually furnished the buyer and the value the article would have had if having the qualities which it was warranted to have; McDonald v. Kansas City Bolt Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110. In some cases the buyer suffers special damage far exceeding the value of the goods promised him, and if the consequential damages thus caused are natural consequences of the breach of warranty, the plaintiff is generally allowed to recover them; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810. The Sales Act makes no distinction in regard either to remedies or the measure of damages for the breach of warranty of title and the breach of warranty of quality.

Considerable difference of decision exists in regard to warranties of title. Many jurisdictions hold that no right of action accrues to the buyer until his possession has been disturbed; Wanser v. Messler, 29 N. J. L. 256; Krumbhaar v. Birch, 83 Pa. 426; Barnum v. Cochrane, 143 Cal. 642, 77 Pac. 656. Even jurisdictions which do not deny the right of action often hold that while the buyer retains undisturbed possession, he can only recover nominal damages; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; O'Brien v. Jones, 91 N. Y. 193.

Sales in Bulk. It is within the police powers of a state to regulate sales of entire

stocks in trade of merchants so as to prevent fraud on innocent creditors, and a state statute prohibiting such sales except under reasonable conditions as to previous notice is not unconstitutional under the due process and equal protection clauses of the 14th Amendment; Lemieux v. Young, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295, affirming Young v. Lemieux, 79 Conn. 434, 65 Atl. 436, 600, 20 L. R. A. (N. S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452. The court, by White, J., considered this view as "too clear to require discussion," and quoted at length from the dissenting opinion of Vann, J., in Wright v. Hart, 182 N. Y. 350, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263. Such acts have been upheld in Squire & Co. v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; Walp v. Mooar, 76 Conn. 515, 57 Atl. 277; Neas v. Borches, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; McDaniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889. Acts declaring such sales to be presumptively fraudulent were assumed to be valid in Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392, and Hart v. Roney, 93 Md. 432, 49 Atl. 661. A contrary view was taken in Miller v. Crawford, 70 Ohio 207, 71 N. E. 631, 1 Ann. Cas. 558; Sol Block & Griff v. Schwarz, 27 Utah 387, 76 Pac. 22; Williams v. Bank, 15 Okl. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

Such acts do not apply to a sale by one partner to another; Taylor v. Folds, 2 Ga. App. 453, 58 S. E. 683; Fairfield Shoe Co. v. Olds, 176 Ind. 526, 96 N. E. 592; nor to giving a chattel mortgage on the goods; Hannah & Hogg v. Brewing Co., 149 Mich. 220, 112 N. W. 713, 12 L. R. A. (N. S.) 178, 119 Am. St. Rep. 674, 12 Ann. Cas. 344. They do apply to a sale to a creditor to pay his debt; Sampson v. Grocery Co., 127 Ga. 454, 56 S. E. 488, 9 Ann. Cas. 331. Such sale is not fraudulent in law; Gorham v. Buzzell, 178 Fed. 596. It is voidable only; Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941.

Sale to Arrive. A sale of goods to arrive per Argo, or on arrival per Argo, is construed to be a sale of goods subject to a double condition precedent: that the ship arrives and the goods are on board; 5 M. & W. 639. In such case, title to the goods does not pass till their arrival; Benedict v. Field, 16 N. Y. 597.

Sale for Illegal Purpose. A sale of goods for the purpose of smuggling is invalid; 3 Term 454; but not when a foreigner sold the goods abroad having no concern in the smuggling; 1 Cowp. 34. The mere knowledge of the vendor that the goods sold would be used for an illegal purpose does not render the sale illegal; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154. See Benj. Sales, § 511, n.

Where a buyer is insolvent and has no intention to pay for goods, the sale may be avoided by the seller; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Wright v. Brown, 67 N. Y. 1; but the mere knowledge on the buyer's part that he will be unable to pay for them, will not alone form a fraudulent intent; Tiedem. Sales, § 170; there must be other facts of a suspicious nature, such as re-selling them at a reduced price; *id.* In Pennsylvania, it is not enough to show that the buyer was insolvent and did not intend to pay for the goods; some artifice must be shown; Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51.

A Massachusetts act of 1884 makes it a crime for any one to sell any property under representation that anything other than what is specifically stated to be the subject of the sale is to be delivered, etc., as a part of the transaction. In a case under this act it appeared that a retail dealer in tobacco offered to each purchaser a selection of a photograph among a number exposed for his choice. A conviction under this act was set aside upon the ground that what was sold in this case was specifically understood to be the subject of the sale. In a case under a like act in New York, the buyer purchased coffee and received a present as a part of the transaction. It appeared that the presents were lying in full view of the purchasers who could make their choice if they bought as much as two pounds of coffee. The act was held to be unconstitutional; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465. A Maryland act was held to be unconstitutional only so far as related to transactions which were dependent upon chance; Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268. See LOTTERY.

A New York act (1898) provides that a seller who publicly advertises statements with respect to quantity, quality, value, price, method of production, or manufacture, which are untrue or calculated to mislead, shall be guilty of a misdemeanor.

As to the interpretation of the Sales Act, see Williston on Sales, p. 1031 *et seq.*

See Williston on Sales, where the whole subject is very ably treated.

See ACCEPTANCE; CONTRACT; DELIVERY; PARTIES; STOPPAGE IN TRANSITU; WARRANTY; EARNEST; FRAUDS, STATUTE OF; CONSIDERATION; JUDICIAL SALES; PRICE; GOODS, WARES AND MERCHANDISE; MISREPRESENTATION; FRAUD; DECEIT; MISTAKE; NOTE OR MEMORANDUM; SAMPLE; SEEDS; MORTGAGE; ROLLING STOCK; TIMBER; SATISFACTION, CONTRACTS TO.

Real Estate. The above rules apply to sales of personal property. The sale of real estate is governed by other rules. When a contract has been entered into for the sale of lands, the legal estate in such lands still re-

mains vested in the vendor, and it does not become vested in the vendee until he shall have received a lawful deed of conveyance from the vendor to him; and the only remedy of the purchaser at law is to bring an action on the contract and recover pecuniary damages for a breach of the contract. In equity, however, after a contract for the sale, the lands are considered as belonging to the purchaser, and the court will enforce his rights by a decree for a specific performance; and the seller will be entitled to the purchase-money; Wms. R. P. 127. See SPECIFIC PERFORMANCE.

In general, the seller of real estate does not guarantee the title; and if it be desired that he should, this must be done by inserting a warranty to that effect.

Section 3 of the statute of frauds provides that no interest in land shall be created unless by deed or note in writing signed by the party or his agent, authorized by writing, or by act of operation of law.

The question whether sales of standing timber involves any interest in land has been much mooted. The majority of cases seem to support the following propositions: 1. Where the vendor has expressly stipulated that the trees may remain standing on the land a given number of years if the purchaser elects. Here, as they derive more or less growth and increase from the soil, there is some reason to hold that the sale involves an interest in land. It has in fact been considered a sale, not only of the trees as they then are, but as they will be at the end of the stipulated period with all the additions to them subsequently acquired by the soil. See Vorebeck v. Roe, 50 Barb. (N. Y.) 302; Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173. 2. Where the trees are to stand for an indefinite time and to be severed solely at the pleasure of the buyer, the statute of frauds requires a written agreement. See Buck v. Pickwell, 27 Vt. 157.

Under the civil law, in a contract of sale the seller was not bound to make the buyer absolute master (*dominus*) of the thing sold, as he would have been in a stipulation. What he was bound to do was this: 1. To deliver the thing itself (*præstare, tradere*), to give free and undisturbed possession of it (*possessionem vacuam tradere*), and to give lawful possession of it (*præstare, licere habere*). 2. If the buyer was disturbed in his possession by the real owner (*evictio*), to recompense him for what was lost. 3. To secure the buyer against secret faults; if such faults were discovered, either compensation might be claimed by an *actio æstimatoria*, reducing the price to a greater or less amount, according as the seller had or had not knowledge of the defect, or at the option of the buyer, the contract might be rescinded by an action *actio redhibitoria*, and the thing returned (which was termed *redhibitio: redhibere est facere ut rursus habeat venditor quod habuerat*). Just. Inst. (8th Ed.) 365.

SALE-NOTE. A memorandum given by a broker to a seller or buyer of goods, stating the fact that certain goods have been sold by him on account of a person called the seller to another person called the buyer. Sale-notes are also called *bought and sold notes*. See BOUGHT NOTE.

SALE ON APPROVAL. See SALE.

SALE OR RETURN. Contracts of *sale or return* exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return; and the title passes to the purchaser subject to his option to return the property; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; upon return the title reverts (a condition subsequent); Tiff. Sales, 93. See SALE.

SALESMAN. One who solicited orders for weather strips, and superintended the placing thereof by workmen acting under his direction, was held a salesman within the bankrupt act, although the bankrupt paid the workmen and furnished the material and paid the solicitor the entire proceeds of the work, less the cost of wages and material and fifteen per cent. of the price; In re Roebuck Weather Strip & Wire Screen Co., 180 Fed. 497.

SALFORD HUNDRED COURT. A court in England, still existing, having civil jurisdiction. It is an inferior court of record.

SALIC or SALIQUE LAW. The name of a code of laws, so called from the Salians, a people of Germany who settled in Gaul under their king Pharamond.

The most remarkable law of this code is that which regards succession. *De terra vero salica nulla portio hæreditatis transit in mulierem, sed hoc virilis sextus acquirit; hoc est, filii in ipsa hæreditate succedunt:* no part of the salique land passes to women, but the men alone are capable of taking; that is, the sons succeed to the inheritance. This has always excluded women from the throne of France.

It dates almost certainly from the reign of Chlodwig (486–511). It was written in Latin. It consists largely of a tariff of offences and atonements, but is said to contain "a few precious chapters," and to be, through the Norman Conquest, one of the ancestors of English Law. Maitland, in 1 Sel. Essays in Anglo-Amer. L. H. 13. It is not a code, but a collection of Germanic folk laws. It was the custumal of the race which became overlords of half of Western Europe. See Hessels & Kern, Salic Law.

SALINE LAND. Land having salt deposits. To fourteen states congress has granted all the salt springs within them; to twelve,

a limited grant of them was made. Eighteen states have received no such grant; Montello Salt Co. v. Utah, 221 U. S. 452, 31 Sup. Ct. 706, 55 L. Ed. 810, Ann. Cas. 1912D, 633.

SALMANNUS. A sale-man, found in the Salic Law in the fifth century, who was a third person called in to complete the transfer of property. 12 Harv. L. Rev. 445, Law in Science, etc., by O. W. Holmes, Jr.

SALOON. A place of refreshment. Kitson v. Mayor of Ann Arbor, 26 Mich. 325. An apartment for a specified public use. Clinton v. Grusendorf, 80 Ia. 117, 45 N. W. 408; Ex parte Livingstone, 20 Nev. 282, 21 Pac. 322. In common parlance, the word is used to designate a place where intoxicating liquors are sold, and this restricted meaning may be given to saloons, where the context or other circumstances requires it; McDougall v. Giacomini, 13 Neb. 434, 14 N. W. 150; Dewar v. People, 40 Mich. 401, 29 Am. Rep. 545; Cahill v. Campbell, 105 Mass. 40; but it does not necessarily import a place where liquors are sold; Kitson v. Mayor of Ann Arbor, 26 Mich. 328; Early v. State, 23 Tex. App. 364, 5 S. W. 122. The word has a much broader meaning than dram shop. To constitute a saloon it is not necessary that ardent spirits should be offered for sale and that it should be a business requiring a license under the revenue laws of the state; Snow v. State, 50 Ark. 561, 9 S. W. 306. See LIQUOR LAWS.

SALT. See SALINE LANDS.

SALUTE. A coin made by Henry V., after his conquests in France.

In the army and navy an honor paid to a distinguished personage, when troops or squadrons meet, when officers are buried, or to celebrate an event or show respect to a flag and on many other ceremonial occasions. Cent. Dict.

Upon the arrival of a man of war in a foreign port the salutes and other ceremonials toward the port and its authorities are prescribed in full detail by the naval regulations. A ship of war entering a harbor or passing by a port or castle should pay the first salute except when the sovereign or his ambassador is on board, in which case the salute should be made first on the shore; Woolsey, Introd. Int. Law, 4th ed. § 85.

No salute is to be fired in honor of any nation, or official of any nation not formally recognized by the United States; Snow, Lect. Int. Law 70.

SALVAGE. A compensation given by the maritime law for service rendered in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake, where interstate or foreign commerce is carried on; Fretz v. Bull, 12 How. (U. S.) 466, 13 L. Ed. 1068.

A salvage service is a service which is voluntarily rendered to a vessel in need of assistance and is designed to relieve her from some distress or danger either present or to be reasonably apprehended, while a towage service is one which is rendered for the mere purpose of expediting her voyage without reference to any circumstances of danger; The Lowther Castle, 195 Fed. 604.

The property saved. The only proper subjects of salvage are vessels or ships used for the purpose of being navigated, and goods which at one time formed the cargoes of such vessels, whether found on board, or drifting, or cast on shore; [1897] A. C. 347. It has been held that there can be no salvage against a floating dry dock intended to be permanently moored to the shore; Cope v. Vallette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501; nor against coal barges on the Mississippi river, which were mere boxes without tackle, apparel, furniture, master, or crew, and which were sold with the coal or broken up for old lumber; Wood v. Two Barges, 46 Fed. 204; nor a floating structure intended to be moored alongside a wharf for carts containing refuse to drive over it to a dumping boat; Ruddiman v. A Scow Platform, 38 Fed. 158; nor a pile-driving machine erected on a floating platform; Pile Driver E. O. A., 69 Fed. 1005; nor a gas-float fifty feet long by twenty wide moored in a river to give light to vessels (not being a ship); [1897] A. C. 337; as to rafts of timber, *quære;* see *id.* Timber found drifting in deep water and out of control of the owners is a subject of salvage; Whitmire v. Cobb, 88 Fed. 91, 31 C. C. A. 395.

When a ship was almost becalmed on the high seas a floating chest was found and with but little trouble taken on board. It contained seventy doubloons. It was held that the finders were not entitled to the whole property, though there were no marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Hollingsworth v. Seventy Doubloons & Three Small Pieces of Gold, 19 Niles, Reg. 104; Fed. Cas. No. 6,620. See FINDER. Passengers' lives may be the subject of salvage services, by statute. See 55 Alb. L. J. 404.

A person who offers useful services to a vessel in distress without any previous contract, is a salvor; The Nebraska, 75 Fed. 598, 21 C. C. A. 448, 24 U. S. App. 559.

Salvage, after actual compensation for the services rendered, is a gratuity for the benefit of commerce, as an encouragement for like services and efforts; no amount of reward to owners and machinery will so stimulate efforts to save life and property as will moderate awards to master and crew who are the effective agents to set the machinery in motion; Compagnie Commerciale de Transport a Vapeur Francaise v. Charente

S. S. Co., 60 Fed. 921, 9 C. C. A. 292, 13 U. S. App. 662.

"Salvage consists (1) of an adequate compensation for the actual outlay of labor and expense made in the enterprise; and (2) of the reward as bounty allowed from motives of public policy, as a means of encouraging such exertions. In determining the amount of an award the leading considerations are: the degree of danger from which the rescue is made; value of the property saved; risk to the salvors; the value of property risked by salvors and the dangers to which it was exposed; the skill shown and the time and labor spent." The Rita, 62 Fed. 761, 10 C. C. A. 629, 23 U. S. App. 435.

Moral considerations and questions of policy enter largely into salvage cases; 2 Hagg. 3.

The peril. The peril from which property was saved must be real, not speculative merely; Talbot v. Seeman, 1 Cra. (U. S.) 1, 2 L. Ed. 15; 1 Ben. Adm. 166; but it need not be such that escape from it by any other means than by the aid of the salvors was impossible. It is sufficient that the peril was something extraordinary, something differing in kind and degree from the ordinary perils of navigation; Hennessey v. Versailles, 1 Curt. C. C. 353, Fed. Cas. No. 6365; The Independence, 2 Curt. C. C. 350, Fed. Cas. No. 7,014. See The Rumsey, 40 Fed. 909; Stone v. The Jewell, 41 Fed. 103. All services rendered at sea to a vessel in distress are salvage services; 1 W. Rob. 174; 3 *id.* 71. But the peril must be present and pending, not future, contingent, and conjectural; The Emulous, 1 Sumn. 216, Fed. Cas. No. 4,480; 3 Hagg. Adm. 344. It may arise from the sea, rocks, fire, pirates, or enemies; Talbot v. Seeman, 1 Cra. (U. S.) 1, 2 L. Ed. 15; or from the sickness or death of the crew or master; Robson v. Huntress, 2 Wall. Jr. 59, Fed. Cas. No. 11,971; 1 Swab. 84.

The saving. The property must be effectually saved; it must be brought to some port of safety, and it must be there in a state capable of being restored to the owner, before the service can be deemed completed; The Henry Ewbank, 1 Sumn. 417, Fed. Cas. No. 6,376; 1 W. Rob. 329, 406; The Angeline Anderson, 35 Fed. 796; The Golden Gate, 57 Fed. 661. The salvage services must be performed by persons not bound by their legal duty to render them; 1 Hagg. Adm. 227; 2 Spinks, Adm. 253. The property must be saved by the instrumentality of the asserted salvors, or their services must contribute in some certain degree to save it; Clarke v. The Dodge Healy, 4 Wash. C. C. 651, Fed. Cas. No. 2,849; Olc. 462; though, if the services were rendered on the request of the master or owner, the salvor is entitled to salvage though the services were slight and the property was saved mainly by a providential act; McGinnis v. The Pontiac, 5 McLean 359, 1 Newb. 130, Fed. Cas. No. 8,801; 2 W. Rob. 91; Allen v. The Canada, Bee 90, Fed. Cas. No. 219.

Towage services are sometimes the subject of compensation as salvage. Mere expediting the voyage of a vessel, by towing, is not salvage; but salvage was allowed in the case of a steamship who had broken her main shaft, but could sail fairly well, the weather also being favorable, in which condition she was towed ninety miles; 1 Spinks, A. & E. 169, said to be the extreme case; Kennedy, Civil Salvage 22; courts are liberal to such claims in respect of the amount of danger necessary to render towage a salvage source; *id.*

The assistance into port of an ocean steamer carrying passengers which was disabled by the loss of her propeller is a salvage service; The Roanoke, 209 Fed. 114.

The place. In England it has been held that the services must be rendered on the high seas, or, at least, *extra corpus comitatus*, but in this country it is held that the district courts of the United States have jurisdiction to decree salvage for services rendered on tide waters and on the lakes or rivers where interstate or foreign commerce is carried on, although *infra corpus comitatus;* Fretz v. Bull, 12 How. (U. S.) 466, 13 L. Ed. 1068; The A. D. Patchin, 1 Blatchf. 420, Fed. Cas. No. 87. Extinguishing a fire on a vessel in a dry dock is ground of salvage; The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907.

The amount. Some foreign states have fixed by law the amount or proportion to be paid for salvage services; but in England and the United States no such rule has been established. In these countries the amount rests in the sound discretion of the court awarding the salvage, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opere et labore*, the excess being intended, upon principles of sound policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266; 1 C. Rob. 312, n.; 3 *id.* 355; 3 Hagg. Adm. 95. But it is equally the policy of the law not to provoke the salvor's appetite of avarice, nor encourage his exorbitant demands, nor teach him to stand ready to devour what the ocean has spared; Hand v. The Elvira, Gilp. 75, Fed. Cas. No. 6,015. Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance and tend to augment the risk and loss of vessels in distress. 7 Notes of Cas. 579, Salvage viewed as a reward is not properly the subject of a binding contract in advance. Courts of admiralty fully examine into the circumstances of the service in the interest of the property saved, and award no more than a reasonable sum, and are not bound by the

amount agreed on beforehand; The Schiedam, 48 Fed. 923. But a salvage agreement for services to be performed on the high seas will not be set aside merely because only one of the contracting parties was at a disadvantage. But, if in addition to that circumstance, the sum required by the intending salvor appears to the court exorbitant, the agreement will be set aside as inequitable; [1891] P. 175. The amount is determined by a consideration of the peril to which the property was exposed, the value saved, the risk to life or property incurred by the salvors, their skill, the extent of labor or time employed, and the extent of the necessity that may exist in any particular locality to encourage salvage services; 3 Hagg. Adm. 121; The Henry Ewbank, 1 Sumn. 413, Fed. Cas. No. 6,376; The James T. Abbott, 2 Sprague 102, Fed. Cas. No. 7,202. An ancient rule of the admiralty allowed the salvors one-half of the property saved, when it was absolutely derelict or abandoned; but that rule has been latterly distinctly repudiated by the high court of admiralty and our supreme court, and the reward in cases of derelict is now governed by the same principles as in other salvage cases; 20 E. L. & E. 607; Post v. Jones, 19 How. (U. S.) 161, 15 L. Ed. 618. While there is no rule of giving salvors of a derelict a moiety, or other specific proportion of the value of the property saved, and the award is to be assessed as in other cases of salvage, still there are usually present three special elements which tend to increase the award: the high degree of danger to which the property is exposed; the difficulty of approaching a derelict vessel without any aid in boarding her; and the necessity of supplying men to steer her; [1897] Pr. Div. 59. But it is usual to give half of the value, and even seven-eighths have been given. See The Josephine, 2 Blatch. 323, Fed. Cas. No. 7,546.

Money found on an unknown dead body at sea, where the salvage involved no danger to vessels or crew, may be awarded one-half to the master and crew and the rest to the public administrator; Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552.

Risking life to save the lives of others is an ingredient in salvage service which will enhance the salvage upon the property saved; The Emblem, Davels 61, Fed. Cas. No. 4,434; 3 Hagg. Eccl. 84. No salvage was formerly due for saving life merely, unaccompanied by any saving of property; 1 W. Rob. 330; unless it was the life of a slave; Flinn v. The Leander, Bee 260, Fed. Cas. No. 4,870. But the saving of life in addition to property was held to increase the award of salvage on the property; Br. & L. 344. By statute 17 & 18 Vict. salvage was extended to the saving of life and the award therefor was given priority over other salvage. If the vessel is not of large enough value to pay the award, it is payable out of the Mercantile Marine Fund.

"It is the value of the property which is restored to the owner that is to be considered, and of which a proportion is to be awarded as salvage in salvage cases, and not the original value imperilled. The exact value of the property saved, when large, is but a minor element in computing salvage, and as it increases, the rate per cent. given is rapidly reduced." Compagnie Commerciale de Transport a Vapeur Francaise v. Charente S. S. Co., 60 Fed. 921, 9 C. C. A. 292, 13 U. S. App. 662.

Where part of a cargo saved consists of specie, it must bear its share of the common burden; The St. Paul, 86 Fed. 340, 30 C. C. A. 70; up to the time when it was removed, but not of the expense of getting the ship afloat after the specie was removed; The St. Paul, 82 *id.* 104. There is no distinction in the proportion of salvage charges against different parts of a cargo; 4 Asp. 385.

The fact that a vessel receives injuries in the course of salvage operations will tend to reduce the amount of compensation; The Haxby, 83 Fed. 715, 28 C. C. A. 33.

A salvage award will not be set aside as too large, unless so grossly excessive as to shock the conscience of the appellate court; The R. R. Rhodes, 82 Fed. 751, 27 C. C. A. 258.

The value of the service performed is not to be estimated in the light of subsequent events, but of the facts which seemed to surround it at the time; The Lowther Castle, 195 Fed. 604.

The property saved. Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit from the salvage service; Peters v. Warren Ins. Co., 1 Stor. 469, Fed. Cas. No. 11,034. *Qui sentit commodum sentire debet et onus.* It follows that salvage expenses incurred in saving ship, cargo, and freight in one common and continuous service are apportionable upon them all, according to their respective values; but expenses incurred for any one interest separately, or any two interests only, are chargeable wholly to it or to them; 2 W. Rob. 315; 7 E. & B. 523; Bedford Commercial Ins. Co. v. Parker, 2 Pick. (Mass.) 1, 13 Am. Dec. 388; Bevan v. Bank, 4 Whart. (Pa.) 301, 33 Am. Dec. 64; Nelson v. Belmont, 5 Duer (N. Y.) 310. No distinction can be made in the proportion of salvage charged against different portions of the cargo; The St. Paul, 82 Fed. 104; The St. Paul, 86 Fed. 340, 30 C. C. A. 70.

Goods of the government pay the same rate as if owned by individuals; U. S. v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694; but not the mails; Marv. Salv. 132. Salvage may be recovered from the United States government where imported goods upon which duties have been paid are saved from total loss, and where the government would have been obliged to return the duties, had the merchandise been wholly lost; U. S. v. Steamboat

Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987.

But, it is said, no proceedings *in rem* can be instituted against public ships or stores on them, or against property of the state on a private ship; though the question is not always raised, and the British Admiralty usually appeals and submits to the judgment of the court in the case of claims for saving public stores, and foreign governments have sometimes requested the British Admiralty to award as an arbitrator in respect of their property when salved; Kennedy, Civil Salv. 61. See 5 P. D. 197, where the subject is reviewed. Vessels of war belonging to a foreign neutral power cannot be arrested in our ports for salvage; The Exchange v. M'Faddon, 7 Cra. (U. S.) 116, 3 L. Ed. 287.

Salvage is not allowed on the clothing left by the master and crew on board the vessel which they abandon, but this should be returned free of charge; The Rising Sun, 1 Ware (378) 385, Fed Cas. No. 11,858; or for saving from a wreck bills of exchange or other evidences of debt, or documents of title; The Amethyst, Daveis, 20, Fed. Cas. No. 330.

The wearing apparel of passengers is not liable for salvage services; 3 A. & E. 490; this extends only to apparel with the usual changes for the voyage and not to trunks in the hold; Heye v. North German Lloyd, 36 Fed. 705.

Wreck was formerly limited to those portions of ship or cargo which are stranded. But by the Merchant Shipping Act, 1854, it includes jetsam and derelict, and, in salvage law, it includes any part of a ship or cargo aground or afloat; Kennedy, Civil Salv. 53.

The right to salvage for saving life depends upon something—ship, cargo, or freight—having been preserved; 8 P. D. 117; and such salvage can be recovered only against the party to whom the property belonged; 15 P. D. 146; *i. e.* from the ship if the cargo was lost; or from the cargo, if the ship was lost. The value of the property salved is the limit of recovery; 2 P. D. 157. Life salvors may claim against the property salved, although its preservation was not due to salvage services; 2 P. D. 145. Taking passengers from a burning vessel at sea is not the subject of salvage under the British act; L. R. 3 A. & Eccl. 487.

The liability to pay salvage is not confined to the actual legal owners of the property saved, but extends to those who have an interest in the property, and whose interests have been saved by the placing of the property itself in security; 15 Prob. Div. 142.

A tug being partly in fault in colliding with a schooner, is not entitled to salvage for towing the schooner into port; The Minnie C. Taylor, 52 Fed. 323; The Pine Forest, 129 Fed. 700, 64 C. C. A. 228, 1 L. R. A. (N. S.) 873.

Bar to salvage claim. An express explicit agreement, in distinct terms, to pay at all events, whether the property shall be saved or not, a sum certain, or a reasonable sum, for work, labor, and the hire of a vessel in attempting to save the property, is inconsistent with a claim for salvage; and when such agreement is pleaded in bar and proved, any claim for salvage will be disallowed; The Independence, 2 Curt. C. C. 350, Fed. Cas. No. 7,014; 2 W. Rob. 177. See The Excelsior, 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75. An agreement fairly made and fully understood by the salvors, to perform a salvage service for a stipulated sum or proportion to be paid in the event of a successful saving, does not alter the nature of the service as a salvage service, but fixes the amount of compensation. But such an agreement will not be binding upon the master or owner of the property unless the court can clearly see that no advantage has been taken of the party's situation, and that the rate of compensation agreed upon is just and reasonable; The Emulous, 1 Sumn. 207, Fed. Cas. No. 4,480.

A contract for salvage of a stranded vessel will not be set aside unless the master has been fraudulently induced to sign, or the amount is unreasonable, even if after the contract is made the amount of work necessary to free the ship is grossly disproportioned to the stipulated contract price; The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413. A custom in any particular trade that vessels shall assist each other without claiming salvage is legal, and a bar to a demand for salvage in all cases where it properly applies; 1 W. Rob. 440. See *supra.*

Forfeiture or denial of salvage. Embezzlement of any of the goods saved works a forfeiture of the salvage of the guilty party; The Boston, 1 Sumn. 328, Fed. Cas. No. 1,673; and, in general, fraud, negligence, or carelessness in saving or preserving the property, or any gross misconduct on the part of the salvors in connection with the property saved, will work a total forfeiture of the salvage, or a diminution of the amount; 1 W. Rob. 497; 3 *id.* 122; 2 E. L. & E. 554; Tome v. Dubois, 6 Wall. (U. S.) 548, 18 L. Ed. 943; [1892] Prob. 58, 70. Salvors rescuing a derelict property are bound to care for its preservation while they retain possession; Serviss v. Ferguson, 84 Fed. 202, 28 C. C. A. 327.

A rescuing vessel which saves an abandoned ship, which is found in a sinking condition surrounded by a sea of ice, may use a part of her cargo and supplies to put her in a seaworthy condition in order to tow her to port; The Catherine Sudden, 1 Alaska, 607.

Distribution. The distribution of salvage among the salvors, like the amount, rests in the sound discretion of the court. In general, all persons, not under a pre-existing obligation of duty to render assistance, who have contributed by their exertions to save

the property, and who have not forfeited their rights by their misconduct, are entitled to share in the salvage, as well those who remain on board the salvor vessel in the discharge of their duty, but are ready and willing to engage in the salvage enterprise, as those who go on board and navigate the wreck; The Centurion, 1 Ware (477) 483, Fed. Cas. No. 2,554; 2 Dods. 132; 2 W. Rob. 115; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266. The apportionment between the owners and crew of the salvor ship depends upon the peculiar circumstances of each case: such as, the character, size, value, and detention of the vessel, its exposure to peril, and like considerations, and the number, labor exposure, and hazard of the crew. In ordinary cases, the more usual proportion allowed the owners of a salvor sail-vessel is one-third; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266; The Nathaniel Hooper, 3 Sumn. 579, Fed. Cas. No. 10,032. The owner of a steam-vessel, if of considerable value, is often allowed a larger proportion; Marv. Wreck & Salv. 247. The master's share is usually double that of the mate, and the mate's double that of a seaman, and the share of those who navigate the derelict into port, or do the labor, double that of those who remain on board the salvor vessel. But these proportions are often varied according to the circumstances, so as to reward superior zeal and energy and discourage indifference and selfishness; 3 Hagg. Adm. 121. See Abb. Shipp., 13th Ed. 1021.

While the owner of a vessel which has performed salvage service may settle for the vessel's share in the compensation, he cannot exclude the crew from obtaining theirs; The Lowther Castle, 195 Fed. 604.

In marine insurance, the salvage is to be accounted for by the assured to underwriters in an adjustment of a total or salvage loss, or assigned to the underwriters by abandonment or otherwise; 2 Phill. Ins. § 1726. And so, also, the remnant of the subject insured or of the subject pledged in bottomry, and (if there be such) in that of a fire insurance, and of the interest in the life of a debtor (if so stipulated in this case), is to be brought into the settlement for the loss in like manner; Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. 541; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057.

The liability to pay salvage is not confined to the actual legal owners of the property saved, but it extends to all those who have an interest in the property and whose interests have been saved; 15 Prob. Div. 142.

Provision is made in R. S. § 4652 for salvage for the recapture of vessels or other property captured by any force hostile to the United States, before the capture. See the next titles; WRECK; RECAPTURE; FINDER.

SALVAGE CHARGES. In Insurance. All those costs, expenses, and charges necessarily incurred in and about the saving and preservation of the property imperilled, and which, if the property be insured, are eventually borne by the underwriters. Stevens, Av. c. 2, § 1.

SALVAGE LOSS. That kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. It also means, among underwriters and average-adjusters, a mode of settling a loss, under a policy, in cases where the goods have been necessarily sold at a port short of the port of destination, in consequence of the perils insured against. In such cases, though the property be not abandoned to the underwriter, the principle of abandonment is assumed in the adjustment of the loss. The underwriter pays a total loss. The net proceeds of the sale of the goods, after deducting all the expenses, are retained by the assured, and he credits the underwriter with the amount; 2 Phill. Ins. § 1480.

SALVOR. In Maritime Law. A person who saves property or rescues it from impending peril on the sea or when wrecked on the coast of the sea, or, in the United States, on a public navigable river or lake where interstate commerce is carried on, and who is under no pre-existing contract or obligation of duty by his relation to the property to render such services. 1 Hagg. Adm. 236; Williamson v. The Alphonso, 1 Curt. C. C. 378, Fed. Cas. No. 17,749.

In general the crew cannot claim as salvors of their own ship or cargo, they being under a pre-existing obligation of duty to be vigilant to avoid the danger, and when in it to exert themselves to rescue or save the property, in consideration of their wages merely; 1 Hagg. Adm. 236; The Two Catherines, 2 Mas. C. C. 319, Fed. Cas. No. 14,288. But if their connection with the ship be dissolved, as by a capture, or the ship or cargo be voluntarily abandoned by order of the master, *sine spe revertendi aut recuperandi*, such abandonment taking place *bona fide* and without coercion on their part, and for the purpose of saving life, their contract is put an end to, and they may subsequently become salvors; 16 Jur. 572; Williams v. Suffolk Ins. Co., 3 Sumn. 270, Fed. Cas. No. 17,738; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266. A passenger; 3 B. & P. 612, n.; Candee v. Sixty-Eight Bales Cotton, 48 Fed. 479; The Brabo, 33 Fed. 884; a pilot; Hobart v. Drogan, 10 Pet. (U. S.) 108, 9 L. Ed. 363; Lloyd's agent; 3 W. Rob. 181; an agent; [1892] Prob. 366; official persons; Le Tigre, 3 Wash. C. C. 567, Fed. Cas. No. 8,281; 1 C. Rob. 46; officers and crews of naval vessels; Robson v. The Huntress, 2 Wall. Jr. 67, Fed. Cas. No. 11,971; 1 Hagg. Adm. 158; coast guards; Bened. Adm. § 300 *a*; may all become salvors, and, as such, be entitled to salvage for performing services

in saving property, when such services are not within or exceed the line of their proper official duties. But it is said that neither crew, pilot, ship's agent, nor public servants can, under ordinary circumstances, be salvors; Kennedy, Civil Salv. 25; nor can passengers; 2 Hagg. 3.

The fact that a part owner in a salving ship also has an interest in the salved property, will not prevent him from sharing in the salvage; A Lot of Whalebone, 51 Fed. 916. An incorporated wrecking and salvage company may be granted salvage awards as liberally as natural persons so engaged; The Kimberley, 40 Fed. 301. Persons rendering salvage service have a lien upon the property saved; Eads v. The Bacon, Fed. Cas. No. 4,232; Sturtevant v. The George Nicholaus, Fed. Cas. No. 13,578; Taylor v. The Cato, Fed. Cas. No. 13,786; Central Stock Yard & Transit Co. v. Mears, 89 App. Div. 452, 85 N. Y. Supp. 795; The Sabine, 101 U. S. 384, 25 L. Ed. 982. The service creates a property in the thing saved, not a claim against the owner; The Carl Schurz, Fed. Cas. No. 2,414. In The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533, it was held that, where services are rendered by the crew of a wrecking tug or by a municipal fire department, no lien arises.

The finders of a derelict (that is, a ship or goods at sea abandoned by the master and crew without the hope or intention of returning and resuming the possession) who take actual possession with an intention and with the means of saving it, acquire a right of possession which they can maintain against all the world, even the true owner, and become bound to preserve the property with good faith and bring it to a place of safety for the owner's use. They are not bound to part with the possession until their salvage is paid, or the property is taken into the custody of the law preparatory to the amount of salvage being legally ascertained; The Amethyst, Daveis, 20, Fed. Cas. No. 330; The Bee, Ware 339, Fed. Cas. No. 1,219. If they cannot with their own force convey the property to a place of safety without imminent risk of a total or material loss, they cannot, consistently with their obligations to the owner, refuse the assistance of other persons proffering their aid, nor exclude them from rendering it under the pretext that they are the finders and have thus gained the right to the exclusive possession. But if third persons unjustifiably intrude themselves, their services will inure to the benefit of the original salvors; 1 Dods. 414; 3 Hagg. Adm. 156; Olc. 77. See SALVAGE.

If a first set of salvors fall into distress, and are assisted by a second or third set, the first or second do not lose their claim to salvage, unless they voluntarily and without fraud or coercion abandon the enterprise, but they all share together according to their respective merits; The Henry Ewbank, 1 Sumn. 400, Fed. Cas. No. 6,376; 1 W. Rob. 406; 2 *id.* 70. When a vessel stands by and renders services to another, upon request, even though no benefit result from her doing so, she is entitled to salvage; 8 Asp. Mar. L. Cas. 263. In cases of ships stranded or in distress, not derelicts, salvors do not acquire an exclusive possession as against the owner, the master, or his agent. While the master continues on board, he is entitled to retain the command and control of the ship and cargo and to direct the labor. The salvors are assistants and laborers under him; and they have no right to prevent other persons from rendering assistance, if the master wishes such aid; 3 Hagg. Adm. 383; 2 W. Rob. 307; 2 E. L. & E. 551. When the ship has been relieved from its peril, salvors forfeit no right and impair no remedy by leaving the ship; 1 Hagg. Adm. 156; Eads v. The Bacon, 1 Newb. 275, Fed. Cas. No. 4,232. Their remedy to recover salvage is by libel or suit in the district court of the United States.

SALVUS PLEGIUS. A safe pledge; called, also, "*certus plegius*," a sure pledge. Bract. 160 *b*.

SAME. Same does not always mean identical. It frequently means of the kind or species, not the specific thing. Crapo v. Brown, 40 Ia. 487, 493.

SAMPLE. A small quantity of any commodity or merchandise, exhibited as a specimen of a larger quantity called the bulk.

A part shown as a specimen. Webber v. Com., 33 Gratt. (Va.) 909.

When a sale is made by sample, the vendor warrants the quality of the bulk to be equal to that of the sample; Benj. Sales § 648; and if it afterwards turn out that the bulk does not correspond with the sample, the purchaser is not, in general, bound to take the property on a compensation being made to him for the difference; 1 Camp. 113. See Sands v. Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Borrekins v. Bevan, 3 Rawle (Pa.) 37, 23 Am. Dec. 85; 14 M. & W. 651. It is held that the vendor does not warrant goods, as fit for a particular purpose; Kauffman Milling Co. v. Stuckey, 37 S. C. 7, 16 S. E. 192.

To constitute a sale by "sample," the contract must be made solely with reference to the sample; Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122. Not every sale where a sample is shown is a sale by sample; there must be an understanding, expressed or implied, that the sale is by sample; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Gunther v. Atwell, 19 Md. 157. The mere exhibition of a sample is but a representation that it has been fairly taken from the full; Hargous v. Stone, 5 N. Y. 73. In Pennsylvania it has been held that in the absence of fraud or representation as to the quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guar-

anty that the goods shall be similar in kind and merchantable; Boyd v. Wilson, 83 Pa. 319, 24 Am. Rep. 176; but the rule was changed by statute in 1887, the decision having been unsatisfactory to the profession and the public.

Although goods sold by sample are not in general deemed to be sold with an implied warranty that they were merchantable, the facts and circumstances may justify the inference that this implied warranty is superadded to the contract; L. R. 4 Ex. 49. If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties; L. R. 7 C. P. 438; but if the sale is made by a merchant, who is not a manufacturer, there is no implied warranty against secret defects; Dickinson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656. It is an implied condition in a sale by sample that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the vendor to allow this will justify the buyer in rejecting the contract; 1 B. & C. 1. See Benj. Sales § 649; SALES; WARRANTY.

SANCTION. That part of a law which inflicts a penalty for its violation or bestows a reward for its observance. Sanctions are of two kinds,—those which redress civil injuries, called civil sanctions, and those which punish crimes, called penal sanctions. 1 Hoffm. Leg. Outl. 279; Ruth. Inst. b. 2, c. 6, s. 6; Toull. tit. prél. 86; 1 Bla. Com. 56. See LAW.

SANCTUARY. A place of refuge, where the process of the law cannot be executed.

Sanctuary existed among the Greeks. The Romans are said to have recognized the peculiar sacredness attached to particular places as well as to the altars of their temples and the statues of their emperors. It is probable that the church sanctuary came into existence from the time of Constantine, A. D. 303. The code of Theodosius, A. D. 392, enacted a law concerning the asylum and church. A later law, about 450, extended the limits to the precincts including the houses of the bishops and clergy, the cloisters, courts and cemeteries. About 680 the King of Wessex in his code of laws provided for sanctuary. Many subsequent acts were passed in England regulating the subject.

In the Dark Ages, the church succeeded in establishing the doctrine that the blood-feud should be suspended during certain seasons (see HOLIDAYS) and in certain places. If the accused could reach a place sheltered by the protection of the church, he could evade the challenge to battle. The privilege was confined to the locality and merely suspended the feud. The accused must remain in sanctuary, and the avenger could only watch to prevent his escape. Before the close of the Middle Ages, the accused could "abjure the realm" in the presence of the coroner, become an outlaw, and receive a safe-conduct abroad. In 1530, sanctuaries were confined to parish, cathedral and collegiate churches, the greater crimes were excluded from the privilege and the fugitives in any one place were limited to twenty. In 1623 the privilege was abolished; Jenks, Hist. E. L. 157. See Cox, Sanctuaries; Besant's London.

See ARREST.

SANÆ MENTIS. Of sound mind. Fleta, lib. 3, c. 7, § 1.

SANE. Whole; sound; in healthful state. It is applicable equally to the mind and to the body. Den v. Vancleve, 5 N. J. L. 661.

SANE MEMORY. That understanding which enables a man to make contracts and his will, and to perform such other acts as are authorized by law. See LUNACY; MEMORY; NON COMPOS MENTIS.

SANG, SANC. Blood. These words are nearly obsolete.

SANGUINEM EMERE. A redemption by villeins, of their blood or tenure, in order to become freemen.

SANGUIS. The right or power which the chief lord of the fee had to judge and determine cases where blood was shed. Mon. Ang. t. i. 1021.

SANITARY AUTHORITIES. Persons having jurisdiction over their respective districts in regard to sewerage, drainage, supply of water, prevention of nuisances, etc. See HEALTH; QUARANTINE.

SANITY. The state of a person who has a sound understanding; the reverse of insanity. See INSANITY.

SANS CEO QUE. The same as *Absque hoc*, which see.

SANS FRAIS (Fr.). Without expense.

SANS IMPEACHMENT DE WASTE. Without impeachment of waste. Litt. § 152.

SANS NOMBRE (Fr. without number). **In English Law.** A term used in relation to the right of putting animals on a common. The term common *sans nombre* does not mean that the beasts are to be innumerable, but only indefinite, not certain; Willis 227; but they are limited to the commoner's own commonable cattle, *levant et couchant*, upon his lands, or as many cattle as the land of the commoner can keep and maintain in winter. 5 Term 48; 1 Wms. Saund. 2S, n. 4.

SANS RECOURS (Fr. without recourse). Words which are sometimes added to an indorsement by the indorsee to avoid incurring any liability. 7 Taunt. 160; Wilson v. Codman's Ex'r, 3 Cra. (U. S.) 193, 2 L. Ed. 408. See INDORSEMENT.

SATISDATIO (Lat. *satis*, and *dare*). **In Civil Law.** Security given by a party to an

action to pay what might be adjudged against him. It is a satisfactory security in opposition to a naked security or promise. Vicat, Voc. Jur.; 3 Bla. Comm. 291.

SATISFACTION (Lat. *satis*, enough, *facio*, to do, to make). **In Practice.** An entry made on the record, by which a party in whose favor a judgment was rendered declares that he has been satisfied and paid.

In many states provision is made by statute, requiring the mortgagee to discharge a mortgage upon the record, by entering satisfaction in the margin, or by separate instrument, to be recorded on the margin. The refusal or neglect to enter satisfaction after payment and demand renders the mortgagee liable to an action after the time given him by the respective statutes for doing the same has elapsed, and subjects him to the payment of damages, and, in some cases, treble costs. In Indiana and New York, the register or recorder of deeds may himself discharge the mortgage upon the record on the exhibition of a certificate of payment and satisfaction signed by the mortgagee or his representatives, and attached to the mortgage, which shall be recorded. See MORTGAGE. As to accord and satisfaction, see ACCORD.

In Equity. The donation of a thing, with the intention, expressed or implied, that such donation is to be an extinguishment of some existing right or claim in the donee. See LEGACY; CUMULATIVE LEGACY.

SATISFACTION, CONTRACTS TO. A term used to express a class of contracts in which one party agrees to perform his promise to the satisfaction of the other. The cases have been classified by Prof. Lawson, in 46 Cent. L. J. 360, as follows: 1. Where the fancy, taste, sensibility, or judgment of the promisor are involved. 2. Where the question is merely one of operative fitness or mechanical utility. In the first class the courts refuse to say that where a man agrees to pay if he is satisfied with the performance, he should be compelled to pay if some one else is satisfied with it. The courts recognize that in matters of taste or opinion there is no absolute standard as to what is good or bad. Hence, where the subject-matter is a suit of clothes; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; a bust of the defendant's husband; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; a portrait of the defendant's daughter; Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351; a cabinet organ; McClure Bros. v. Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; a set of artificial teeth; 7 Pitts. L. J. 140; a carriage; 2 C. B. N. S. 779; a steam-heater for a house; Adams Radiator & B. Works v. Schnader, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 893; a play to be written by an author for an actor; Haven v. Russell, 34 N. Y. Supp. 292; a design for a bank-note; Gray v. Bank, 10 N. Y. Supp. 5; the question is not one for the court or jury to decide, but for the promisee alone.

So where the contract gives the master a right to discharge a servant if he is satisfied that the servant is incompetent; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 54 Am. Rep. 714; or to employ him so long as he is satisfactory; Spring v. Clock Co., 24 Hun (N. Y.) 175; or to pay for services if they are satisfactory; Johnson v. Bindseil, 8 N. Y. Supp. 485.

In the second class of cases, Mr. Lawson maintains that the same principle of law should be applied, and gives a number of cases where it has been applied; where the subject-matter of the agreement was the making of a book-case; McCarren v. McNulty, 7 Gray (Mass.) 139; the sale of a harvesting machine; Wood Reap. & M. M. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. St. Rep. 57; the sale of a steam fire engine; Silsby Mfg. Co. v. Chico, 24 Fed. 893; of a cord binder; McCormick H. M. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; a steamboat; Gray v. R. Co., 11 Hun (N. Y.) 70; an elevator; Singerly v. Thayer, 108 Pa. 297, 2 Atl. 230, 56 Am. Rep. 207; steam fans; Exhaust Ventilator Co. v. Ry. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; a printing press; Campbell Printing-Press Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645; a grain binder; Plano Mfg. Co. v. Ellis, 68 Mich. 101, 35 N. W. 841; a gas machine; Aiken v. Hyde, 99 Mass. 183; a fanning mill; Goodrich v. Van Nortwick, 43 Ill. 445; the purchase of a saloon; Stuart & Peterson Co. v. Newton, 52 Pa. Super. Ct. 158.

The promisee must act in good faith; his dissatisfaction must be actual not feigned; real not merely pretended; Daggett v. Johnson, 49 Vt. 345; Singerly v. Thayer, 108 Pa. 297, 2 Atl. 230, 56 Am. Rep. 207. He must not act from caprice; Sidney School Furniture Co. v. School Dist., 130 Pa. 76, 18 Atl. 604. He must, if a test is necessary to determine its fitness, give that test or allow it to be made; Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; Exhaust Ventilator Co. v. R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; Crane Elevator Co. v. Clark, 80 Fed. 705, 26 C. C. A. 100; Adams Radiator & B. Works v. Schnader, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 893, holding that where the promisor dies before the test is made, the right to reject vests in his executor.

So an article to be manufactured cannot be rejected before it is substantially completed, so that the promisor will be able fairly to determine whether it was or would be satisfactory to him; Singerly v. Thayer, 108 Pa. 297, 2 Atl. 230, 56 Am. Rep. 207.

In sales of goods where the promisor can be put substantially *in statu quo* the promisee is the sole judge; Wood Reap. & M. M.

Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Exhaust Ventilator Co. v. R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257. In contracts for work and labor other than such as are to satisfy a matter of personal taste, where the work and labor would be wholly lost to the promisor if refused, the courts tend to the view that the promisee must be satisfied when he ought to be; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Boyd v. Hallowell, 60 Minn. 225, 62 N. W. 125.

There are a few cases which are apparently discordant, but which will be found, as Prof. Lawson observes, to rest on the difference between executory contracts of sale, and contracts for work and labor which have been done on the house or land of the promisee; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398; Clark v. Rice, 46 Mich. 308, 9 N. W. 427; McNeil v. Armstrong, 81 Fed. 943, 27 C. C. A. 16; Electric Lighting Co. of Mobile v. Elder, 115 Ala. 138, 21 South. 983; Pope Iron & Metal Co. v. Best, 14 Mo. App. 503. The cases of Mullally v. Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613, Folliard v. Wallace, 2 Johns. (N. Y.) 395, and Burns v. Munger, 45 Hun (N. Y.) 75, appear to be really discordant. In Crawford v. Pub. Co., 163 N. Y. 404, 57 N. E. 616, it was held that where one is employed to do work which involves taste, fancy, interest, personal satisfaction and judgment, to the satisfaction of his employer, the employer is the sole judge of whether the work is satisfactory.

The rule is held to be otherwise in the case of a complete contract of an ordinary commercial nature. That which the law shall say a contracting party ought in reason to be satisfied with that the law will say he is satisfied with; Brooklyn v. R. Co., 47 N. Y. 475, 7 Am. Rep. 469. Referring to this case, Brown, D. J., in Campbell Printing Press Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645, points out that the differences between the New York decisions and those of other states are more apparent than real, and he cites the rule laid down in Silsby Mfg. Co. v. Chico, 24 Fed. 893, as "an accurate summary of the whole law on the subject:" Where a fire engine was to be made and delivered which should be satisfactory to the purchaser, it must in fact be satisfactory to him, or he is not bound to take it; but that where the purchaser was in fact satisfied, but fraudulently and in bad faith declared he was not satisfied, the contract had been fully performed by the vendor, and the purchaser was bound to accept the article.

If the goods are rejected as unsatisfactory, they must be returned to the vendor; Campbell Printing Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645; Savage Mfg. Co. v. Armstrong, 19 Me. 147; but it was held in Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339, that the dissatisfied buyer may retain the goods and recoup damages in an action for the price.

If the dissatisfaction of a third party designated as an arbiter is required, the contractor must show fraudulent collusion between the other party and such arbiter in order to recover; Thaler Bros. v. Greisser Const. Co., 229 Pa. 518, 79 Atl. 147, 33 L. R. A. (N. S.) 345.

Under an agreement to pay commissions for negotiating a "satisfactory lease" the lessor cannot arbitrarily refuse to accept a lease negotiated; Mullally v. Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613.

SATISFACTION PIECE. In English Practice. An instrument of writing in which it is declared that satisfaction is acknowledged between the plaintiff and defendant. It is signed by the attorney, and on its production and the warrant of attorney, to the clerk of the judgments, satisfaction is entered on payment of certain fees. Lee, Dict. of Pract. *Satisfaction.*

SATISFACTORY EVIDENCE. That which is sufficient to induce a belief that the thing is true; in other words, it is credible evidence. 3 Bouvier, Inst. n. 3049.

SATISFACTORY PROOF. Where a city charter authorized contracts for street improvements to be given to the lowest bidder "who shall give satisfactory proof of his" ability to properly perform the work, it was held that the board of public works could not exercise an arbitrary discretion in awarding the contract, but must base their discretion on facts reasonably tending to support its determination. McGovern v. Board of Public Works of Trenton, 57 N. J. L. 580, 31 Atl. 613.

SATISFIED. When applied to a note or bond, *paid.* Reynolds v. Bird, 1 Root (Conn.) 306.

SATISFIED TERMS ACT. The stat. 8 & 9 Vict. c. 112, passed to abolish satisfied outstanding terms of years in land. By this act, terms which shall henceforth become attendant upon the inheritance, either by express *declaration* or construction of law, are to cease and determine. This in effect abolishes outstanding terms; 1 Steph. Com., 11th ed. 296, 297; Wms. R. P. pt. iv. c. 1.

SAVING CLAUSE. In a legal instrument a clause exempting something which might otherwise be subjected to the operation of the instrument. In an act of parliament, a saving clause which is repugnant to the body of such act is void. 1 Co. 118. See CONSTRUCTION.

SAVINGS BANK. An institution in the nature of a bank, established for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof to the depositors, their executors or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no benefit whatever from any such deposit or the produce thereof. Grant, Bank., 5th ed. 262; Bolles, Banks & Dep. 177.

Savings banks are not banking institutions in the commercial sense of that phrase and are not to be classed as national banks in determining the validity of state taxation of the latter; National Bank of Redemption v. Boston, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689. See BANK.

Savings banks cannot do business as banks of discount unless by statute; In re Jaycox, 12 Blatchf. 209, Fed. Cas. No. 7,237. It has been considered that savings banks are trustees for depositors; In re Newport Sav. Bk., 68 Me. 396; Stockton v. Bank, 32 N. J. Eq. 163; and therefore subject to the jurisdiction of equity; In re Newark Sav. Inst. Case, 28 N. J. Eq. 552; they have been held to be agents for the depositor; Bunnell v. Sav. Soc., 38 Conn. 203, 9 Am. Rep. 380; and debtors; People v. Sav. Inst., 92 N. Y. 7; Reed v. Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468. That the rights of the depositors are of a two-fold character and occupy a position similar to that of stockholders in an ordinary corporation, see 1 Moraw. Corp. § 391; but as long as the institution is solvent the depositors are mere creditors; *id.*

Where the by-laws require the presentation of the pass-book, as a condition precedent to the withdrawal of the deposit and this regulation is printed in the book, it becomes a part of the contract between the parties; Peoples' Savings Bank v. Cupps, 91 Pa. 315; Kimins v. Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441. In case of the loss of the pass-book, the depositor has the right to receive his money without producing it; Palmer v. Sav. Inst., 14 R. I. 68, 51 Am. Rep. 341.

It has been held that after payment to one who was apparently in lawful possession of the pass-book, the real depositor cannot recover unless upon proof of want of care on the part of the officers of the savings banks. See Smith v. Sav. Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653. And even where the pass-book contains a stipulation that the deposit may be paid to any one who presents the book, the officers are still bound to use reasonable care; Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 171. A by-law that a savings bank shall not be liable to pay a depositor when it has already paid the holder of his pass-book which had been stolen, is not binding unless the depositor has notice of it; Ackenhausen v. Bank, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338.

In case of insolvency the assets are distributable among the depositors; Roan v. Winn, 93 Mo. 503, 4 S. W. 736. In Re Newark Sav. Inst. Case, 28 N. J. Eq. 552, the court made an order scaling down the deposits and authorized the savings bank to continue business. By statute in New York courts may scale down deposits of insolvent savings banks and authorize them to continue business.

The surplus of a savings bank belongs in equity to its depositors, and is a part of its deposits in the same sense as the stipulated interest is; People v. Barker, 154 N. Y. 122, 47 N. E. 1103.

A law providing that deposits which have remained unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the state treasurer and receiver general to be held by him for the owner or his legal representative, is constitutional; Provident Institution for Savings v. Malone, 221 U. S. 660, 31 Sup. Ct. 661, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129.

The mere fact that a deposit stands in the depositor's name as "trustee" for another was held not ground for holding that an irrevocable trust was created, but to establish the creation of a "tentative" trust merely revocable by the depositor in his lifetime; In re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900. The transfer of the deposit and the bank book to another as trustee for a third person was held merely a tentative trust; Lattan v. Van Ness, 107 App. Div. 393, 95 N. Y. Supp. 97; 19 H. L. R. 207.

A provision in a state tax statute excepting from an exemption banks, savings banks and trust companies is not an unconstitutional discrimination against savings banks, the state court having held that there were reasonable grounds for the classification; Farmers' Bank v. Minnesota, 232 U. S. 517, 34 Sup. Ct. 354, 58 L. Ed. —.

Postoffice savings banks were established in England in 1861. Deposits are payable ten days after demand, with interest at the rate of two pounds ten shillings per cent. per annum. The deposits are paid over to the national debt commissioners and by them invested in such securities as are lawful for the funds of other savings banks. Any deficiency is made good out of the consolidated fund; 3 Steph. Com. 88.

Postal savings banks have been established in the United States; see POSTAL SAVINGS BANKS.

SAVOY. One of the ancient privileged places or sanctuaries. 4 Steph. Com. 227, n.

SAXON LAGE. The laws of the West Saxons. Cowell.

SAY ABOUT. Words frequently used in contracts to indicate an uncertain quantity. They have been said to mark emphatically the vendor's purpose to guard himself against being supposed to have made an absolute promise as to quantity; 21 W. R. 609. There a sale of all the spars manufactured, say about 600, was held to be complied with by tender of 496 spars. See 2 B. & Ad. 106; Pembroke Iron Co. v. Parsons, 5 Gray (Mass.) 589; Robinson v. Noble, 8 Pet. (U. S.) 181, 8 L. Ed. 910.

SCACCARIUM. A chequered cloth resembling a chess-board which covered the table in the Exchequer, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. Hence the court of exchequer or *curia scaccarii* derived its name. 3 Bla. Com. 44.

SCALAM. The old way of paying money into the Exchequer. Cowell.

SCALING LAWS. A term used to signify statutes establishing the process of adjusting the difference in value between depreciated paper money and specie. Such statutes were rendered necessary by the depreciation of paper money necessarily following the establishment of American independence. And, more recently, to discharge those debts which were made payable in Confederate money. The statutes are now obsolete.

SCALPER. See TICKET; BROKERAGE.

SCANDALOUS MATTER. In Equity Pleading. Unnecessary matter criminatory of the defendant or any other person, alleged in the bill, answer, or other pleading, or in the interrogatories to or answers by witnesses. Adams, Eq. 306. "Impertinent matter which is also criminatory, or which otherwise reflects on the character of an individual." Manhattan Trust Co. v. Traction Co., 188 Fed. 1008. It consists of an unnecessary allegation bearing cruelly on the moral character of an individual, or stating matter contrary to good manners, or unbecoming the dignity of the court to hear; McNulty v. Wiesen, 130 Fed. 1012.

The court has a right to preserve the purity of its records; its proceedings are not to be converted into a machinery for circulating scandal. It may strike out allegations which wound the character of one party without being of real service to the other; Riddle v. Stevens, 2 S. & R. (Pa.) 537.

Matter which is relevant can never be scandalous; Story, Eq. Pl. § 270; 15 Ves. 477; the degree of relevancy is of no account in determining the question; Cooper, Eq. Pl. 19; 2 Ves. 24. Where scandal is alleged, whether in the bill; 2 Ves. 631; answer; Mitf. Eq. Pl. 313; or interrogatories to or answer of witnesses; 2 Y. & C. 445; it will be referred to a master at any time; 2 Ves. 631; and, by leave of court, even upon the application of a stranger to the suit; 5 Beav. 82; and matter found to be scandalous by him will be expunged; Story, Eq. Pl. §§ 266, 862; 4 Hen. & M. 414; at the cost of counsel introducing it, in some cases; Story, Eq. Pl. § 266. The circuit court has an inherent power to strike out scandalous matter on their own motion and in the absence of pleading, and may order a bill to be struck from its files and to permit the complainant to file a new bill excluding such matter; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14. The presence of scandalous matter in the bill is no excuse for its being in the answer; Langdon v Pickering, 19 Me. 214. Parts of an answer, though immaterial as a defence and scandalous will not be suppressed when intended to meet charges of bad faith in the bill; Mercantile Trust Co. v. R. Co., 84 Fed. 379.

See IMPERTINENT.

SCANDALUM MAGNATUM (L. Lat. slander of great men). Words spoken in derogation of a peer, a judge, or other great officer of the realm. 1 Ventr. 60. This was distinct from mere slander in the earlier law, and was considered a more heinous offence. Bull. N. P 4; Webb's Poll. on Torts, 288 *b*.

It depended on early English statutes which after being long obsolete in practice were repealed in 1887. See 3 Bla. Com. 124.

SCAVAGE, SCHEVAGE, SCHEWAGE, or SHEWAGE. A kind of toll or custom, exacted by mayors, sheriffs, etc., of merchant strangers, for wares showed or offered for sale within their liberties. Prohibited by 19 Hen. VII. c. 7. Cowell.

SCHEDULE. When an indictment is returned from an inferior court in obedience to a writ of certiorari, the statement of the previous proceedings sent with it is termed the schedule. 1 Sound. 309, *a*. n. 2.

Schedules are also frequently annexed to answers in a court of equity, and to depositions and other documents, in order to show more in detail the matter they contain than could otherwise be conveniently shown.

The term is frequently used instead of inventory.

The Interstate Commerce Act requires common carriers to publish and file schedules of their rates, fares and charges, which shall plainly state all privileges or facilities granted or allowed and any rules or regulations which in any way change, etc., the value of the service rendered. A provision in a ticket containing a provision not in the schedule is void; Baltimore & O. R. Co. v. Hamburger, 155 Fed. 849.

SCHIREMAN. A sheriff; the ancient name of an earl.

SCHIRRENS-GELD. A tax paid to sheriffs for keeping the shire or county court. Cowell.

SCHISM-BILL. An act passed in the reign of Queen Anne to restrain Protestant dissenters from educating their own children; it forbade all tutors and schoolmasters to be present at any dissenting place of worship.

SCHOOL. An institution of learning of a lower grade than a college or a university. A place of primary instruction. Webster, Dict. As used in the American reports, the term generally refers to the common or public schools existing under the laws of each state and maintained at the expense of the public.

Public school is synonymous with common school; but the term is not limited to a school of the lowest grade; it includes all schools from those lower than grammar schools to high schools, but not one founded by a charitable bequest which vests the order and superintendence of it in a board of trustees; Jenkins v. Andover, 103 Mass. 97.

A common school is one which is common to children of proper age and capacity, free and under the control of the qualified voters of the district. School Dist. No. 20, Spokane Co., v. Bryan, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033.

Where a constitutional provision requires school funds to be applied exclusively to common schools, a model training school to be conducted in connection with various normal schools is not a common school; School Dist. No. 20, Spokane Co., v Bryan, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033; a normal school was held not to be a part of the public free school system; State Female Normal School v. Auditors, 79 Va. 233; Gordon v. Cornes, 47 N. Y. 608.

When the legislature has placed the management of public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given or what book shall be used therein; Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233.

The establishment and regulations of public schools rest primarily with the legislative department; Stone v. Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147, 14 Ann. Cas. 295; Cumming v. Richmond Co. Board of Education, 175 U. S. 529, 20 Sup. Ct. 197, 44 L. Ed. 262.

A statute establishing separate systems of schools for white and colored children is not in violation of the fourteenth amendment of the constitution of the United States. And where appropriate schools for colored children are maintained, such children may be lawfully excluded from schools established for white children; State v. Gray, 93 Ind. 303; Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540; Berea College v. Com., 123 Ky. 209, 94 S. W. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337; nor did such exclusion violate any constitutional right before the fourteenth amendment was adopted; Roberts v. Boston, 5 Cush. (Mass.) 198. But it has been held that unless the legislature clearly confers upon boards of education the power to establish separate schools for white and colored children, the power does not exist; Knox v. Board of Education, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830.

Where separate schools are provided, the educational advantages must be equal; Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216, 22 L. R. A. (N. S.) 584.

A Chinese pupil cannot be excluded from a public school; Tape v. Hurley, 66 Cal. 473, 6 Pac. 129. Mandamus will lie compelling trustees to admit colored children to public schools where separate schools are not provided for them; State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713.

See CIVIL RIGHTS.

Reading the Bible in schools is not sectarian teaching; Church v. Bullock, 104 Tex. 1, 109 S. W. 115, 16 L. R. A. (N. S.) 860; Billard v. Board of Education, 69 Kan. 53, 76 Pac. 422, 66 L. R. A. 166, 105 Am. St. Rep. 148, 2 Ann. Cas. 521; Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36; Stevenson v. Hanyon, 7 Pa. Dist. R. 585; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Spiller v. Woburn, 12 Allen (Mass.) 127; McCormick v. Burt, 95 Ill. 263, 35 Am. Rep. 163; Moore v. Monroe, 64 Ia. 367, 20 N. W. 475, 52 Am. Rep. 444; Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233; *contra*, State v. Dist. Board of School Dist., 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41. To do so does not make the school a place of worship; Moore v. Monroe, 64 Ia. 367.

A rule requiring the pupils to learn the Ten Commandments and repeat them once a week is not a violation of the constitutional provision which secures liberty of conscience and worship; Comm. v. Cooke, 7 Am. L. Reg. (Mass.) 417 (in the police court of Boston). A college rule requiring attendance at chapel does not violate a constitutional provision that "no person shall be required to attend * * * any place of worship against his consent;" North v. Trustees, 137 Ill. 296, 27 N. E. 54.

A tax payer's bill to restrain school directors from allowing a school house to be used as a religious meeting house was dismissed on demurrer; Nichols v. School Directors, 93 Ill. 61, 34 Am. Rep. 160. But it has been held that school directors have no authority to permit public school buildings to be used for holding sectarian religious meetings or public lyceum meetings, but they

may permit them to be used for lectures, etc., of an educational nature; Bender v. Streabich, 182 Pa. 251, 37 Atl. 853.

A public school teacher has no authority to compel a pupil to pursue a certain study against the wishes of its parent; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471; Trustees of Schools v. People, 87 Ill. 303, 29 Am. Rep. 55; *contra*, State v. Webber, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30; Hodgkins v. Rockport, 105 Mass. 475; Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Kidder v. Chellis, 59 N. H. 473; Sewell v. Board, 29 Ohio St. 89. A teacher has no right to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy is to exclude the pupil from the school; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471. But it is held that the school authorities have the power to classify and grade the scholars in their respective districts, and cause them to be taught in such departments as they may deem expedient; they may also prescribe the course of study and text books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may require prompt attendance, respectful deportment, and diligence in studies; School Board Dist. No. 18, Garvin Co. v. Thompson, 24 Okl. 1, 103 Pac. 578, 24 L. R. A. (N. S.) 221, 138 Am. St. Rep. 861, 19 Ann. Cas. 1188. It has been said that the parent has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and that this selection must be respected by the school authorities; *id.*, where it was held that in this respect the right of the parent is superior to that of the school officers and teachers.

Directors; Hodgkins v. Rockport, 105 Mass. 475; and teachers; Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133; may expel or suspend pupils for sufficient cause, as for breach of discipline; Scott v. School Dist. No. 2, 46 Vt. 452; or for general immoral character; Sherman v. Charlestown, 8 Cush. (Mass.) 160; for refusal to take part in musical exercises; State v. Webber, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30; for refusal to write English compositions; Guernsey v. Pitkin, 32 Vt. 224, 76 Am. Rep. 171; for absence contrary to rules; Ferriter v. Tyler, 48 Vt. 444; for refusal on the part of the parents to sign and return periodical written reports of the pupil's standing; Bourne v. State, 35 Neb. 1, 52 N. W. 710; for misbehavior outside of the school tending to injure the school and subvert the master's authority; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; for a father's refusal to permit the master to whip the child or to correct him himself; Fessman v. Seeley (Tex.) 30 S. W. 269; because a parent visited the school when in session and used offensive language to the teacher; Board of Education of Cartersville v. Purse, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593, 65 Am. St. Rep. 312, in which case the court cited a letter from Bleckley, C. J., to the court relating to the case. In King v. Jefferson City School Board, 71 Mo. 628, 36 Am. Rep. 499, it was held that the proper remedy for truancy was not expulsion, but it is also held that the conduct of a pupil at a boarding school, in continually playing truant, and finally going home, is ground for expulsion; Fessman v. Seeley (Tex.) 30 S. W. 268.

School boards or a teacher may make rules to govern the conduct of the pupils after school hours and may suspend pupils for violation of such rules; Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Wayland v. Hughes, 43 Wash. 441, 86 Pac. 642, 7 L. R. A. (N. S.) 352; Kinzer v. Directors of Independent School Dist., 129 Ia. 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496, 6 Ann. Cas. 996; Jones v. Cody, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160. A pupil may be suspended for publishing a newspaper article tending to influence the conduct of other pupils in the schoolroom to set at naught the authority of the teachers and bring them into ridicule; State v. Dist. Board of School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. (N. S.) 730, 128 Am. St. Rep. 1050. He may be punished for disrespectful language regarding a teacher, though he has returned to his home, but is afterward passing the teacher's house; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; also for being drunk and disorderly during the holidays; Douglass v. Campbell, 89 Ark. 254, 116 S. W. 211, 20 L. R. A. (N. S.) 205.

A rule may forbid pupils playing football in a game purporting to be played under the auspices of the school; Kinzer v. Directors of Independent School Dist., 129 Ia. 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496, 6 Ann. Cas. 996; a rule may require children to be vaccinated and exclude those who refuse; Com. v. Pear, 183 Mass. 246, 66 N. E. 719, 67 L. R. A. 935; State v. Zimmerman, 86 Minn. 358, 90 N. W. 783, 58 L. R. A. 78, 91 Am. St. Rep. 351; Hutchins v. Durham, 137 N. C. 70, 49 S. E. 46, 2 Ann. Cas. 340; Blue v. Beach, 155 Ind. 138, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; Duffield v. School Dist., 162 Pa. 483, 29 Atl. 742, 25 L. R. A. 152; In re Viemeister, 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; State v. Cole, 220 Mo. 697, 119 S. W. 424, 22 L. R. A. (N. S.) 986; but a rule that children should not, during the school term, attend social parties

is unreasonable, and where the child, with the consent of his parents, disobeyed such rule and was expelled, held, the school board had gone beyond its power; Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343.

Pupils may not be expelled merely for being members of a secret society, where it is not shown that the interests of the school are affected thereby; 82 Ind. 286; but where the board has made a rule that members of such societies may not represent the school, in any public capacity, the court will not interfere; Wilson v. Board, 233 Ill. 464, 84 N. E. 697, 15 L. R. A. (N. S.) 1136, 13 Ann. Cas. 330; Wayland v. Hughes, 43 Wash. 441, 86 Pac. 642, 7 L. R. A. (N. S.) 352. They may not be expelled for the infraction of a rule that pupils shall stay at home and study in the evening from 7 to 9; Hobbs v. Germany, 94 Miss. 469, 49 South. 515, 22 L. R. A. (N. S.) 983.

A parent has no right of action for the wrongful expulsion of his child from a public school; Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53; Sherman v. Charlestown, 8 Cush. (Mass.) 161; Stephenson v. Hall, 14 Barb. (N. Y.) 222; Donahoe v. Richards, 38 Me. 376, where it was held that the child alone was entitled to compensation; Sorrells v. Matthews, 129 Ga. 319, 58 S. E. 819, 13 L. R. A. (N. S.) 357, 12 Ann. Cas. 404.

Truancy is an offense not known to the common law, but it is held that boys between the ages of twelve and fifteen who refuse to attend school and wander about public places during school hours are truants under a statute; Cushing v. Friendship, 89 Me. 525, 36 Atl. 1001, which case see as to correction for that offense. Where the rules of a boarding school provide that there will be no reduction in case of withdrawals, and that all payments shall be forfeited on expulsion, there can be no recovery; Fessman v. Seeley (Tex.) 30 S. W. 268.

It is usually provided by constitution or statute that school facilities must be provided for children of the proper age, and compulsory education has been established in most of the states. Usually the mere fact that a child is actually living in a school district entitles him to school privileges; Yale v. West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161; Board of Education v. Lease, 64 Ill. App. 60; School Dist. No. 2 in Brentwood v. Pollard, 55 N. H. 503; McNish v. State, 74 Neb. 261, 104 N. W. 186, 12 Ann. Cas. 896; but where the parents reside elsewhere, tuition must be paid for; School Dist. of Barnard v. Matherly, 90 Mo. App. 403; State v. School Dist., 55 Neb. 317, 75 N. W. 855; Gardner v. Board of Education, 5 Dak. 259, 38 N. W. 433; but this question is held to be for the school board to decide; Com. v. Wenner, 211 Pa. 637, 61 Atl. 247.

School boards may require pupils to attend a specified school, though outside of their district and at a greater distance than their nearest school; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895; People v. Gallagher, 93 N. Y. 451, 45 Am. Rep. 232; the assignment of pupils is in the discretion of the directors; Com. v. School Directors, 4 Pa. Dist. R. 314.

School directors cannot terminate a contract with a teacher by doing away with the particular school; School Town of Milford v. Zeigler, 1 Ind. App. 138, 27 N. E. 303.

In the absence of any express stipulation to that effect, there is no contract to give a scholarship to the candidate who obtains the highest marks in the scholarship examination; [1895] 1 Ch. 480.

Within the scope of his powers the decision of a state superintendent of schools is conclusive and will be enforced by mandamus; Thompson v. Board of Education, 57 N. J. L. 628, 31 Atl. 168.

Statutes conferring upon a ministerial officer or board the power to issue or revoke teachers' licenses are not invalid as conferring judicial power; Spurgeon v. Rhodes, 167 Ind. 1, 78 N.E. 228. But it was held that the act of a superintendent in revoking a license under the laws of the state was a judicial act, and that, if in any case he proceeds without jurisdiction, the court may restrain him; Superintendent of Common Schools of Daviess Co. v. Taylor, 105 Ky. 387, 49 S. W. 38. He may revoke only for statutory cause, and, if attempting to proceed upon grounds outside the statute, equity may intervene; Stone v. Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147, 14 Ann. Cas. 295.

One who accepts an appointment under the school law is bound by its provisions and has barred himself from having the propriety of his dismissal by the local school board reviewed in any tribunal, except those specially created by the Legislature for the purpose; Draper v. Comm'rs, 66 N. J. L. 54, 48 Atl. 556.

A regulation of the department of public instruction prohibiting teachers from wearing a distinctive religious garb while teaching is not unreasonable; O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. (N. S.) 402, 6 Ann. Cas. 432; but it is held that school districts might employ sisters of a religious order and permit them to wear their distinctive dress in school; Hysong v. School Dist., 164 Pa. 629, 30 Atl. 482, 26 L. R. A. 203, 44 Am. St. Rep. 632.

See Taylor, Public Schools; VACCINATION; EDUCATION; CORRECTION; COLLEGE; WHIPPING; COMPULSORY SCHOOL ATTENDANCE; ASSAULT; BATTERY.

School buildings are not *public buildings* of a city within the meaning of a contract to furnish free water to public buildings of the city; Water Supply Co. of Albuquerque v. Board, 9 N. M. 441, 54 Pac. 969; Kensington Electric Co. v. Philadelphia, 187 Pa. 446, 41 Atl. 309; such a condition will be strictly

construed in favor of the water company; Louisville Water Co. v. Clark, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55.

SCHOUT. An officer appointed by a court in Holland with both judicial and administrative duties. He resembled a resident magistrate, though he could not act judicially without the *schepenen*. The *schout* and the *schepenen* looked after the well-being of the citizens, and saw that the city was properly policed. Wessels' History. In New Netherlands the schout was sheriff and collector of customs. Fiske, Hist. Writings VIII, 153.

SCIENCE. The knowledge of many methodically digested and arranged, so as to be attainable by one; a body of principles and deductions to explain the nature of some matter. Vredenburg v. Behan, 33 La. Ann. 637. See Jackson v. Waldron, 13 Wend. (N. Y.) 205; BOOKS OF SCIENCE.

SCIENDUM (L. Lat.). The name given to a clause inserted in the record by which it is made "known that the justice here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law." Lee, Dict. *Record.*

SCIENTER (Lat. knowingly). The allegation in a pleading of knowledge; Webb's Poll. Torts 614; on the part of a defendant or person accused, which is necessary to charge upon him the consequence of the crime or tort.

A man may do many acts which are justifiable or not, according as he is ignorant or not ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offence; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money.

Where evidence of the *scienter* has been given, it may be rebutted, as where the charge is passing counterfeit money, the defendant may show that the bill was genuine or that under the circumstances he had reason to suppose it was, or that he examined a counterfeit detector in regard to it; State v. Morton, 8 Wis. 352. Proof of a conspiracy to put forth counterfeit bills is admissible to show the *scienter* as against one of the parties to it; State v. Spalding, 19 Conn. 233, 48 Am. Dec. 158.

In an action against the owner of a dog, alleged to be a dangerous animal, the fact that it is a watch-dog, chained during the day and loosed at night, is sufficient without further proof of *scienter;* Montgomery v. Koester, 35 La. Ann. 1091, 48 Am. Rep. 253.

The averment of a *scienter* in an indictment is not sufficient to supply omission of the positive statement that the defendant did the act; State v. Halder, 2 McCord (S. C.) 377, 13 Am. Dec. 738; and a charge in an indictment that the defendant passed, etc., a counterfeit, without alleging that he knew it to be such, is insufficient even after verdict; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

SCILICET (Lat. *scire*, to know, *licet*, it is permitted; you may know; translated by *to wit*, in its old sense of to know). That is to say; to wit; namely.

It is a clause to usher in the sentence of another, to particularize that which was too general before, distribute what was too gross, or to explain what was doubtful and obscure. It neither increases nor diminishes the premises or *habendum*, for it gives nothing of itself; it may make a restriction when the preceding words may be restrained; Hob. 171; 1 P. Wms. 18; Co. Litt. 180 *b*, n. 1.

When the scilicet is repugnant to the precedent matter, it is rejected: for example, when a declaration in trover states that the plaintiff on the *third* day of May was possessed of certain goods which on the fourth day of May came to the defendant's hands, who afterward, to wit, on the *first* day of May, converted them, the scilicet was rejected as surplusage; Cro. Jac. 428. And see Haak v. Breidenbach, 6 Binn. (Pa.) 15; 3 Saund. 291, note 1.

Stating material and traversable matter under a scilicet will not avoid the consequences of a variance; 1 M'Cl. & Y. 277; 2 B. & P. 170, n. 2; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; nor will the mere omission of a scilicet render immaterial matter material; 2 Saund. 206 *a;* even in a criminal proceeding; 2 Camp. 307, n. See 3 Maule & S. 173.

It is said to have been used interchangeably with *videlicet*. It came to be contracted into ss. Its chief use was in connection with the *venue* of an action. *Scilicet* was used to particularize a general statement, thus: "London ss. In the Ward of Cheap," meant at London, but more particularly in the ward of Cheap. When, in 1706, it was enacted that the jury should no longer be summoned *de vicineto*, and the parish and ward were dropped from the venue, the pleaders held fast to the ss. (as "London ss.") though it had become meaningless. But the prevalence of county courts in America has brought back its real use. It should be written thus:

Commonwealth of Pennsylvania, ss.
County of Philadelphia

meaning: In the commonwealth of Pennsylvania, but more particularly in the county of Philadelphia. See 25 Green Bag 59, by J. O. Skinner.

The omission of "ss." in a legal document is not material so as to invalidate it; Babcock v. Kuntzsch, 85 Hun 33, 32 N. Y. Supp. 587; McCord & Nave M. Co. v. Glenn, 6 Utah, 139, 21 Pac. 500.

SCINTILLA OF EVIDENCE. The doctrine that where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence; Mercier v. Mercier, 43 Ga. 323; Brooks v. Somerville, 106 Mass. 271; Way v. R. Co., 35 Ia. 585; Lewis v. Pratt, 48 Vt. 358.

In the United States courts and in England, it has been decided that the more reasonable rule is, "that before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there is literally *no* evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden or proof is imposed"; Marim County Com'rs v. Clark, 94 U. S. 278, 24 L. Ed. 59; 3 C. B. N. S. 150.

The old rule is likewise exploded in several of the states, whose courts are now in the constant habit of ordering nonsuits; Connor v. Giles, 76 Me. 132; Bailey v. Kimball, 26 N. H. 351; Colt v. R. Co., 49 N. Y. 671; or giving peremptory instructions to the jury to find for one party or the other; Wittkowsky v. Wasson, 71 N. C. 451; Fort Scott Coal & Min. Co. v. Sweeney, 15 Kan. 244; or of sustaining demurrers to the evidence, in cases where there is confessedly some evidence supporting a material issue. This is done under the guise of various expressions, which seem to leave the ancient prerogative of the jury intact. In Maryland, the judge achieves this result by determining the *legal* sufficiency of the evidence; Cole v. Hebb, 7 Gill & J. (Md.) 20; and in Missouri by determining its legal effect; Harris v. Woody, 9 Mo. 113. See Thomps. Charg. Jury § 30; Thomps. Jur. § 2246. Judge Dillon (Law and Jurisprudence 130) strongly disapproves the scintilla doctrine, quoting substantially the language above quoted, which was used also by Miller, J., in Pleasants v. Fant, 22 Wall. (U. S.) 116, 22 L. Ed. 780, which he says follows the English doctrine. He quotes the approval of certain judges of his view.

See INSTRUCTIONS.

SCINTILLA JURIS (Lat. a spark of law or right). A legal fiction resorted to for the purpose of enabling feoffees to uses to support contingent uses when they come into existence, thereby to enable the statute of uses, 27 Hen. VIII., to execute them. For example, a shifting use: a grant to A and his heirs to the use of B and his heirs, until C perform an act, and then to the use of C. and his heirs. Here the statute executes the use in B, which, being coextensive with A's seisin, leaves no actual seisin in A. When, however, C performs the act, B's use ceases, and C's springs up, and he enjoys the fee-simple; upon which the question arises, out of what seisin C's use is served. It is said to be served out of A's original seisin; for upon the cessor of B's use it is contended that the original seisin reverted to A for the purpose of serving C's use, and is a possibility of seisin, or *scintilla juris*. See 4 Kent 238, and the authorities there cited, for the learning upon this subject; Burton, R. P. 48; Wilson, Springing Uses 59; Washb. R. P.

SCIRE FACIAS (Lat. that you make known). The name of a writ (and of the whole proceeding) founded on some public record. Fost. Fed. Pr. 301.

A judicial writ at common law to revive judgments or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered. Egan v. R. Co., 163 Fed. 344.

Public records, to which the writ is applicable, are of two classes, *judicial* and *non-judicial*.

Judicial records are of two kinds, judgments in former suits, and recognizances which are of the nature of judgments. When founded on a judgment, the purpose of the writ is either to revive the judgment, which because of lapse of time—a year and a day at common law, but now varied by statutes—is presumed in law to be executed or released, and therefore execution on it is not allowed without giving notice, by *scire facias*, to the defendant to come in, and show if he can, by release or otherwise, why execution ought not to issue; or to make a person, who derives a benefit by or becomes chargeable to the execution, a party to the judgment, who was not a party to the original suit. In both of these classes of cases, the purpose of the writ is merely to continue a former suit to execution. When the writ is founded on a recognizance, its purpose is, as in cases of judgment, to have execution; and though it is not a continuation of a former suit, as in the case of judgments, yet, not being the commencement and foundation of an action, it is not an original, but a judicial, writ, and at most is only in the nature of an original action. When founded on a judicial record, the writ must issue out of the court where the judgment was given or recognizance entered of record, if the judgment or recognizance remains there, or if they are removed out of the court where they are; 3 Bla. Com. 416, 421; Hanson v. Barnes' Lessee, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322; 2 Wms. Saund. 71. See Challenor v. Niles, 78 Ill. 78.

Scire facias to revive a judgment being a continuation of the suit, jurisdiction thereon is in the court where the judgment was rendered, regardless of the residence of the parties; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638. A *scire facias* to revive a judgment being regarded in Pennsylvania as a substitute for an action of debt on the judgment, a judgment so revived without service or appearance has no binding force as against

a defendant who resides in another state; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; and it is held that when judgment is thus revived the plaintiff cannot recover in another state thereon after the limitation has run against the original judgment; Betts v. Johnson, 68 Vt. 549, 35 Atl. 489. A judgment may be revived at common law on a writ and alias writ of *sci. fa.* with return of *nihil* as to each; Kratz v. Preston, 52 Mo. App. 251; but such revival on two returns of *nihil* operates merely to keep in force the local lien and does not stop the running of the statute of limitations in another state where the defendant resides; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837.

Non-judicial records are letters patent and corporate charters. The writ, when founded on a non-judicial record, is the commencement and foundation of an original action; and its purpose is always to repeal or forfeit the record. *Quo warranto* is the usual and more appropriate remedy to forfeit corporate charters and offices; and *scire facias*, though used for that purpose, is more especially applicable to the repeal of letters patent. When the crown is deceived by a false suggestion, or when it has granted anything which by law it cannot grant, or where the holder of a patent office has committed a cause of forfeiture, and other like cases, the crown may by its prerogative repeal by *scire facias* its own grant. And where by several letters patent the self-same thing has been granted to several persons, the first patentee is of right permitted, in the name and at the suit of the crown by *scire facias*, to repeal the subsequent letters patent; and so, in any case of the grant of a patent which is injurious to another, the injured party is permitted to use the name of the crown in a suit by *scire facias* for the repeal of the grant. This privilege of suing in the name of the crown for the repeal of the patent is granted to prevent multiplicity of suits; 2 Wms. Saund. 72, notes. A state may by *scire facias* repeal a patent of land fraudulently obtained; Carroll's Lessee v. Llewellin, 1 H. & McH. (Md.) 162. See REPEAL; PATENT.

Scire facias is also used by government as a mode of ascertaining and enforcing the forfeiture of a corporate charter; 3 Wood, Ry. L. 208, n.; where there is a legal existing body capable of acting, but who have abused their power; it cannot, like *quo warranto* (which is applicable to all cases of forfeiture), be applied where there is a body corporate *de facto* only, who take upon themselves to act, but cannot legally exercise their powers. In *scire facias* to forfeit a corporate charter, the government must be a party to the suit; for the judgment is that the parties be ousted and the franchises be seized into the hands of the government; 2 Kent 313; 10 B. & C. 240; Centre & K. Turnpike Road Co. v. M'Conaby, 16 S. & R. (Pa.) 140; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72. See QUO WARRANTO.

Scire facias is also used to suggest further breaches on a bond with a condition, where a judgment has been obtained for some but not all of the breaches and to recover further instalments where a judgment has been obtained for the penalty before all the instalments are due; 1 Wms. Saund. 58; Young v. Reynolds, 4 Md. 375.

By statute, in Pennsylvania, *scire facias* is the method of proceeding upon a mortgage.

The pleadings in *scire facias* are peculiar. The writ recites the judgment or other record, and also the suggestions which the plaintiff must make to the court to entitle him to the proceeding by *scire facias*. The writ, therefore, presents the plaintiff's whole case, and constitutes the declaration, to which the defendant must plead; Lasselle v. Godfroy, 1 Blackf. (Ind.) 297. And when the proceeding is used to forfeit a corporate charter, all the causes of forfeiture must be assigned in distinct breaches in the writ, as is done in the declaration or replication on a bond with a condition. And the defendant must either disclaim the charter or deny its existence, or deny the facts alleged as breaches, or demur to them. The suggestions in the writ, disclosing the foundation of the plaintiff's case, must also be traversed if they are to be avoided. The *scire facias* is founded partly upon them and partly upon the record; 2 Inst. 470, 679. They are substantive facts, and can be traversed by distinct pleas embracing them alone, just as any other fundamental allegation can be traversed alone. All the pleadings after the writ or declaration are in the ordinary forms. There are no pleadings in *scire facias* to forfeit a corporate charter to be found in the books, as the proceeding has been seldom used. There is a case in 1 P. Wms. 207, but no pleadings are given; also in Board of Com'rs for the Frederick Female Seminary, 9 Gill (Md.) 379, with a synopsis of the pleadings. Perhaps the only other case is in Vermont; and it is without pleadings. A defendant cannot plead more than one plea to a *scire facias* to forfeit a corporate charter: the statutes of 4 & 5 Anne, ch. 16, and 9 Anne, ch. 20, allowing double pleas, do not extend to the crown; 1 Chitty, Pl. 479; 1 P. Wms. 220.

SCIRE FACIAS AD AUDIENDUM ERRORES (Lat.). The name of a writ which is sued out after the plaintiff in error has assigned his errors. Fitzh. N. B. 20; Bac. Abr. *Error* (F). Where a *scire facias ad audiendum errores* describes correctly, in its recital, the parties to the judgment complained of, but in the citing part brings in parties whose names do not appear in the writ of error, the irregularity in the *scire facias* may be cured by amendment; U. S. Mut. Accident Ass'n of City of New York v. Weller, 30 Fla. 210, 11 South. 786.

SCIRE FACIAS AD DISPROBANDUM DEBITUM (Lat.). The name of a writ in use in Pennsylvania, which lies by a defendant in foreign attachment against the plaintiff, in order to enable him, within a year and a day next ensuing the time of payment to the plaintiff in the attachment to disprove or avoid the debt recovered against him. Act June 13, 1836. See a form in 60 Pittsb. Leg. J. 449.

SCIRE FACIAS FOR THE CROWN. The summary proceeding by extent is only resorted to when a crown debtor is insolvent, or there is good ground for supposing that the debt may be lost by delay. Whart. Law Lex.

SCIRE FACIAS QUARE RESTITUTIONEM NON. A writ which lies where execution on a judgment has been levied, but the money has not been paid over to the plaintiff, and the judgment is afterwards reversed in error or on appeal; in such a case a *scire facias* is necessary before a writ of restitution can issue. 1 Chitty, Pl. 582.

SCIRE FECI (Lat. I have made known). The return of the sheriff, or other proper officer, to the writ of *scire facias*, when it has been served.

SCIRE FIERI INQUIRY. In English Law. The name of a writ formerly used to recover the amount of a judgment from an executor.

The history of the origin of the writ is as follows: When on an execution *de bonis testatoris* against an executor the sheriff returned *nulla bona* and also a *devastavit*, a *fieri facias de bonis propriis* might formerly have been issued against the executor, without a previous inquisition finding a *devastavit* and a *scire facias*. But the most usual practice upon the sheriff's return of *nulla bona* to a *fieri facias de bonis testatoris* was to sue out a special writ of *fieri facias de bonis testatoris*, with a clause in it, "*et si tibi constare poterit*" that the executor had wasted the goods, then to levy *de bonis propriis*. This was the practice in the king's bench till the time of Charles I.

In the common pleas a practice had prevailed in early times upon a suggestion in the special writ of *fieri facias* of a *devastavit* by the executor, to direct the sheriff to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued out against him, and, unless he made a good defence thereto, an execution *de bonis propriis* was awarded against him.

The practice of the two courts being different, several cases were brought into the king's bench on error, and at last it became the practice of both courts, for the sake of expedition, to incorporate the *fieri facias* inquiry, and *scire facias*, into one writ, thence called a *scire fieri inquiry*,—a name compounded of the first words of the two writs of *scire facias* and *fieri facias*, and that of inquiry, of which it consists.

This writ recites the *fieri facias de bonis testatoris* sued out on the judgment against the executor, the return of *nulla bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debt and damages recovered, commands the sheriff to levy the said debt and damages of the goods of the testator in the hands of the executor, if they could be levied thereof, but if it should appear to him by the inquisition of a jury that the executor had wasted the goods of the testator, then the sheriff is to warn the executor to appear, etc. If the judgment had been either by or against the testator or intestate, or both, the writ of *fieri facias* recites that fact, and also that the court had adjudged, upon a *scire facias* to revive the judgment, that the executor or administrator should have execution for the debt, etc. Clift, Entr. 659; Lilly, Entr. 664.

Although this practice is sometimes adopted, yet the most usual proceeding is by action of debt, on the judgment, suggesting a *devastavit* because in the proceeding by *scire fieri inquiry* the plaintiff is not entitled to costs unless the executor appears and pleads to the *scire facias;* 1 Saund. 219, n. 8. See 2 Archb. Pr. 934.

SCIREWYTE. The annual tax or prestation paid to the sheriff for holding the assizes or county courts. Par. Ant. 573.

SCOLD. See COMMON SCOLD.

SCOPE. Design, aim, or purpose. Linblom v. Ramsey, 75 Ill. 246. As ordinarily used, extent, limits, etc.

SCOT AND LOT. See LOT AND SCOT.

SCOTALE. An extortion by officers of the forests who kept ale-houses and compelled people to drink there under fear of their displeasure. Manw. For. Laws, pt. 1, 216.

SCOTCH MARRIAGES. See GRETNA GREEN.

SCOTCH PEERS. Peers of the kingdom of Scotland; of these sixteen are elected by the entire body as representative peers in the House of Lords. They are elected for one parliament only. See PEERS.

SCOTLAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

SCOUNDREL. An opprobrious title, applicable to a person of bad character.

General damages will not lie for calling a man a scoundrel, but special damages may be recovered when there has been an actual loss; 1 Chitty, Pr. 44.

SCRAWL. A mark which is to supply the place of a seal. 2 Pars. Contr., 8th ed. 589. See SCROLL.

SCRIBE. See CANCELLARIUS.

SCRIP. A certificate or schedule. Evidence of the right to obtain shares in a public company; sometimes called scrip certificate, to distinguish it from the real title to shares. Whart. L. Dict. Sometimes, in this country, it indicates a substitute for a cash dividend, usually payable out of future earnings. Land scrip is a certificate that the holder is entitled to take up so much (usually government) land. The possession of such scrip is *prima facie* evidence of ownership of the shares therein designated; Add. Contr. 203*. It is not goods, wares, or merchandise within the statute of frauds; 16 M. & W. 66. Scrip certificates have been held negotiable; L. R. 10 Ex. 337; Dos Passos, Stockbrokers 488.

South Carolina, by act of 1872, authorized

revenue bond scrip of the state in the form of bills payable which resembled treasury notes. They bore no interest, but were made receivable for all bills due the state except taxes levied to pay interest on the public debt. When received by the treasurer they could be paid out again. It was held they were intended to circulate as money, and were bills of credit within the prohibition of the federal constitution; Wesley v. Eells, 177 U. S. 370, 20 Sup. Ct. 661, 44 L. Ed. 810.

See DIVIDEND; STORE ORDERS.

SCRIPT. The original or principal instrument, where there are part and counterpart.

SCRIVENER. A person whose business it is to write deeds and other instruments for others; a conveyancer.

Money scriveners are those who are engaged in procuring money to be lent on mortgages and other securities, and lending such money accordingly. They act also as agents for the purchase and sale of real estates.

An attorney, *qua* attorney, is not a scrivener; 18 E. L. & Eq. R. 402

To be considered a money scrivener, a person must be concerned in carrying on the trade or profession as a means of making a livelihood. He must in the course of his occupation receive other men's money into his trust and custody, to lay out for them as occasion offers: 3 Camp. 538.

SCROLL. A mark intended to supply the place of a seal made with a pen on a deed or other instrument of writing. Mitch. R. E. & Conv. 454, 455. In Mississippi and Florida it has been held, that "a scroll attached to a written instrument has the effect of a seal, whenever it appears from the body of the instrument, the scroll itself, or the place where affixed, that such scroll was intended as a seal;" Hudson v. Poindexter, 42 Miss. 304. The word "seal" affixed to the name has been held equivalent to a seal or scroll; Whitley v. Davis' Lessee, 1 Swan (Tenn.) 333; Cochran v. Stewart, 57 Minn. 499, 59 N. W. 543; and so where the word seal is printed and appears opposite the name; Lorah v. Nissley, 156 Pa. 329, 27 Atl. 242; otherwise in Virginia and Indiana. In Wisconsin and Pennsylvania a printed "L. S.," inclosed in brackets, in the usual place of a seal, is sufficient; Williams v. Starr, 5 Wis. 549 (see Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430); or in the latter state a seal made with a flourish of the pen; Appeal of Hacker, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861, a printed "L. S." annexed to the maker's signature constitutes a seal by adoption where the instrument recites that it is executed under the maker's hand and seal; Stansell v. Corley, 81 Ga. 453, 8 S. E. 868. An expression in the body of the instrument denoting that it is sealed is sufficient, whatever the scroll may be; Armstrong v. Pearce, 5 Harr. (Del.) 351; Bell v. Keefe, 13 La. Ann. 524. See SEAL.

SCRUET ROLL (called, also, *Scruet Finium*, or simply *Scruet*). **In Old English Law.** A record of the bail accepted in cases of *habeas corpus*. The award was set down in the remembrance roll, together with the cause of commitment, the writ and return were put on file, the bail was recorded in the scruet. 3 Howell, St. Tr. 134, arg. For remembrance roll, see Reg. Mich. 1654, § 15.

SCRUTATOR (Lat. from *scrutari*, to search). **In Old English Law.** A bailiff whom the king of England appointed in places that were his in franchise or interest, whose duty was to look after the king's water-rights: as, *flotsam*, *jetsam*, wreck, etc. 1 Hagr. Tracts 23; Pat. 27 Hen. VI. parte 2, m. 20; Pat. 8 Ed. IV. parte 1, m. 22.

SCUTAGE (from Lat. *scutum*, a shield). Knight-service. Littleton § 99. The tax which those who, holding by knight-service, did not accompany the king, had to pay on its being assessed by parliament. Scutage certain was a species of socage where the compensation for service was fixed. Littleton § 97; Reg. Orig. 88.

Payment in lieu of military service was the essential principle of scutage. It was the fixed sum due from mesne tenants to their lord. See Round, Feud. Engl. 270; 3 Holdsw. Hist. E. L. 34; Vinogradoff, Engl. Soc. 15.

SCYREGEMOTE. The name of a court among the Saxons. It was the court of the shire, in Latin called *curia comitatis*, and the principal court among the Saxons. It was holden twice a year for determining all causes both ecclesiastical and secular.

SE DEFENDENDO (Lat.). Defending himself. Homicide *se defendo* may be justifiable.

SEA. The ocean; the great mass of water which surrounds the land, covering nearly three-quarters of the globe. Waters within the ebb and flow of the tide are to be considered the sea; Thackarey v. The Farmer of Salem, Gilp. 526, Fed. Cas. No. 13,852.

A large body of salt water communicating with the ocean is also called a sea; as, the Mediterranean sea, etc.

Very large inland bodies of salt water are also called seas; as, the Caspian sea, etc.

"A sea," in nautical language, may mean a general disturbance of the surface of the water occasioned by a storm, and breaking it up into the roll and lift of waves following or menacing each other; some particular wave or surge, separate from its fellows; Snowden v. Guion, 101 N. Y. 463, 5 N. E. 322.

As a boundary in a conveyance, it includes the beach to low water mark; Snow v. Real Estate Co., 84 Me. 14, 24 Atl. 429, 17 L. R. A. 280, 30 Am. St. Rep. 331.

The high seas include the whole of the seas below high water mark and outside the body of the county. Couls. & F. on Waters. See 2 Ex. Div. 62; HIGH SEAS.

The open sea is public and common property, and any nation or person has ordinarily an equal right to navigate it or to fish therein; 1 Kent 27; Ang. Tide-Waters 44; and to land upon the sea-shore. Bened. Adm. 224-257.

Every nation has jurisdiction over the person of its own subjects in its own public and private vessels when at sea; and so far territorial jurisdiction may be considered as preserved; for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. The extent of jurisdiction over adjoining seas is often a question of difficulty, and one that is still open to controversy. As far as a nation can conveniently occupy, and that occupation is acquired by prior possession or treaty, the jurisdiction is exclusive; 1 Kent 29. This has been heretofore limited to the distance of a *cannon-shot*, or marine league, over the waters adjacent to its shore; Church v. Hubbart, 2 Cra. (U. S.) 187, 234, 2 L. Ed. 249; Bynkershoek, Qu. Pub. Juris. 61; 1 Azuni, Marit. Law 185, 204; Vattel 207. See LEAGUE; SEAMAN; ADMIRALTY; ARM OF THE SEA; LOW WATER MARK; LITUS MARIS; TERRITORIAL WATERS; SEA-SHORE; LEGISLATIVE POWER.

SEA BATTERIES. Assaults by masters in the merchant service upon seamen, at sea.

SEA DAMAGED. In a contract for sale of goods shipped or to be shipped, the phrase, "Sea damaged, if any, to be taken at a fair valuation," contemplates the risk of damage to the goods by perils of the sea, and does not restrict to any particular ship the subsequent transportation of such goods to their destination. Harrison v. Fortlage, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616. See PERILS OF THE SEA.

SEA-LETTER. SEA-BRIEF. A document which should be found on board of every neutral ship; it specifies the nature and quantity of the cargo, the place from whence it comes and its destination. Chitty, Law of Nat. 197; I. & C. Sleght v. Rhinelander, 1 Johns. (N. Y.) 192. See SHIP'S PAPERS.

SEA PERILS. See PERILS OF THE SEA.

SEA POSTAGE. The difference reached by subtracting inland postage from the total postage. Pacific Mail S. S. Co. v. U. S., 28 Ct. Cl. 1.

SEA-SHORE. That space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark. Hargrave, St. Tr. 12; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Bell v. Gough, 23 N. J. L. 624; Cutts v. Hussey, 15 Me. 237; 4 De G. M. & G. 206; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 51, n; Hathaway v. Wilson, 123 Mass. 361; Galveston v. Menard, 23 Tex. 358; Long Beach Land & W. Co. v. Richardson, 70 Cal. 206, 11 Pac. 695; Martin v. O'Brien, 34 Miss. 21. See TIDE; TIDE-WATER. In a deed, sea-shore is equivalent in its strict legal sense to foreshore and means the land between medium high and low water mark; [1905] 2 Ch. 164.

At common law, the sea-shore, in England, belongs to the crown; in this country, to the state; 3 Kent 347; 27 E. L. & E. 242; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Brookhaven's Trustees v. Strong, 60 N. Y. 56; Pollard's Lessee v. Hagan, 3 How. (U. S.) 221, 11 L. Ed. 565; Bell v. Gough, 23 N. J. L. 624. In England, the sovereign is not the absolute proprietor, but holds the sea-shore subject to the public rights of navigation and fishery; and if he grants it to an individual, his grantee takes subject to the same rights; Phear, Rights of Water 45; Ang. Tide-Wat. 21. So in this country it has been held that the rights of fishery and navigation remain unimpaired by the grant of lands covered by navigable water; Wilson v. Inloes, 6 Gill (Md.) 121. But the power of the states, unlike that of the crown, is absolute except in so far as it is controlled by the federal constitution; Ang. Tide-Wat. 59. The states, therefore, may regulate the use of their shores and the fisheries thereon, provided such regulations do not interfere with the laws of congress; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269; Townsend v. Brown, 24 N. J. L. 80; Wilson v. Black-Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412. And see TIDE-WATER; RIVER; FISHERY.

The public right of fishing includes shrimping and gathering all shell-fish or other fish whose natural habitat is between high and low water mark; Peck v. Lockwood, 5 Day (Conn.) 22; 2 B. & P. 472; Moore v. Griffin, 22 Me. 353.

In Massachusetts and Maine, by the colony ordinance of 1641, and by usage arising therefrom, the proprietors of the adjoining land on bays and arms of the sea, and other places where the tide ebbs and flows, own to low water mark, subject to the public easement, and not exceeding one hundred yards below high water mark; Sale v. Pratt, 19 Pick. (Mass.) 191; 3 Kent 429; Dane, Abr. c. 68, a. 3, 4. It was a question whether this ordinance extended to New Hampshire; Nudd v. Hobbs, 17 N. H. 527. A description of lands extending *to* the sea-*shore* will not include the shore itself; Niles v. Patch, 13 Gray (Mass.) 257; Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653.

A conveyance of a wharf has been held to include flats in front of it: Doane v. Broad-St. Ass'n, 6 Mass. 332; Com. v. Alger, 7

Cush. (Mass.) 66; and as an incident sea weed cast upon them is *prima facie* an appurtenant belonging to the owner of the soil; East Hampton v. Kirk, 6 Hun (N. Y.) 257; Phillipps v. Rhodes, 7 Metc. (Mass.) 322. See LAKE; WHARF.

See an article by Frederic R. Coudert in Col. L. Rev. (March, 1909), reviewing the cases.

An owner of land bounded by the sea has a private right of access thereto for the purpose of navigation, and this, even when the foreshore is left bare by the tide; [1906] Ir. R. Ch. Div. 519.

By the Roman law, the shore included the land as far as the greatest wave extended in winter; *est autem littus maris quatenus hibernus fluctus maximus excurrit.* Inst. l. 2, t. 1, s. 3. *Littus publicum est eatenus qua maxime fluctus exæstuat.* Dig. 50. 16. 112.

The Civil Code of Louisiana seems to have followed the law of the Institutes and the Digest; for it enacts, art. 442, that the "sea-shore is that space of land over which the waters of the sea are spread in the highest water during the winter season."

See 5 Rob. 182; Dougl. 425; 2 Rolle, Abr. 170; Dy. 326; 5 Co. 107; Bacon, Abr. *Courts of Admiralty* (A); Mobile v. Eslava, 16 Pet. (U. S.) 234, 10 L. Ed. 948; Martin v. Waddell, 16 Pet. (U. S.) 367, 10 L. Ed. 997; 5 M. & W. 327; Moore v. Griffin, 22 Me. 350; Coul. & F. Waters; Hale's *De Jure Maris*, given in full in Hale, Sea Sh. and for the most part in Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 54; FORESHORE.

SEA WEED. A species of grass which grows in the sea. When cast upon land, it belongs to the owner of the land adjoining the sea-shore, upon the grounds that it increases gradually, that it is useful as manure and a protection to the ground, and that it is some compensation for the encroachment of the sea upon the land; 3 B. & Ad. 967; Emans v. Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427. See Rogers v. Judd, 5 Vt. 223, 26 Am. Dec. 299; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715. But when cast upon the shore between high and low water mark it belongs to the public and may be lawfully appropriated by any person; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 54. See ALLUVION.

SEAL. An impression upon wax, wafer, or some other tenacious substance capable of being impressed. Warren v. Lynch, 5 Johns. (N. Y.) 239; 4 Kent 452. It does not seem necessary that an impression be made; 6 C. P. 411.

Lord Coke defines a seal to be wax, with an impression. 3 Inst. 169. "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum.*" The definition given above is the common-law definition of a seal; Perkins 129, 134; Brooke, Abr. *Faits* 17, 30; 2 Leon. 21; Warren v. Lynch, 5 Johns. (N. Y.) 239; Mill Dam Foundery v. Hovey, 21 Pick. (Mass.) 417; but any other material besides wax may be used; Tasker v. Bartlett, 5 Cush. (Mass.) 359.

Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device with which an impression may be made on wax or other substance, on paper or parchment, in order to authenticate them; the impression thus made is also called a seal; Répert. mot *Sceau;* Kershaw's Ex'rs v. Whitaker, 3 McCord (S. C.) 583; Biery v. Haines, 5 Whart. (Pa.) 563.

Where the seal of a public officer does not contain the name of the state, but it is written in a blank left for that name, a verification authenticated by such a seal is insufficient; Oelbermann v. Ide, 93 Wis. 669, 68 N. W. 393, 57 Am. St. Rep. 947.

The seal came from the Frankish kings; its use was confined to counts and bishops; a man of lower degree could execute his bond by carrying it before his lord and having him affix his seal. Before the end of the 13th century the free and lawful man usually had a seal. 2 Poll. & Maitl. 223. See, also, Add. Contr. 6.

A person may adopt any seal as his own, or anything in place of a seal; In re Thomas, 35 Fed. 337; it is not necessarily of any particular form or figure, and may consist of an outline without an enclosure, or of a single dash or flourish of the pen; and its precise form in each case depends wholly upon the taste or fancy of the person who makes it; Appeal of Hacker, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861.

In many states, a scroll or similar device may constitute a valid seal; California, Connecticut, Florida, Illinois, Indiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Pennsylvania, Virginia, West Virginia, and Wisconsin. In several states the distinction between sealed and unsealed instruments is abolished; Arkansas, California, North Dakota, South Dakota, Mississippi, Indiana, Kentucky, and Tennessee. The use of seals by private persons is unnecessary in Arizona, Colorado, Idaho, Iowa, Kansas, Mississippi, Nebraska, Nevada, Ohio, Tennessee, Utah, and Washington. In some states official or corporate seals may be impressed on the paper itself; California, Connecticut, Dakota, Kansas, New York, Rhode Island, and Virginia. By U. S. R. S. § 6, an impression on the paper of any common process or instrument is sufficient.

When a seal is affixed to an instrument it makes it a specialty, and consideration is presumed; 2 Bla. Com. 446; Storm v. U. S., 94 U. S. 76, 24 L. Ed. 42; but the presumption does not extend to contracts in restraint of trade where actual consideration is wanting; 3 Bing. 327; or where the real consideration was illegal; Whart. Contr. § 495;

but where the distinction between sealed and unsealed instruments is abolished by statute, any failure of consideration may be shown; Williams v. Haines, 27 Ia. 251, 1 Am. Rep. 268; Carter v. Doe, 21 Ala. 88. One seal may serve for a number of signers; 36 Am. Dec. 511; although the contrary was held in Creswell's Lessee v. Lawson, 7 Gill & J. (Md.) 248; State v. Humbird, 54 Md. 327.

When an instrument concludes with the words, "witness our hands and seals," and is signed by two persons, with only one seal, the jury may infer from the face of the paper that the person who signed last adopted the seal of the first; Bowman v. Robb, 6 Pa. 302.

It is said the burden is upon a party to prove the adoption of another's seal; and the question of the adoption of a seal has been held to be for the jury; Yarborough v. Monday, 14 N. C. 420. The same contract may be the specialty of one and the parol agreement of another party to it; Eames v. Preston, 20 Ill. 389; whether a mark or character is a seal depends upon the intention of the executant, as shown by the paper; Jacksonville R. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

Whether an instrument be under seal or not is a question of law, to be solved by inspection; Duncan v. Duncan, 1 Watts (Pa.) 325.

It is not necessary to recite in a deed that it is under seal; Frevall v. Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; Richardson v. Scott River W. & M. Co., 22 Cal. 157; Eames v. Preston, 20 Ill. 389; although the contrary is held in Virginia and Alabama; Baird v. Blaigrove, 1 Wash. (Va.) 170; Carter & Carter v. Penn, 4 Ala. 140, and is recognized in New Jersey; Corlies v. Vannote, 16 N. J. L. 324; and in many jurisdictions, conclusions are expressed as to what language in an instrument is a recognition of the seal, it being held that the use of the technical language of specialties is sufficient; Lindsay & Atkinson v. State, 15 Ala. 43; Van Santwood v. Sandford, 12 Johns. (N. Y.) 197; or if the fact of the seal appears in the attestation clause; Burton v. Le Roy, 5 Sawy. 510, Fed. Cas. No. 2,217.

A recital in a bond that it is under seal estops the obligor from denying that it was a sealed instrument; Metropolitan Life Ins. Co. v. Bender, 124 N. Y. 49, 26 N. E. 345, 11 L. R. A. 708.

Though a contract indicates an intention to contract under seal, if not sealed, it is a simple contract; Simpson v. Ritchie, 110 Me. 299, 86 Atl. 124.

Where an ancient document (an exemplification of a report of commissioners appointed to fix municipal limits) has a slip for a seal and no seal, it will be presumed that a seal was once there; 2 M. & Rob. 140; 1 Lewis's Gr. Evid. § 144.

The word "*seal*" written or printed within a scroll is held to be a sufficient seal; Hudson v. Poindexter, 42 Miss. 304; Miller v. Binder, 28 Pa. 489; Jackson v. Life Ins. Co., 233 Ill. 161, 84 N. E. 198; *contra*, Jenkins v. Hurt's Com'rs., 2 Rand. (Va.) 446; Merritt v. Cornell, 1 E. D. Smith (N. Y.) 335. A recital in an instrument that it is sealed, will not make it a specialty; Chilton v. People, 66 Ill. 501; Boothbay v. Giles, 68 Me. 160.

An executory contract under seal, ignorantly made in pursuance of a parol authority, will be sufficient to maintain an action, the seal being disregarded as mere excess; Jones v. Horner, 60 Pa. 214.

Where a corporation executed a promissory note, payable to the order of its president, attaching thereto, before delivery, its corporate seal, it was held that the note was not a negotiable note under the law merchant, but was a specialty; Coe v. R. Co., 8 Fed. 534. The Uniform Negotiable Instrument Act provides otherwise. The affixing of his private seal by a corporate officer to a contract of the corporation binds the latter only by simple contract; Bank of the Metropolis v. Guttschlick, 14 Pet. (U. S.) 19, 10 L. Ed. 335.

In the absence of evidence it will be presumed that the seal of a corporation attached to an instrument was attached by authority; 4 Leg. & Ins. Rep. 107, per Sharswood, J.; where an instrument is executed on behalf of the corporation and is signed by its agent, with the common seal attached, it will be presumed, on proof of the signature, that the seal was intended as that of the corporation; Penn Natural Gas. Co. v. Cook, 123 Pa. 170, 16 Atl. 762; it is *prima facie* evidence that it was attached by corporate authority; Kirkpatrick v. Milling & Export Co., 135 Fed. 144; it is presumed to be such corporate seal as it purports to be; Boyce v. Gas Coal Co., 37 W. Va. 73, 16 S. E. 501; the seal is *prima facie* evidence that a contract has been duly entered into. It may be affixed by a less number than was competent to enter into the contract, provided it was done by a legal quorum; B. & D. Turnpike Road v. Myers, 6 S. & R. (Pa.) 12, 9 Am. Dec. 402, per Gibson, C. J.

The seal of a foreign corporation (the city of London, attached to a proof of a deed before the Lord Mayor) must be proved; Chew v. Keck, 4 Rawle (Pa.) 163.

Where an affidavit in foreign attachment was sworn to before a mayor in another state, who attached the seal of the city, it was held that proof of the seal was not necessary; Woods v. Watkins, 40 Pac. 458.

The public seal of a foreign state proves itself; U. S. v. Johns, 4 Dall. (U. S.) 416, 1 L. Ed. 888; and public acts, decrees, and judgments exemplified under this seal are received as true and genuine; Griswold v. Pitcairn, 2 Conn. 85; Lincoln v. Battelle, 6 Wend. (N. Y.) 475. But to entitle its seal to such authority the foreign state must have been acknowledged by the government within whose jurisdiction the forum is lo-

cated; U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471; 9 Ves. 347.

While an action of covenant will lie on an unsealed instrument in the state where executed, it will not lie in the state requiring a sealed instrument to support such action; Bank of U. S. v. Donnally, 8 Pet. (U. S.) 362, 8 L. Ed. 974; nor is the rule different where, by the *lex loci contractus*, a scroll or other device is recognized as a seal, but is not in the state of the forum; Prentice v. Zane, 8 How. (U. S.) 471, 12 L. Ed. 1160. Whether any seal is required upon a protest of a bill of exchange is determined by the *lex loci contractus*; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254. A scroll does not amount to a seal of office; Hendrix v. Boggs, 15 Neb. 470, 20 N. W. 28; or a corporate seal; Bates v. R. Co., 10 Allen (Mass.) 251.

The absence of a seal from a writ of attachment does not invalidate the writ, it being in a new county and not yet provided with one; Wehrman v. Conklin, 155 U. S. 329, 15 Sup. Ct. 129, 39 L. Ed. 167.

The seal of a notary public is taken judicial notice of the world over: 2 Esp. 700; Browne v. Bank, 6 S. & R. (Pa.) 484, 9 Am. Dec. 463; Chanoine v. Fowler, 3 Wend. (N. Y.) 173; Porter v. Judson, 1 Gray (Mass.) 175. Judicial notice is taken of the seals of superior courts; Com. Dig. *Evidence* (A 2); not so of foreign courts; 3 East 221; except admiralty or marine courts; Church v. Hubbart, 2 Cra. (U. S.) 187, 2 L. Ed. 249; Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168. See Story, Confl. Laws § 643.

In Louisiana and other civil-law jurisdictions the effects of a deceased person are taken into public custody by being sealed, and the details of the action of officials in connection therewith are carefully regulated by statute.

See Cooper v. Rankin, 5 Binn. (Pa.) 613, for some interesting history, and a suggestion that the use of seals by persons be abolished by law.

See BULL; PRIVY SEAL; SEAL OF THE UNITED STATES; SCROLL.

SEAL DAYS. **In English Practice.** Motion days in the court of chancery, so called because every motion had to be stamped with the seal, which did not lie in court in the ordinary sittings out of term. Whart. Dict.

SEAL FISHERIES. The controversy concerning the sealing interest in Bering sea between the United States and Great Britain has involved an elaborate discussion with respect to the characteristics and habits of the seals, and the question whether their custom of going in herds through the open sea to certain islands at stated periods of the year for breeding purposes, made them the lawful prey of any captor, or whether the United States could assert over them a property right growing out of the fact that unquestionably the *home* of the animal was in the territory of the United States. This subject occupied the attention of the Paris tribunal under the treaty for the settlement of claims growing out of the seizure of vessels engaged in the seal fishery. The discussions were of great interest and extended to the general question so much mooted by writers on the subject, whether international law had any real basis other than the mere consent of nations to specific propositions. That particular controversy was decided against the United States and the proceedings may be referred to for information on the subject. See INTERNATIONAL LAW.

Rev. St. § 1956 (as amended April 21, 1910) prohibits the killing within the limits of Alaska or its waters of fur seals and various other fur-bearing animals under penalty of fine or imprisonment, or both, and forfeiture of vessels found engaged in violating the section, but power is given to the secretary of commerce to make regulations authorizing the killing of such animals.

By the act of April 21, 1910, the killing of fur seals shall be exercised by officers, agents or employees of the United States or natives of Pribilof Islands acting under them and by no other person. Only males shall be killed and only ninety-five per cent. of three year old males killed in any one year. The skins are to be sold by the government. These islands are declared a special reservation, on which landing is forbidden except for unavoidable cause. Killing shall not be done by firearms. It is unlawful to kill any female seal or any seal less than one year old; and to kill any seal in the waters adjacent to the Pribilof Islands, or on the beaches or cliffs where they haul up. No citizen of the United States or person owing obedience to its laws, nor any person belonging to or on board a United States vessel, shall kill or hunt fur seals in the waters of the Pacific Ocean, whether in the territorial waters of the United States or in the open sea.

The act of congress of August 24, 1912, reciting a convention with Great Britain, Japan and Russia, provides that no United States citizen or person owing obedience to its laws shall kill or capture seals more than three miles from the coast line of any United States territory, excepting the aborigines when fishing in canoes or undecked boats manned by not more than five such. Killing seals on Pribilof Island is forbidden for five years. Pelagic sealing is defined as meaning the killing, capturing, or pursuing in any manner fur seals while the same are in the water.

It has been held by United States courts that the waters of Bering sea are those within the three-mile zone from Alaska: La Ninfa, 75 Fed. 513, 21 C. C. A. 434; In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232. R. S. § 1956 is violated though the animals are taken by boats sent out to a dis-

tance from the vessel seized; The Alexander, 60 Fed. 914. See The James G. Swan, 50 *id.* 108. A vessel is liable to forfeiture if her boats take seals within the prohibited zone though she does not go there; U. S. v. The Jane Gray, 77 Fed. 908, under act of 1894.

See FISHERY.

SEAL OFFICE. **In English Practice.** The office at which certain judicial writs are sealed with the prerogative seal, and without which they are of no authority. The officer whose duty it is to seal such writs is called "sealer of writs."

SEAL OF THE UNITED STATES. The seal used by the United States in congress assembled shall be the seal of the United States, viz.: ARMS, paleways of thirteen pieces argent and gules; a chief azure; the escutcheon on the breast of the American eagle displayer proper, holding in his dexter talon an olive-branch, and in his sinister a bundle of thirteen arrows, all proper, and in his beak a scroll, inscribed with this motto, "*E pluribus unum.*" For the CREST: over the head of the eagle which appears above the escutcheon, a glory, or breaking through a cloud, proper, and surrounding thirteen stars, forming a constellation argent on an azure field. REVERSE, a pyramid unfinished. In the zenith, an eye in a triangle, surrounded with a glory proper: over the eye, these words, "*Annuit cœptis.*" On the base of the pyramid, the numerical letters MDCCLXXVI; and underneath, the following motto: "*Novus ordo sectorum.*" Resolution of Congress, June 20, 1782; R. S. § 1793. See Marbury v. Madison (U. S.) 1 Cra. 158, 2 L. Ed. 60. It is in the custody of the secretary of state; R. S. § 1794.

The various departments and courts have each their own seal as provided by the Revised Statutes and the Judicial Code.

SEAL-PAPER. A document issued by the lord chancellor previously to the commencement of the sittings, detailing the business to be done for each day in his court, and in the courts of the lords justices and vice-chancellors. The master of the rolls in like manner issued a seal-paper in respect to the business to be heard before him. Sm. Ch. Pr. 9.

SEALED AND DELIVERED. The common formula of attestation of deeds and other instruments, written immediately over the witnesses' names.

SEALER. An officer in chancery who sealed the writs and instruments.

SEALING A VERDICT. The putting a verdict in writing, and placing it in an envelope, which is sealed. To relieve jurors after they have agreed, it is not unusual for the counsel to agree that the jury shall seal their verdict and then separate. When the court is again in session, the jury come in and give their verdict in all respects as if it had not been sealed; and a juror may dissent from it if since the sealing he has honestly changed his mind; Sutliff v. Gilbert, 8 Ohio, 405; Cook v. Scott, 1 Gilm. (Ill.) 333. A sealed verdict of guilty on certain counts of an indictment, without any finding as to the other counts, is held not to be invalidated by permitting the jury, after the verdict is opened, but before it is recorded, to amend it by adding not guilty as to the others; Hechter v. Maryland, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457.

SEAMAN. A sailor; a mariner; one whose business is navigation. 2 Boulay-Paty, *Dr. Com.* 232; Laws of Oleron, art. 7; Laws of Wisby, art. 19; Bened. Adm. 277.

The term seamen, in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors; 3 Pardessus, n. 667. But the mate; Atkyns v. Burrows, 1 Pet. Adm. 246, Fed. Cas. No. 618; the cook and steward; Black v. The Louisiana, 2 Pet. Adm. 268, Fed. Cas. No. 1,461; and engineers, clerks, carpenters, firemen, deck-hands, porters, and chambermaids, on passenger-steamers, when necessary for the service of the ship; 1 Conkl. Adm. 107; 2 Pars. Marit. Law 582; are considered, as to their rights to sue in the admiralty, as common seamen; and persons employed on board of steamboats and lighters engaged in trade or commerce on tide-water are within the admiralty jurisdiction; while those employed in ferry-boats are not; Smith v. The Pekin, Gilp. 203, Fed. Cas. No. 13,090. Persons who do not contribute their aid in navigating the vessel or to its preservation in the course of their occupation, as musicians, are not to be considered as seamen with a right to sue in the admiralty for their wages; Trainer v. The Superior, Gilp. 516, Fed. Cas. No. 14,136. Persons employed upon a flat boat with an engine erected thereon, mainly employed in constructing bulkheads and to assist in moving materials to and fro, are to be regarded as rendering maritime services, so as to give them a lien on the vessel for their wages; Lawrence v. Flatboat, 84 Fed. 200. One who brings a vessel to her home port, and lays her up there *i. e.* anchors her out of the channel, pumps her out, dries her sails, sees to her fastenings, and renders other services usually performed by mariners, is entitled to a lien for his compensation; The Hattie Thomas, 59 Fed. 297. See LIEN.

Seamen in the merchant-vessels are required to enter into a contract in writing, commonly called shipping articles, which see. This contract being entered into, they are bound, under severe penalties, to render themselves on board the vessel according to the agreement; they are not at liberty to leave the ship without the consent of the captain or commanding officer; and for such

absence, when less than forty-eight hours, they forfeit three days' wages for every day of absence; and when the absence is more than forty-eight hours at one time, they forfeit all the wages due to them, and all their goods and chattels which were on board the vessel, or in any store where they may have been lodged at the time of their desertion, to the use of the owners of the vessel; and they are liable for damages for hiring other hands. They may be imprisoned for desertion until the ship is ready to sail.

A consular officer of the United States may discharge a seaman on the application of the master, for any cause sanctioned by the usages and principles of maritime law, as recognized in the United States, on the payment of the wages then earned; and all claims for wages for the remainder of the voyage is thereby cut off and barred; The T. F. Oakes, 36 Fed. 442.

On board, a seaman is bound to do his duty to the utmost of his ability; and when his services are required for extraordinary exertions, either in consequence of the death of other seamen or on account of unforeseen perils, he is not entitled to an increase in wages, although it may have been promised to him; 2 Camp. 317; The Potomac, 72 Fed. 535, 19 C. C. A. 151, 38 U. S. App. 219. For disobedience he could formerly be imprisoned or punished with stripes; but the correction must be reasonable; U. S. v. Freeman, 4 Mas. 508, Fed. Cas. No. 15,162; Hempstead v. Bird, 2 Day (Conn.) 294; U. S. v. Wickham, 1 Wash. C. C. 316, Fed. Cas. No. 16,689; but see CORRECTION; ASSAULT; BATTERY; and, for just cause, may be put ashore in a foreign country; Relf v. The Maria, 1 Pet. Adm. 186, Fed. Cas. No. 11,692; 2 East 145. By act of congress, Sept. 28, 1850, it is provided that flogging in the navy and on board of vessels of commerce be abolished. And this prohibits corporal punishment by stripes inflicted with a cat, and any punishment which in substance amounts thereto; U. S. v. Cutler, 1 Curt. C. C. 501, Fed. Cas. No. 14,910. See The General Rucker, 35 Fed. 152. A master may punish a seaman who refuses to do his duty, and may, if he is incorrigible, discharge him, confine him, or deprive him of privileges; but forfeiture of wages cannot be superadded to corporal punishment, and it is not within the ordinary powers of a master to imprison a sailor on shore; The Stacey Clarke, 54 Fed. 533.

Seamen are entitled to their wages, of which one-third is due at every port at which the vessel shall unlade and deliver her cargo before the voyage be ended; and at the end of the voyage an easy and speedy remedy is given them to recover all unpaid wages. When taken sick, a seaman is entitled to medical advice and aid at the expense of the ship, such expense being considered in the nature of additional wages and as constituting a just remuneration for his labor and services; Harden v. Gordon, 2 Mas. 541, Fed. Cas. No. 6,047; Raymond v. The Ella S. Thayer, 40 Fed. 904. In case of sickness preventing a performance of duty, if the malady be not occasioned by the mariner's malconduct, the full wages are payable; and if a sailor dies on the voyage, his heirs shall have his full wages; Highland v. The Harriet C. Kerlin, 41 Fed. 224.

The right of seamen to wages is founded not in the shipping articles, but in the services performed; Mahoon v. The Glocester, Bee 395, Fed. Cas. No. 8,970; and to recover such wages the seaman has a triple remedy, —against the vessel, the owner, and the master; Bronde v. Haven, Glip. 592, Fed. Cas. No. 1,924; Carey v. The Kitty, Bee 254, Fed. Cas. No. 2,401. But he cannot claim wages to the end of the voyage when he has obtained his discharge at his own solicitation and against the advice and even against the expostulation of the master; Raymond v. The Ella S. Thayer, 40 Fed. 903. The legislation of most maritime countries, ancient and modern, established that the contract of a seaman always involved, to a certain extent, the surrender of his personal liberty during the life of the contract, and the necessities, and perhaps the safety, of navigation have called into existence legislation, by nearly all maritime nations, for the purpose of securing the personal attendance of the crew on board and for their criminal punishment for their desertion or absence without leave; and it is, therefore, a natural and equitable result that the expenses of their confinement and the wages of their substitutes whilst they are refusing to work should be deducted from their wages; The W. F. Babcock, 85 Fed. 978, 29 C. C. A. 514. In cases of desertion of seamen, the proper expenses for their arrest and detention, and the cost of supplying substitutes whilst so detained, and also the cost of any damage to property by them, may be deducted from their wages; *id.*

When destitute in foreign ports, American consuls and commercial agents are required to provide for them and for their passage to some port of the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board at the request of the consul. See R. S. §§ 4577–4579, as amended 1884 and 1886; SEAMEN'S FUND.

The arrest and return to their ships of deserting foreign seamen is required by the treaty with Russia and other treaties; whether, in the absence of a treaty, the courts have such power, is not decided; Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264. That they have not, see Moore, Extrad. § 408; 6 Op. A. G. 209.

A seaman is one of the crew of a merchant vessel from the time he signs the shipping

articles; of a man of war, as soon as he is detailed to her service; Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264.

An alien enlisting as one of the crew of an American ship becomes a temporary subject of the United States so as to bring him within the jurisdiction of a United States consular tribunal in respect of an offence committed by him on board ship; In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. So a German serving as a seaman on a Swedish ship becomes, for all purposes in relation to that ship, a Swedish subject; Hawaii v. Mankichi, 190 U. S. 216, 23 Sup. Ct. 787, 47 L. Ed. 1016.

If a seaman is seriously injured and requires medical attendance within a reasonable distance of a port it is the master's duty to go there but not in every instance; The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640; 48 L. Ed. 955.

Where a seaman on a whaling voyage performed extra labor in connection with a trading venture carried on without his previous knowledge, he is entitled to the same share in the profits as his lay in the catch; Lopes v. Luce, 84 Fed. 465.

If the return of a whaling ship is unduly delayed, a seaman is allowed for his time and expenses in return, over and above his lay; The William Martin, 1 Spr. 564, Fed. Cas. No. 17,698.

Seamen on a whaler have no property in the oil; they may take their lay in kind, or get it in the cash value of the oil at the port of delivery; Bourne v. Smith, 1 Lowell, 547, Fed. Cas. No. 1,701. Seamen on a mackerel fishing vessel are not part owners of the catch; Lewis v. Chadbourne, 54 Me. 484, 92 Am. Dec. 558.

Seamen in the public service are governed by particular laws. See NAVY; LIEN; MARINER; DESERTION OF A SEAMAN; SHIP; PARTIES; LAY.

SEARCH. An examination of a man's house, premises, or person, for the purpose of discovering proof of his guilt in relation to some crime or misdemeanor of which he is accused. See SEARCH WARRANT.

By act of March 2, 1799, s. 68, it is enacted that every collector, naval officer, and surveyor, or other person specially appointed by either of them for that purpose, shall, if they have reason to suspect the concealment of merchandise, in any place, have full power and authority to enter any ship or vessel or any dwelling house in the daytime, upon a warrant obtained on application from any justice of the peace, etc., or any federal district judge or commissioner, to search for goods forfeited for non-payment of duties; R. S. § 3066, as amended April 25, 1882.

In England a prisoner arrested for an indictable offence may be searched for the purpose of finding upon him any property which will afford material evidence for the prosecution or any weapon or instrument which might be used for the purpose of escape or of inflicting injury on himself or others. There does not appear to be any authority permitting the search of prisoners for other purposes than the above, and there have been cases in which the court has directed property taken from an unconvicted person and not necessary to be used for the purpose of evidence, to be returned to him. It is said that money not connected with the offence charged should not be taken from a prisoner. Women should be employed to search female prisoners. The person's lodgings and effects may also be searched. In England special statutory provisions as to searching are made in the case of numerous specified crimes; see Haycraft, Ex. Pow. in Rel. to Crime.

Where one was fined for drunkenness and the mayor, as a committing magistrate, found certain money on his person and applied it, against his protest, to the payment of the fine, and the prisoner insisted upon his right to accept imprisonment in place of a fine, it was held that the mayor was justified; McCann v. Barr, 19 Pa. Co. Ct. R. 669.

Officers making arrests may seize articles on a prisoner and retain them for the purposes of evidence against him, though they belong to other parties; 36 Wash. L. Rep. 421. See PRISONER.

An English act (1897) provides that police magistrates may order the return of such articles, or, if not claimed, may make such order as to their disposal as they deem proper.

See SEARCH WARRANT; SEARCH, RIGHT OF.

In Practice. An examination made in the proper lien office for mortgages, liens, judgments, or other incumbrances against real estate. The certificate given by the officer as to the result of such examination is also called a search. See RECORD; JUDGMENT; LIEN.

SEARCH, RIGHT OF. In International Law. *In time of peace.* The right of a public vessel to visit and search private vessels for the purpose of investigating their character. Within the territorial waters of a state it may be exercised by the public vessels of said state for the enforcement of revenue and other domestic laws. As it is a police measure it cannot, apart from treaty stipulations, be exercised upon the high seas, except after pursuit of an offending vessel which has escaped from the territorial waters of the state, and by public vessels generally where there is a well grounded suspicion of piracy (*q. v.*).

The right of visit and search was long a subject of controversy between the United States and Great Britain in connection with the suppression of the slave trade. Great

Britain claimed that there was a distinction between the right of visit (*q. v.*) and the right of search, and that while the latter was strictly a belligerent right, the former might be exercised in time of peace for the purpose of ascertaining the nationality of suspected vessels. The United States held that the right of visit on the high seas was necessarily associated with the right of search and had no meaning apart from it, and that neither could be exercised in time of peace except under treaty. Finally, by the treaty of 1862, the two countries agreed to permit a reciprocal right of search within a specified zone. A similar agreement had previously been entered into, in 1841, between five of the great powers, and the right is now embodied in article 22 of the general act concluded between the great powers in 1890.

In time of war. The right of a belligerent to visit and search neutral merchant vessels. It is exercised, first, as an incident to the belligerent right to capture, upon the high seas, private property of enemy subjects. In the case of The Maria, 1 C. Rob. 340, Lord Stowell held that the "right is so clear in principle, that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain, by such inquiry, whether there is property that can legally be captured, it is impossible to capture." Secondly, it is exercised as an incident to the recognized belligerent right to prevent the carriage of contraband (*q. v.*) by neutral vessels to the enemy, and to punish breaches of blockade. The Declaration of London, of 1909, embodies (article 63) the established rule that "forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel;" but mere flight does not constitute resistance. In making the search the ship's papers are first examined, and if anything suspicious appear in them, the ship and cargo may be examined. If the ship's papers are missing or are fraudulent the ship may be captured.

Neutral vessels sailing under convoy (*q. v.*) of enemy war-ships have almost universally been held subject to capture as resisting search, though the principle was contested by the United States in 1810; 2 Opp. 542. The question whether sailing under the convoy of neutral war-ships confers exemption from search, has been one of long standing controversy. The British courts held that neutral convoy was equivalent to resistance to search; 1 C. Rob. 340; and this doctrine was followed by Kent, Story, and Wheaton in the United States, in spite of the fact that between 1782 and 1800 the United States had concluded treaties with several continental powers stipulating exemption from search under neutral convoy. Continental jurists held the contrary doctrine, which was recognized by the United States in the Navy Regulations of 1876 and in the Naval War Code of 1900 (article 30), and it is now embodied in the provision of the Declaration of London (article 61) that "neutral vessels under convoy of war-ships of their own nationality are exempt from search," but this is made conditional upon evidence in writing from the commander of the war-ship as to the character of the vessels and their cargoes; 2 Opp. 533–545; Bonfils, §§ 586–593, 1589–1605.

Great Britain formerly claimed, as an incident to the belligerent right of visit and search, the right to effect the impressment (*q. v.*) into her navy of British seamen found on board the vessels of other nations on the high seas. On the other hand, the United States contended that the fact that the vessels were American should be evidence that the seamen on board were such. The controversy, which was one of the causes of the War of 1812, was definitely settled, on the part of the United States, in 1842, when Webster declared that the American government was ready to protect the crew of every "regulated documented American merchant vessel;" 2 Moore, §§ 317–320.

See APPROACH.

SEARCH WARRANT. A warrant requiring the officer to whom it is addressed to search a house, or other place, therein specified, for property therein alleged to have been stolen, and, if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully authorized officer.

It should be given under the hand and seal of the justice, and dated.

The United States laws provide for the search in the daytime only, by any custom-house officer under a search warrant; R. S. § 3066. Ownership in some specific person must be alleged in the information; State v. Intoxicating Liquors, 64 Ia. 300, 20 N. W. 445.

See SEARCH.

The constitution of the United States, Amendm. art. 4, declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." See Sailly v. Smith, 11 Johns. (N. Y.) 500; Ex parte Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. This does not apply to the states; Nat. Safe Dep. Co. v. Stead, 232 U. S. 58, 34 Sup. Ct. 209, 58 L. Ed. —.

Originally search warrants were used almost exclusively for the discovery of stolen property, but of late years their use has been extended to searches for intoxicating liquors; State v. Whiskey, 54 N. H. 164; Com. v. Intoxicating Liquors, 150 Mass. 164, 22 N. E. 628; gaming implements; Com. v. Gaming Implements, 119 *id.* 332; and the like. The constitutional provision does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; or the seizure of articles and papers by internal revenue officers under a search warrant while making a raid on defendant's place of business for an alleged violation of the oleomargarine act; May v. U. S., 199 Fed. 53, 117 C. C. A. 431; nor under Chinese exclusion proceedings; Chin Wah v Colwell, 187 Fed. 592, 109 C. C. A. 422; nor the seizure of infringing copies of copyrighted articles or the use thereof as evidence; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

Hale, 2 Pl. Cr. 149, recommends great caution in granting such warrants:—*first*, that they be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect that the goods are in such a house or place, and his reason for such suspicion; see 2 Wils. 283; 1 Dowl. & R. 97: State v. Mann, 27 N. C. 45; Humes v. Taber, 1 R. I. 464; *second*, that such warrants express that the search shall be made in the daytime (but in this country this limitation is not observed); State v. Brennan's Liquors, 25 Conn. 278; Com. v. Hinds, 145 Mass. 182, 13 N. E. 397; *third*, that they ought to be directed to a constable or other proper officer, and not to a private person; *fourth*, that they ought to command the officer to bring the stolen goods, and the person in whose custody they are, before some justice of the peace. See 6 B. & C. 332; Stone v. Dana, 5 Metc. (Mass.) 98. They should designate the place to be searched; 1 M. & W. 255; Com. v. Dana, 2 Metc. (Mass.) 329; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

The description "suspected place" is not sufficient; People v. Holcomb, 3 Parker, Cr. R. (N. Y.) 656. It has been said that "the description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place;" Jones v. Fletcher, 41 Me. 254. Trespass will not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed; Beaty v. Perkins, 6 Wend. (N. Y.) 382, but if the warrant itself shows that the magistrate had no jurisdiction, the officer who serves it will be a trespasser; 19 How. St. Tr. 1029; State v. Mann, 27 N. C. 45. And see Hayden v. Shed, 11 Mass. 500.

Search warrants are available only in public prosecutions and not to enforce private rights; Robinson v. Richardson, 13 Gray (Mass.) 454, where it was said: "Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established, on the ground of public necessity; because, without them, felons and other malefactors would escape detection." At common law they were confined to places, but it is held that a search warrant may be authorized by law for the person; Collins v. Lean, 68 Cal. 284, 9 Pac. 173.

The constitution does not prevent the federal government from requiring ordinary and reasonable tax returns such as are required by the corporation tax law; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; nor the issuing of process to require the attendance and testimony of witnesses, the production of books and papers etc.; Interstate Com. Com. v. Brimson, 154 U. S. 447, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49; Interstate Com. Com. v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860; Hale v. Henkel, 201 U. S. 43, 73, 26 Sup. Ct. 370, 50 L. Ed. 652; but a general *subpœna duces tecum*, which is too sweeping in its terms, may constitute an unreasonable search and seizure, and is equally indefensible as a search warrant would be, if couched in similar terms; Hale v. Henkel, 201 U. S. 76, 26 Sup. Ct. 370, 50 L. Ed. 652, citing Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; 4 Ves. 66; L. R. 2 Eq. 59. A statute requiring corporations to produce their books and papers for investigation, even though they may have been kept outside the state, does not amount to an unreasonable search and seizure; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645. The compulsory production of documentary evidence before the interstate commerce commission under the act does not infringe against unreasonable searches and seizures guaranteed by the fifth amendment, since that act, as amended (1893), expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law; Interst. Com. Com. v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

The seizure of documents and all books and papers of a defendant's firm, covering their business of importers of silks, laces, etc., was held improper; U. S. v. Mills, 185 Fed. 318. An act which provided for the issue of a search warrant upon the affidavit of a manufacturer of beverages that he has reason to believe, and does believe, that a person, in violation of the act, is using any of complainant's bottles, casks, etc., is unconstitutional; Lippman v. People, 175 Ill. 101, 51 N. E. 872; and where one searching for liq-

uor under a search warrant, removed the lath and plastering for a space two to four feet around all the rooms on the lower floor and left it for the owner to repair, it was an invasion of his rights; Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70, 22 L. R. A. (N. S.) 819; and so was taking away an iron safe and breaking it open, the owner refusing to open it till he had consulted his counsel; Blackmar v. Nickerson, 188 Mass. 399, 74 N. E. 932; but breaking open the cellar of a dwelling house after refusal of admission was held not illegal; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; and so was breaking and entering a railway depot without first asking permission, there being no one to admit the officer; Androscoggin R. Co. v. Richards, 41 Me. 233.

When an engineer was indicted for causing the death of persons killed by a boiler explosion, entry on his employer's premises and taking of the boiler and engine into custody of the police was held to be an unconstitutional search and seizure; Newberry v. Carpenter, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. Rep. 346.

It does not require actual entry upon premises and search for and seizure of papers. A compulsory production of a party's private books and papers to be used against him or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment and it is equivalent to a compulsory production of papers, to make the non-production of them a confession of the allegations which it is pretended they will prove; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Hale v. Henkel, 201 U. S. 43, 71, 26 Sup. Ct. 370, 50 L. Ed. 652.

If officers armed with a search warrant, upon presenting it at the home of one accused of crime, are invited by his mother to enter and search the premises, so that they do not act under the warrant, evidence obtained during the search is admissible against the accused, though the act may have been a trespass against him; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

See Cooley, Const. Lim. (6th Ed.) 364; 1 Archb. Cr. Pr. & Pl. 126, note; 1 Bish. New Cr. Proc. ch. 16; GENERAL WARRANT; SUBPŒNA; INCRIMINATION.

SEAT OF JUSTICE. The county seat; the place where the courthouse, jail, and county offices are located; the place where the chancery, circuit, and county courts are held, and where the county records are kept. Ellis v. State, 92 Tenn. 85, 20 S. W. 502.

SEATED LANDS. In the early land legislation of some of the United States, *seated* is used, in connection with improved, to denote lands of which actual possession was taken. Hawkins v. Barney, 5 Pet. (U. S.) 468, 8 L. Ed. 190.

Lands which are actually resided upon, cultivated, or occupied. Residence without cultivation or cultivation without residence, or both together, constitute seated lands. Kennedy v. Daily, 6 Watts (Pa.) 269; George v. Messinger, 73 Pa. 418. See UNSEATED LANDS.

SEAWORTHINESS. The sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit, for the trade or service in which it is employed.

It is that quality which fits a ship for carrying safely the particular cargo which it takes on board for the voyage for which it is destined. The Thames, 61 Fed. 1014, 10 C. C. A. 232, 8 U. S. App. 580.

Under a marine policy on ship, freight, or cargo, the fitness for the service of the vessel, if there is no provision to the contrary at the outset, is an implied condition, non-compliance with which defeats the insurance; 2 B. & Ald. 73; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287; Myers v. Ins. Co., 26 Pa. 192; 4 H. L. C. 253; Augusta Ins. & B. Co. v. Abbott, 12 Md. 348.

It is of no consequence whether the insured was aware of the condition of the ship, or not. His innocence or ignorance is no answer to the fact that the ship was not seaworthy. When the want of seaworthiness arises from justifiable ignorance of the cause of the defect, and is discovered and remedied before any injury occurs, it is not to be considered as a defect; Patrick v. Hallett, 1 Johns. (N. Y.) 241; McLanahan v. Ins. Co., 1 Pet. (U. S.) 183, 7 L. Ed. 98; 2 B. & Ald. 73. See Richelieu Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

The warranty of seaworthiness is absolute and extends to latent defects; 10 P. D. 103. Seaworthiness varies with the place of voyage, the class of ship, and the nature of the cargo; 2 F. & F. 263. She must be seaworthy in relation to the kind of cargo which she is to carry; The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 42 L. Ed. 241; L. R. 7 C. P. 421; if the voyage is to be by stages requiring different equipment, she must be ready for each stage at its commencement; [1899] P. 140 (C. A.).

A vessel offering to carry frozen meat impliedly warrants that the refrigerating machinery was at the time of shipment fit to carry such cargo in safety; [1895] L. R. 2 Q. B. 550, where there was loss to a shipment caused by the negligence of the crew in the management of the refrigerating apparatus it was a fault "in the management of" the "vessel;" [1903] 1 K. B. 114; and that the seaworthiness of the vessel engaged in the dressed meat trade relates and extends to the refrigerating apparatus necessary for the preservation of the meat during transportation, is held in The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65.

To be seaworthy a vessel must be sufficiently tight, staunch and strong to resist the ordinary attacks of winds and seas; Sanford

& Brooks Co. v. Columbia Dredging Co., 177 Fed. 878, 101 C. C. A. 92.

It includes a master having competent skill in navigation; 3 C. & P. 18; and a sufficient and competent crew; 7 B. & C. 798; and proper equipment, including proper medicines and necessaries for the voyage; 3 Esp. 257.

A vessel is not seaworthy if the cargo is so badly stowed that it is difficult and dangerous to navigate the ship; 2 F. & F. 663; Harloff v. Barber & Co., 150 Fed. 185; or if she is not properly disinfected for the carriage of cattle; 12 Q. B. Div. 297; or has a defective crank-shaft; 10 P. D. 103; as to unseaworthiness by reason of not employing a pilot, it is said that if a vessel sails from a port where there is a pilot and the navigation requires one, the master must employ one; 3 B. & Ad. 383; but in entering a port, if the master uses due diligence to obtain a pilot but cannot find one, and, being competent himself, attempts to enter a harbor without one, it is not a breach of the warranty of seaworthiness; 3 B. & Ad. 383.

The warranty of seaworthiness in a time policy is complied with if the vessel be seaworthy at the commencement of the risk; Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497. Where a vessel sprung a leak, and was lost without encountering any sea peril, it was held that she was not seaworthy, heavy seas not being a sea peril within the meaning of a policy of marine insurance; The Gulnare, 42 Fed. 861.

The opinion of carpenters who have repaired the vessel, however they may strengthen the presumption that the ship is seaworthy, when it is favorable, is not conclusive of the fact of seaworthiness; 4 Dowl. 269. The presumption *prima facie* is for seaworthiness; 1 Dowl. 336. See Earnmoor v. Ins. Co., 40 Fed. 847. And it is presumed that a vessel continues seaworthy if she was so at the inception of the risk; Martin v. Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220. Where nothing is said on the subject, seaworthiness is an implied condition of a hiring of shipping; Lyon v. Tiffany, 76 Mich. 158, 42 N. W. 1098. Any sort of disrepair left in the ship, by which she or the cargo may suffer, is a breach of the warranty of seaworthiness. A deficiency of force in the crew, or of skill in the master, mate, etc., is a want of seaworthiness; 1 Camp. 1; Draper v. Ins. Co., 4 Duer (N.Y.) 234; Holland v. Seven Hundred & Twenty-Five Tons of Coal, 36 Fed. 784. But if there was once a sufficient crew, their temporary absence will not be considered a breach of warranty; 2 B. & Ald. 73; Silva v. Low, 1 Johns. Cas. (N. Y.) 184; McLanahan v. Ins. Co., 1 Pet. (U. S.) 183, 7 L. Ed. 98. A charge of unseaworthiness by reason of the pilot's intoxication is not sustained when there is no evidence that he was not perfectly capable when the vessel left port, or, if he was not, that the master knew the fact, and where the pilot, when sober, was one of the best; Earnmoor S. S. Co. v. Ins. Co., 44 Fed. 374. A vessel may be rendered not seaworthy by being overloaded; 2 B. & Ald. 320; or by having a defective compass; Richelieu Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398. The burden of the proof of seaworthiness is on the one who alleges it; 3 Q. B. Div. 594; but in The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, it is held that the burden is on the owner to prove seaworthiness (citing the definition here given). The fact that a ship after being eleven hours at sea in fair weather began to leak so that she was obliged to run for a harbor of refuge, is sufficient to throw the burden of proof on the carrier even if it is not sufficient proof of unseaworthiness; The Queen of The Pacific, 75 Fed. 74.

A presumption of unseaworthiness is not rebutted by evidence of previous diligence nor by the proof of subsequent storms or perils of the sea, and where the bill of lading contains no exception as to seaworthiness the owners are not entitled to the benefit of the Harter Act; Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 108 C. C. A. 257.

An underwriter who knows the age and defective condition of a vessel, and charges nearly a double premium, cannot set up unseaworthiness as a defence; Farmers' Feed Co. of N. Y. v. Ins. Co., 162 Fed. 379.

It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them; 2 Pars. Marit. Law 134. Seaworthiness is, therefore, in general, a question of fact; The Northern Belle, 9 Wall. (U. S.) 526, 19 L. Ed. 746; Palmer v. Ins. Co., 116 N. Y. 599, 23 N. E. 5.

The carrier of passengers by sea does not assume the same responsibility as to seaworthiness as the carrier of freight. He is held to a very high degree of care, prudence and foresight, but there is no implied warranty of seaworthiness at the beginning of the voyage; The Oregon, 133 Fed. 609, 68 C. C. A. 603; so in England; Machlachlan, Merchant Shipping 354.

See HARTER ACT; SHIP.

SEAWORTHY FOR THE VOYAGE. The words in the Merchant Shipping Act, 1876, mean that the ship must be "in a fit state, as to repairs, equipment, and crew, and in all other respects, to encounter ordinary perils of the voyage." They do not include "a neglect properly to use the appliances on board a vessel well equipped and furnished." [1894] App. Cas. 222.

SEBASTOMANIA. In Medical Jurisprudence. Religious insanity or monomania.

SECESSION. The act of withdrawing; separation.

The attempted secession of eleven of the states from the Union led to the War of Secession in 1861–65, and gave rise to many important decisions affecting the mutual relations of the national and state governments, and the rights of citizens under contracts made before and during the war.

As to the Right of Secession.

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States." Texas v. White, 7 Wall. (U. S.) 700, 724, 19 L. Ed. 227.

As to the Validity of Contracts. Where one engaged actively in the service of the Confederate government purchased cotton which was afterwards seized by the military forces of the United States, sold, and the proceeds paid into the treasury, *held*, that his purchase of the cotton was illegal and void and gave him no title thereto; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; Mitchell v. U. S., 21 Wall. (U. S.) 350, 22 L. Ed. 584. The Confederate government had no corporate power to take, hold, or convey a valid title to property, real and personal, and a purchaser of cotton from said government during the rebellion acquired no title thereto; Sprott v. U. S., 8 Ct. Cl. 499.

Confederate Bonds. The bonds issued by the seceding states do not constitute a valid consideration for a promissory note; Hanauer v. Woodruff, 15 Wall. (U. S.) 439, 21 L. Ed. 224; and so of the securities known as Confederate treasury notes; Bailey v. Milner, 1 Abb. U. S. Rep. 261, Fed. Cas. No. 740; but a promise to pay in "Confederate notes" in consideration of the receipt of such notes and of drafts payable by them, is neither a *nudum pactum* nor an illegal contract; Planters' Bank v. Bank, 16 Wall. (U. S.) 483, 21 L. Ed. 473.

Validity of Statutes. When the military forces of the Confederate government were overthrown, it perished, and with it all its enactments. But the legislative acts of the several states forming the confederacy stand on different grounds, and so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the constitution, they are in general to be treated as valid and binding; Williams v. Bruffy, 96 U. S. 177, 24 L. Ed. 716; Ford v. Surget, 97 U. S. 594, 24 L. Ed. 1018; Keppel v. R. Co., 1 Chase's Dec. 167, Fed. Cas. No. 7,722; Texas v. White, 7 Wall. (U. S.) 733, 19 L. Ed. 227; U. S. v. Ins. Co., 22 Wall. (U. S.) 99, 22 L. Ed. 816.

Payments made under the Confederate sequestration acts were void and gave no title. See Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654.

Decisions of the Confederate Courts. Judgments of such courts merely settling the rights of private parties actually within their jurisdiction, not tending to defeat the just rights of citizens of the United States, nor in furtherance of laws passed in aid of the rebellion, are valid; Cook v. Oliver, 1 Woods 437, Fed. Cas. No. 3,164; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118; and a judgment of a court of Georgia in November, 1861, for the purchase-money of slaves, was held a valid judgment when entered, and enforcible in 1871; French v. Tumlin, 10 Am. Law Reg. (N. S.) 641, Fed. Cas. No. 5104 (with note by James T. Mitchell, late Chief Justice of Pennsylvania). But during the war, the courts of states in rebellion had no jurisdiction of parties residing in states which adhered to the national government; Livingston v. Jordan, 10 Am. L. Reg (N. S.) 53, Fed. Cas. No. 8,415, by Chase, C. J. See further Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; 12 Op. Att. Gen. 141, 182; 13 *id.* 149; Macon & A. R. Co. v. Little, 45 Ga. 370; Griffin v. Cunningham, 20 Gratt. (Va.) 31; White v. Hart, 13 Wall. (U. S.) 646, 20 L. Ed. 685; Hurd's Theory of Nat. Govt.; RECONSTRUCTION; CONFEDERATE STATES; CONFEDERATE MONEY; WAR.

William Rawle, in his "View of the Constitution" (Philadelphia, 1825, 2d Ed. 1829), in treating the guarantee of the constitution to every state in the Union of a republican form of government, expressed the opinion that a state had the right to withdraw from the Union. He said (2d Ed.):

"If a faction should attempt to subvert the government of a state for the purpose of destroying its republican form, the paternal power of the Union could thus be called forth to subdue it. Yet it is not to be understood that its interposition would be justifiable, if the people of a state should determine to retire from the Union, whether they adopted another or retained the same form of government." (Page 296.)

"The states, then, may wholly withdraw from the Union, but while they continue, they must retain the character of representative republics." (Page 297.)

"The secession of a state from the Union depends on the will of the people of such state." (Page 302.)

The editor of this Revision of Bouvier found among the papers of William Rawle, some years ago, his "Notes on the Constitution" evidently intended to be used in the preparation of a third edition. Apparently they were prepared during the Nullification excitement; President Jackson's Nullification Proclamation was issued December 10, 1832. He died in 1836 without completing the third edition. He says in these notes:

"The distressing agitation of the public mind now prevailing in two of the Southern States has induced the author carefully to review this chapter with much anxiety to discover whether his opinions on this important subject are correct and with a full

determination candidly to avow any error which he should find in them. The exact question is whether the people of one state may withdraw that state from the Union without the consent of the other states, or the rest of the people of the Union." And he concludes: "Very gratifying would it have been to the author of this work had his reconsideration of this most interesting question terminated in a different conviction, but he cannot retract in this edition what he continues to think nor expunge what has already been laid before the public."

Among the same papers was a letter from Mr. Justice Story, written to Mr. Rawle soon after the publication of his first edition, in which he expressed his dissent from Mr. Rawle's view of the right of secession, and accepted an invitation to visit him in Philadelphia on his way from Washington to Boston, after the adjournment of the Supreme Court, to discuss the subject. Unfortunately this letter has been mislaid.

Charles Francis Adams, in a letter to the editor of May 18, 1914, from which the editor is authorized to quote, refers to the "crystallization of United States nationality" He says:

"As you, doubtless, know, I have made rather a specialty of this subject. The result has left my mind perfectly clear. Your grandfather's statement is correct both historically and legally. When approached with an open mind his position is unassailable.

"He wrote of a condition of affairs, and of a law, prevailing anterior to the year 1830. I do not think that his statement and conclusions admit of question. The process of crystallization,—or, to put it in other terms, the growth of the idea of nationality, —may be dated from that time. It is a most interesting historical development. Story initiated it in his *Comments* on the Constitution. Webster developed it in his debate with Hayne. The Nullification Question presented it as a concrete fact at issue to the community at large. The result was apparent in the growth of the generation which grew up, and took control of public affairs in 1860. . . . .

"Lawyers and judges, as a result of a profession living by contention, are always disposed to stand for a written law, everlasting, fixed and invariable. The historian, seeing things from a different point of view, recognizes growth and elasticity. These two elements of law had in my judgment curious exemplification in the case of the constitution; and in this connection the record contained in Rawle's *Commentaries* has in my judgment great historic value. But it needs to be developed historically; and people should be made to understand the process of crystallization which went on in this country from 1642, when the New England Confederacy was formed, and which reached its final climax at Appomattox, some 220 years later. The last pretence of the right of secession then was reluctantly abandoned, as something outgrown.

"I hope, therefore, you will not hesitate to revive what I consider by no means a 'dead question,' but, on the contrary, an historical fact of great constitutional moment."

It may be added that the question of whether this work on the Constitution was used as a text book and the right of secession was taught at the West Point Military Academy has received much discussion in the last few years. The evidence is not conclusive; the last and fullest treatment of the question is by James W. Latta, a member of the Philadelphia bar and a student of military affairs, in a paper read before the Loyal Legion, in 1909. He reaches the conclusion that Rawle on the Constitution (published in 1825) could not have been used as a text book at West Point for more than two years from the date of its publication, that it may have been so used during that period, and that constitutional law was a part of the course of only the graduating class.

The reader is referred to Charles F. Adams' "Studies Military and Diplomatic," and "Trans-Atlantic Historical Solidarity," for his further consideration of this subject.

SECK. A want of remedy by distress. Littleton, § 218. See RENT. Want of present fruit or profit, as in the case of the reversion without rent or other service, except fealty. Co. Litt. 151 *b*, n. 5.

SECOND COUSINS. Those who are related, being descended from the same great-grandfather, or great-grandmother. L. R. 19 Ch. Div. 204. See LEGACY.

SECOND DELIVERANCE. The name of a writ given by statute of Westminster 2d, 13 Edw. I. c. 2, founded on the record of a former action of replevin. Co. 2d Inst. 341. It commands the sheriff, if the plaintiff make him secure of prosecuting his claim and returning the chattels which were adjudged to the defendant by reason of the plaintiff's default, to make deliverance. On being nonsuited, the plaintiff in replevin might, at common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant. The statute of Westminster restrains the plaintiff when nonsuited from so doing, but allows him this writ, issuing out of the original record, in order to have the same distress delivered again to him, on his giving the like security as before; 3 Bla. Com. 150.

SECOND DISTRESS. See DISTRESS.

SECOND-HAND EVIDENCE. This term is sometimes applied to *hearsay* evidence, and should not be confounded with secondary evidence. See Pow. Ev.

SECOND SURCHARGE, WRIT OF. The name of a writ issued in England against a commoner who has a second time surcharged the common. 3 Bla. Com. 239.

SECONDARY. An officer who is second or next to the chief officer; as, secondaries to the prothonotaries of the courts of king's bench or common pleas; secondary of the remembrancer in the exchequer, etc. Jacob, L. Dict.

SECONDARY BOYCOTT. See BOYCOTT.

SECONDARY CONVEYANCES, or derivative conveyances, are those which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 2 Sharsw. Bla. Com. 234.*

SECONDARY EVIDENCE. See EVIDENCE.

SECONDARY LIABILITY. A liability which does not attach until or except upon the fulfillment of certain conditions; as that of a surety, or that of an accommodation indorser. See SURETYSHIP; INDORSEMENT.

SECONDARY USE. A use limited to take effect in derogation of a preceding estate, otherwise called a "shifting use" as a conveyance to the use of A and his heirs, with a proviso that when B returns from India,

then to the use of C and his heirs. 1 Steph. Com. 546.

SECONDS. In Criminal Law. Those persons who assist, direct, and support others engaged in fighting a duel.

Where the principal in deliberate duelling would be guilty of murder, the second is considered equally guilty. It has been contended that the second of him who is killed is equally guilty with the second of the successful principal; but this is denied by Hale, who considers such a one guilty only of a great misdemeanor; 2 Bish. Cr. Law § 311. See ACCESSORY.

SECRET COMMITTEE. A secret committee of the house of commons is a committee especially appointed to investigate a certain matter, and secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors. All other committees are open to members of the house, although they may not be serving upon them. Brown.

SECRET PARTNERSHIP. One where the existence of certain persons as partners is not avowed to the public. Deering v. Flanders, 49 N. H. 225. See PARTNERS.

SECRET PROCESS. See TRADE SECRET.

SECRET SERVICE. A branch of government service concerned with the detection of counterfeiting and other offences, civil or political, committed or threatened by persons who operate in secrecy. It is under the charge of the treasury department. Its rules and regulations, promulgated by the department, are laws within R. S. U. S. § 753 (U. S. Comp. St. 1901, p. 592), authorizing the issuance by a federal court of the writ of *habeas corpus* in case of a prisoner in custody for an act done in pursuance of a law of the United States; U. S. v. Fuellhart, 106 Fed. 911.

SECRETARY. An officer who, by order of his superior, writes letters and other instruments. He is so called because he is possessed of the *secrets* of his employer. This term was used in France in 1343, and in England the term secretary was first applied to the clerks of the king, who being always near his person were called *clerks of the secret*, and in the reign of Henry VIII. the term secretary of state came into use.

In the United States the term is used to denote the head of a department: as, secretary of state, etc. See DEPARTMENT; CABINET.

SECRETARY OF EMBASSY. An officer appointed by the sovereign power to accompany a minister of the first or second rank, and sometimes, though not often, of an inferior rank.

He is, in fact, a species of public minister; for, independently of his protection as attached to an ambassador's suite, he enjoys in his own right the same protection of the law of nations, and the same immunities, as an ambassador. But *private secretaries* of a minister must not be confounded with secretaries of embassy or of legation. Such private secretaries are entitled to protection only as belonging to the suite of the ambassador.

SECRETARY OF LEGATION. An officer employed to attend a foreign mission and to perform certain duties as clerk. In the United States his position does not differ, except in point of salary, from that of *secretary of embassy* (*q. v.*); by R. S. § 1674, he is classed among diplomatic officers.

SECRETARY OF STATE. See DEPARTMENT; CABINET. The name was first given by Queen Elizabeth in 1601. See Taylor, Jurispr. 352.

SECRETS OF STATE. The production in court of documents containing secrets of state will not be compelled if it would be injurious to the public interest and if the officer in custody of them claims the privilege; Beatson v. Skene, 5 H. & N. 838, per Pollock, C. B.; this is said to include confidential communications made by servants of the Crown to each other; 21 Q. B. D. 512; the question of their production is to be decided by the head of the department having custody of them and not by the court; 5 H. & N. 838; [1900] 1 Ch. 347; 13 Low. Can. 33 (where the cases were fully considered); Appeal of Hartranft, 85 Pa. 433, 27 Am. Rep. 667 (in which Agnew, C. J., vigorously dissented), where a ruling in the trial of Aaron Burr was cited as a precedent. That it is for the judge to pass on the question, see Wigm. Evid. § 2376. In 21 Q. B. D. 515, Field, J., said that if he were sitting, he should consider himself entitled to examine the documents privately, and ascertain the real motive of the refusal to produce.

SECTA (Lat. *sequor*, to follow). The persons, two or more in number, whom the plaintiff produced in court, in the ancient form of proceedings, immediately upon making his declaration, to confirm the allegations therein, before they were called in question by the defendant's plea. Bracton 214 *a*. The word appears to have been used as denoting that these persons *followed* the plaintiff into court; that is, came in a matter in which the plaintiff was the leader or one principally concerned. The actual production of *suit* was discontinued very early; 3 Bla. Com. 295; but the formula "*et inde producit sectam*" (for which in more modern pleadings "and thereupon he brings suit" is substituted) continued till the abolition of the Latin form of pleadings. Steph. Pl., And. ed. 171. The count in dower and writs of right did not so conclude, however; 1 Chitty, Pl. 399.

A suit or action. Hob. 20; Bracton 399 *b*.

A suit of clothes. Cowell; Spelman, Gloss.

SECTA AD CURIAM. A writ that lay against him who refused to perform his suit either to the county court or the court-baron. Cowell.

Ad Furnum. Suit due a public bakehouse. 3 Bla. Com. 235.

Ad Molendinum. A service arising from the usage, time out of mind, of carrying corn to a particular mill to be ground. 3 Bla. Com. 235. A writ adapted to the injury lay at the old law. Fitzh. N. B. 123.

Ad Torrale. Suit due a man's kiln or malt-house. 3 Bla. Com. 235.

Curiæ. Suit at court. The service due from tenants to the lord of attending his courts-baron, both to answer complaints alleged against themselves, and for the trial of their fellow-tenants. 2 Bla. Com. 54.

SECTA FACIENDA PER ILLAM QUÆ HABET ÆNICIAM PARTEM. A writ to compel the heir, who has the elder's part of the co-heirs, to perform suit and services for all the coparceners. Reg. Orig. 177.

SECTA REGALIS. A suit or service by which all persons were bound twice in a year to attend the sheriff's tourn.

SECTA UNICA TANTUM FACIENDA PRO PLURIBUS HÆREDITATIBUS. A writ for an heir who was distrained by the lord to more suits than one, that he should be allowed to do one suit only in respect of the land of divers heirs descended to him. Cowell.

SECTARIAN. A Roman Catholic orphanage where the pupils are instructed in the doctrines of their church is a sectarian institution within a constitutional provision forbidding the use of public funds for sectarian purposes. State v. Hallock, 16 Nev. 373. See RELIGION.

SECTATORES. A man's followers. Suitors of court among the Saxons. 1 Reeve's Hist. Eng. L. 22.

SECTION. A part separated from the rest, a division, a portion, as, specifically, a distinct part of a book or writing; the subdivision of a chapter; the division of a law or other writing, a paragraph, an article. State v. Babcock, 23 Neb. 128, 36 N. W. 348. The smallest numbered subdivision of a statute, code, text-book, etc., which contains a distinct subject. A paragraph (*q. v.*); an article. *Id.*

SECTION OF LAND. A parcel of government land containing six hundred and forty acres. The lands of the United States are surveyed into parcels of six hundred and forty acres; each such parcel is called a section. These sections are divided into half-sections, each of which contains three hundred and twenty acres, and into quarter-sections of one hundred and sixty acres each. See 2 Washb. R. P.

SECTIS NON FACIENDIS. A writ for a woman, who, for her dower, ought not to perform suit of court. Reg. Orig. 174.

SECTORES (Lat.). **In Roman Law.** Bidders at an auction. Babington, Auct. 2.

SECULAR. Temporal things; of the world; worldly. Allen v. Deming, 14 N. H. 139, 40 Am. Dec. 179.

SECURED CREDITOR. Under the bankrupt act it includes a creditor who has security for his debt upon the property of the bankrupt, of a nature to be assignable under the act, or who owns a debt for which some indorser, surety or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets. A creditor of a bankrupt holding a mortgage on exempt property is not a secured creditor; In re Bailey, 176 Fed. 99.

SECURITATIS PACIS. A writ that lay for one who was threatened with death or bodily harm by another, against him who so threatened. Reg. Orig. 98.

SECURITY. That which renders a matter sure; an instrument which renders certain the performance of a contract. A person who becomes the surety for another, or who engages himself for the performance of another's contract. See Brown v. White, 3 Blackf. (Ind.) 431. Collateral security is security given for the payment of a debt, or the performance of some other act.

SECURITY FOR COSTS. In some courts there is a rule that when the plaintiff resides abroad he shall give security for costs, and until that has been done, when demanded, he cannot proceed in his action.

This is a right which the defendant must claim in proper time; for if he once waives it he cannot afterwards claim it: the waiver is seldom or perhaps never expressly made, but is generally implied from the acts of the defendant. When the defendant had undertaken to accept short notice of trial; 2 H. Bla. 573; or after issue joined, and when he knew of plaintiff's residence abroad, or, with such knowledge, when the defendant takes any step in the cause, these several acts will amount to a waiver; 5 B. & Ald. 702; Swift v. Stine, 3 Wash. T. 518, 19 Pac. 63. It is never too late, however, if the motion do not delay the trial; Shaw v. Wallis, 1 Yeates (Pa.) 176.

The fact that the defendant is out of the jurisdiction of the court will not alone authorize the requisition of security for costs: he must have his domicil abroad; 1 Ves. 396. A wife petitioning for a writ of *habeas corpus* to obtain from her husband, who resides in the state, the custody of their child, cannot be required without proofs to give bond as a non-resident, since her domicil is *prima facie* the same as her husband's; Curtis v. Curtis, 131 Ind. 489, 30 N. E. 18. When the defendant resides abroad, he will be required to give such security although he is a foreign prince. See McFarland v. Brown, 11 S. & R. (Pa.) 121. A general affidavit is sufficient on moving for security for costs; the particulars of the defence need not be specified; Sheridan v. Cassidy, 1 W.

N. Cas. (Pa.) 134; a rule of court requiring non-residents to enter security for costs does not violate article iv. sec. 2 of the federal constitution, which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states; Haney v. Marshall, 9 Md. 194; Coleman v. Waters, 13 W. Va. 299.

SECUS (Lat.). Otherwise.

SEDERUNT, ACTS OF. Ancient ordinances of the court of session in Scotland, by which authority is given to the court to make regulations equivalent to the Regulæ Generales of the English courts. Various modern acts give the court such power; Whart. Dict.

SEDGE FLAT. A tract of land below high water mark. Church v. Meeker, 34 Conn. 421.

SEDITION. In Criminal Law. The raising commotions or disturbances in the state: it is a revolt against legitimate authority. Erskine, Inst. 4. 4. 14.

According to the English criminal libel act of 1820, it is to compose, print or publish any words tending to bring into hatred or contempt the king, government, or either house of parliament, or to incite subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means. No act is seditious unless its full consequences are felt over considerable area or felt by a considerable number of persons. It does not include an isolated breach of the peace. It is sufficient that the acts or words tend to produce the result. An attempt to incite mutiny in the army and navy is seditious. Certain ancient forms of sedition were punished under the writ of *præmunire* which is now practically obsolete. See Odgers, C. L. 149; RIOT.

The distinction between sedition and treason consists in this: that though the ultimate object of sedition is a violation of the public peace, or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution. Alison, Crim. Law 580.

The obnoxious and obsolete act of July 14, 1798, 1 Story, Laws 543, was called the *sedition law*, because its professed object was to prevent disturbances.

SEDUCING TO LEAVE SERVICE. See ENTICE.

SEDUCTION. The act or crime of persuading a female, by flattery or deception, to surrender her chastity. Webster.

The corrupting, deceiving and drawing aside from the path of virtue which she was pursuing of a virtuous woman, by such acts and wiles, in connection with a promise of marriage, as were calculated to operate upon a virtuous woman. State v. Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

The wrong of inducing a female to consent to unlawful sexual intercourse, by enticements and persuasions overcoming her reluctance and scruples. Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397. And seduction may occur whether the woman is conscious or not; Marshall v. Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144. In civil cases, seduction and debauching are generally used as substantially similar terms; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696.

Mere illicit intercourse is not seduction, although a promise of marriage be made; People v. Clark, 33 Mich. 112; there must be some promise, deception, art, or influence of the seducer whereby chastity is surrendered; Dinkey v. Com., 17 Pa. 126, 55 Am. Dec. 542; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349. Force is not an element of seduction, although force is used after consent is obtained; People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863. That force was used makes no difference; Velthouse v. Alderink, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. (N. S.) 587, 15 Ann. Cas. 1111.

The complainant must be chaste at the time of the seduction, and a reasonable doubt as to such fact is fatal to a recovery; State v. Deitrick, 51 Ia. 467, 1 N. W. 732. Chastity, in the civil or criminal action, means actual personal virtue, and not reputation; Andre v. State, 5 Ia. 389, 68 Am. Dec. 708; and requires specific acts of lewdness for impeachment; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177. Previous chastity is presumed; State v. Wenz, 41 Minn. 196, 42 N. W. 933; Mills v. Com., 93 Va. 815, 22 S. E. 863. As to what may be shown to establish lack of chastity, see State v. Wheeler, 94 Mo. 252, 7 S. W. 103; State v. Primm, 98 Mo. 368, 11 S. W. 732; State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374. Chastity must be affirmatively shown where the statute requires that the person seduced be of good repute; Oliver v. Com., 101 Pa. 215, 47 Am. Rep. 704. Although a woman may have fallen, if she repent and reform, she is the object of seduction; State v. Carron, 18 Ia. 372, 87 Am. Dec. 401; Wilson v. State, 73 Ala. 527.

Most states have enacted statutes making seduction a crime. What allurements are sufficient to constitute seduction, is for the jury to determine; State v. Higdon, 32 Ia. 262; and the courts allow considerable latitude in the evidence; Lewis v. People, 37 Mich. 518; State v. Thompson, 79 Ia. 703, 45 W. 293.

The indictment should allege the essential elements of the crime as defined by statute; Wilson v. State, 73 Ala. 527. Where there are several counts the prosecution cannot be compelled to elect; Armstrong v. People, 70 N. Y. 38.

The statutes generally require:—that seduction be accomplished by promise of marriage; Rice v. Com., 102 Pa. 408; which need

not be valid; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211; provided the seduced was ignorant of its invalidity; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336, and it may have been made some time prior to the seduction; Armstrong v. People, 70 N. Y. 38; and the defendant may have intended to fulfil it; State v. Bierce, 27 Conn. 319; and he need not be of lawful age to marry; Polk v. State, 40 Ark. 482, 48 Am. Rep. 17. The previous character of the prosecutrix is to be determined by the jury; State v. Carron, 18 Ia. 372, 87 Am. Dec. 401. Chastity is always an issue; Hussey v. State, 86 Ala. 34, 5 South. 484; but is always presumed, and the burden of impeaching it is on the defendant; State v. McClintic, 73 Ia. 663, 35 N. W. 696.

The statutes generally require the evidence of the complainant to be corroborated; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; but as to what must be corroborated there is much confusion; State v. Timmens, 4 Minn. 325 (Gil. 241); People v. Kearney, 110 N. Y. 188, 17 N. E. 736; Wilson v. State, 73 Ala. 527.

The seduction of a married woman is known as *criminal conversation*, for which the husband has an action against the seducer; 2 Greenl. Ev. § 40. In England the statute 20 and 21 Vict. ch. 85, § 59, deprives the husband of the action but allows him damages in a suit for divorce where the seducer is made co-respondent. See CRIM. CON.

As to the seduction or alienation of a husband's affections, see ENTICE.

At common law the woman herself has no action for damages, though practically the end is reached by a suit for breach of promise of marriage, in many cases, but in some states the rule has been altered by statute. The parent, as being entitled to the services of his daughter, may maintain an action in many cases grounded upon that right, but only in such cases; 6 M. & W. 55; McDaniel v. Edwards, 29 N. C. 408, 47 Am. Dec. 331; Lee v. Hodges, 13 Gratt. (Va.) 726; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267, 14 L. R. A. 700, 27 Am. St. Rep. 521. (But this rule was not followed in Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. [N. S.] 757; Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397.) In England the parent's right of action terminates when the child leaves the parent's house without the intention of returning; 5 East 45; where an employer seduces the maid, no action lies; [1901] 2 K. B. 722; the maid is no longer the servant of her parent; 36 Ir. L. T. R. 189; but in America the right of action depends on the will of the parent, not the child; if he has not divested himself of a right to require his child's services, he may recover, even though at the time of the injury she was in another's service with his permission; Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; s. c. Big. L. C. Torts 286; Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; otherwise if his power over the child was gone at the time of the seduction. If the control was divested by fraud, the parent has still a right of action; 2 Stark. 493. Specific acts of service are not necessary to a right of action: the right to the service is enough; Big. Torts 146. The right of action continues after the majority of the child, if the relation of master and servant continues; Sutton v. Huffman, 32 N. J. L. 58; Hahn v. Cooper, 84 Wis. 629, 54 N. W. 1022; Bayles v. Burgard, 48 Ill. App. 371. It is not necessary that pregnancy should ensue; Big. Torts 147; *contra*, 1 Exch. 61; where the proper consequence of the defendant's act was a loss of the child's health, resulting in an incapacity for service, an action lies; Abrahams v. Kidney, 104 Mass. 222, 6 Am. Rep. 220; especially where sexual disease is communicated to the child; Big. Torts 147. The daughter's consent does not affect the parent's right to recover; Damon v. Moore, 5 Lans. (N. Y.) 454. If the mother, after the father's death, is the child's guardian, she has a right of action; Big. Torts 149; apart from the mother's guardianship, she has a right of action so long as the daughter continues to give her services to her mother. See Gray v. Durland, 51 N. Y. 424. Where the daughter in her illness returns to her mother and is taken care of by her, the mother may sue for the seduction; Sargent v. ——, 5 Cow. (N. Y.) 106; *contra*, South v. Denniston, 2 Watts (Pa.) 474; Roberts v. Connelly, 14 Ala. 235. See, generally, as to the mother's right of action, Big. L. C. Torts 302. Any one standing *in loco parentis*, and entitled to, or receiving, in his own right, the services of a minor, is entitled to maintain the action; Big. Torts 152; 2 C. & P. 303. If the parent consented to the seduction, or rendered it easy by his misconduct or neglect, he cannot recover; Peake 240; Big. Torts 151.

While the loss of services is the gist of the action, yet, when that has once been established, the jury may give damages commensurate with the real injury inflicted on the plaintiff. See Big. L. C. Torts 294.

See PROMISE OF MARRIAGE.

It is competent to show that the seduced yielded to defendant's solicitations under promise of marriage; Badder v. Keefer, 91 Mich. 611, 52 N. W. 60; but the mere promise of marriage as the inducement is not sufficient, where she was not seduced by any arts, wiles, or blandishments; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349. The prosecutrix, on a trial for seduction under promise of marriage, may be permitted to testify that she yielded in reliance upon the promise; Ferguson v. State, 71 Miss. 805, 15 South. 66, 42 Am. St. Rep. 492; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; but she cannot be asked if she would have yielded in the absence of such a

promise; Cook v. People, 2 Thomp. & C. (N. Y.) 404.

SEE. The diocese of a bishop.

SEED. Generally the sale of seed as and for a certain kind—that is, a sale by description—constitutes a warranty of the seed. A sale of seed as rape seed constitutes a warranty that the seed is true to name, where the purchaser is ignorant of the appearance of rape seed, and hence an inspection of it by him would not aid him to determine the true character of the seed; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916. The sale of turnip seed as "skirvings seed" constituted a warranty that the seed is of that kind; 18 Q. B. 560; also a sale of turnip seed as and for "early strap-leaf red-top turnip seed"; Wolcott v. Mount, 38 N. J. L. 496, 20 Am. Rep. 425. A sale of seed for seed purposes as and for "Arlington white spine cucumber seed" constitutes a warranty that the seed will produce that kind of cucumbers; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708. Selling seed for sowing or planting as being a particular kind of seed constitutes a warranty that it is true to name, which is breached by delivering seed of a different kind, utterly unproductive; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136. In a few jurisdictions the theory of a warranty being created on a sale of seeds is denied. In Kircher v. Conrad, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. Rep. 731, the court held that a statement made by a seller that certain wheat was "spring wheat" was not a warranty. The court relied on Shisler v. Baxter, 109 Pa. 443, 58 Am. Rep. 738; but the law of Pennsylvania is peculiar, for it requires, in order to constitute a warranty, that a warrantor intends to contract or agree to be bound, and it is not enough that he intends to affirm.

By the Sales Act: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

The sale of seed with the intent upon the part of both buyer and seller that it is to be used in planting or sowing raises an implied warranty of fitness for that purpose; that is, that it is clean seed, possessing no defects in germinating power; Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602; as to rice; Reiger v. Worth, 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865; as to peas; Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388; as to onions; Ferris v. Comstock, 33 Conn. 513. A sale of seed for seed purposes by the grower thereof raises an implied warranty that it is free from noxious weed seed; Bell v. Mills, 78 App. Div. 42, 80 N. Y. Supp. 34; and that there is no impurity in the seed from cross fertilization; Landreth v. Wyckoff, *supra*.

There is a split of authority as to the effect of a notice accompanying seed sold for planting or sowing, containing a clause in effect that the seller does not warrant the seed in any respect, and that if the purchaser is not willing to take it without warranty he must return it. In some jurisdictions a distinction is made between a warranty and a condition, and it is held that a sale by description constitutes a condition rather than a warranty, and hence that such a clause does not cover the rights of the parties claiming a violation of the condition; [1911] A. C. 394. In other jurisdictions, the clause is held binding upon the purchaser, if it comes to his notice, but is not unless it does; Bell v. Mills, 78 App. Div. 42, 80 N. Y. Supp. 34; Blizzard Bros. v. Growers' Canning Co., 152 Ia. 257, 132 N. W. 66.

The purchaser is not entitled to rely entirely upon representations as to the kind or quality of seed, but he should make an inspection of it before using and if he fails to do so the question of his negligence in that regard is a question for the jury; Fox v. Everson, 27 Hun (N. Y.) 355.

The purchaser upon discovering a breach of warranty may rescind the sale within a reasonable time and return the property, or he may retain it and avail himself of the damages he has suffered, either by bringing a cross action for breach of warranty, or proving the real value and abating the recovery *pro tanto;* Frith v. Hollan, 133 Ala. 583, 32 South. 494, 91 Am. St. Rep. 54.

Where seed is not as warranted and the purchaser discovers this fact before using it, he may retain the seed and recover in damages the difference between the market price of the seed he received and the purchase price of the seed had it been as warranted; Dunn v. Bushnell, 63 Neb. 568, 88 N. W. 693, 93 Am. St. Rep. 474.

Where the seller is not informed that the buyer intends to mix the seed before sowing or planting it, the purchaser is not entitled to recover the value of the seed thus mixed with the impure seed purchased; Fox v. Everson, 27 Hun (N. Y.) 355.

For breach of warranty that seed is true to name, the measure of damages recoverable is the value of the crop, had the seed been true to name, such as would ordinarily have been produced that year, deducting the expense of raising the crop and also the product and value of the crop actually raised; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13. So also where seed is warranted as to kind and quality, but because of poor quality it does not properly germinate and grow,

but only a partial crop results; Flick v. Wetherbee, 20 Wis. 392.

The purchaser is not entitled to recover interest on the damages from the time the crop would have been harvested and sold, since the demand is unliquidated and the amount cannot be determined by computation simply or reference to market values; White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544.

See SALES; WARRANTY; NURSERY. As to damages recoverable, see MEASURE OF DAMAGES; note in 37 L. R. A. (N. S.) 79.

SEED GRAIN LOANS. An act appropriating state funds to loaning money to farmers for the purchase of seed grain is unconstitutional; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568.

SEEDS. Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur.* Inst. 2. 1. 32.

SEIGNIOR, SEIGNEUR. Among the feudists, this name signified lord of the fee. Fitzh. N. B. 23. Seigneur is still used in French Canada. The most extended signification of this word includes not only a lord or peer of parliament, but is applied to the owner or proprietor of a thing: hence the owner of a hawk, and the master of a fishing vessel, is called a seigneur. 37 Edw. III, c. 19; Barrington, Stat. 258. *Seignior in gross*, a lord without a manor.

SEIGNIORAGE. A royalty or prerogative of the sovereign, whereby an allowance of gold and silver, brought to a mint in the mass to be exchanged for coin, is claimed. Cowel. Mintage, the charge for coining bullion into money at the mint. Black, L. Dict.

SEIGNIORY. In English Law. The rights of a lord, as such, in lands. Swinb. Wills 174.

SEISIN. The completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rights of homage and fealty. Stearns, Real Act. 2; Mitchell, R. E. & Conv. 225.

Possession with an intent on the part of him who holds it to claim a freehold interest. Towle v. Ayer, 8 N. H. 58; 1 Washb. R. P. 35.

Ex vi termini, the whole legal title. Allen v. Allen, 48 Minn. 462, 51 N. W. 473.

"Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass." 1 Burr. 110, per Lord Mansfield.

This definition is said to be more applicable to the ceremony of livery of seisin than to seisin itself, while the definition of seisin as possession, does not lay sufficient stress on what is really the most important element in seisin—the element of title; 12 L. Quart. Rev. 240.

It is said that seisin is of practical importance at the present day in England in those rare cases where land is conveyed by an infant under the custom of gavelkind, and where a man claims an estate by curtesy. If feoffments were abolished and the law of curtesy made similar to that of dower, seisin would be completely obsolete, as it is in all other respects; 12 L. Quart. Rev. 246, 251.

Immediately upon the investiture or livery of seisin the tenant became tenant of the freehold; and the term seisin originally contained the idea of possession derived from a superior lord of whom the tenant held. There could be but one seisin, and the person holding it was regarded for the time as the rightful owner; Littleton § 701; 1 Spence, Eq. Jur. 136. In the early history of the country, livery of seisin seems to have been occasionally practised. See 1 Washb. R. P. *344; Colony Laws (Mass.) 85, 86; Smith, Landl. & T. 6, n.

In Connecticut, Massachusetts, Pennsylvania, and Ohio, seisin means merely ownership, and the distinction between seisin in deed and in law is not known in practice; Bush v. Bradley, 4 Day (Conn.) 305; Bates v. Norcross, 14 Pick. (Mass.) 224. A patent by the commonwealth, in Kentucky, gives a right of entry, but not actual seisin; Speed v. Buford, 3 Bibb (Ky.) 57.

Seisin in fact is possession with intent on the part of him who holds it to claim a freehold interest.

Seisin in law is a right of immediate possession according to the nature of the estate. Cowell; Com. Dig. *Seisin* (A 1, 2).

If one enters upon an estate having title, the law presumes an intent in accordance, and requires no further proof of the intent; Means v. Welles, 12 Metc. (Mass.) 357; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; but if one enters without title, an intent to gain seisin must be shown; Bradstreet v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170. Seisin once established is presumed to continue till the contrary is shown; Brown v. King, 5 Metc. (Mass.) 173. Seisin will not be lost by entry of a stranger if the owner remains in possession; 1 Salk. 246; Hall v. Stevens, 9 Metc. (Mass.) 418. Entry by permission of the owner will never give seisin without open and unequivocal acts of disseisin known to the owner; Clarke v. McClure, 10 Gratt. (Va.) 305; Hall v. Stevens, 9 Metc. (Mass.) 418. Simple entry by one having the freehold title is sufficient to regain seisin; Spaulding v. Warren, 25 Vt. 316; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475. The heir is invested with the seisin by law upon descent of the title; Green v. Chelsea, 24 Pick. (Mass.) 78. As a general proposition, by the law in this country, the making, delivery, and recording of a deed of lands passes the seisin without any formal entry being necessary. This is generally by force of the statutes of the several states,—in some such a deed being in terms declared to be equivalent to livery of seisin, and in others dispensing with any further act to pass a full and complete title; 4 Greenl. Cruise, Dig. 45, n., 47, n.; Smith, Landl. & T. 6, n.; McKee's Lessee v. Pfout, 3 Dall. (U. S.) 489, 1 L. Ed. 690.

The seisin could never be in abeyance; 1 Prest. Est. 255; and this necessity gave rise to much of the difficult law in regard to estates enjoyable in the future. See 1 Spence, Eq. Jur. 156.

A tenant for years had no seisin; nor had a remainderman. It was a fundamental principle that seisin could not be in abeyance; there must always be a feudal representative of any piece of land; Jenks, Mod. Land L. 95. The statute of uses (*q. v.*) entirely changed the meaning of the word "seisin." Before the statute seisin had been exclusively a state of fact—the condition of the person actually possessed, by himself or his tenant for years as feudal owner. But it then came to signify the state of the person entitled to possession and to be treated as in possession by the statute of uses; Jenks, Mod. Land L. 110.

As to the seisin of chattels, see 29 L. Q. R. 383; and see the "Mystery of Seisin" by Maitland in 3 Sel. Essays in Anglo-Amer. L. H. 591.

See TURF AND TWIG; LIVERY OF SEISIN.

SEISINA HABENDA. A writ for delivery of seisin to the lord, of lands and tenements, after the sovereign, in right of his prerogative, had had the year, day, and waste, on a felony committed, etc. Reg. Orig. 165.

SEIZING OF HERIOTS. Taking the best beast, etc., where an heriot is due, on the death of the tenant. 2 Bla. Com. 422.

SEIZURE. In Practice. The act of taking possession of the property of a person condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff, constable, or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of having such property sold according to law to satisfy the judgment. Carey v. Ins. Co., 84 Wis. 80, 54 N. W. 20, 20 L. R. A. 267, 36 Am. St. Rep. 907. The taking possession of goods for a violation of a public law; as, the taking possession of a ship for attempting an illicit trade; The Caledonian, 4 Wheat. (U. S.) 100, 4 L. Ed. 523; The Bolina, 1 Gall. 75, Fed. Cas. No. 1,608; Le Tigre, 2 Wash. C. C. 567, Fed. Cas. No. 8,281; Francis v. Ins. Co., 6 Cow. (N. Y.) 404.

The seizure is complete as soon as the goods are within the power of the officer; Haggerty v. Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; Collins v. Montgomery, 2 Nott & M'C. (S. C.) 392; Wats. Sher. 172, approved Carey v. Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. Rep. 907.

The taking of part of the goods in a house, however, by virtue of a *fieri facias* in the name of the whole, is a good seizure of all; 8 East 474. As the seizure must be made by virtue of an execution, it is evident that it cannot be made after the return-day; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300. See DOOR; HOUSE; SEARCH WARRANT.

SEIZURE QUOUSQUE. Where the heir on the death of his ancestor postpones claiming admittance from the lord, the lord may, after a reasonable time, and after due proclamation at three successive courts, seize the tenement into his hands *quousque*, *i. e.* until an heir appears and claims admittance; Jenks, Mod. Land L. 208.

SELECTI JUDICES (Lat.). **In Roman Law.** Judges who were selected very much like our juries. They were returned by the prætor, drawn by lot, subject to be challenged and sworn. 3 Bla. Com. 366.

SELECTMEN. The name of certain town officers in several states of the United States, who are invested by the statutes of the states with extensive powers for the conduct of the town business.

SELF-DEFENCE. In Criminal Law. The protection of one's person and property from injury. Whart. Crim. Law 97. A man may defend himself, and even commit a homicide for the prevention of any forcible and atrocious crime which if completed would amount to a felony; Oliver v. State, 17 Ala. 587; Monroe v. State, 5 Ga. 85; Staten v. State, 30 Miss. 619; and, of course, under the like circumstances, mayhem, wounding, and battery would be excusable at common law; 4 Bla. Com. 180. A man may repel force by force even to the taking of life; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; Fields v. State, 134 Ind. 46, 32 N. E. 780; in defence of his person, property, or habitation, or of a member of his family, against any one who manifests, intends, attempts, or endeavors, by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary, and the like; Logue v. Com., 38 Pa. 265, 80 Am. Dec. 481; Bohannon v. Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474. In these cases he is not required to retreat; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52; but he may resist, and even pursue his adversary, until he has secured himself from all danger; Gray v. Combs, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431; 4 Bingh. 628; State v. Thompson, 45 La. Ann. 969, 13 South. 392; but see People v. Sullivan, 7 N. Y. 396. A man may defend his dwelling to any extremity; and this includes whatever is within the curtilage of his dwelling-house; Pond v. People, 8 Mich. 150. Where one finds another trying to break into his house in the night-time he may employ such force as to prevent his doing so, and if the other threatens to kill him and makes a motion as if to do so and puts him in fear of his life, he is not bound to retreat, but may use such force as is necessary to repel the assault; Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051. In deciding what force is necessary, a person need only act upon the circumstances as they appear to him at the time. See Hinton v. State, 24 Tex. 454; Schnier v. People, 23 Ill. 17.

In the case of homicide, the law permits the resistance of force or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more: Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85. The law of self-defence justifies an act done "in an honest and reasonable belief of immediate danger;" New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. To justify a homicide, however, on the ground of self-defence, there must have been not only the belief but also reasonable ground for believing that at the time of killing the deceased, he was in imminent or immediate danger of his life or great bodily harm; Wilson v. State, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654; People v. Hyndman, 99 Cal. 1, 33 Pac. 782; Kelly v. State, 27 Tex. App. 562, 11 S. W. 627; Baum v. Bell, 28 S. C. 201, 5 S. E. 485; People v. Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; and to justify shooting, on apparent necessity, the circumstances must have been such as to induce the mind of a reasonably prudent person to entertain the belief that the defendant was in imminent peril of his life or great bodily harm; Roden v. State, 97 Ala. 54, 12 South. 419; there must be a reasonable apprehension of immediate danger justified by the circumstances; Field v. Com., 89 Va. 690, 16 S. E. 865; if there is manifestly no adequate or reasonable ground for such belief, the plea will not avail; Anderson v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116; it is good if it appeared to the accused, at the time, acting as a reasonable man, that it was necessary for him to kill the deceased in order to prevent injury to himself; Owens v. U. S., 130 Fed. 279, 64 C. C. A. 525.

One on trial for homicide, and setting up self-defence, may testify as to what he thought the deceased intended to do; Taylor v. People, 21 Colo. 426, 42 Pac. 652; and that he believed it was necessary to kill the deceased in order to save himself; State v. Harrington, 12 Nev. 126; Lane v. State, 44 Fla. 105, 32 South. 896, where the deceased had threatened the accused and just before the killing had made a demonstration against him with his hand, declaring that he would kill the accused, the latter may testify what he believed the former would do; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039; the accused may testify that he struck the deceased because he believed that the deceased was going to strike him; Com. v. Woodward, 102 Mass. 155; the accused may explain his motives in drawing his revolver at the time of the assault; Ryan v. Territory, 12 Ariz. 208, 100 Pac. 770.

One setting up this defence must have acted on facts as they appeared to him. If, without fault, or carelessness, he is misled concerning them and defends himself correctly according to what he supposes the facts to be, though they are in truth otherwise, and he has really no occasion for the extreme measures, the defence is made out; 1 Bish. Cr. L. § 384; State v. Harris, 46 N. C. 193; Pond v. People, 8 Mich. 150. It need not appear that the killing was absolutely necessary; State v. Collins, 32 Ia. 39.

Reasonable fear does not mean the fear of a coward, but the fear of a reasonably courageous man; Gallery v. State, 92 Ga. 463, 17 S. E. 863; fear that one's life is in danger will not excuse a homicide in the absence of an overt act or hostile demonstration on the part of the deceased.

A question whether a homicide is committed in repelling an attack is a question of fact not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. One assailed on his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat and may defend himself with such means as are within his control; Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; Eversole v. Com., 95 Ky. 623, 26 S. W. 816. So a person who has had an angry altercation with another person may be justified in arming himself for self-defence; and if, on meeting his adversary afterwards, he kills him, but not in necessary self-defence, his crime may be manslaughter or murder, according to the circumstances on the occasion of the killing, and is not necessarily murder by reason of his having previously armed himself; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. Accordingly it is wrong to charge that the intentional arming of himself with a pistol by a defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of self-defence; Allen v. U. S., 157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854.

Where the accused embarks in the quarrel with no felonious intent or malice or purpose of doing bodily harm or killing, and, under reasonable belief of imminent danger, inflicts a deadly wound, it is not murder; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039; but where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defence; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039.

In Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; the following rule was quoted with approval: "A true man, who is without fault, is not obliged to fly from an assailant who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm"; in Alberty

v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051, the rule was stated: "He may lawfully kill the assailant....provided he use all the means in his power otherwise to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power." Quoting these two inconsistent rules, Prof. Beale (16 Harv. L. Rev. 567) considers the cases on this subject at length. On one or two points the authorities agree. If retreat would not diminish the danger, the person assailed may stand his ground; People v. Macard, 73 Mich. 15, 40 N. W. 784; Bird v. State, 77 Wis. 276, 45 N. W. 1126 (that he must retreat unless it would increase the danger; Carter v. State, 82 Ala. 13, 2 South. 766); so if he is assailed in his own dwelling house; Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; Eversole v. Com., 95 Ky. 623, 26 S. W. 816.

In Com. v. Drum, 58 Pa. 9, it was finely said by Agnew, J.: "Ordinary defence and the killing of another evidently stand upon different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die."

It is not the duty of a police officer, when not exceeding his authority, to fly when assaulted. He may defend himself with such force as may be necessary, but he may not take life except when the assault is so violent as to put him in danger of death or great bodily harm; but he is not required to flee to the wall; Com. v. Crowley, 26 Pa. Super. Ct. 124.

What is or what is not an overt demonstration of violence sufficient to justify a resistance which ends in the death of the party making the demonstration varies with the circumstances and is a question for the jury; Allison v. U. S., 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defence is restored when the person assaulted, in violation of law, pursues him with a deadly weapon, and seeks to take his life, or do him great bodily harm; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547; Parker v. State, 88 Ala. 4, 7 South. 98; Whart. Hom. § 483; Beard v. U. S., 158 U. S. 550, 564, 15 Sup. Ct. 962, 39 L. Ed. 1086; but there must be a real and *bona fide* surrender and withdrawal on the part of the original aggressor, otherwise he will continue to be so regarded; Whart. Cr. L., 9th ed. § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to respond before he takes the life of his adversary; Bish. Cr. L., 7th ed. § 871; 1 Bish. N. Cr. L. § 702. It is "for the jury to say whether the withdrawal was not in good faith or was a mere device by the accused to obtain some advantage of his adversary"; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547. It is said of the two United States cases cited that they "consistently united in expressing a judicial policy on the subject of self-defence which is not only logical in principle, but commends itself to the practical sense of justice"; 55 Alb. L. J. 268; to the same effect in substance are recent cases in state courts; State v. Evans, 124 Mo. 397, 28 S. W. 8; Page v. State, 141 Ind. 236, 40 N. E. 745.

A person assaulted may do more than ward off a blow; he may strike back; Carman Deana, Cr. App. Rep. (Engl. 1909) 75.

The possession of a good conscience is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation upon the right to repel it; Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841.

It has been said that the justification of self-defence must be established by a preponderance of evidence; State v. Ballou, 20 R. I. 607, 40 Atl. 861; State v. Welsh, 29 S. C. 4, 6 S. E. 894; but see Gearty v. New York, 171 N. Y. 71, 63 N. E. 804; and perhaps the doctrine is too broadly stated. One who starts an affray with intent to kill the deceased cannot plead self-defence; Andersen v. U. S., 170 U. S. 481, 18 Sup. Ct. 689, 42 L. Ed. 1116; so of one who provoked an affray by insulting language; State v. Scott, 41 Minn. 365, 43 N. W. 62; Shaw v. State (Tex.) 73 S. W. 1046. Where one sought a meeting to provoke an assault, but was attacked without provocation, he may plead self-defence; 1 Hale, P. C. 479; *contra*, State v. Neeley, 20 Ia. 108; Vaiden v. Com., 12 Gratt. (Va.) 717.

The doctrine of constructive self-defence comprehends the principal civil and domestic relations; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each, respectively, are excused, the act of the relation being construed the same as the act of the party himself; 4 Bla. Com. 186; Hathaway v. State, 32 Fla. 56, 13 South. 592; strangely enough, there seems to be no authority for placing a brother or sister in this category, though they doubtless occupy as good a position as a stranger; 25 Alb. L. J. 187. See 2 Bish. Cr. L. 877.

A man may defend himself when no felony has been threatened or attempted. *First*, when the assailant attempts to beat another

and there is no mutual combat: as where one meets another and attempts to commit or does commit an assault and battery on him, the person attacked may defend himself; Bartlett v. Churchill, 24 Vt. 218; Hazel v. Clark, 3 Har. (Del.) 22; Com. v. Ford, 5 Gray (Mass.) 475; 3 C. & P. 31; but it is not true as a general proposition, that one who is assaulted by another with a dangerous weapon is justified in taking the life of the person so assaulting him; State v. West, 45 La. Ann. 14, 12 South. 7; and in case of an offer or attempt to strike another, when sufficiently near, so that there is danger, the person assailed may strike first, and is not required to wait until he has been struck; Bull. N. P. 18. *Second*, when there is a mutual combat upon a sudden quarrel. In these cases both parties are the aggressors; and if in the fight one is killed, it will be manslaughter at least unless the survivor can prove two things, viz.: that before the mortal stroke was given he had refused any further combat, and had retreated as far as he could with safety; Hodges v. State, 15 Ga. 117; Stewart v. State, 1 Ohio St. 66; and that he killed his adversary from necessity, to avoid his own destruction; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Dill v. State, 25 Ala. 15.

A person assaulted by another, whom he kills, cannot set up the plea of self-defence if he could have safely retreated or have disarmed the other without danger to himself, and believed himself able to do so; Fallin v. State, 86 Ala. 13, 5 South. 423; State v. Dillon, 74 Ia. 653, 38 N. W. 525.

The settled rule that where a person having authority to arrest and using the proper means for that purpose is resisted, he can repel force with force, and, if the party making the resistance is unavoidably killed, the homicide is justifiable, may be invoked by a person who resists and kills the officer, if he was ignorant of the fact that he was an officer; Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841.

A man may defend himself against animals, and he may during the attack kill them, but not afterwards; 1 C. & P. 106; Credit v. Brown, 10 Johns. (N. Y.) 365. See Horr. & T. Cas. on Self-Defence, where the cases are collected.

In early English law killing in self-defence was not justifiable homicide. The party indicted was not entitled to an acquittal by a jury. He was sent back to prison and must trust to the king's mercy for a pardon. And although he obtained a pardon, he forfeited his goods for the crime. But by 1400, self-defence had become a bar to an action for a battery. Pardons for killing in self-defence became a matter of course; ultimately the jury was permitted to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out. Ames, Lect. Leg. Hist. 436.

See DEFENCE; COOLING TIME; JUSTIFICATION; MURDER; HOMICIDE.

SELF-DESTRUCTION. This term in an insurance policy is synonymous with, not more comprehensive than, suicide. It does not include an intentional though insane killing of one's self. "The act, whether described by words of Saxon or of Latin origin, or partly of the one and partly of the other, 'dying by his own hand,' 'self-killing,' 'self-slaughter,' 'suicide,' 'self-destruction,' without more, cannot be imputed to a man who, by reason of insanity (as is commonly said), 'is not himself';" Connecticut Mut. L. Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148. See SUICIDE.

SELF-DISSERVING EVIDENCE. See SELF-REGARDING EVIDENCE.

SELF-EXECUTING PROVISIONS. See CONSTITUTIONAL; and also Thomps. Corp. § 3001.

SELF-REGARDING EVIDENCE. That evidence for or against a party which is afforded by the language or demeanor of himself or of those who represent him. When in favor of the party supplying it, the evidence may be said to be "self-serving," when otherwise, "self-disserving," and these terms are also applicable to the statement and demeanor of witnesses.

Self-serving evidence is not originally admissible except where part of the document is used against the party, who is entitled to have the whole of it laid before the jury who may consider such statements as are self-serving, and give such weight to them as they see fit; 5 Taunt. 245; 2 D. & Ryl. 358. See CONFESSION.

Self-disserving statements are termed "admissions" in civil cases and "confessions" in criminal cases. See those titles. They are also classified as "plenary" when the statements are not absolutely inconsistent with the existence of fact different from those indicated by it. See, generally, Best, Evidence §§ 518–577.

SELF-SERVING EVIDENCE. See SELF-REGARDING EVIDENCE.

SELION OF LAND. A ridge of ground rising between two furrows, containing no certain quantity, but sometimes more and sometimes less. *Termes de la Ley.*

SELLER. One who disposes of a thing in consideration of money; a vendor.

This term is more usually applied in the sale of chattels, and that of vendor in the sale of estates. See SALE.

SELLETTE (Fr.). A kind of wooden seat set up in criminal courts in France, on which they placed the accused to undergo his last interrogatory when the conclusions of the counsel for the prosecution went against him with regard to capital punishment or at least penal corporal punishment. It implied moral degradation and was therefore limited to persons accused of crimes entailing corporal punishment. See *Ord. Cr. de* 1670, *Titre* IV, *art.* 21. Abolished by Edict of May 1, 1788. Called a "stool of repentance."

SELLING PUBLIC OFFICES. Buying or selling any office in the gift of the crown, or making any negotiation relating thereto, was deemed a misdemeanor under stats. 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126. 2 Steph. Com., 11th ed. 631.

SEMBLE (Fr. it seems). A term frequently used before the statement of a point of law which has not been directly settled, but about which the court have expressed an opinion and intimated what a decision would be.

SEMESTRIA. The collected decisions of the emperors in their councils. Whart. Dict.

SEMI-COLON. According to well-established grammatical rules, this is a point only used to separate parts of a sentence more distinctly than a comma. Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293.

SEMI-MATRIMONIUM. Half-marriage. Concubinage was so called in the Roman law. Tayl. Civ. L. 273.

SEMI-PROOF. In Civil Law. Presumption of fact. This degree of proof is thus defined: "*Non est ignorandum probationem semiplenam eam esse per quam rei gestæ fides aliqua fit judici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi.*" Mascardus, de Prob. vol. 1, Quæst. 11, n. 1, 4.

SEMINARY. A place of education. Any school, academy, college, or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments. Webster, Dict.

The word is said to have acquired no fixed and definite legal meaning. Chegaray v. New York, 13 N. Y. 229.

SEMINAUFRAGIUM (Lat.). A term used by Italian lawyers, which literally signifies *half-shipwreck*, and by which they understand the jetsam, or casting merchandise into the sea to prevent shipwreck. Locré, *Esp. du Code de Com.* art. 409. The state of a vessel which has been so much injured by tempest or accident that to repair the damages, after being brought into port, and prepare her for sea, would cost more than her worth. 4 Bost. L. Rep. 120.

SEMPER PARATUS (Lat. always ready). The name of a plea by which the defendant alleges that he has always been ready to perform what is demanded of him. 3 Bla. Com. 303. The same as *Tout temps prist.*

SEN. Said to be an ancient word which signified justice. Co. Litt. 61 *a.*

SENAGE. Money paid for synodals.

SENATE. The name of the less numerous of the two bodies constituting the legislative branch of the government of the United States, and of the several states. See the articles upon the various states.

The Senate of the United States is composed of two senators from each state; and each senator has one vote. Under the 17th amendment to the federal constitution, senators are elected by popular vote. See CONSTITUTION OF UNITED STATES. The equal representation of states in the senate is secured to them beyond the ordinary power of amendment; no state can be deprived thereof without its consent. Art. 5. The senate has been, from the first formation of the government, divided into three classes. The rotation of the classes was originally determined by lot, and the seats of one class were vacated at the end of the second year, so that one-third of the senate is chosen every second year. Const. art. 1, s. 3. This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example.

The qualifications which the constitution requires of a senator are that he should be thirty years of age, have been nine years a citizen of the United States, and, when elected, be an inhabitant of that state for which he shall be chosen. Const. art. 1, s. 3. See CONGRESS. They do not hold their places "under the government of the United States" within the meaning of the Revised Statutes that any one convicted under its provisions shall be incapable of holding any office of honor, trust or profit under that government; Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

SENATUS. In Roman Law. The senate. Also the place where the senate met. Calv. Lex.

SENATUS CONSULTUM (Lat.). **In Roman Law.** A decree or decision of the Roman senate, which had the force of law.

When the Roman people had so increased that there was no place where they could meet, it was found necessary to consult the senate, instead of the people, both on public affairs and those which related to individuals. The opinion which was rendered on such an occasion was called *senatus consultum.* Inst. 1. 2. 5; *Clef des Lois Rom.;* Merlin, *Répert.* These decrees frequently derived their titles from the names of the consuls or magistrates who proposed them; as senatus-consultum Claudianum, Libonianum, Velleianum, etc., from Claudius, Libonius, Valleius. Ayliffe, Pand. 30.

SENATUS DECRETA. (Decisions of the senate.) Private acts concerning particular persons merely.

SENESCHAL. A steward; also one who has the dispensing of justice. Co. Litt. 61 *a.*

SENESCHALLO ET MARESHALLO QUOD NON TENEAT PLACITA DE LIBERO TENEMENTO. A writ addressed to the steward and marshal of England, inhibiting them to take cognizance of an action in their court that concerns freehold. Reg. Orig. 185.

SENESCHALLUS (Lat.). A steward. Co. Litt. 61 *a.*

SENILE DEMENTIA. See DEMENTIA.

SENILITY. The state of being old.

When on account of senility the party is unable to manage his affairs, a committee will be appointed as in case of lunacy; 1 Collier, Lun. 66; In re Barker, 2 Johns. Ch. (N. Y.) 232; Darling v. Bennet, 8 Mass. 129; 19 Ves. Jr. 285.

SENIOR. The elder. This addition is sometimes made to a man's name, when two persons bear the same, in order to distinguish them. In practice, when nothing is mentioned, the senior is intended; Neil v. Dillon, 3 Mo. 59. See NAME; JUNIOR.

One older in office, or whose entrance upon an office was anterior to that of another. State v. Hueston, 44 Ohio St. 6, 4 N. E. 471.

SENTENCE. A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal, proceedings.

Sentences are final, when they put an end to the case; or interlocutory, when they settle only some incidental matter which has arisen in the course of its progress. See Aso & Man. Inst. b. 3, t. 8, c. 1.

A sentence exceeding the term allowed by law will be reversed upon *certiorari*; White v. Com., 3 Brews. (Pa.) 30. Under some circumstances a sentence may be suspended after conviction; State v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547; Com. v. Dowdican's Bail, 115 Mass. 133; but not indefinitely; Ex parte Bugg, 163 Mo. App. 44, 145 S. W. 831. But a single sentence exhausts the power of the court to punish the offender, after the term is ended or the judgment has gone into operation; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; Com. v. Foster, 122 Mass. 317, 23 Am. Rep. 326; Com. v. Mayloy, 57 Pa. 291.

The court may set a day for the execution of a prisoner after the time originally fixed has elapsed. The prisoner may be held in confinement after the first day fixed for execution has passed; In re Cross, 146 U. S. 271, 13 Sup. Ct. 109, 36 L. Ed. 969. Upon the affirmance of a judgment, sentencing a prisoner to death, there is nothing which requires that he shall be sentenced anew by the trial court; Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218. See EXECUTION.

When a sentence different from that authorized by law has been imposed and the judgment has been reversed for that error, and the cause remanded to the trial court with instructions to proceed therein according to law, the trial court resumes jurisdiction of the cause at the point where the error supervened and may resentence the defendant and impose the penalty provided by law, although part of the void sentence has been executed; U. S. v. Harman, 68 Fed. 472.

Where a court has jurisdiction of the person and the offence, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void, but only such part as may be in excess; U. S. v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; State v. Williams, 77 Mo. 310; so, on a plea of guilty, if the court had authority to impose the punishment actually adjudged on a conviction of a higher grade of the offence; In re Paschal, 56 Kan. 123, 42 Pac. 373.

Where the judgment on the first count is reversed and there is arrest of judgment under the second, a term of imprisonment under the third may be made to commence on the day fixed for the first count; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725.

Where a sentence is imposed after a general verdict on an indictment containing several counts, some of which were subsequently found bad, such sentence will be sustained, where it is no heavier than what might properly have been imposed upon the good counts; Haynes v. U. S., 101 Fed. 817, 42 C. C. A. 34.

Failure in the sentence to name the crime for which the prisoner was sentenced may be supplied by reference to the rest of the record; Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

Statutes providing for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301. The doctrine is that the subsequent punishment is not for the first offence, but for persistence in crime; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Ingalls v. State, 48 Wis. 647, 4 N. W. 785. For the same reason, they are not open to the objection that they are *ex post facto*, even when the prior convictions occurred before the passage of the act imposing the additional penalty; Ex parte Gutierrez, 45 Cal. 429; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18; Rand v. Com., 9 Gratt. (Va.) 738. Such statutes cannot apply to the case of a conviction for an offence committed after that for which the prisoner is on trial, but for which he is first tried; Rand v. Com., 9 Gratt. (Va.) 738. The indictment must allege that the defendant had been previously convicted, sentenced, and imprisoned (once or twice, as the case may be) in some penal institution for felonies (as such penalties are usually only prescribed for felonies or penitentiary offences), describing each separately; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; State v. Austin, 113 Mo. 538, 21 S. W. 31; Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18. As a general rule the courts have no discretion in the matter of imposing sentence under the habitual criminal acts; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18. It is not necessary, unless required by statute, that the subsequent conviction or convictions should be for the same identical offence or character of offence. It is sufficient if the accused has been convicted of any one of the offences of the grade named; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184. The previous offences must have been penitentiary offences, and not merely made so by repeated convictions

for what would otherwise have been misdemeanors; Stover v. Com., 92 Va. 780, 22 S. E. 874.

A statute permitting the supreme court to reduce a sentence imposed by a trial court is not unconstitutional as an exercise of pardoning power by the judiciary; Palmer v. State, 70 Neb. 136, 97 N. W. 235; nor is a statute allowing the governor to fix a new date for execution when the date in the judgment has passed, since it is a ministerial and not a judicial act; Bullitt v. Sturgeon, 127 Ky. 332, 105 S. W. 468, 14 L. R. A. (N. S.) 268.

Where one is found guilty of manslaughter on an indictment for murder, and on a new trial granted on appeal he is subsequently found guilty of murder, the case will be remanded with directions to sentence for manslaughter only; People v. Farrell, 146 Mich. 264, 109 N. W. 440.

A prisoner who is paroled without statutory authority cannot, upon violation of his parole, be required to remain in prison beyond the time when the original sentence expired; Scott v. Chichester, 107 Va. 933, 60 S. E. 95, 16 L. R. A. (N. S.) 304.

A person who commits a felony while enjoying his liberty under a bond given to stay execution of a judgment for a previously committed felony must serve such second sentence upon the expiration of the first; State v. Finch, 75 Kan. 582, 89 Pac. 922, 20 L. R. A. (N. S.) 273; but a death sentence in a subsequent prosecution will be put into effect although the prisoner is serving a previously imposed life sentence; Brown v. State, 50 Tex. Cr. R. 114, 95 S. W. 1039.

Where, under an indeterminate sentence act, the court fixes a maximum term below the statutory period, the prisoner cannot bring a writ of *habeas corpus* to be released at the expiration of the maximum period, since he is subject to the statutory maximum; In re Duff, 141 Mich. 623, 105 N. W. 138. On an indictment charging separate offences under the same statute, the court may impose separate and cumulative sentences; but a single sentence for a term longer than is authorized by the statute for one offense is void as to the excess; U. S. v. Peeke, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314. An act authorizing a board of commissioners of a county workhouse to deduct from sentence for good conduct, leaving the whole matter to arbitrary discretion, is an unconstitutional delegation of legislative authority; Fite v. State, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108; People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285; Com. v. Halloway, 44 Pa. 210, 84 Am. Dec. 431; State v. Board, 16 Utah 478, 52 Pac. 1090; *contra*, State v. Peters, 43 Ohio 629, 4 N. E. 81; Opinion of Justices, 13 Gray (Mass.) 618; State v. Austin, 113 Mo. 538, 21 S. W. 31; State v. Patterson (N. J.) 22 Atl. 802.

A Pennsylvania act (1911) provides that the court shall "pronounce upon such facts a sentence of imprisonment for a definite term and state in such sentence the minimum and maximum limits thereof and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offence." It is said that the act does not *fix punishment;* it relates exclusively to the *manner of sentence.* As was first pointed out by Judge Sulzberger a maximum sentence is the only portion of the sentence which is valid; the minimum sentence is merely an administrative notice by the court to the executive department calling attention to the policy that when a man's so-called minimum sentence is about to expire . . . the propriety of granting a qualified pardon may be determined; Com. v. Kalck, 239 Pa. 541, 87 Atl. 61, where it was held that such an act is constitutional, following State v. Perkins, 143 Ia. 55, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217; In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658; People v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; State v. Peters, 43 Ohio 629, 4 N. E. 81; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572. To the same effect, Berry v. Com., 141 Ky. 422, 132 S. W. 1030.

The suspension of civil rights of a person sentenced to the penitentiary for a term less than life begins at the date of his imprisonment; Harmon v. Bowers, 78 Kan. 135, 96 Pac. 51, 17 L. R. A. (N. S.) 502, 16 Ann. Cas. 121.

In England where one convicted of an offense is not less than 16 nor more than 21 years old, and by reason of bad associates it is expedient to subject him to instruction and discipline, the court may pass a sentence of detention under penal discipline in a Borstal institution for not less than one nor more than three years; here he is drilled and taught a trade and trained morally and physically. Act of 1908.

See CUMULATIVE SENTENCE; JUDGMENT; HABITUAL CRIMINALS' ACT; PRISONER; TICKET OF LEAVE; SOLITARY CONFINEMENT.

As to the formal address of the court to the prisoner before sentence, see ALLOCUTION.

SENTENCE OF DEATH RECORDED. A custom in the English courts, now disused, of entering sentence of death on the record which is not intended to be pronounced. The effect was the same as if it had been pronounced and the offender reprieved.

SENTENTIA. See MAXIM.

SEPARALITER (Lat. separately). A word sometimes used in indictments to show

that the defendants are charged separately with offences which without the addition of this word would seem, from the form of the indictment, to be charged jointly; as, for example, when two persons are indicted together for perjury, and the indictment states that A and B came before a commissioner, etc., this is alleging that they were both guilty of the same crime, when by law their crimes are distinct, and the indictment is vicious; but if the word *separaliter* is used, then the affirmation is that each was guilty of a separate offence. 2 Hale, Pl. Cr. 174.

SEPARATE ACTION. An action is so called which each of several persons must bring when they are denied the privilege of joining in one suit. See JOINDER.

SEPARATE ESTATE. That which belongs to one only of several persons: as, the separate estate of a partner, which does not belong to the partnership. 2 Bouvier, Inst. n. 1519.

The separate estate of a married woman is that which belongs to her and over which her husband has no right in equity. It may consist of lands or chattels. Firemen's Ins. Co. of Albany v. Bay, 4 Barb. (N. Y.) 409.

See MARRIED WOMAN.

SEPARATE MAINTENANCE. The allowance made by a husband to his wife for her separate support and maintenance. In general, if a wife is abandoned by her husband, without fault on her part, and left without adequate means of support, a bill in equity will lie to compel the husband to support her, without asking for or procuring a decree of divorce; Schoul. Hus. & W. § 485; Garland v. Garland, 50 Miss. 694; Van Arsdalen v. Van Arsdalen, 30 N. J. Eq. 359.

When this allowance is regularly paid, and notice of it has been given, no person who has received such notice will be entitled to recover against the husband for necessaries furnished to the wife, because the liability of the husband depends on a presumption of authority delegated by him to the wife, which is negatived by the facts of the case; 2 Stark. Ev. 699.

SEPARATE TRIAL. See JOINDER.

SEPARATION. A cessation of cohabitation of husband and wife by mutual agreement.

After much diversity of opinion in the English cases, the House of Lords upheld an agreement to live apart, and decreed specific performance of its covenants; 1 H. L. C. 538, followed in 4 De G., F. & J. 221; separation deeds are not *per se* against public policy; 12 Ch. Div. 605, per Jessel, M. R. See an interesting historical review of the English cases by R. J. Peaslee in 15 Harv. L. Rev. 638.

In this country the weight of authority is that there may be a valid agreement for a separation directly between the husband and wife, without the intervention of a trustee, which the courts will sanction; Carey v. Mackey, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; Randall v. Randall, 37 Mich. 563; Stebbins v. Morris, 19 Mont. 115, 47 Pac. 642; Hilbish v. Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783; Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727; the husband will be treated as trustee; Com. v. Richards, 131 Pa. 209, 18 Atl. 1007.

When subject to such an agreement, the court will prevent the husband from decreasing the alimony, and will not aid the wife to increase the alimony; Martin v. Martin, 65 Ia. 255, 21 N. W. 595; Henderson v. Henderson, 37 Or. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. Rep. 741.

But it is held that a husband and wife cannot contract to renounce their marital rights; Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848, 124 Am. St. Rep. 966; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84, where it is said that the law does not sanction such agreements, but merely tolerates them when made in such a manner that they can be enforced by or against a third person acting on behalf of the wife; and to the same effect see Clark v. Post, 113 N. Y. 27, 20 N. E. 573; Baum v. Baum, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854, where such an agreement was held to be against public policy, as substituting the will of the parties for the judgment of the court, and involving the assumption of a false character in both parties contrary to the marriage contract and subversive of the interests of society.

The wife's allowance is not forfeited by adultery unless so provided, which is usually by the "*dum casta*" (while chaste) clause. If made in view of future separation, it is not good; 6 B. & C. 200. It is avoided by reconciliation; 31 Ch. D. 524; unless otherwise provided; [1904] 2 Ch. 121. But reconciliation does not necessarily put an end to a separation deed; *e. g.* where the husband had made in the separation deed a settlement on the children; [1904] 1 Ch. 451; but when the parties changed their mind and did not separate, it was held that the consideration had failed and the settlement was avoided; L. R. 7 Eq. 343; the distinction raised in this case is said to be a fine one; 20 L. Q. R. 234.

Reconciliation after separation supersedes special articles of separation, in courts of law and equity; 1 Dowl. P. C. 245; Wells v. Stout, 9 Cal. 479.

Articles of separation are no bar to proceedings for divorce for subsequent cause; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183.

SEPARATION A MENSA ET THORO. A partial dissolution of the marriage relation.

By the ecclesiastical or canon law of England, which had exclusive jurisdiction over marriage and

divorce, marriage was regarded as a sacrament and indissoluble. This doctrine originated with the church of Rome, and became established in England. After the reformation it ceased to be the doctrine of the church of England, yet the law remained unchanged until the statute of 20 & 21 Vict. (1857) c. 85, and amendments; Bish. Marr. & D. § 65, n., 225; 1 Bish. M. Div. & S. § 1377. Hence a valid marriage could not be dissolved in England except by what has been termed the omnipotent power of parliament.

This gave rise, in the ecclesiastical courts, to the practice of granting divorces from bed and board, as they used to be called, or judicial separation, as they are called in the statute 20 & 21 Vict. c. 85, § 7; Bish. Marr. & D. § 65, n., 225; 1 Bish. M. D. & S. § 1377. From England this practice was introduced into this country; and though in some of the states it has entirely given way to the divorce *a vinculo matrimonii*, in others it is still in use, being generally granted for causes which are not sufficient to authorize the latter.

The legal consequences of a separation from bed and board are much less extensive than those of a divorce *a vinculo matrimonii* or a sentence of nullity Such a separation works no change in the relation of the parties either to each other or to third persons, except in authorizing them to live apart until they mutually come together. In coming together, no new marriage is required; neither, it seems, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation; Dean v. Richmond, 5 Pick. (Mass.) 461; Barrere v. Barrere, 4 Johns. Ch. (N. Y.) 187; Thompson v. Thompson, 2 Dall. (Pa.) 128, 1 L. Ed. 317; Cro. Eliz. 908.

Nor does such a separation, at common law and without statutory aid, change the relation of the parties as to property. Thus, it neither takes away the right of the wife to dower, nor the right of the husband to the wife's real estate, either during her life or after her death, as tenant by the curtesy; neither does it affect the husband's right in a court of law to reduce into possession the choses in action of the wife; though in equity it may be otherwise; Kriger v. Day, 2 Pick. (Mass.) 316; Clark v. Clark, 6 Watts & S. (Pa.) 85; Cro. Eliz. 908; Holmes v. Holmes, 4 Barb. (N. Y.) 295.

It should be observed, however, that in this country the consequences of a judicial separation are frequently modified by statute. See Bishop. Marr. & D. §§ 660–695, Bish. M. D. & S. § 1832.

Of those consequences which depend upon the order and decree of the court, the most important is that of alimony. See ALIMONY. In respect to the custody of children, the rules are the same as in case of divorce *a vinculo matrimonii;* Bish. Marr. & D. c. 25.

SEPTENNIAL ACT. An act which fixed the extreme duration of a Parliament at seven years. See PARLIAMENTARY ACT.

SEPTUM. An enclosure. Cowell.

SEPULCHRE. The place where a corpse is buried. The violation of sepulchres is a misdemeanor at common law.

See DEAD BODY; CEMETERY.

SEQUATUR SUB SUO PERICULO. A writ that lay where a summons *ad warrantizandum* was awarded, and the sheriff returned that he had nothing whereby he might be summoned, then issued an *alias* and a *pluries*, and if he came not in on the *pluries*, this writ issued. O. N. B. 163.

SEQUELA CAUSÆ. The process and depending issue of a cause for trial. Cowell.

SEQUELA CURIÆ. Suit of court. Cowell.

SEQUELA VILLANORUM. The family retinue and appurtenances to the goods and chattels of villeins, which were at the absolute disposal of the lord. Par. Ant. 216.

SEQUESTER. **In Civil and Ecclesiastical Law.** To renounce. Example: when a widow comes into court and disclaims having anything to do or to intermeddle with her deceased husband's estate, she is said to sequester. Jacob, Law Dict.

SEQUESTRATIO. The separating or setting aside of a thing in controversy, from the possession of both the parties that contend for it; it is twofold—*voluntary*, done by consent of all parties; and *necessary*, when a judge orders it.

SEQUESTRATION. **In Chancery Practice.** A writ of commission, sometimes directed to the sheriff, but usually to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues, and profits into their own hands, and keep possession of or pay the same, as the court shall order or direct, until the party who is in contempt shall do that which he is enjoined to do and which is especially mentioned in the writ. Newl. Ch. Pr. 18; Blake, Ch. Pr. 103. See Asburner, Equity 38–45, for an interesting account of the development of the process of equity. Sequestration is the practice in the king's bench division of the High Court in England to enforce an order to pay money into court or to do any other act in a limited time; it goes against the rents and profits of the real estate and all the personal estate of the person who disobeys the order; 3 Steph. Com. 566.

A process for contempt, used by chancery courts, to compel a performance of their orders and decrees. Ryan v. Kingsbery, 88 Ga. 361, 14 S. E. 596.

Upon the return of *non est inventus* to a commission of rebellion, a sergeant-at-arms may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made upon his certificate for an order for a sequestration; 2 Madd. Ch. Pr. 203; Blake, Ch. Pr. 103. It is the process formerly used instead of an attachment to secure the appearance of persons having the privilege of peerage or parliament, before a court of equity; Adams, Eq. 326.

Under a sequestration upon mesne process, as in respect of a contempt for want of appearance or answer, the sequestrators may take possession of the party's personal property and keep him out of possession, but no sale can take place, unless perhaps to pay expenses; for this process is only to form the foundation of taking the bill *pro confesso*. After a decree it may be sold. See 3 Bro. C. C. 72, 372; 2 Cox, Ch. 224.

A judgment of sequestration does not dissolve the corporation against which it is rendered, but it may appeal from an adverse judgment in an action brought by it and pending when the judgment of sequestration was rendered; Auburn Button Co. v. Sylvester, 68 Hun (N. Y.) 401, 22 N. Y. Supp. 891.

See, generally, as to this species of sequestration, 19 Viner, Abr. 325; Bac. Abr. *Sequestration;* Com. Dig. *Chancery* (D 7, Y 4); 1 Hov. Suppl. to Ves. 25; 7 Vern., Raithby ed. 58, n. 1, 421, n. 1.

In England the glebes and tithes of a parsonage are not liable to be seized on execution to satisfy a judgment, but they are made liable to sequestration; 2 Steph. Com. 715. In some cases the bishop may sequester the profits of a benefice and apply them according to law; *id.* 742.

In Contracts. A species of deposit which two or more persons, engaged in litigation about anything, make of the thing in contest with an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong. La. Code, art. 2912; Story, Bailm. § 45. See 19 Viner, Abr. 325; 1 Vern. 58, 420; 2 Ves. 23.

In Louisiana. A mandate of the court, ordering the sheriff, in certain cases, to take in his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. This is what is properly called a judicial sequestration. See Pitot v. Elmes, 1 Mart. O. S. (La.) 79; La. Civ. Code 2941, 2948.

SEQUESTRATOR. One to whom a sequestration is made.

A depositary of this kind cannot exonerate himself from the care of the thing sequestered in his hands, unless for some cause rendering it indispensable that he should resign his trust. La. Civ. Code, art. 2947.

Officers appointed by a court of chancery and named in a writ of sequestration. As to their powers and duties, see 2 Madd. Ch. Pr. 205.

SERF. In Feudal Law. A term applied to a class of persons who were bound to perform very onerous duties towards others. Pothier, *Des Personnes.*

The serf cannot be spoken of as a slave; in relation to his lord, the general rule makes him rightless, but as to all other men he was treated as a free man. Except where the lord was concerned, criminal law made no difference between bond and free. In his relation to the state, it is highly probable that he could not act as a judge of free men, unless perhaps in the manorial courts; he could not be a juror in civil causes. He filled lower offices in the manorial courts; he paid taxes and was expected to have arms. Almost always the serf was a *born* serf; a person born free rarely became a serf. There were no degrees of personal freedom; there was no such thing as mere praedial serfage. The serf could be emancipated by the lord by a charter of manumission, or impliedly by a grant of land to be held freely by the serf and his heirs, for a serf can have no heir but his lord, or by certain acts which treat him as free. He becomes free by dwelling for a year and day on the king's demesne or in a privileged town; by being knighted (but the knighted serf can be degraded when his servility is proved); by entering religion or receiving holy orders. This is a bare outline of what is said (1 Poll. & Maitl. 395-415) to be the law of serfage in the 13th century. See Maitl. Domesday Book 26.

SERGEANT-AT-ARMS. An officer appointed by a legislative body, whose duties are to enforce the orders given by such bodies, generally under the warrant of its presiding officer.

SERIATIM (Lat.). In a series; severally: as, the judges delivered their opinions *seriatim.*

SERIOUS. Important, weighty, momentous, and not trifling. Lawlor v. People, 74 Ill. 231. A *serious injury* is defined by statute in Ohio to be any such injury as shall permanently or temporarily disable a person receiving it from earning a livelihood by manual labor; Ohio L. 1892, 136; and *serious bodily injury* is held to be one which gives rise to apprehension, or is attended with great danger. George v. State, 21 Tex. App. 317, 17 S. W. 351.

SERJEANT-COUNTEUR. See COUNTEUR.

SERJEANTS-AT-LAW. A very ancient and the most honorable order of advocates at the common law.

They were called, formerly, countors, or serjeant-countors, or countors of the bench (in the old law-Latin phrase, *banci narratores*), and are mentioned by Matthew Paris in the life of John I., written in 1255. They are limited to fifteen in number, in addition to the judges of the courts of Westminster, who were always admitted before being advanced to the bench. This legal monopoly of the bench lasted, in theory, till 1875, though in recent years a judge designate was made a serjeant as a preliminary to being sworn into office. Jenks, Hist. E. L. 199.

The most distinctive feature in the Serjeant's dress in olden times was the "coif," a close-fitting head-covering of lawn or silk. He was invested with this on the day of his call by the chief justice of the king's bench, and it was not doffed even in the presence of the sovereign. It is supposed that the coif was invented for the purpose of hiding the clerical tonsure. This concealment became desirable after the law of 1217, which debar-

red churchmen from their lucrative practice in the courts.

The most valuable privilege formerly enjoyed by the serjeants was the monopoly of the practice in the court of common pleas. A bill was introduced into parliament for the purpose of destroying this monopoly, in 1755, which did not pass. In 1833, a warrant under the sign manual was directed to the judges of the common pleas, commanding them to open that court to the bar at large. The order was received and complied with. In 1839, the matter was brought before the court and decided to be illegal; 10 Bingh. 571; 6 Bingh. N. C. 187, 232. The exclusive privilege of serjeants to appear at the bar of the common pleas was argued before the privy council by Lord Brougham in 1839; see Manning's *Serviens ad Legem.*

The statute 9 & 10 Vict. c. 54, has since extended the privilege to all barristers; 3 Sharsw. Bla. Com. 27, n. Upon the Judicature Act coming into operation, the institution and office of serjeant-at-law virtually came to an end; Weeks, Att. at Law § 33.

In 1812 Mr. Justice Story made an order in the United States circuit court for the first circuit conferring upon Jeremiah Smith and Jeremiah Mason "the honorable decree of Serjeant-at-Law"; Charles Warren, in 46 Am. L. Rev. 667.

The last surviving serjeant-at-law was Lord Justice Lindley, who was admitted to Serjeant's Inn in 1875.

See Experiences of Serjeant Ballantine, Lond. 1882; Pulling, Order of Coif; INNS OF COURT; FARYNDON INN.

SERJEANTS' INN. The Inn to which the serjeants-at-law belonged, near Chancery Lane, formerly called Faryndon Inn. See INNS OF COURT; 3 Steph. Com. 292. It no longer exists.

SERJEANTY. In English Law. A species of service which cannot be due or performed from a tenant to any lord but the king, and is either grand or petit.

"The exact idea of serjeanty as conceived in the thirteenth century," says a recent writer on this subject, "is not one easily defined." Several different classes of men were grouped together under one heading, the bond between them being very slight, and the distinction between serjeanty and knight's service on the one hand and socage on the other is hard to determine; 1 Poll. & Maitl. 262.

Serjeanty means *service.* The serjeant means primarily *one who serves.* Those who follow the law are serjeants-at-law. The tenants by serjeanty are no doubt the descendants of the *servientes* of Domesday Book, who held land in many counties as the servants, in many capacities, of the king and the great nobles. There were many peculiar features of this tenure in the 13th century. Land so held went back to the donor when the tenant died. When it descended to the heir, the relief was arbitrary. The land was never partitioned, because personal services could not be partitioned. Land long remained inalienable. Of the non-military serjeanties held under the king, there were services which were rather regarded as conferring dignity than as service: to carry the king's banner and the like. Many tenants held by the tenure of doing a variety of humbler services. Similarly, the great lords let lands to be held by serjeanty, the tenants being the servants of the lord. The importance of this class of tenants was very great.

In the 12th and 13th centuries the military serjeanties supplied the feudal army with light auxiliary troops, attendants on the knights, material for war, etc., and this both to the king and the mesne lord. In the 14th century there was a tendency to substitute the contract with the hired servant for the status of the tenant in serjeanty. As a result, little was left except the tenure of those who held by the tenure of dignified services to the king, or some service pertaining to war.

In Britton's day, serjeanty was specially, but not exclusively, connected with war and the idea arose that all tenure by serjeanty must be tenure in chief; Litt. § 161. The distinction, in a social sense, between these two surviving classes was expressed by the terms "*grand*" and "*petit.*" They came to have a technical meaning, due probably to the need for settling the question whether tenure by serjeanty gave rise to the incidents of wardship and marriage; 1 Poll. & Maitl. 304. As the greater number of the old serjeanties dropped out, there remained only the serjeanties performed by the great nobility on state occasions and the smaller military serjeanties. Tenure by the latter class came to be "but socage in effect"; Litt. § 160; and tenure by the former class came to be similar to tenure by knight service, till it also was turned into tenure by socage by an act in 1660 which abolished military tenures, but preserved the honorary services due from the tenant by grand serjeanty; 3 Holdsw. Hist. E. L. 39. Estates conferred by the crown in recognition of distinguished public services are generally held by petit serjeanty; Jenks, Mod. Land Law 23.

SERVAGE. Where a tenant, besides his rent, finds one or more workmen for his lord's service. King John brought the Crown of England in servage to the see of Rome; 2 Inst. 174; Whart. Dict.

SERVANTS. Domestics; those who receive wages, and who are lodged and fed in the house of another and employed in his service. Such servants are not particularly recognized by law.

One who serves, or does service, voluntary or involuntary; a person who is employed by another for menial offices or for other labor, and is subject to his command;

a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper. Webst., approved in Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374. They are called menial servants, or domestics, from living *infra mœnia*, within the walls of the house. 1 Bla. Com. 324; Wood, Inst. 53.

The right of the master to their services in every respect is grounded on the contract between them.

Laborers or persons hired by the day's work or any longer time are not considered servants; Boniface v. Scott, 3 S. & R. (Pa.) 351. See 12 Ves. 114; Delphine v. Deveze, 2 Mart. N. S. (La.) 652; DOMESTIC; OPERATIVE; MASTER AND SERVANT.

In the branch of the law called master and servant, the latter word has a much broader meaning than mere domestic servants.

SERVI. See SERVUS.

SERVICE. In Contracts. The being employed to serve another.

In cases of *seduction*, the gist of the action is not the injury which the seducer has inflicted on the parent by destroying his peace of mind and the reputation of his child, but for the consequent inability to perform those services for which she was accountable to her master or her parent, who assumes this character for the purpose. See SEDUCTION.

In Feudal Law. That duty which the tenant owed to his lord by reason of his fee or estate.

The services, in respect of their quality, were either free or base, and in respect of their quantity, and the time of exacting them, were either certain or uncertain. 2 Bla. Com. 62.

In Civil Law. A servitude.

In Practice. The execution of a writ or process. Thus, to serve a writ of *capias* signifies to arrest a defendant under the process; Kirb. 48; Gage v. Graffam, 11 Mass. 181; to serve a summons is to deliver a copy of it at the house of the party, or to deliver it to him personally, or to read it to him: notices and other papers are served by delivering the same at the house of the party, or to him in person. The manner of service is usually statutory.

But where personal service is impossible, through the non-residence or absence of a party, constructive service by *publication* is, in some cases, permitted, and is effected by publishing the paper to be served in a newspaper designated in the order of court and by mailing a copy of the paper to the last known address of the party, or as regulated by statute.

Substituted service is a constructive service made upon some recognized representative, as where a statute requires a foreign insurance company doing business in the state of Massachusetts to appoint the insurance commissioner of the state their attorney, "upon whom all lawful processes in any proceeding against the company may be served with like effect as if the company existed in that commonwealth." Questions are constantly arising as to the validity of service on some particular agent of a foreign corporation within state statutes giving jurisdiction in suits against such corporations. It was held in Louisiana that any service sufficient as against a domestic corporation might be, by law, sufficient against a foreign one, and consequently, that such service might be made upon the president of the latter while temporarily within the jurisdiction of the court in which the suit was commenced; In re Curtis, 115 La. 918, 40 South. 334, 112 Am. St. Rep. 284, 5 Ann. Cas. 950; but the rule laid down by the federal courts is that such service is insufficient; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Fidelity Trust & Safety Vault Co. v. R. Co., 53 Fed. 850. See FOREIGN CORPORATION. But it was held by the circuit court that when the manager of a corporation goes into another state on business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there; Houston v. Filer & Stowell Co., 85 Fed. 757.

"It is useful in all cases to consult the careful opinion in U. S. v. Tel. Co., 29 Fed. 17, and to re-state the three conditions which it is there said must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created in another state: (1) It must appear as a matter of fact that the corporation is carrying on its business in the state where it is served with process; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the state." Union Associated Press v. Printing Co., 83 Fed. 823.

Where one was brought into a state by extradition proceedings, and had given bail for his appearance, and later returned for trial, and after acquittal was served with civil process, it was held that he was privileged from such service; Murray v. Wilcox, 122 Ia. 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *contra*, Clark v. McFarland, 10 Wend. (N. Y.) 636; Com. v. Daniel, 4 Clark (Pa.) 49. One going into another state as a witness or as a party defendant in a suit therein, either nominally or as a defendant in interest, is exempt from process in such state, while necessarily attending in respect to such trial; Skinner & Mounce Co. v. Waite, 155 Fed. 828.

The privilege from service of summons accorded to suitors going to, attending, or returning from court, extends to both residents

and non-residents; Barber v. Knowles, 77 Ohio St. 81, 82 N. E. 1065, 14 L. R. A. (N. S.) 663, 11 Ann. Cas. 1144; but it is held that a non-resident coming into the state to attend trial upon an indictment is not exempt from service of process in a civil suit; Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333, 134 Am. St. Rep. 886. One who voluntarily goes into the jurisdiction on business with the third parties takes the risk of being served there with process; Case v. Smith, Lineaweaver & Co., 152 Fed. 730.

Service obtained by inviting an officer of a New York corporation to come into New Jersey for an interview was considered as obtained by fraud; Cavanagh v. Transit Co., 133 Fed. 818.

Service of a subpœna in New York on a foreign steamship company may be made on its financial agent who is the head of a firm which is the general agent of the company; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

The residence of a corporate officer in a state does not necessarily give a corporation a domicile in the state. He must be there officially representing the corporation in its business; Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; a mere travelling agent of a foreign corporation cannot receive service for it; Saxony Mills v. Wagner, 94 Miss. 233, 47 South. 899, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199.

A salaried agent, empowered to solicit advertisements for a non-resident newspaper corporation, and to make contracts therefor, and receive payment, and who carries on business at an office having the name of the newspaper on its windows, is a "managing agent," on whom valid service of process against the corporation may be made under the New York Code; Brewer v. George Knapp & Co., 82 Fed. 694.

In an action against a foreign corporation, service on an officer who is also the attorney in fact of the plaintiff to institute and prosecute the action is invalid and confers no jurisdiction; George v. Ginning Co., 46 S. C. 1, 24 S. E. 41, 32 L. R. A. 764, 57 Am. St. Rep. 671. Service cannot be made upon the deputy of a public officer, who has been designated as the proper agent of a foreign corporation to receive service; Bennett v. Supreme Tent of K. of M. of W., 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389. The statutory agent of a foreign corporation cannot admit or waive service where it has not been properly made; Bennett v. Supreme Tent of K. of M. of W., 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

Service by publication is in general held valid only in proceedings *in rem*, where the subject-matter is within the jurisdiction of the court, as in suits in partition, attachment, for the foreclosure of mortgages, and the enforcement of mechanics' liens.

Where non-residents hold real property within a state, jurisdiction over them may be obtained, under a statute, by publication of notice; Connor v. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687. The appointment of a trustee to convey land in an action for a specific performance is a proceeding *in rem*, and notice by publication may be given to non-resident defendants; Hollander v. Supply Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135.

A state may make reasonable discriminations in regard to service of process for enforcement of liens for taxes and assessments on real estate between resident and non-resident owners, providing for personal service on the former and service by publication on the latter; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461. But in the absence of statutory authority, there is no power to order personal service of process upon the defendant outside the jurisdiction. Jennings v. Johnson, 148 Fed. 337, 78 C. C. A. 329; and statutes authorizing substituted services are to be strictly construed; Gage v. Trust Co., 156 Fed. 1002.

Service out of the jurisdiction is "all but annulled in England"; 19 L. Q. Rev. 123.

An act providing for service on a domestic corporation by advertising, in cases where no service can be had in the county, does not violate the federal Constitution; Ward Lumber Co. v. Mfg. Co., 107 Va. 626, 59 S. E. 476, 17 L. R. A. (N. S.) 324.

A judgment against a domestic corporation based upon service by publication is good; Clearwater Mercantile Co. v. Shoe Co., 51 Fla. 176, 40 South. 436, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153. Service by publication is valid in an action for tort, where the defendant is a resident of the state, but cannot be personally served in the county; Nelson v. R. Co., 225 Ill. 197, 80 N. E. 109, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133; the legislature may provide for the re-establishment of lost records of title to real estate upon process served by publication against unknown claimants; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 99, 11 Ann. Cas. 465.

Where an ancillary bill was filed in the court where the principal case was pending, substituted service on the defendant's counsel in the principal case was held good; Pike v. Gregory, 94 Fed. 373, 36 C. C. A. 299.

In many of the states statutes have been passed to meet this class of cases. In purely personal actions, service by publication is invalid, upon the well-settled principle that the person or thing proceeded against must be within the jurisdiction of the court entertaining the cause of action. Neal v. Scruggs, 95 U. S. 704, 24 L. Ed. 586; Insurance Co. v. Bangs, 103 U. S. 439, 26 L. Ed. 580;

Story, Confl. L. § 539. No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the jurisdiction of the court or voluntarily appears; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; or service is upon some one authorized to accept service on his behalf, or the want of due service is waived by a general appearance, or otherwise; Caledonian Coal Co. v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540.

Where suit was brought in Massachusetts against a non-resident, and he, in Pennsylvania, accepted service of process, it was held that this did not give the court jurisdiction; Hocking Valley Bk. v., Barton, 72 Pa. 110; to the same effect; White v. White, 66 W. Va. 79, 66 S. E. 2, 24 L. R. A. (N. S.) 1279, 135 Am. St. Rep. 1013.

Substituted service will be allowed upon a defendant who was within the jurisdiction when the writ issued, but had left the country (though not to evade service), before service could be made; 77 L. T. R. 335.

Where a suit is brought to enforce a lien on real estate in the district to remove a cloud on the title, the plaintiffs are entitled to get substituted service on a non-resident party in order to bring him within the jurisdiction of the court; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397, 31 U. S. App. 486.

Proceedings in divorce are sometimes recognized as forming an exception to the rule; 1 Bish. Marr. Div. & Sep. § 837; Bish. Mar. & D. § 159.

A suit in equity in the federal court is *commenced* by suing out process and a *bona fide* attempt to serve it; U. S. v. Lumber Co., 85 Fed. 827, 29 C. C. A. 431.

Priority of jurisdiction between two courts of concurrent jurisdiction is determined by the date of the service of process; Schuehle v. Reiman, 86 N. Y. 271; In re Alexander, 84 Fed. 633; as to criminal cases, see Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287. As to the effect of service in relation to the commencement of actions see LIMITATION.

See DIVORCE; FOREIGN JUDGMENT; NON-RESIDENT.

When the service of a writ is prevented by the act of the party on whom it is to be served, it will, in general, be sufficient if the officer do everything in his power to serve it; 1 Mann. & G. 238.

Service of summons on a director of a company who was unfriendly to it and failed to report the service, but without collusion with the plaintiff, was ground for setting aside a default judgment thereon; Farrar v. Min. Co., 12 S. D. 237, 80 N. W. 1079.

Where the invalidity, irregularity or defect in service appears on the face of the papers, the objection may be taken by a motion to quash, but where it is necessary to prove such facts aliunde it should be made by plea in abatement; Electric Vehicle Co. v. Motor Co., 157 Fed. 316 (S. D. of N. Y.). An order setting aside a return of service of a writ is a final order from which an appeal lies; Ben Franklin Coal Co. v. Water Co., 25 Pa. Super. Ct. 628.

If the service of a summons is not illegal, but slightly irregular, and the irregularity does not appear on the face of the return, it will not be set aside on motion, but the objection must be raised by plea; Union Pac. Ry. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629, 15 U. S. App. 400.

See SHERIFF; notes in 8 L. R. A. (N. S.) 1186; 4 *id.* 117; 21 *id.* 344; FOREIGN CORPORATIONS.

As to what constitutes the being in the service of the United States within the meaning of an act relating to longevity pay, see that title.

SERVICES FONCIERS. In French Law. Easements.

SERVIENS NARRATOR. A serjeant-at-law, which see.

SERVIENT. In Civil Law. A term applied to an estate or tenement by or in respect of which a servitude is due to another estate or tenement.

SERVIENTIBUS. Certain writs touching servants and their masters violating the statutes made against their abuses. Reg. Orig. 189.

SERVILE. The service of a writ has been held to be servile labor. Gladwin v. Lewis, 6 Conn. 49, 16 Am. Dec. 33.

SERVITIIS ACQUIETANDIS. A judicial writ for a man distrained for services to one, when he owes and performs them to another, for the acquittal of such services. Reg. Jud. 27.

SERVITIUM DEBITUM (Lat.). Service *due*, under the feudal system, for land granted.

SERVITIUM FEODALE ET PRÆDIALE. A personal service, but due only by reason of lands which were held in fee. Bract. l. 2, c. 16.

SERVITIUM FORINSECUM. A service which did not belong to the chief lord, but to the king. Mon. Angl. ii. 48.

SERVITIUM LIBERUM. See FREEHOLD.

SERVITIUM REGALE. Royal service, or the prerogatives that within a royal manor, belonged to the lord of it, viz.: power of judicature in matters of property; of life and death in felonies and murders; right to waifs and estrays; remitting of money; assize of bread and beer, and weights and measures. Whart. Dict.

SERVITORS OF BILLS. Such servants or messengers of the marshal belonging to the king's bench as were heretofore sent

abroad with bills or writs to summon men to that court, being now called "tip-staves." Blount; 2 Hen. IV. c. 23.

SERVITUDE. In Civil Law. The subjection of one person to another person, or of a person to a thing, or of a thing to a person, or of a thing to a thing.

A right which subjects a land or tenement to some service for the use of another land or tenement which belongs to another master. Domat, Civ. Law, Cushing's ed. § 1018.

A *mixed* servitude is the subjection of persons to things, or things to persons.

A *natural* servitude is one which arises in consequence of the natural condition or situation of the soil.

A *personal* servitude is the subjection of one person to another: if it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to do: this right arises from all kinds of contracts or *quasi*-contracts. *Lois des Bât.* p. 1, c. 1, art. 1.

A *real* or *prædial* servitude is a charge laid on an estate for the use and utility of another estate belonging to another proprietor. La. Code, art. 643. When used without any adjunct, the word servitude means a real or prædial servitude. *Lois des Bât.* p. 1, c. 1; Mitch. R. E. & Conv. 49. Real servitudes are divided into rural and urban.

Rural servitudes are those which are due by an estate to another estate, such as the right of passage over the serving estate, or that which owes the servitude, or to draw water from it, or to water cattle there, or to take coal, lime, and wood from it, and the like.

Urban servitudes are those which are established over a building for the convenience of another, such as the right of resting the joists in the wall of the serving building, of opening windows which overlook the serving estate, and the like. Dalloz, Dict. *Servitudes.*

This term is used as a translation of the Latin term *servitus* in the French and Scotch Law, Dalloz, Dict.; Paterson, Comp., and by many common-law writers, 3 Kent 434; Washb. Easem., and in the Civil Code of Louisiana. Service is used by Wood, Taylor, Harris, Cowper, and Cushing in his translation of Domat. Much of the common-law doctrine of easements is closely analogous to, and probably in part derived from, the civil-law doctrine of servitudes.

In common law the use of the word servitude is as a correlative of easement; where one person has an easement which creates a burden upon the property of another, the latter is said to be burdened with a servitude. All servitudes are stereotyped and cannot be varied at the pleasure of parties; Mershon v. Safe Deposit Co., 208 Pa. 295, 57 Atl. 569.

SERVITUS (Lat.). **In Roman Law.** Servitude; slavery; a state of bondage; a disposition of the law of nations by which, against common right, one man has been subjected to the dominion of another. Inst. 1. 2. 3; Bracton 4 *b*; Co. Litt. 116.

A service or servitude; a burden imposed by law, or the agreement of parties, upon one estate for the advantage of another, or for the benefit of another person than the owner.

Servitus actus, a right of way on horseback or in a carriage. Inst. 2. 3. pr.

Servitus altius non tollendi, a servitude preventing the owner of a house from building higher than his neighbor. Inst. 2. 3. 4; Paterson, Comp.

Servitus aquæ ducendæ, a right of leading water to one's own land over that of another. Inst. 2. 3. pr.

Servitus aquæ educendæ, a right of conducting water from one's own land upon a neighbor's. Dig. 8. 3. 29.

Servitus aquæ hauriendæ, a right of drawing water from another's spring or well. Inst. 2. 3. 2.

Servitus cloacæ mittendæ, a right of having a sewer through a neighbor's estate. Dig. 8. 1. 7.

Servitus fumi immittendi, a right of conducting smoke or vapor through a neighbor's chimney or over his ground. Dig. 8. 5. 8.

Servitus itineris, a right of way on horseback or in a carriage. This includes a *servitus actus*. Inst. 2. 3.

Servitus luminum, a right to have an open place for receiving light into a chamber or other room. Domat, 1. 1. 4; Dig. 8. 2. 4.

Servitus oneris ferendi, a servitude of supporting a neighbor's building.

Servitus pascendi, a right of pasturing one's cattle on another's lands. Inst. 2. 3. 2.

Servitus pecoris ad aquam adpulsus, a right of driving one's cattle on a neighbor's land to water.

Servitus prædii rustici, a rural servitude.

Servitus prædii urbani, an urban servitude.

Servitus prædiorum, a servitude on one estate for the benefit of another. See PRÆDIÆ.

Servitus projiciendi, a right of building a projection into the open space belonging to a neighbor. Dig. 8. 2. 2.

Servitus prospectus, a right of prospect. Dig. 8. 2. 15. This may be either to give one a free prospect over his neighbor's land, or to prevent a neighbor from having a prospect over one's own land. Domat, 1. 1. 6.

Servitus stillicidii, a right of having the water drip from the eaves of one's house upon a neighbor's house or ground.

Servitus tigni immittendi, a right of inserting beams in a neighbor's wall. Inst. 2. 3. 1. 4; Dig. 8. 2. 2.

Servitus viæ, a right of way on foot or horseback, or with a loaded beast or wagon, over a neighbor's estate. Inst. 2. 3.

See, generally, Inst. 2. 3; Dig. 8. 2; *Dict. de Jur.*; Domat. Civ. Law; Bell, Dict.; Washb. Easem.; Gale, Easem.; Jones, Easem.

SERVUS (Lat.). A slave.

The institution of slavery is traced to the remotest antiquity. It is referred to in the poems of Homer; and all the Greek philosophers mention it without the slightest censure. Aristotle justified it on the ground of a diversity of race. The Roman jurists rest the institution of slavery on the law of nations: in a fragment of Florentinus copied in the Institutes of Justinian, servitude is defined, *Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.* D. 1. 5. 4. 1; Inst. 1. 3. 2. The Romans considered that they had the right of killing their prisoners of war, *manu capti;* and that by preserving their lives, *servati,* they did not abandon but only postponed the exercise of that right. Such was, according to their ideas, the origin of the right of the master over his slave. Hence the etymology of the words *servi,* from *servati,* and *mancipia,* from *manu capti,* by which slaves were designated. It is, however, more simple and correct to derive the word *servus* from *servire.* Inst. 1 3 3. Children born of a woman who was a slave followed the condition of their mother; *servi nascuntur aut fiunt.*

A free person might be reduced to slavery in various ways: by captivity, *ex captivitate.* The Roman who was taken prisoner by the enemy lost all his rights as a citizen and a freedman: thus, when Regulus was brought to Rome by the Carthaginian ambassadors he refused to take his seat among the senators, saying that he was nothing but a slave. But if he had made his escape and returned to Rome, all his rights would have been restored to him by the *jus postliminii;* and the whole period of his captivity would have been effaced, and he would have been considered as if he had never lost his freedom. According to the law of the Twelve Tables, the insolvent debtor became the slave of his creditor, by a judgment rendered in a proceeding called *manus injectio,*—one of the four *leges actiones.* The thief taken in the act of stealing, or while he was carrying the thing stolen to the place where he intended to conceal it, was deprived of his freedom, and became a slave. So was a person, who, for the purpose of defrauding the state, omitted to have his name inscribed on the table of the *census.* The illicit intercourse of a free woman with a slave without the permission of his master, the sentence to a capital punishment and the sentence to work perpetually in the mines,—*in metallum dati,*—made the culprit the slave as his punishment (*servi pœnæ*). The ingratitude of the emancipated slave towards his patron or former master and the fraud of a freeman who had suffered himself to be sold by an accomplice (after having attained the age of twenty years) in order to divide the price of the sale, were so punished.

Liberty being inalienable, no one could sell himself; but in order to perpetrate a fraud on the purchaser, a freeman was offered for sale as a slave and bought by an innocent purchaser: after the price had been paid and divided between the confederates, the pretended slave claimed and, of course, obtained his freedom. To remedy this evil and punish this fraud, a *senatus consultum* issued under Claudius provided that the person who had thus suffered himself to be sold should lose his liberty and remain a slave. In the social and political organization slaves were not taken into consideration; they had no *status. Quod attinet ad jus civile, servi pro nullis habentur. Servitutem mortalitati fere comparamus.* With regard to the master there was no distinction in the condition of slaves: they were all equally subject to the *domini potestas.* But the master some times established a distinction between the *servi vicarii* and the *servi ordinarii:* the former exercised a certain authority over the latter. But there was a marked difference between those slaves of whom we have been speaking and the *coloni censili, ascripti* and *tributarii,* who resembled the serfs of the middle ages. 1 Ortolan 27; 1 Etienne 68 *et seq.;* Lagrange 93. See SLAVE. As to the distinction between servus and serf, see SERF.

SESSION. The time during which a legislative body, a court, or other assembly, sits for the transaction of business: as, a session of congress, which commences on the day appointed by the constitution, and ends when congress finally adjourns before the commencement of next session; the session of a court which commences at the day appointed by law, and ends when the court finally rises. Cited in People v. Auditor of Public Accounts, 64 Ill. 86; Ralls v. Wyand, 138 Pac. 158, 12 Okl. L. J. 265.

A term.

SESSION LAWS. A term used to designate the printed statutes as passed at the successive legislative sessions of the various states. In Pennsylvania they are usually called pamphlet laws. See PAMPHLET LAWS.

SESSIONAL ORDERS. Certain orders agreed to by both houses of parliament at the commencement of each session, and in force only during that session. May, P. L.

SESSIONS OF THE PEACE. In English Law. Sittings of justices of the peace for the execution of the powers which are confided to them as such.

Petty sessions (or petit sessions) are sittings held by one or more justices for the trial of minor offences, admitting to bail prisoners accused of felony, and the like purposes.

When sitting for purposes of preliminary inquiry, the public cannot claim admittance; but it is otherwise when sitting for purposes of adjudication.

Special sessions are sittings of two or more justices on a particular occasion for the exercise of some given branch of their authority, upon reasonable notice given to the other magistrates of the hundred or other division of the county, city, etc., for which they are convened. See stat. 7 & 8 Vict. c. 33.

The counties are distributed into divisions, and authority given by various statutes to the justices acting for the several divisions to transact different descriptions of business, such as licensing alehouses, or appointing overseers of the poor, surveyors of the highways, etc., at special sessions. 3 Steph. Com., 11th ed. 37.

General sessions of the peace are courts of record, holden before the justices, whereof one is of the *quorum*, for execution of the general authority given to the justices by the commission of the peace and certain acts of parliament.

See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

SET ASIDE. To annul; to make void: as, to set aside an award.

When proceedings are irregular, they may be set aside on motion of the party whom they injuriously affect.

SET OF EXCHANGE. The different parts of a bill of exchange, taken together. Each part is a perfect instrument by itself; but the parts are numbered successively, and upon payment of any one the others become useless. See Chitty, Bills 175; Pars. Notes & B.

SETI. As used in mining laws, lease. Brown.

SET-OFF. **In Practice.** A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim. See Mitchell v. McLean, 7 Fla. 329.

A set-off is generally considered to be a matter which will be capable of use as an offset to any recovery by the plaintiff. A counterclaim is a matter which is capable of use as a basis for a judgment for relief against the plaintiff, and, of course, may be used as a set-off as well. Marconi Wireless Tel. Co. v. Signaling Co., 206 Fed. 295.

A set-off was unknown to the common law; according to which mutual debts were distinct, and inextinguishable except by actual payment or release; Waterm. Set-Off; Com. v. Clarkson, 1 Rawle (Pa.) 293; Babingt. Set-Off 1.

The statute 2 Geo. II. c. 22, which has been generally adopted in the United States, with some modifications, in cases of mutual debts, however, allowed the defendant to set his debt against the other, either by pleading it in bar, or giving it in evidence, when proper notice had been given of such intention, under the general issue. The statute, being made for the benefit of the defendant, is not compulsory; Himes v. Barnitz, 8 Watts (Pa.) 39; the defendant may waive his right, and bring a cross-action against the plaintiff; 2 Camp. 594; Hinckly v. Walters, 9 Watts (Pa.) 179.

It seems, however, that in some cases of intestate estates and of insolvent estates, perhaps owing to the peculiar wording of the law, the statute has been held to operate on the rights of the parties before action brought or an act done by either of them; App v. Dreisbach, 2 Rawle (Pa.) 293, 21 Am. Dec. 447; Murray v. Williamson, 3 Binn. (Pa.) 135; Bac. Abr. *Bankrupt* (K). See Stetson v. Exch. Bk., 7 Gray (Mass.) 425.

Set-off takes place only in actions on contracts for the payment of money: as, assumpsit, debt, and covenant; and where the claim set off grows out of a transaction independent of the contract sued on; Avery v. Brown, 31 Conn. 398; the claims to be set off against each other must both be due. In a suit by a railroad company, the company's coupons which had matured during the suit are admissible under a set-off, but not those that had matured after the appointment of a receiver of the plaintiff company; Wheeling Bridge & Terminal Ry. Co. v. Cochran, 68 Fed. 141; 15 C. C. A. 321, 25 U. S. App. 306. An unliquidated claim cannot be set off against one which is for a stipulated amount. Damages for malicious prosecution cannot be set off in an action for rent; Dietrich v. Ely, 63 Fed. 413, 11 C. C. A. 266, 24 U. S. App. 21. A set-off is not allowed in actions arising *ex delicto;* as. upon the case, trespass, replevin, or detinue; Bull. N. P. 181; Donohue v. Henry, 4 E. D. Sm. (N. Y.) 162. And an independent tort cannot be made a defense against another tort, either by way of set-off or counter-claim; Keller v. B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Christy v. Jones, 39 Kan. 183, 18 Pac. 56; nor is a set-off available as a defence to an action of tort; Marlowe v. Rogers, 102 Ala. 510, 14 South. 790. Nor can there be a set-off to a set-off; Hill v. Roberts, 86 Ala. 523, 6 South. 39. The right of set-off, except in equity, is a matter of local legislation, and the federal court will follow the rules established by the tribunals of the state in which it is sitting; Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

In Pennsylvania, if it appear at the trial that the plaintiff is overpaid, then defendant has a certificate of the amount due to him, which has the effect of a verdict against the plaintiff; Moore's Appeal, 10 Pa. 436. But the plaintiff may suffer a nonsuit, notwithstanding a plea of set-off; McCredy v. Fey, 7 Watts (Pa.) 496.

The matters which may be set off may be mutual liquidated debts or damages; but unliquidated damages cannot be set off; Cummings v. Morris, 16 N. Y. Super. Ct. 560; McCracken v. Elder, 34 Pa. 239; Walker v. McCoy, 34 Ala. 659; Bodman v. Harris, 20 Tex. 31.

Damages for malicious prosecution cannot be set off in an action for rent; Dietrich v. Ely, 63 Fed. 413, 11 C. C. A. 266, 24 U. S. App. 21. There must be a mutuality in claims to authorize a set-off; Kinney v. Tabor, 62 Mich. 517, 29 N. W. 86, 512. The stat-

utes refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction, or dealings necessarily constitute an account consisting of receipts and payments, debts and credits, the balance only is considered to be the debt, and therefore in an action it is not necessary in such cases either to plead or give notice of set-off; 4 Burr. 2221. By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property; and in such case her debt, *dum sola*, may be set off, but not his own debt; if he sues alone, his debt may be set off, but not hers *dum sola;* Wingate v. Parsons, 4 Del. Ch. 117.

A purchaser of goods from the agent of a known principal cannot set off a sum owing to him from the agent; Moline Malleable Iron Co. v. Iron Co., 83 Fed. 66, 27 C. C. A. 442.

A claim, an action to recover which would be barred by statute, is also barred as a set-off; Parker v. Ins. Co., 61 Vt. 65, 17 Atl. 724; but a plea of set-off cannot be defeated by the statute of limitations, where the claim offered to be set off was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in the suit; Patrick v. Petty, 83 Ala. 420, 3 South. 779.

Set-off against the government will only be allowed after the claim has been rejected by the accounting department, or where a statute permits it; U. S. v. Giles, 9 Cra. (U. S.) 213, 3 L. Ed. 708. There can be no recovery on an independent claim against a state; Com. v. Matlack, 4 Dall. (U. S.) 303, 1 L. Ed. 843.

A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank; Yardley v. Clothier, 49 Fed. 337. A debt from an insolvent not due at the time of his making an assignment for the benefit of creditors, may be set off by the creditor against a debt due from him to the insolvent at the time of the assignment; Rothschild v. Mack, 42 Hun (N. Y.) 72. Where mutual obligations have grown out of the same transaction insolvency on the one hand justifies the set-off of the debt due upon the other; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059. A stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him by the corporation; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227.

Judgments in the same rights may be set off against each other, at the discretion of the court; Burns v. Thornburgh, 3 Watts (Pa.) 78; McMahan v. Crabtree, 30 Ala. 470; Goodenow v. Buttrick, 7 Mass. 140, 144; Alexander v. Durkee, 112 N. Y. 655, 19 N. E. 514. In equity judgments may be set off, in the discretion of the court, if substantial justice is thereby done; this rule is generally settled; Reed v. Smith, 158 Fed. 889; Hendrickson v. Brown, 39 N. J. Law 239. They need not be judgments in the same courts nor even in the same state, and one may be in tort and the other in contract; Reed v. Smith, 158 Fed. 889; see Caldwell v. Ryan, 210 Mo. 17, 108 S. W. 533, 16 L. R. A. (N. S.) 494, and note, 124 Am. St. Rep. 717, 14 Ann. Cas. 314.

The right is recognized by the bankruptcy act; Studley v. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313; equitable set-off cannot be pleaded by way of answer, but the relief sought must be invoked by bill or cross-bill; American N. Bk. v. Elevator Co., 36 S. W. 960. See Montague, Babington, Set-Off; Helwig v. Laschowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378; DEFALCATION; LIEN; RECOUPMENT.

SET ON FOOT. Arrange; place in order; set forward; put in the place of being ready. U. S. v. Ybanez, 53 Fed. 538. See NEUTRALITY.

SETTLE. To adjust or ascertain; to pay. Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle such debt or balance. Houston v. Stanton, 11 Ala. 419.

SETTLED CASE ON APPEAL. That part of the record on appeal which consists of a statement prepared by the appellant's counsel setting forth so much of the testimony and proceedings had in the court below as may be material to the questions intended to be inquired of in the appellate court, subject to amendments of the opposing counsel and to a statement of the trial judge. In other states the word appeal book or paper book is applied. 15 Alb. L. J. 242.

SETTLEMENT. A residence under such circumstances as to entitle a person to support or assistance in case of becoming a pauper.

It is obtained in various ways, to wit: by *birth;* by the *legal settlement* of the father, in the case of minor children; by *marriage;* by *continued residence;* by the payment of requisite taxes; by the *lawful exercise of a public office;* by *hiring and service* for a specified time; by *serving an apprenticeship;* and perhaps some others, which depend upon the local statutes of the different states. See 1 Bla. Com. 363; Guardians of the Poor of Philadelphia v. Overseers, 6 S. & R. (Pa.) 565.

In Contracts. An agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other; payment in full.

The conveyance of an estate for the benefit of some person or persons. See ANTE-NUPTIAL CONTRACT; MARRIAGE SETTLEMENT; WIFE'S EQUITY.

SETTLEMENT, DEED OF. A deed made for the purpose of settling property, *i. e.* arranging the mode and extent of the enjoyment thereof. The party who settles property is called the settler; Brown. See SETTLEMENT. In England, the term was used prior to 1862, as indicating in relation to a corporation the same things as articles or memorandum of association. Cook, St. & Stockh. § 15.

SETTLER. A person who, for the purpose of acquiring a pre-emption right, has gone upon the land in question, and is actually resident there. See Peterson v. R. Co., 27 Minn. 222, 6 N. W. 615. See LANDS, PUBLIC; SETTLEMENT, DEED OF.

SETTLING A DECREE. A hearing of counsel and the approval of the court in fixing the terms of a decree in equity. Settling a bill of exceptions relates to the final approval of a bill of exceptions by the court, with the aid of counsel.

SETTLING DAY. The day on which transactions for the "account" are made up on the Stock Exchange. Whart. Dict. The settling days for English and foreign stocks and shares occur twice a month, the middle and the end. Those for consols are once in every month, generally near the commencement of the month; Moz. & W. A conspiracy to obtain a settling day by fraudulent means in order to defraud buyers of shares, or a conspiracy by fraudulent means to raise or lower the price of shares with intent to defraud buyers or sellers, is an indictable offence; 1 Q. B. D. 730; 3 M. & S. 67; 2 Lind. Part. *711, 816.

SETTLING ISSUES. In English Practice. Deciding the forms of the issues to be determined in a trial, according to the provisions of the Judicature Act of 1875. Sched. I. ord. 26; 3 Steph. Com., 11th ed. 549.

SEVER. In Practice. To separate; to insist upon a plea distinct from that of other co-defendants.

SEVERAL. Separate; distinct. Exclusive, individual, appropriated. In this sense it is opposed to common; and it has been held that the word could not be construed as equivalent to respective; Colton v. Fox, 67 N. Y. 348; though it has been construed to mean all; Outcalt v. Outcalt, 42 N. J. Eq. 501, 8 Atl. 532.

More than two, but not very many. Einstein v. Marshall, 58 Ala. 153, 29 Am. Rep. 729; several hundred dollars includes seven hundred dollars. *Id.* See JOINT AND SEVERAL.

SEVERAL FISHERY. See FISHERY.

SEVERAL ISSUES. This occurs where there is more than one issue involved in a case. 3 Steph. Com. 560.

SEVERAL OBLIGATION. See OBLIGATION.

SEVERAL TAIL. An entail severally to two; as, if land is given to two men and their wives, and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety, and the issue of the other the other moiety. Cowell.

SEVERAL TENANCY. A tenancy which is separate, and not held jointly with another person.

SEVERALLY. Distinctly, separately, apart from others. State Nat. Bk. v. Reilly, 124 Ill. 471, 14 N. E. 657. When applied to a number of persons the expression *severally liable* usually implies that each one is liable alone. Pruyn v. Black, 21 N. Y. 301.

SEVERALTY, ESTATE IN. An estate which is held by the tenant in his own right only, without any other being joined or connected with him in point of interest during the continuance of his estate. 2 Bla. Com. 179.

SEVERANCE. The separation of a part of a thing from another: for example, the separation of machinery from a mill is a severance, and in that case the machinery, which while annexed to the mill was real estate, becomes by the severance personalty, unless such severance be merely temporary. Morgan v. Varick, 8 Wend. (N. Y.) 587.

In Pleading. When an action is brought in the name of several plaintiffs, in which the plaintiffs must of necessity join, and one or more of the persons so named do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically called, judgment *ad sequendum solum.*

But in personal actions, with the exception of those by executors, and of detinue for charters there can be no summons and severance; Co. Litt. 139.

After severance, the party severed can never be mentioned in the suit nor derive any advantage from it.

When there are several defendants, each of them may use such plea as he may think proper for his own defence; and they may join in the same plea, or sever, at their discretion; Co. Litt. 303 *a*; except, perhaps, in the case of dilatory pleas; Hob. 245, 250. But when the defendants have once united in the plea they cannot afterwards sever at the rejoinder, or other later stage of the pleading. See, generally, Brooke, Abr. *Summ. and Sev.*; 2 Rolle 488.

Of Estates. The destruction of any one of the unities of a joint tenancy. It is so called

because the estate is no longer a joint tenancy, but is severed.

A severance may be effected in various ways, namely: by *partition*, which is either voluntary or compulsory; by *alienation* of one of the joint tenants, which turns the estate into a tenancy in common; by the *purchase* or descent of all the shares of the joint tenants, so that the whole estate becomes vested in one only. Comyns, Dig. *Estates by Grant* (K. 5); Simpson's Lessee v. Ammons, 1 Binn. (Pa.) 175, 2 Am. Dec. 425.

SEVERE. Within the meaning of a life insurance policy, *severe illness* means such an illness as has, or ordinarily does have, a permanent, detrimental effect upon the physical system. Boos v. Life Ins. Co., 64 N. Y. 236.

SEWAGE PURPOSES. Where the effluent water from a sewage farm flows into a pool, the cleansing, levelling, and concreting the bottom of that pool to prevent the accumulation of sewage is a work for "sewage purposes." 56 L. J. Ch. 159; 32 Ch. D. 421; Stroud.

SEWER. A subterranean passage for drainage, usually constructed and maintained by a municipal corporation.

Properly, a trench artificially made for the purpose of carrying water into the sea, river, or some other place of reception. Crabb, R. P. s. 113; Bennett v. New Bedford, 110 Mass. 433.

The authority to construct public sewers is not incident to corporate powers, if ample provision is made by general statutes; Bulger v. Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205.

The sewers of a city are its private property, and the citizens are alone interested therein; the general public of the state at large have no interest in them, and therefore the city may be liable for negligence in their construction; Donahoe v. Kansas City, 136 Mo. 657, 38 S. W. 571. The construction of a sewer is a private municipal enterprise, for the negligent control of which the city will be liable, under a charter providing for a revenue from its use; Ostrander v. Lansing, 111 Mich. 693, 70 N. W. 332.

Merely granting a city authority by its charter to construct sewers to carry off refuse to a river does not make such use of the sewers a governmental act, freeing the city from personal liability for injuries therefrom; Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. Rep. 335. Legislative authority to a municipality to open and construct a sewer in a public street does not exempt the municipality from the duty of exercising due care in performing the work; Koontz v. District of Columbia, 24 App. D. C. 59; but a city is held not liable for damages resulting from its negligent and defective construction of a sluice for drainage, which it undertook without any authority, and not in the execution of any power conferred on it, since, to create such liability, the injurious act must have been within the scope of its corporate powers as prescribed by its charter; Betham v. Philadelphia, 196 Pa. 302, 46 Atl. 448.

Damages for the negligent construction of a sewer must be confined to actual, not prospective, damages at the time of suit; Nashville v. Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465.

A municipal corporation owes to the public a duty in the construction of its sewers not to injure the gas mains or other under-ground conveniences and is responsible to any one injured in consequence of a breach of that duty, although the performance of it had been delegated to an independent contractor; [1896] 1 Q. B. 335, where it was held that when a gas main was broken by the negligence of the contractors, and an explosion took place in a private house because of the escape of the gas from the broken main, the municipality was liable, the damages not being too remote.

Generally a city will be enjoined from using or building a sewer so as to create a nuisance; Dierks v. Com'rs. of Highways, 142 Ill. 197, 31 N. E. 496; Stoddard v. Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; a license for discharge of sewage draining a particular district will not authorize the discharge from a larger one; New York Cent. & H. R. Co. v. Rochester, 127 N. Y. 591, 28 N. E. 416. Authority to carry a sewer under a highway does not grant power to discharge it in a river at a place that destroys navigation or the use of a dock; Breed v. Lynn, 126 Mass. 367; or into a private canal; Boston Rolling Mills v. Cambridge, 117 Mass. 396.

A borough has a right to make a sewer which empties into a natural stream, though it increased the flowage; Munn v. Pittsburgh, 40 Pa. 364; and may permit citizens to lay a drain pipe into it to carry off their surplus water; Wood v. McGrath, 150 Pa. 451, 24 Atl. 682, 16 L. R. A. 715.

A drain passing through private ground, but receiving the drainage of more than one building, is held to be a sewer; [1894] 1 Q. B. 233.

One who permits noxious vapors, gases, oils, etc., to escape into a sewer is usually held liable for injuries resulting therefrom; Brady v. Steel & Spring Co., 102 Mich. 277, 60 N. W. 687, 26 L. R. A. 175 (crude oil); Fuchs v. St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118 (crude petroleum); Richmond v. Gay's Adm'x., 103 Va. 320, 49 S. E. 482 (gas); even though a contributing cause of the injury might be found in the sewer gas; Hunt v. Gaslight Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697. Where gas escaped through a sewer, owing to the negligence of the city in building it, and injured plants in a greenhouse, the gas company was held liable for the loss; Butcher v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

If a gas company knows or ought to know

of the construction of a sewer near to its mains, it is its duty to guard against the damage likely to be sustained thereby, if the injury to such mains is the natural and probable consequence of the construction of the sewer; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653.

A permit to turn clear water into a sewer is not equivalent to a license to turn steam into it; Walker Ice Co. v. Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

The construction of sewers does not impose an additional burden on a highway; West v. Bancroft, 32 Vt. 367; Cone v. Hartford, 28 Conn. 363; Turner v. Dartmouth, 13 Allen (Mass.) 291; but in Pennsylvania consent of abutting owners is required, where they are constructed by private corporations; McDevitt v. Gas Co., 160 Pa. 372, 28 Atl. 948. See POLLUTION.

SEXTERY LANDS. Lands given to a church for maintenance of a sexton or sacristan. Cowell.

SEXTON. An attendant or care-taker in a church building, usually with care of the attached burying ground. A woman may be a sexton; 2 Stra. 1114.

SHACK. See COMMON.

SHALL. The various meanings of this word range under two general classes according as it is used as implying futurity or implying a mandate; the words *shall be born* in a will in the absence of a context are words of futurity; 6 App. Cas. 471; and where a statute declares a thing *shall* be done, it is a peremptory mandate; Stroud, L. Dict., which see for a classification of cases in which the word has been held to be used in a directory, and others in which it is used in a peremptory, sense. It is held that it is to be construed as *may*, unless a contrary intention is shown; Cairo & Fulton R. Co. v. Hecht, 95 U. S. 170, 24 L. Ed. 423.

SHAM PLEA. See PLEA.

SHANGHAIING OF SAILORS. Procuring or inducing, or attempting to do so, by force, or threats, or by representations which one knows or believes to be untrue, or while the person is intoxicated or under the influence of any drug, to go on board of any vessel, or agree to do so, to perform service or labor thereon, such vessel being engaged in interstate or foreign commerce, on the high seas or any navigable water of the United States, or knowingly to detain on board such vessel such person, so procured or induced, or knowingly aiding or abetting such things, is an offence punishable by a fine of not over $1,000, or imprisonment of not more than one year, or both. U. S. Cr. Code § 82.

SHARE. A portion of anything. Sometimes shares are equal, at other times they are unequal.

As to shares in corporation law, see CORPORATION; PERSONAL PROPERTY; STOCK; STOCKHOLDER.

The proportion which descends to one of several children from his ancestor is called a share. The term share and share alike signifies in equal proportions. See PURPART.

SHARE CERTIFICATE. See STOCK.

SHAREHOLDER. See STOCKHOLDER.

SHARPING CORN. A customary gift of corn which, at every Christmas, the farmers in some parts of England give to their smith for sharpening their plough-irons, harrow-tines, etc. Blount.

SHAVE. To buy any security for money at a discount. Stone v. Cooper, 2 Denio (N. Y.) 293; also, to obtain the property of another by oppression and extortion. *Id.*

SHEADING. A riding, tithing, or division in the Isle of Man, where the whole island is divided into six sheadings, in each of which there is a coroner or chief constable appointed by a delivery of a rod at the Tinewald court or annual convention. King, Isle of Man 7.

SHEEP. A wether more than a year old. 4 C. & P. 216.

SHEEP SILVER. A service turned into money which was paid because anciently the tenants used to wash the lord's sheep.

SHELLEY'S CASE, RULE IN. "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." 1 Co. 104.

This rule has been the subject of much comment. Its origin can be deduced from feudal tenure; 4 Kent 217. It is given by Preston, Estates, pp. 263, 419, as follows: When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. See Stephenson v Hagan, 15 B. Monr. (Ky.) 282; Hargr. Law Tracts 489, 551; 2 Kent 214.

The rule in Shelley's case is not a rule of construction, but an absolute rule of property; Van Grutten v. Foxwell, [1897] A. C. 658 (Lord MacNaghten's historical discussion).

If the limitation be to one and the *heirs of the body*, he takes an estate tail; if to one and his *heirs* generally, a fee-simple; Bishop v. Selleck, 1 Day (Conn.) 299; Baughman v. Baugman, 2 Yeates (Pa.) 410.

It does not apply where the ancestor's estate is equitable and that of the heirs legal; Ward v. Amory, 1 Curt. C. C. 419, Fed. Cas. No. 17,146.

It does not extend to bequests of personal-

ty; Jones v. Rees, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734, see, as to this, Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470.

The rule was adopted as a part of the common law of this country, and in many of the states still prevails. It has been abolished in most of them. The subject has been exhaustively treated in Pennsylvania, and the numerous decisions will be found analyzed and arranged in tabular form in an essay by J. P. Gross. (Harrisburg, 1877.) The rule has been held applicable to instruments in which the words, "*heir*" or "*heirs;*" Elliott v. Pearsoll, 8 W. & S. (Pa.) 38; "*issue;*" Walker v. Milligan, 45 Pa. 179; "*child*" or "*children;*" Stewart v. Kenower, 7 W. & S. (Pa.) 288; "*son*" or "*daughter;*" Appeal of Yarnall, 70 Pa. 335; "*next of kin;*" "*offspring;*" Allen v. Markle, 36 Pa. 117; "*descendants,*" and similar expressions are used in the technical sense of the word heirs. Chief Justice Gibson states the operation of the rule as follows: "It operates only on the intention (of the devisor) when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills. . . . It gives the ancestor an estate for life, in the first instance, and, by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him, as the stock from which alone they can inherit;" Hileman v. Bouslaugh, 13 Pa. 344, 354, 53 Am. Dec. 474. Although a fee is given in the first part of a will, it may be restrained by subsequent words, so as to convert it into a life estate; Appeal of Urich, 86 Pa. 386, 27 Am. Rep. 707. See Hayes on Est. Tail *53; Polk v. Faris, 9 Yerg. (Tenn.) 209, 30 Am. Dec. 400; 77 L. J. Rep. (H. of L.) 170. See Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172.

When applicable it is not affected by the testator's intention; 28 Atl. Rep. (N. J.) 587. It is equally applicable to conveyances by deed and limitations by will; 4 Kent *217. If applied to real estate, it enlarges the estate for life into an inheritance, and makes the tenant for life a tenant in fee; it makes the tenant for life of personalty an absolute owner; 4 Kent 227.

A deed to one for life, and at his death to his surviving heirs, vests a fee in the first taker, the word "surviving" not being sufficient to prevent an application of the rule, at least not where the warranty runs to him and to his assigns forever; Price v. Griffin, 150 N. C. 523, 64 S. E. 372, 29 L. R. A. (N. S.) 935; so where the remainder is to "his then surviving heirs" and "heirs then living" or "heirs living at the time of their deaths"; Hiester v. Yerger, 166 Pa. 445, 31 Atl. 122; it applies only to limitations in which the word heirs is used unless it clearly appears that testator used some other word to mean heirs. The word "children" is not ordinarily equivalent to heirs so as to bring a devise within the rule; Hanes v. Utilities Co., 262 Ill. 86, 104 N. E. 156.

SHEPWAY, COURT OF. See COURTS OF THE CINQUE PORTS.

SHERIFF (Sax. *scyre*, shire, *reve*, keeper). A county officer representing the executive or administrative power of the state within his county.

As to the history of the office, it is said by Holdsworth (1 Hist. E. L. 39): "The immediate result of the large jurisdiction assumed by the *Curia Regis* was an increase in the power of the sheriff. He grew to be the ruler of the county, responsible for its revenues, military force, police, gaols, and courts, and the execution of the writs of the *Curia Regis*. By the 13th century it is clear that he was not an hereditary official. By Edward III's reign, he came to be appointed by the crown and was not elective. He was appointed annually and must own land in the county. In the reign of Richard III, he could not be reappointed till three years had elapsed from the expiration of his year of office. In Henry II's reign, he must appear twice a year to settle for the revenues of his county. His control over the military force ceased with the appointment of lord lieutenants in Mary's reign, though he could still summon the *posse comitatus;* and in the same reign he was prevented from acting as a justice of the peace. By the 14th and 15th centuries, he ceased to have control over prisoners, except those condemned to death. He came to be an attendant of the courts of law, the itinerant justices and the justices of the peace in quarter sessions—to summon juries, give notice to prosecutors and others, prepare the judge's lodgings and attend upon him during the assizes. Royal writs were addressed to him and still are, and their execution is his chief duty. This gives him control over parliamentary elections."

Maitland says (Justice and Police 69) that "the whole history of English justice and police might be brought under this rubric—the Decline and Fall of the Sheriff."

It is the sheriff's duty to preserve the peace within his bailiwick or county. To this end he is the first man within the county, and may apprehend and commit to prison all persons who break or attempt to break the peace, or may bind them over in a recognizance to keep the peace. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and rioters; has the safekeeping of the county jail, and must defend it against all rioters; and for this, as well as for any other purpose, in the execution of his duties he may command the inhabitants of the county to assist him, which is called the *posse comitatus*. And this summons every person over fifteen years of age is bound to obey, under pain of fine and imprisonment; Dalt. Sheriff 355; 2d Inst. 454.

In his ministerial capacity he is bound to execute, within his county, all processes that issue from the courts of justice, except where he is a party to the proceeding, in which case the coroner acts in his stead. On *mesne* process he is to execute the writ, to arrest and take bail; when the cause comes to trial he summons and returns the jury, and when it is determined he carries into effect the judgment of the court. In criminal cases he also

arrests and imprisons, returns the jury (now usually provided by statute), has the custody of the prisoner, and executes the sentence of the court upon him, whatever it may be.

It is a settled principle of the common law that every man's house is his castle; accordingly, in the service of civil process, an officer may not break open the outer door of a dwelling-house. He must await his opportunity to enter peaceably without force or violence; 5 Co. 91; Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; People v. Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; but having, without force, obtained admission to the house, he may go from one room to another and forcibly open any inner doors, chests, trunks, or other places where property is kept in order to make a levy; Cowp. 1; Prettyman v. Dean, 2 Harring. (Del.) 494; Williams v. Spencer, 5 Johns. (N. Y.) 352; State v. Thackam, 1 Bay (S. C.) 358. Where a building was kept by several tenants and had an outer door through which they all passed to gain their several apartments, it was held that an officer who entered this door might enter any other; Cantrell v. Conner, 6 Daly (N. Y.) 39. A building occupied for business as a work-shop, any other building not being a dwelling-house, but connected therewith, may be entered by breaking through the outer door; [1895] 2 Q. B. 663. Where a building is occupied partly as a dwelling and partly for business, a common outer door through which both parties are approached may be broken to make a levy in the store; Stearns v. Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37; but where a milliner carried on her business and resided in one room, it was held to be a trespass, when an officer made an entry by breaking; Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327.

In England it was formerly held that although an officer who forced the outer door of a dwelling was a trespasser, the levy made by him was good; 5 Co. 93; Year Book 18 Edw. IV. fol. 4, pl. 19; but it is now doubtful; 7 Ex. 72; 6 H. L. Cas. 443; and in the United States the doctrine is said to have met with no favor; Freem. Ex. 256; and it is held that such a levy is void; Ilsley v. Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; People v. Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.

He also possesses a judicial capacity, and may hold a court and summon a jury for certain purposes; this jurisdiction, in this respect, is at common law quite extensive. See SHERIFF'S TOURN. This branch of his powers, however, is circumscribed in this country by the statutes of the several states, and is generally confined to the execution of writs of inquiry, of damages, and the like, sent to him from the superior courts of law; 1 Bla. Com. 389.

He has no power or authority out of his own county, except when he is commanded by a writ of *habeas corpus* to carry a prisoner out of his county; and then if he conveys him through several counties the prisoner is in custody of the sheriffs of each of the counties through which he passes; Plowd. 37 *a*; 2 Rolle 163; Jones v. State, 26 Tex. App. 7, 9 S. W. 53, 8 Am. St. Rep. 454. If, however, a prisoner escapes and flies into another county, the sheriff or his officers may, upon fresh pursuit, take him again in such county. But he may do mere ministerial acts out of his county, if within the state, such as making out a panel or return, or assigning a bail-bond, or the like; 2 Ld. Raym. 1455; 2 Stra. 727.

To assist him in the discharge of his various duties, he may appoint an under-sheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the service and return of process and the like, but not the execution of a writ of inquiry, for this is in the nature of a judicial duty, which may not be delegated. All acts of the under-sheriff or of the deputies are done in the name of the sheriff, who is responsible for them, although such acts should amount to a trespass or an extortion on the part of the officer; for which reason he usually takes bonds from all his subordinates for the faithful performance of their duties; Cro. Eliz. 294; Dougl. 40. But a deputy sheriff cannot, as such, engage to guard the property of a private person not in the custody of the law; Railway Co. v. Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; an infant cannot be appointed deputy sheriff, but might be deputed to serve a particular writ; McCracken v. Todd, 1 Kan. 169.

The sheriff also appoints a jailer, who is usually one of his deputies. The jailer is responsible for the escape of any prisoner committed to his charge, and is bound to have sufficient force at his disposal to prevent a breach of the prison by a mob or otherwise; and nothing will excuse him but an act of God or the public enemy. He must not be guilty of cruelty, without sufficient cause; but he may defend himself at all hazards if attacked. In a case where a prisoner, notwithstanding his remonstrances, was confined by the jailer in a room in which was a person ill with the small-pox, which disease he took and died, it was held to be murder in the jailer; Viner, Abr. *Gaol* (A); 4 Term 789; 4 Co. 84; Co. 3d Inst. 34; 2 Stra. 856.

A deputy cannot depute another person to do the duty intrusted to him; although it is not necessary that his should be the hand that executes the writ: it is sufficient if he is present and assists. A deputy sheriff's return of process in his own name, with the words "deputy sheriff" added, is void; Gib-

bens v. Pickett, 31 Fla. 147, 12 South. 17, 19 L. R. A. 177; but a return of a levy may properly be indorsed on an execution by a third person at the discretion and in the presence of the sheriff; Lewis v. Watson, 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82. In the execution of criminal process, he may, after demanding admittance, break open the outer door of a house; but in civil actions he may not forcibly enter a dwelling-house, for every man's house is said to be his castle and fortress, as well for defence as for repose. But a warehouse, store, or barn, or the inner door of a dwelling-house after the officer has peaceably entered, is not privileged. Process or writs of any description may not be served on Sunday, except in cases of treason, felony, or breach of the peace; nor may the sheriff on that day retake a prisoner who has escaped from custody; People v. Brush, 6 Wend. (N. Y.) 454; Cro. Eliz. 908; Cro. Car. 537; W. Jones, 429; 3 B. & P. 223.

In the absence of representations of title made at a sheriff's sale of property on execution, the purchaser has no remedy against the plaintiff or sheriff for failure of title; Lewark v. Carter, 117 Ind. 206, 20 N. E. 119, 3 L. R. A. 440, 10 Am. St. Rep. 40.

A sheriff is not liable on his bond, but is personally liable, for acts done under process void on its face; and the order of a criminal court in excess of its jurisdiction, directing him to redeliver a certain person to prison, is no protection to a sheriff, no matter what the decision of the court having jurisdiction of the *habeas corpus* proceeding might be; McLendon v. State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738; but he is not liable for acts done by order of a court of competent jurisdiction; Crow v. Manning, 45 La. Ann. 1221, 14 South. 122; or by a court in excess of its jurisdiction, if the process does not show that fact on its face; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470. He is not required to question apparently regular process; Hatch v. Saunders, 66 Mich. 181, 33 N. W. 178. He is bound to serve voidable process; Rogers v. Marlboro County, 32 S. C. 555, 11 S. E. 383; if the error may be amended; Archibald v. Thompson, 2 Col. 388. See FALSE IMPRISONMENT.

If a court having jurisdiction issues a writ against specific property, the sheriff is protected in seizing it; Bullis v. Montgomery, 50 N. Y. 355; whoever owns it; Sample v. Broadwell, 87 Ill. 617; if he take it from the defendant in the writ; Billings v. Thomas, 114 Mass. 570; although the plaintiff had no claim; Cannon v. Sipples, 39 Conn. 507. See *infra*.

A levy on the goods of a stranger to an execution amounts to a trespass, although the goods are not touched and there is no actual taking, and to maintain the action the plaintiff must have the right of, or be in actual, possession of the property at the time of the levy; and the sheriff may abandon or restrict the levy to the defendant's interests, and be thereby discharged, even though the return was not altered until after the action of trespass is begun; Dixon v. Sewing Mach. Co., 128 Pa. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. Rep. 683.

A sheriff may not serve a writ to which he is a party; Thayer v. Ray, 17 Pick. (Mass.) 166; or in which he is interested; Barker v. Remick, 43 N. H. 238. In such case the coroner must act; if he cannot, then elisors are appointed, which see.

Where there are several writs, it is the sheriff's duty to serve them in the order of their receipt; Freeman, Exec. § 197; Knox v. Webster, 18 Wis. 406, 86 Am. Dec. 779. Where the judgment is a lien, it is his duty to apply the proceeds to the oldest lien; Polk County v. Sypher, 17 Ia. 358, 85 Am. Dec. 568; but if the defendant gives him money to apply to a junior execution, he must so apply it; Rudy v. Com., 35 Pa. 166, 78 Am. Dec. 330.

A sheriff cannot arrest in civil proceedings without a writ; 8 Term 187; which the person arrested is entitled to see; Com. v. Field, 13 Mass. 321; and the writ must contain the correct name of the person arrested; Gurnsey v. Lovell, 9 Wend. (N. Y.) 319; unless he is known by either name; Griswold v. Sedgwick, 1 Wend. (N. Y.) 132; but the officer is liable for arresting the wrong person, whose name is the same as that in the writ; Hallowell & Augusta Bk. v. Howard, 14 Mass. 184. Misnomer in an execution in which the same mistake occurred as in the original writ, does not affect the officer; Smith v. Bowker, 1 Mass. 76. See ARREST

Where a person in custody on civil process escapes, the sheriff is liable to the plaintiff for the value of the claim; State v. Falls, 63 N. C. 188. At common law, voluntary escape made the sheriff liable for the plaintiff's claim, and discharged the defendant; Hopkinson v. Leeds, 78 Pa. 396; but if the escape was through negligence, or was involuntary, recaption before suit by the plaintiff was a bar; Stone v. Wilson, 10 Gratt. (Va.) 529.

The sheriff must act with diligence; Andrews v. Keep, 38 Ala. 315; and, in the absence of instructions, execute the process according to its terms; Smith v. Judkins, 60 N. H. 127; Ransom v. Halcott, 18 Barb. (N. Y.) 56. Special instructions regarding a general writ should be followed; Perkins v. Pitman, 34 N. H. 261; in the absence of which he should make reasonable search for the defendant and his property; Freeman, Exec. § 252. If he has doubt as to the title of the defendant, he may require indemnity; Burnett v. Handley, 8 Ala. 685; which is implied by instructions to proceed in a special

manner; State v. Koontz, 83 Mo. 323. If he seize the property of one not named in the writ he is liable as a trespasser; Hanchett v. Williams, 24 Ill. App. 56; if he remain in a house a long time in possession of goods taken in execution, he becomes a trespasser *ab initio*; 8 Ex. 237.

An officer may continue to levy until the return day in order to satisfy the writ; Moses v. Thomas, 26 N. J. L. 124; but is liable for an excessive levy; Sexcy v. Adkison, 40 Cal. 408; and must take due care to preserve the lien on the property attached; Cooper v. Mowry, 16 Mass. 5; in moving goods; Gilbert v. Meriam, 2 La. Ann. 162; but if the property attached perishes without his fault, he is not liable; Shaw v. Laughton, 20 Me. 266.

See EXECUTION; ARREST; ELISORS; ESCAPE; LEVY; SERVICE; PROCESS; RETURN OF WRITS.

SHERIFF-GELD. A rent formerly paid by a sheriff, and it is prayed that the sheriff in his account may be discharged thereof. Rot. Parl. 50 Edw. III.

SHERIFF-TOOTH. 1. A tenure by the service of providing entertainment for the sheriff at his county courts. 2. An ancient tax on land in Derbyshire. 3. A common tax levied for the sheriff's diet. Cowell.

SHERIFF'S COURT IN LONDON. A tribunal having cognizance of personal actions under the London (city) Small Debts Act of 1852.

The sheriff's court in London is one of the chief of the courts of limited and local jurisdiction in London. 3 Steph. Com., 11th ed. 301, 449, note (1); 3 Bla. Com. 80, note (j).

By the County Courts Act, 1867, 30 & 31 Vict. c. 142, this court is now classed among the county courts, so far as regards the administration of justice; 3 Steph., 11th ed. 30, n.

SHERIFF'S JURY. **In Practice.** A jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purposes of an inquisition or inquest of office. 3 Bla. Com. 258.

SHERIFF'S OFFICERS. Bailiffs who are either bailiffs of hundreds or bound-bailiffs.

SHERIFF'S SALE. A sale of property by a sheriff or his deputy, in execution of the mandate of legal process. Anderson, L. Dict.; Batchelder v. Carter, 2 Vt. 172, 19 Am. Dec. 707.

SHERIFF'S TOURN. A court of record in England, formerly held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county. It was indeed only the *turn* of the sheriff to keep a court leet in each respective hundred. This was the great court leet of the county, out of it grew the court leet or view of frank pledge, which see. 4 Steph. Com. 257. It was obsolete in Coke's time, but was not abolished till 1887. It had a limited criminal jurisdiction.

SHERIFFALTY, or SHRIEVALTY. The office of sheriff.

SHERMAN ACT. See RESTRAINT OF TRADE.

SHERRERIE. A word used by the authorities of the Roman church, to specify contemptously the technical parts of the law, as administered by non-clerical lawyers. Bacon.

SHIFTING CLAUSE. In a settlement, a clause by which some other mode of devolution is substituted for that primarily prescribed.

SHIFTING USE. Such a use as takes effect in derogation of some other estate, and is limited expressly by the deed or is allowed to be created by some person named in the deed. Gilb. Uses 152, n.; 2 Washb. R. P. 284.

For example, a feoffment in fee is made to the use of W and his heirs till A pays £40 to W, and then to the use of A and his heirs. A very common application is in the case of marriage settlements. Wms. R. P., 16th ed. 330. The doctrine of shifting uses furnished a means of evading the principle of law that a fee could not be limited after a fee. See 2 Washb. R. P. 284; Wms. R. P. 330; 1 Spence, Eq. Jur. 452; 1 Vern. 402; 1 Edw. Ch. 34.

SHIFT MARRIAGE. "When a man died having debts which his widow was unable to pay, she was obliged, if she contracted a second marriage, to leave her clothes in the hands of the creditors, and to go through the ceremony in her shift. Gradually, however, the ceremony was mitigated by the bridegroom lending her clothes for the occasion." Said by Lecky, Hist. of Eng. 18th Cent., IV, p. 23, to be a curious relic of a standard of commercial integrity which had long since passed away.

SHILLING. **In English Law.** The name of an English coin, of the value one-twentieth part of a pound. In the colonies there were coins of this denomination; but they varied greatly in their value.

SHIN-PLASTER. Formerly a jocose term for a bank-note greatly depreciated in value; also for paper money of a denomination less than a dollar. Webster. See Madison Ins. Co. v. Forsythe, 2 Ind. 483.

SHIP. A vessel employed in navigation. Ben. Ad. § 215; for example, the terms the ship's papers, the ship's husband, shipwreck, and the like, are employed whether the vessel referred to be a brig, a schooner, or a sloop, or a three-masted vessel.

The word comprehends every description of vessel navigating on any sea or channel, lake

or river, to which the provisions of revised statutes, title "Merchant Marine," may be applicable; R. S. § 4612; The St. Louis, 48 Fed. 312. See Cope v. Dry Dock Co., 119 U. S. 629, 7 Sup. Ct. 336, 30 L. Ed. 501. See Wood v. Two Barges, 46 Fed. 204, as to what is not a ship.

A vessel with three masts, employed in navigation; U. S. v. Kelly, 4 Wash. C. C. 528, Fed. Cas. No. 15,516; the boats and rigging; 2 Marsh. Ins. 727; together with the anchors, masts, cables, and such like objects, are considered as part of the ship; Pardessus, n. 599.

A ship is born when she is launched and lives so long as her identity is preserved; Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264. Prior to her launching she is an ordinary piece of personal property and subject only to mechanic's liens created by state law and enforceable in state courts. From the moment her keel touches the water, she is transformed and becomes a subject of admiralty jurisdiction. She acquires a personality of her own and becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents; Thorp v. Hammond, 12 Wall. (U. S.) 408, 20 L. Ed. 419; Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155. She is capable of committing a tort, and is responsible in damages therefor. She may also become a quasi-bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and, perhaps, be subjected to a second sale; Tucker v. Alexandroff, 183 U. S. 439, 22 Sup. Ct. 195, 46 L. Ed. 264. So sharply is the line drawn between a vessel upon the stocks and one in the water, that the former can never be made liable in admiralty, either *in rem* against herself or *in personam* against her owners upon contracts or for torts, while if, in taking the water in the process of launching, she escapes from the control of those about her, shoots across the stream and injures another vessel, she is liable to a suit *in rem* for damages; 2 W. Rob. 421; L. R. 2 Prob. Div. 231, 235; L. R. 8 Prob. Div. 119; Baker v. Power, 14 Fed. 483.

As to what passes by a bill of sale under the general term ship, or ship and her appurtenances, or ship, apparel, and furniture, see 1 Pars. Marit. Law 71, n. 3; APPAREL. The capacity of a ship is ascertained by its tonnage, or the space which may be occupied by its cargo.

A majority of the owners cannot change the ownership by forming themselves into a limited company; [1895] P. 284; admiralty will authorize a majority in value of the owners of a ship to employ the ship, taking a bond for the protection of the minority; 3 Kent 151; a dissenting part-owner, receiving security cannot claim compensation or a share of the profits; 4 Sim. 439; and is not liable for a collision; Scull v. Raymond, 18 Fed. 547.

"American vessels are of two classes, those registered and those enrolled and licensed." Registry declares the nationality of a vessel in foreign trade; enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic; Anderson v. Pacific Coast S. S. Co., 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047.

The British registry act divides a ship into sixty-four parts or shares, which may be held in severalty. Ownership of a fraction of a share cannot be registered, but any number not exceeding five (except in case of transfer by operation of law) may be registered as joint owners of a share.

Carriers by water are to a certain extent common carriers, in all the strictness of the common-law rule; 3 Kent *217; Garrison v. Ins. Co., 19 How. (U. S.) 312, 15 L. Ed. 656; like common carriers, apart from express contract, they are absolutely responsible for the goods intrusted to them, and insure them against all contingencies excepting only the act of God and the queen's enemies; per Lopes, L. J., in 16 Q. B. D. 633; see, also, L. R. 9 Ex. 342; 1 C. P. D. 19; this rule is said to have been established in the seventeenth century; 1 C. P. D. 430. The master of a general ship is liable where his goods were stolen by robbers; 1 Mod. 85; and an action will lie against the owners as well as the master; Carth. 58. It has been held that the owner of a private ship is subject to the same rule; L. R. 9 Ex. 638.

Lord Cockburn has denied that a carrier by sea is subject to the same liability as a common carrier by land; 1 C. P. D. 426; and Brett, J., was of opinion that he is not a common carrier, but that his liability to carry at his absolute risk arises from recognized custom; L. R. 9 Ex. 338; 7 *id.* 267. See article in 5 L. Q. Rev. 15. It is said that they are not common carriers, because not bound to receive all goods, offered. See 1 Pars. Ship. 248.

Stringent regulations in regard to the number of passengers to be taken on board of sailing-vessels, and the provisions to be made for their safety and comfort, are also prescribed by R. S. § 4465.

Numerous acts of congress have been passed from time to time in reference to the registering, enrolling, licensing, employment, and privileges of the vessels of commerce owned in the United States. See R. S. §§ 4399, 4500.

Construction of the Harter Act. The act of congress of Feb. 13, 1893, known as the

Harter Act (see that title), was not intended as general legislation concerning the rights or liabilities of ship-owners, but only to deal with the carrying vessel and her own cargo. And all principles and rules of decisions previously applicable, as to the apportionment of damages in case of mutual fault, should still be followed as closely as possible and no more changes admitted than the evident intent of the act necessitates; The Viola, 60 Fed. 296; The Chattahoochee, 74 Fed. 899, 21 C. C. A. 162, 33 U. S. App. 510; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. In determining the effect of the statute in restricting the operation of general and well-settled principles, the course of decision has been to treat those principles as still existing, and limit the relief from their operation afforded by the statute to precisely that called for by the language of the statute, and no more. It is said that the intent of the act is that damages to the cargo arising from negligence in navigation shall be borne by the cargo owner and not by the ship, and that the act was not designed to increase or diminish the liability of the other vessel in cases of mutual fault and a division of damages; The Niagara, 77 Fed. 329. The provision of the act making invalid contracts relieving a carrier from liability for negligence apply to a special as well as a common carrier; B. S. Shipping Co. v. Crossman, 206 Fed. 183.

The requirement in the act of due diligence to exempt the owner from liability to cargo owners means not only the personal diligence of the owner but also of his agents employed to fit the vessel for sea; The Colima, 82 Fed. 665. Such diligence is not exercised where no inspection is made of the cement covering the bottom of an iron steamship; The Alvena, 79 Fed. 973, 25 C. C. A. 261, 51 U. S. App. 100; s. c. 79 Fed. 973, 25 C. C. A. 261. Covenants avoiding exercise of due diligence are void; The Toronto, 174 Fed. 632, 98 C. C. A. 386. That a vessel was one man short of her full complement of seamen, and was being unlawfully navigated at full speed in a fog at the time of a collision, because she was a slow boat, do not establish faults in navigation; Boston Marine Ins. Co. v. Lumber Co., 197 Fed. 703, 117 C. C. A. 97.

The word "management" in the act relates to management on the voyage and not to the master's acts in stowing the ship; The Colima, 82 Fed. 665. Exemption from liability for faults or errors in management applies only after the voyage has commenced; Steamship Wellesley Co. v. C. A. Hooper & Co., 185 Fed. 733, 108 C. C. A. 71. A schooner in first class condition at the beginning of the voyage is not liable for damage to cargo from sea-water caused by dangerous storms; The F. & T. Lupton, 182 Fed. 144. Proof that a vessel sprung a leak soon after leaving port raises a presumption that she was unseaworthy; Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 108 C. C. A. 257. Permitting whale oil to remain in the bilge, with the object of saving it, does not pertain to the management of the vessel; The Persiana, 185 Fed. 396, 107 C. C. A. 416. Insufficiency of the mechanical fog-horn on a sailing vessel because of failure to provide any means for repairing it is a lack of proper equipment under the act; The Niagara, 77 Fed. 329. Diligent care of the ship for the purposes of the act does not require re-docking more than once a year; The Sandfield, 79 Fed. 371.

Due diligence in repair and equipment must be exercised in fact and is not satisfied by the mere appointment of competent persons to repair; The Mary L. Peters, 68 Fed. 919; The Flamborough, 69 Fed. 470; The Alvena, 74 Fed. 253. The provisions of section 3 of the Harter Act apply to foreign vessels in suits brought in the United States; The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; or foreign vessels transporting merchandise from a foreign port to a port of the United States; Knott v. Botany Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90; they receive the benefits; The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; and with them they must take the burdens; The Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610; and see The Chattahoochee, 74 Fed. 899, 21 C. C. A. 162, where the subject is discussed inconclusively. The act has no retroactive effect, so as to apply to damages occasioned before its passage; Humboldt Lumber Mfr's Ass'n v. Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

The object of the act "is to modify the relations previously existing between the vessel and her cargo"; and it was an outgrowth of attempts made in recent years to limit as far as possible the liability of vessels and their owners by stipulations against loss arising from unseaworthiness, bad stowage, and negligence in navigation; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771. The provision exempting owners from loss from faults or errors in navigation or management in no way relieves him from the duty of furnishing a seaworthy vessel; The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; at the commencement of the voyage; International Nav. Co. v. Mfg. Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; and the burden of proof as to seaworthiness at the time of sailing is on the owner; and a break-down in any necessary apparatus within three hours of sailing raises a presumption of unseaworthiness at the time of sailing; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65; The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794, where it was said that the relief to the

shipowner of section 3 is purely statutory, and in the absence of proof there is no presumption that the vessel was seaworthy at the beginning of the voyage.

See HARTER ACT; APPURTENANCES; VESSEL.

As to limited liability of vessels in case of accidents, see VESSEL.

A vessel is deemed a part of the territory of the country to which she belongs; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071; St. Clair v. U. S., 154 U. S. 152, 14 Sup. Ct. 1002, 38 L. Ed. 936; and although the deck of a private American vessel is considered for many purposes constructively as territory of the U. S., yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions of the constitution as to the indictment and trial by jury, until brought within the actual territorial boundaries of the United States; In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

The word "ex-ship" is not restricted to any particular ship; and by the usage of merchants, simply denotes that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of lading. They do not constitute a condition of the contract but are inserted for the benefit of the seller; Harrison v. Fortlage, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616; L. R. 1 C. P. 684. See PRIZE.

SHIP-BROKER. One who transacts business relating to vessels and their employment between the owners of vessels and merchants who send cargoes.

SHIP-MONEY. An imposition formerly levied on port towns and other places for fitting out ships; revived by Charles I. and abolished in the same reign. 17 Car. I. c. 14; Whart. Dict.

SHIP SUBSIDY. See SUBSIDY.

SHIP'S BILL. The copy of the bill of lading retained by the master. In case of a variance between this and the bill delivered to the shipper, the latter must control; The Thames, 14 Wall. (U. S.) 98, 20 L. Ed. 804.

SHIP'S HUSBAND. An agent appointed by the owner of a ship, and invested with authority to make the requisite repairs and attend to the management, equipment, and other concerns of the ship. He is the general agent of the owners in relation to the ship; he may be appointed in writing or orally. Abb. Sh. 90. He is appointed to act on shore; Maclachlan, Merch. Shipp. 188. He is usually, but not necessarily, a part-owner; 1 Pars. Mar. Law 97. In that case he is a managing owner, an interchangeable term; Maclachlan, Merch. Shipp. 193. He must *see to the proper outfit* of the vessel in the repairs adequate to the voyage and in the tackle and furniture necessary for a seaworthy ship; must *have a proper master*, mate, and crew for the ship, so that in this respect it shall be seaworthy; must *see to the due furnishing* of provisions and stores according to the necessities of the voyage; must *see to the regularity of the clearances* from the custom-house and the regularity of the registry; must *settle the contracts* and provide for the payment of the furnishings which are requisite to the performance of those duties; must *enter into proper charter-parties*, or engage the vessel for general freight under the usual conditions, and settle for freight and adjust averages with the merchant; and must *preserve the proper certificates*, surveys and documents, in case of future disputes with insurers and freighters, and keep regular books of the ship; 4 B. & Ad. 375; 1 Y. & C. 326; Turner v. Burrows, 8 Wend. (N. Y.) 144; Gould v. Stanton, 16 Conn. 12. These are his general powers; but they may be limited or enlarged by the owners; and it may be observed that without special authority he cannot borrow money generally for the use of the ship; though, as above observed, he may settle the accounts for furnishings, or grant bills for them, which form debts against the concern whether or not he has funds in his hands with which he might have paid them; 1 Bell, Com. § 499. Although he may, in general, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he would not have power to take bills for the freight and give up the possession of the lien over the cargo, unless it has been so settled by the charter-party.

He cannot insure or bind the owners for premiums; Hewett v. Buck, 17 Me. 147, 35 Am. Dec. 243; 2 Maule & S. 485; Foster v. Ins. Co., 11 Pick. (Mass.) 85; 5 Burr. 2627.

As the power of the master to enter into contracts of affreightments is superseded in the port of the owners, so it is by the presence of the ship's husband or the knowledge of the contracting parties that a ship's husband has been appointed; 2 Bell, Com. 199. The ship's husband, as such, has no lien on the vessel or proceeds; The Larch, 2 Curt. C. C. 427, Fed. Cas. No. 8,085; The Esteban de Antunano, 31 Fed. 923. See EXERCITOR MARIS.

SHIP'S PAPERS. The papers or documents required for the manifestation of the ownership and national character of a vessel and her cargo, and to show her compliance with the revenue and navigation laws of the country to which she belongs.

The want of these papers or any of them renders the character of a vessel suspicious; 2 Boulay-Paty, *Droit Com.* 14; and the use of false or simulated papers frequently subjects the vessel to confiscation; 15 East 46, 70, 364; or avoid an insurance, unless the insurer has stipulated that she may carry such papers; *id.*

The absence of any one of a ship's proper

papers is not conclusive against the good faith of the ship; 1 Kent *157. Spoliation of ship's papers is an aggravated ground of suspicion and is said to be almost conclusive of guilt; 1 Dods. 480; but it is not of itself a ground of condemnation; The Pizarro, 2 Wheat. (U. S.) 227, 4 L. Ed. 226.

A ship's papers are of two sorts: *first*, those required by the law of the particular country to which the ship belongs: as, the certificate of registry or of enrolment, the license, the crew-list, the shipping articles, clearance, etc.; and, *second*, such as are required by the law of nations to be on board of neutral ships as evidence of their title to that character: as, the sea brief or letter, or passport; the proofs of property in the ship, as bills of sale, etc.; the charter-party; the bills of lading; the invoices; the crew-list or muster-roll; the log-book, and the bill of health. M'Culloch, Com. Dict.

The following constitute a ship's papers according to 1 Kent *157; a certificate of registry, sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. As to what are ship's papers under the rules of various foreign nations, see 2 Halleck, Int. L., Baker's ed. 98.

The register, or other document in lieu thereof, together with the clearance and other papers granted by the officers of the customs to any foreign vessel, at her departure from the port from which she may have arrived, are required to be produced to the collector of any United States port previous to her entry. The master is required, within forty-eight hours after entry, to deposit the papers with the consul or vice-consul of the nation to which the vessel belongs, and to deliver to the collector of the port the certificate of such consul or vice-consul that he has done so; R. S. § 4209.

An application by a vice-consul for a permit for a vessel to depart, a bill of lading signed by the captain, a license to sail, a certificate of the custom-house official that the vessel had paid its tax for hospital dues, and a bill of health signed by the maritime sub-delegate; the bill of lading being identified by the mate and the other papers being official documents under seal executed by the Chilian authorities, are entitled to confidence and should be admitted in evidence as documents of a public nature; Grace v. Browne, 86 Fed. 156, 29 C. C. A. 621. It is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth; *id.*, citing 1 Greenl. Ev. § 423.

See SEA LETTER.

SHIPPER. One who ships or puts goods on board of a vessel, to be carried to another place during her voyage. In general the shipper is bound to pay for the hire of the vessel or the freight of the goods; 1 Bouvier, Inst. n. 1030.

SHIPPING. Ships in general; ships or vessels of any kind intended for navigation. Relating to ships; as, shipping interests, shipping affairs, shipping business, shipping concerns. Putting on board a ship or vessel, or receiving on board a ship or vessel. Webster, Dict.; Worcester, Dict. See SHIP; SHIP'S PAPERS.

SHIPPING ARTICLES. An agreement, in writing or print, between the master and seamen or mariners on board his vessel (except such as shall be apprenticed or servant to himself or owners), declaring the voyage or voyages, term or terms of time, for which such seamen or mariners shall be shipped. It is also required that at the foot of every such contract there shall be a memorandum of the day and the hour on which each seaman or mariner who shall so ship and subscribe shall render himself on board to begin the voyage agreed upon. They must state the number and description of the crew, specifying their respective employments; the time at which each seaman is to be on board to begin work; the capacity in which each seaman is to serve; the amount of wages which each seaman is to receive; a scale of the provisions which are to be furnished to each seaman; any regulations as to conduct on board, and as to fines, short allowance of provisions or other lawful punishments for misconduct; any stipulations in reference to advance and allotment of wages or other matters not contrary to law; U. S. R. S. § 4511, as amended in 1911.

The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen; and, if they do, such clause will be declared void; Brown v. Lull, 2 Sumn. 443, Fed. Cas. No. 2,018; Harden v. Gordon, 2 Mas. 541, Fed. Cas. No. 6,047.

A seaman who signs shipping articles is bound to perform the voyage; and he has no right to elect to pay damages for non-performance of the contract; Ex parte Pool, 2 Va. Cas. 276.

See, generally, Douglass v. Eyre, Gilp. 147, Fed. Cas. No. 4,032; Magee v. The Moss, Gilp. 219, Fed. Cas. No. 8,944; Wickham v. Blight, Gilp. 452, Fed. Cas. No. 17,611; Jameson v. The Regulus, 1 Pet. Adm. 212, Fed. Cas. No. 7,198; U. S. v. Hamilton, 1 Mas. 443, Fed. Cas. No. 15,291; U. S. v. Haines, 5 Mas. 272, Fed. Cas. No. 15,275; Bartlett v. Wyman, 14 Johns. (N. Y.) 260; SEAMEN.

SHIPPING COMMISSIONER. An officer formerly appointed by the several circuit courts of the United States for each port of entry, which is also a port of ocean navigation, which may require the same. His duties are: To facilitate and superintend the engagement and discharge of seamen; to secure the presence on board of the men engaged at the proper times; to facilitate the making of apprenticeship to the sea service; and such other like duties as may be required by law; R. S. §§ 4501–4508.

In 1884 the secretary of the treasury was

given the right to appoint them and to regulate their mode of conducting business in the shipping offices. In 1903 the office of shipping commissioner was transferred to the Department of Commerce and Labor.

The master of a vessel making a coastwise voyage between Atlantic ports of the United States may act as shipping commissioner for the purpose of signing his own crew and the contract so signed is valid; The William H. Clifford, 165 Fed. 59.

SHIPMENT. The delivery of the goods within the time required on some vessel destined to the particular port which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel as well as putting the goods on board where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management; Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245. See L. R. 2 App. Cas. 455; Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63.

SHIPS OF WAR. The ports of every nation are considered as open to the ships of war of other powers with whom it is at peace. They are exempt from all forms of process in private suit and cannot be seized or interfered with by judicial proceedings to punish violation of the public laws; 7 Op. A. G. 122. Such violations are to be remedied by the offended state appealing directly to the other sovereign. But such ships must not appear as a disturbing agency in the port of a friendly state. They must conform to the rules of quarantine and anchorage, and a ship of war which refuses to comply with such local regulations may be refused admittance, or her stay limited. If any of her crew while on land infringe the laws of the country, they are subject to the local authorities, but if an offender escapes to his vessel, he cannot be pursued there; Snow, Lect. Int. Law 33. They are probably not subject to salvage claims; 1 Halleck, Int. L., Baker's ed. 217.

In international law a state has jurisdiction over its property and citizens on the high seas when carried under its own flag. This jurisdiction is sometimes based on the theory that the ships of a country are a prolongation of its territory and sometimes on the theory that the jurisdiction arises from the mere fact of property; Snow, Lect. Int. L. 147.

Woolsey says of public ships: "They are not only public property, built or bought by the government, but they are, as it were, floating barracks, a part of the public organism and represent the national dignity, and on these accounts even in foreign ports are exempt from the local jurisdiction. . . . However, it is on account of the crew rather than on account of the ship itself that they have any territorial quality. Take the crew away, let the abandoned hulk be met at sea; it now becomes property, nothing more." Wheaton says: "A public vessel belonging to an independent sovereign is exempt from every species of visitation and search, even within the territorial jurisdiction of another state." The principle is universally admitted.

Public ships of a friendly nation, coming into ports of the United States, and demeaning themselves in a friendly manner are exempt from the jurisdiction of the country; The Exchange v. McFaddon, 7 Cr. (U. S.) 116, 3 L. Ed. 287. See NEUTRALITY.

SHIRE. A Saxon word which signified a division; it was made up of an indefinite number of hundreds—later called a county (*Comitatus*). 1 Steph. Com. 76.

The ancient English states, though degraded to the rank of shires, preserved their autonomy to the utmost practicable extent. They retained the state assembly, which was the supreme court of law, the king himself sitting in it as in the national assembly. In the absence of the king, the ealdorman presided in it. The shire government was not royal, but ducal. The king, in appointing the ealdorman, appointed, not a servant of his will, but a prince and lord of the shire. The Anglo-Saxon shire constitution, in spite of the establishment of the empire, was an expression of still undeveloped royalty. See Essays Ang. Sax. Law 21.

A county.

SHIRE-GEMOT (spelled, also, *Scire-gemote, Scir-gemot, Scyre-gemote, Shire-mote;* from the Saxon *scir* or *scyre*, county, shire, and *gemote*, a court, an assembly).

The Saxon county court. It was held twice a year before the bishop and aldermen of the shire, and was the principal court. Spelman, Gloss, *Gemotum;* Crabb, Hist. Eng. Law 28.

SHIRE-MAN, or SCYRE-MAN. Before the conquest the judge of the county, by whom trials for land, etc., were determined. Toml.; Moz. & W.

SHIRE RIEVE, or SHIRE REVE. A sheriff (*q. v.*).

SHOCK. See MEASURE OF DAMAGES.

SHOP. A place kept and used for the sale of goods. Com. v. Riggs, 14 Gray (Mass.) 378, 77 Am. Dec. 333. A building as distinguished from a place of sale which is open like a stall. Richards v. Ins. Co., 60 Mich. 426, 27 N. W. 586. In order to constitute a shop there must be some structure of a more or less permanent character; 6 B. & S. 303.

As used in a statute it is a house or building in which small quantities of goods, wares, or drugs and the like are sold, or in which mechanics labor, and sometimes keep their manufactures for sale. State v. Morgan, 98 N. C. 643, 3 S. E. 927.

SHOP-BOOKS. The books of a retail dealer, mechanic, or other person, in which en-

tries or charges are made of work done, or goods sold and delivered to customers, commonly called "account-books," or "books of account." The party's own *shop-books* are in certain cases admissible in evidence to prove the delivery of goods therein charged, where a foundation is laid for their introduction. The following are the general rules governing the production of this kind of evidence. *First*, that the party offering the books kept no clerk; *second*, that the books offered by the party are his books of account, and that the entries therein are in his handwriting; *third*, it must appear, by some of those who have dealt with the party and settled by the books offered, that they found them correct; *fourth*, it must be shown that some of the articles charged have been delivered. Where entries are made by a clerk who is dead, such entries are admissible in evidence on proof of the handwriting; Steph. Ev. art. 38; Boyer v. Sweet, 4 Ill. (3 Scam.) 120; Linnell v. Sutherland, 11 Wend. (N. Y.) 568; 1 Greenl. Ev. § 117; 1 Smith, Lead. Cas. 282. Where memoranda made during the day by one, are at night transcribed to a book by another, who did not know the truth of the facts recorded by the former, the book is not competent testimony and cannot be used to refresh his memory; Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129, 22 U. S. App. 646. See ORIGINAL ENTRY; MEMORANDUM; ACCOUNT BOOK.

SHOP LIFTING. See LARCENY; KLEPTOMANIA.

SHOP RIGHT. See PATENT.

SHORE. Land on the side of the sea, a lake, or a river. Strictly speaking, when the water does not ebb and flow in a river, there is no shore. See Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Galveston v. Menard, 23 Tex. 349; Bell v. Gough, 23 N. J. L. 683; RIVER; SEA; LITUS MARIS; FORESHORE.

On a navigable river it is the ground lying between ordinary high and low water mark; Dalton v. Hazelet, 182 Fed. 562, 105 C. C. A. 99. Shore and shore line, when used in rules for the division of accretions upon rivers, mean the margin of the river or the water's edge; Peoria v. Bank, 224 Ill. 43, 79 N. E. 296.

SHORT CAUSE. A suit in the chancery division of the high court of justice, where there is only a simple point for discussion, which will probably occupy not more than ten minutes in the hearing. A suit may often be greatly accelerated by being placed on the list of short causes, which are heard one day in each week (generally Saturday) during the sittings of the court; Dan. Ch. Pr. (5th Ed.) 836; Hunt. Eq. pt. I, ch. 4, § 4. A similar provision is familiar to the practice of the courts of several of the states, but its operation is not restricted to chancery cases, and the time allowed for the hearing varies in the different courts.

SHORT ENTRY. A term used among bankers to denote the fact which takes place when a note has been sent to a bank for collection, and an entry of it is made in the customer's bank-book, stating the amount in an inner column, and carrying it out into the accounts between the parties when it has been paid.

SHORT-FORD. An ancient custom of the city of Exeter, similar to that of *gavelet* in London, which was in effect a foreclosure of the right of the tenant by the lord of the fee, in cases of non-payment of rent. Cowell.

SHORT HAUL. See INTERSTATE COMMERCE COMMISSION.

SHORT NOTICE. In English Practice. Four days' notice of trial. Wharton, Law Dict. *Notice of trial.* 1 Cr. & M. 499. Where short notice has been given, two days is sufficient notice of continuance; Wharton, Lex.

SHORTAGE. No allowance for shortage can be made where the contents of missing bags of sugar had been put into new bags by seamen and actually delivered; Kerruish v. Refining Co., 49 Fed. 280, 1 C. C. A. 243, 1 U. S. App. 14.

SHOW. To make apparent or clear by evidence, to prove. Coyle v. Com., 104 Pa. 133.

SHRUB. A low, small plant, the branches of which grow directly from the earth without any supporting trunk or stem. Clay v. Tel. Cable Co., 70 Miss. 406, 11 South. 658.

SHUT DOWN. Within the meaning of an insurance policy, a saw mill which has stopped running for the winter, is shut down, though men are employed about the premises and the machinery has not been dismantled. McKenzie v. Ins. Co., 112 Cal. 548, 44 Pac. 922.

SHYSTER. A trickish knave; one who carries on any business, especially a legal business, in a dishonest way. Gribble v. Press Co., 34 Minn. 343, 25 N. W. 710; see Bailey v. Pub. Co., 40 Mich. 251.

SI ACTIO. The conclusion of a plea to an action when the defendant demands judgment, if the plaintiff ought to have his action, etc. Obsolete.

SI ITA EST. If it be so. Emphatic words in the old writ of mandamus to a judge, commanding him, if the act alleged be truly stated (*si ita est*), to affix his seal to a bill of exceptions. Ex parte Crane, 5 Pet. (U. S.) 192, 8 L. Ed. 92.

SI PRIUS. If before. Formal words in ancient writs for summoning juries. Fleta, l. 2, c. 65, § 12.

SI TE FECERIT SECURUM (Lat. if he make you secure). Words which occur in the form of writs, which originally required, or still require, that the plaintiff should give security to the sheriff that he will prosecute

his claim, before the sheriff can be required to execute such writ.

SICKNESS. By sickness is understood any affection of the body which deprives it temporarily of the power to fulfil its usual functions. It has been held to include insanity. L. R. 8 Q. B. 295.

Sickness is either such as affects the body generally, or only some parts of it. Of the former class a fever is an example; of the latter, blindness. When a process has been issued against an individual for his arrest, the sheriff or other officer is authorized, after he has arrested him, if he be so dangerously sick that to remove him would endanger his life or his health, to let him remain where he found him, and to return the facts at large, or simply *languidus*.

SIDE-BAR RULES. In English Practice. Rules which were formerly moved for by attorneys on the side-bar of the court, but now may be had of the clerk of the rules, upon a *præcipe*. These rules are, that the sheriff return his writ, that he bring in the body, for special imparlance, to be present at the taxing of costs, and the like. As to side-bar applications, see Mitchell, Rules 20.

SIDESMEN (*testes, synodales*). **In Ecclesiastical Law.** A kind of impanelled jury, consisting of two, three, or more persons, in every parish, who were upon oath to present all heretics and irregular persons. In process of time they became standing officers in many places, especially cities. They were called synodsmen,—by corruption sidesmen; also questmen. But their office has become absorbed in that of church-warden. 1 Burn, Eccl. Law 399.

SIDEWALK. That part of a public street or highway designed for the use of pedestrians.

As used in this country it does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily is used to designate that part of the street of a municipality which has been set apart and used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles. Graham v. Albert Lea, 48 Minn. 201, 50 N. W. 1108.

Generally the sidewalk is included with the gutters and roadway in the general term *street;* Bloomington v. Bay, 42 Ill. 503; In re Burmeister, 76 N. Y. 174; Warner v. Knox, 50 Wis. 429, 7 N. W. 372. It was so held in the construction of a statute providing for compensation for damages caused by changing the grade of streets; Kokomo v. Mahan, 100 Ind. 242; and in one authorizing the improvement of streets; Wiles v. Hoss, 114 Ind. 371, 16 N. E. 800; but in many cases of municipal ordinances and contracts, the word street is held not to include sidewalks; Dyer v. Chase, 52 Cal. 440; Dickinson v. Worcester, 138 Mass. 555.

It is the duty of a municipal corporation to keep the sidewalks, as well as the roadbed of the street, in repair; Brown v. Chillicothe, 122 Ia. 640, 98 N. W. 502; Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Wall v. Pittsburg, 205 Pa. 48, 54 Atl. 497; Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; it is held that proof that a sidewalk was carefully constructed originally does not absolve the city from its duty of exercising continuous oversight to keep it free from defects or obstructions; City of Muncie v. Hey, 164 Ind. 570, 74 N. E. 250; that sidewalks are constructed the same way in other cities is not a defence; George v. Haverhill, 110 Mass. 506. It is not necessary to show that the city constructed the walk in question or ordered its construction; Argus v. Sturgis, 86 Mich. 344, 48 N. W. 1085; Hillyer v. Winsted, 77 Conn. 304, 59 Atl. 40; Klein v. Dallas, 71 Tex. 280, 8 S. W. 90; nor to prove title to the property in the city; Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; nor to prove any formal dedication of the street; Maus v. Springfield, 101 Mo. 613, 14 S. W. 630, 20 St. Rep. 634; nor that it had been accepted by the authorities of the corporation or to allege the name of the street; Town of Rosedale v. Ferguson, 3 Ind. App. 596, 30 N. E. 156.

If an individual voluntarily puts down a sidewalk in front of his premises, the city may by acquiescence in the act for a sufficient length of time, and by other acts, accept it, together with an obligation to keep it in repair and free from obstructions; Hutchings v. Sullivan, 90 Me. 131, 37 Atl. 883; Graham v. Albert Lea, 48 Minn. 201, 50 N. W. 1108; such acquiescence sufficiently appears where, after the construction of the walk, the city assumes jurisdiction over it and orders repairs to be made, or where the walk is in a public street and in constant use and in the line of other sidewalks, constructed by the direction of the city or over which it has control; Plattsmouth v. Mitchell, 20 Neb. 228, 29 N. W. 593.

A city which permits a citizen to construct a platform over the gutter before his place of business is bound to exercise the same degree of care toward keeping it in a safe condition for pedestrians as if it had itself constructed it, though not an insurer of its safe condition; Bell v. Henderson, 74 S. W. 206, 24 Ky. L. Rep. 2434. See Elam v. Mt. Sterling, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 513. A municipal corporation which permits a walk to be used for public travel is liable for an injury wrongfully caused by an obstruction thereon, no matter how the walk came into existence; Saulsbury v. Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Ponca v. Crawford, 23 Neb. 662, 37 N. W. 609, 8 Am. St. Rep. 144. One who knows of a defect in the sidewalk is bound to use particular care to avoid injury; Koch v. Edgewater, 14 Hun (N. Y.) 544; but knowledge does not defeat recovery, if due care is used; Gage v. Hornellsville, 2 N. Y. St. Rep. 351.

The duty imposed on municipal corpora-

tions of keeping highways safe and convenient includes obstructions from ice and snow; Green v. Danby, 12 Vt. 338; Loker v. Brookline, 13 Pick. (Mass.) 343; Providence v. Clapp, 17 How. (U. S.) 161, 15 L. Ed. 72, where it was held that it was for the jury to say whether treading down and not removing the snow was a safe and convenient method of removing the obstruction.

Ice formed by melting snow and ice falling from a building simply as the result of natural laws, have been held not a defect for which the municipality is liable; Hausmann v. Madison, 85 Wis. 187, 55 N. W. 167, 21 L. R. A. 263, 39 Am. St. Rep. 834. There must be a breach of duty on the part of the city, such as an unusual or dangerous obstruction to travel from snow and ice, and such time must have elapsed after the creation of the obstruction as to afford a presumption of knowledge; Harrington v. Buffalo, 121 N. Y. 147, 24 N. E. 186. The duty of removing such obstructions is a qualified one, becoming imperative only under the circumstances mentioned; Hunt v. New York, 109 N. Y. 134, 16 N. E. 320. Where, however, there is by statute an absolute liability for injuries resulting from a defective sidewalk, no question of want of notice or the exercise of care is a defence; Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22. The remedy for an injury resulting from a defective sidewalk is exclusively against the city, and its liability cannot be avoided by the existence of any ordinance on the subject; Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; Kirby v. Market Ass'n, 14 Gray (Mass.) 249, 74 Am. Dec. 682. But if a property owner negligently maintains a pipe from the roof of a building so as to discharge water upon the sidewalk, by which ice is accumulated thereon, this will render the property owner liable for injury to pedestrians caused thereby; Tremblay v. Harmony Mills, 171 N. Y. 598, 64 N. E. 501.

Depressions in a sidewalk, into which water flows from adjoining property and freezes into uneven surfaces, may constitute a defect, for injury by which the municipality may be liable; Upham v. Salem, 162 Mass. 483, 39 N. E. 178; or the cutting of a ditch through ice and snow across a sidewalk for the purpose of conveying water into a gutter; Hall v. Manchester, 40 N. H. 410. A ridge of ice caused by water flowing from a pipe leading from a house near the edge of the walk is such defect; Dean v. New Castle, 201 Pa. 51, 50 Atl. 310; Brown v. White, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321.

Unguarded holes, pits, or excavations are obstructions; Baltimore v. Holmes, 39 Md. 243; Muncy v. Bevier, 124 Mo. App. 10, 101 S. W. 157; Purcell v. Chicago, 231 Ill. 164, 83 N. E. 137. Not everything which endangers the safety of highway travel renders a highway defective and out of repair; Hewison v. New Haven, 34 Conn. 136, 91 Am. Dec. 718. The right of action arises solely from negligence; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; the fact that an accident occurs is not sufficient, there must be a neglect of duty; Winne v. Albany, 61 Hun (N. Y.) 620, 15 N. Y. Supp. 423. In order to hold the city liable for negligence in permitting an obstruction, it must have notice, but this may be constructive through the elapse of sufficient time for the presumption of notice to arise; 27 Can. 545; Blakeley v. Troy, 18 Hun (N. Y.) 167.

Where an awning over the sidewalk was permitted to remain in an unsafe condition by the accumulation of snow and ice, the city was held liable for injuries sustained by the fall of the awning; Drake v. Lowell, 13 Metc. (Mass.) 292; but where an accident was occasioned by ice formed by water dripping from the awning, it was held that the city was not liable and the action should have been against the owner; Hanson v. Warren, 22 Wkly. Notes Cas. (Pa.) 133.

Obstructions above ground may interfere as much with the safe use of a sidewalk as those on the surface; Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Bohen v. Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; Bieling v. Brooklyn, 120 N. Y. 98, 24 N. E. 389 (awnings); Leary v. Yonkers, 95 App. Div. 126, 88 N. Y. Supp. 829 (signs); West v. Lynn, 110 Mass. 514 (transparencies); Bliven v. Sioux City, 85 Ia. 346, 52 N. W. 246 (a bill board).

A city has no inherent power to go upon private property abutting on a highway to remove melting snow and stop the discharge of water from a pipe in order to prevent the accumulation of ice on a sidewalk, since the pipe and the accumulated snow do not constitute a nuisance *per se*; Udkin v. New Haven, 80 Conn. 291, 68 Atl. 253, 14 L. R. A. (N. S.) 868.

A citizen owes the city the duty to use his senses, and not to run into obstructions with which he is familiar and which he might avoid by the exercise of ordinary care; Jackson v. Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Lerner v. Philadelphia, 221 Pa. 294, 70 Atl. 755, 21 L. R. A. (N. S.) 614; Cook v. Atlanta, 94 Ga. 613, 19 S. E. 987; Shelley v. Austin, 74 Tex. 608, 12 S. W. 753; but if one injured by defective condition of the street had no knowledge of the defect, he cannot be charged with contributory uegligence; Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562; Mishawaka v. Kirby, 32 Ind. App. 233, 69 N. E. 481; Newman v. New York, 57 Misc. Rep. 636, 108 N. Y. Supp. 676; Cox v. Des Moines, 111 Ia. 646, 82 N. W. 993; Quinlan v. Philadelphia, 205 Pa. 309, 54 Atl. 1026.

One has a right to presume, and to act upon that presumption, unless he has knowledge or reason to believe to the contrary, that a street is in a reasonably safe condition for travel if he uses due care; Bruch v. Philadelphia, 181 Pa. 588, 37 Atl. 818; Lamb v.

Worcester, 177 Mass. 82, 58 N. E. 474; Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Corcoran v. New York, 188 N. Y. 131, 80 N. E. 660; City Council of Montgomery v. Reese, 146 Ala. 410, 40 South. 760; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; he may assume that it is not obstructed, or that obstructions will be sufficiently guarded to insure safety, and that it is reasonably safe throughout its entire width; Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035; Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89; Brusso v. Buffalo, 90 N. Y. 679; he is not bound to anticipate danger; Turner v. Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; nor is he under duty to look for defects; Drake v. Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; Lamb v. Worcester, 177 Mass. 82, 58 N. E. 474; but if one knows a street or sidewalk to be dangerous, he has no right to presume it to be safe; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448.

A person whose sight is defective is required to exercise more care and keener watchfulness than is required from a person of good sight; Wedderburn v. Detroit, 144 Mich. 684, 108 N. W. 102; Keith v. R. Co., 196 Mass. 478, 82 N. E. 680, 14 L. R. A. (N. S.) 648; so of one who is blind; Hill v. Glenwood, 124 Iowa, 479, 100 N. W. 522; nearsighted; Spring v. Williamstown, 186 Mass. 479, 71 N. E. 949; *contra*, Rock v. Const. Co., 120 La. 831, 45 South. 741, 14 L. R. A. (N. S.) 653, where it was held that a person with defective eye-sight has a right to assume within reasonable limits that the sidewalks are safe, and that he will be warned and protected from danger due to an unsafe condition.

In actions for damages from defective sidewalks, it was a question for the jury whether, under the circumstances, the corporation is liable; Burr v. Plymouth, 48 Conn. 460; Beck v. Hood, 185 Pa. 32, 39 Atl. 842. A question for their decision is whether ordinary care was used and whether the sidewalk was reasonably safe; Hall v. Lowell, 10 Cush. (Mass.) 260; or whether there was negligence in not removing the obstruction; Goodfellow v. New York, 100 N. Y. 15, 2 N. E. 462; Foxworthy v. Hastings, 25 Neb. 133, 41 N. W. 132; or whether there was a sufficient lapse of time to be considered constructive notice; Woolsey v. Ellenville, 61 Hun 136, 15 N. Y. Supp. 647.

Even if the city were negligent, a person injured by a defective sidewalk cannot recover unless he show himself in the exercise of due care; Sandwich v. Dolan, 133 Ill. 177, 24 N. E. 526, 23 Am. St. Rep. 598; and if the accident occurred by reason of the plaintiff's being intoxicated, he cannot recover; McCracken v. Markesan, 76 Wis. 499, 45 N. W. 323.

Where the sidewalk is manifestly dangerous it is the duty of a pedestrian to walk on the roadway; Forker v. Sandy Lake, 130 Pa. 123, 18 Atl. 609; and he cannot recover for an injury which his own observation, prudently exercised, ought to have enabled him to avoid; Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512.

A municipal corporation may require its citizens to clean the snow from their sidewalks; Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492. A law requiring the abutting owners to keep sidewalks in repair is a duty cast directly upon the property owner and is in the nature of a police regulation; it is not a tax or municipal assessment; Wilkinsburg Bor. v. Home for Aged Women, 131 Pa. 109, 18 Atl. 937, 6 L. R. A. 531.

Where the abutting owners permitted the sidewalk to be obstructed for an unreasonable time in loading and unloading a truck with skids so that a pedestrian was injured in passing over it, the owner was held liable; Linehen v. Western Electric Co., 29 App. Div. 462, 51 N. Y. Supp. 1080. The temporary obstruction of a street or sidewalk for the purpose of loading or unloading vehicles may be justified on the ground of necessity; Mathews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248; Gates & Son Co. v. Richmond, 103 Va. 702, 49 S. E. 965; Tolman & Co. v. Chicago, 240 Ill. 268, 88 N. E. 488, 2 L. R. A. (N. S.) 97, 16 Ann. Cas. 142; so as to transferring baggage and passengers at a railroad station, but not for soliciting business there; Pennsylvania Co. v. Donovan, 116 Fed. 907.

During building operations, materials may be placed in the street; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Tolman & Co. v. Chicago, 240 Ill. 268, 88 N. E. 488, 24 L. R. A. (N. S.) 97, 16 Ann. Cas. 142.

Where the proprietor of a theatre invites an unusual crowd to occupy his sidewalk, he is bound to greater precaution and owes a duty to pedestrians that they are not injured through any lack of care; Stewart v. Jermon, 5 Pa. Super. Ct. 609. See STREET; HIGHWAY.

A lot owner in a city may use space under a sidewalk in front of his lot for hatchways and coal holes; Stege v. Milwaukee, 110 Wis. 484, 86 N. W. 161; an electric light company, having the right to use the streets for its conduits, can use the sidewalks; Allegheny County L. Co. v. Booth, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404; a city may plant shrubs on a part of the sidewalk; Dotey v. District of Columbia, 25 App. D. C. 232.

A city has the same control over sidewalks as over the cartway; McDevitt v. Gas Co., 160 Pa. 375, 28 Atl. 948.

SIETE PARTIDAS. See PARTIDAS.

SIGHT. Presentment. Bills of exchange are frequently drawn payable at sight or a certain number of days or months after sight.

Bills payable at sight are said to be entitled to days of grace by the law merchant; Big. Bills & N. 92; Dan. Neg. Instr. § 617; Cribbs v. Adams, 13 Gray (Mass.) 597; *contra*, Trask v. Martin, 1 E. D. Sm. (N. Y.) 505. Statutes have provided otherwise in all but a few states. See DAYS OF GRACE.

The holder of a bill payable at sight is required to use due diligence to put it into circulation, and, if payable after sight, have it presented in reasonable time; Robinson v. Ames, 20 Johns. (N. Y.) 146, 11 Am. Dec. 259, 28 E. L. & E. 131; Field v. Nickerson, 13 Mass. 137; Fernandez v. Lewis, 1 McCord (S. C.) 322.

After sight in a bill means after acceptance; in a note, after exhibition to the maker; Dan. Neg. Instr. § 619. It is usual to leave a bill for acceptance one whole day; but the acceptance is dated as on the day it was left; Sewell, Bank.

A bill drawn payable a certain number of days after sight, acceptance waived, must be presented to fix the time at which the bill is to become due, and the term of the bill begins to run from the date of presentment. See 4 Montreal L. Rep. 249.

Sight drafts and sight bills are bills payable at sight. See BILL OF EXCHANGE.

SIGILLUM (Lat.). A seal.

SIGN. To affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting. Webst.; Knox's Estate, 131 Pa. 230, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798.

SIGN MANUAL. **In English Law.** The signature of the king to grants or letters patent, inscribed at the top. 2 Sharsw. Bla. Com. 347*. The sign manual is not good unless countersigned, etc.; 9 Mod. 54.

Any one's name written by himself. Webster, Dict.; Wharton, Law Dict.

SIGNA (Lat.). **In Civil Law.** Those species of indicia which come more immediately under the cognizance of the senses: such as, stains of blood on the person of one accused of murder, indications of terror at being charged with the offence, and the like.

SIGNAL. A means of communication between vessels at sea or between a vessel and the shore. The international code of signals for the use of all nations assigns arbitrary meanings to different arrangements of flags or displays of lights. Where a steamer did not hear the signal but should have heard it, she is as culpable as if she had heard and disregarded it; The City of New York, 49 Fed. 956, 1 C. C. A. 483, 1 U. S. App. 72. Where a collision results through the failure of one of two colliding steamers to conform to her own signals, she is responsible for the collision; The Nutmeg State, 67 Fed. 556, 14 C. C. A. 525, 35 U. S. App. 161. See COLLISION; VESSEL; NAVIGATION, RULES OF; RAILROAD.

SIGNATORY. A term used in diplomacy to indicate a nation which is a party to a treaty.

SIGNATURE. **In Ecclesiastical Law.** The name of a sort of rescript, without seal, containing the supplication, the signature of the pope or his delegate, and the grant of a pardon. Dict. Dr. Can.

In Practice. By signature is understood the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written is also called a signature.

A person's name as set down by himself. Mills v. Howland, 2 N. D. 30, 49 N. W. 413.

It is not necessary that a party should write his name himself, to constitute a signature; his mark is sufficient, though he was able to write; 7 L. R. Pr. 590; 3 Nev. & P. 228; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; In re Guilfoyle, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370; see MARK; and it is valid without attestation (unless required by statute); Bates v. Harte, 124 Ala. 427, 26 South. 898, 82 Am. St. Rep. 186 (*contra*, Sivils v. Taylor, 12 Okl. 47, 69 Pac. 867); or when the mark is in lead pencil; Drefahl v. Bank, 132 Ia. 563, 107 N. W. 179. Under the English statute of frauds, the signing may be a mark or by initials only, or by a fictitious or assumed name, or by a name different from that by which the testator is designated in the body of the will; In re Knox's Estate, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, citing Jarman on Wills, 78, where it was said that the precise case of a signature by the Christain name only had not then arisen in England or in the United States, but the court held it valid, and affirmed the admission to probate as a will of an instrument written with a lead pencil upon three pages of the ordinary sheets of letter paper and signed "Harriet."

"Where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence, which is admitted to apply to them, the signature is to be held valid;" Browne, Stat. of Frauds, § 362; and the signature to a note may be by initials only; 14 L. T. 433; 1 Ames, B. & N. 145. The initials "A. B." are not the signature of the judge, or a sufficient authentication of a bill of exceptions, or sufficient evidence of its allowance by the judge; Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743. A signature in lead pencil is valid; Drefahl v. Bank, 132 Iowa, 563, 107 N. W. 179; although other signatures to the same instrument were in ink; Porter v. Valentine, 18 Misc. Rep. 213, 41 N. Y. Supp. 507; so is a printed signature or one lithographed on an instrument by the party as signed by him; Grieb v. Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002; or it may be on a telegraph message

given to an operator; L. R. 5 C. P. 295. The printed name of the vendor on the heading of a bill of parcels sent by him to the vendee is a sufficient signature to bind the vendor under the statute of frauds. A signature made by a party, another person guiding his hand with his consent, is sufficient; Stevens v. Vancleve, 4 Wash. C. C. 262, 269, Fed. Cas. No. 13,412.

It is not necessary in the execution of a note, that the person executing it, if unable to write, touch the pen while the person authorized signs his name; Jesse v. Parker's Adm'r, 6 Gratt. (Va.) 57, 52 Am. Dec. 102; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565.

Where one who cannot write directs another to sign for him in his presence, it will be valid with or without a mark; Just v. Wise, 42 Mich. 573, 4 N. W. 298; and the signature of the grantor affixed to a deed by another in the presence and at the request of the grantor, is as binding as if he had personally affixed his signature; Lewis v. Watson, 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82, and note; though he were able to write; Espenscheid v. Espenscheid, 158 N. Y. 732, 53 N. E. 1125; and the owner of a trust estate who is very feeble may sign a deed substituting trustees, through the agency of another person who signs in his presence at his direction; Watkins v. McDonald (Miss.) 41 South. 376.

The signature "Ezekiel Norman, for Rachel Doherty, at her resquest," was held to be valid in a Pennsylvania will; Vernon v. Kirk, 30 Pa. 218; and the surname signed to a church subscription with the word "family" added was binding upon the signer; Hodges v. Nalty, 113 Wis. 567, 89 N. W. 535.

If a person is designated by his proper name in the body of a deed, the fact that he signs by a wrong name will not invalidate it; Middleton v. Findla, 25 Cal. 76. Where a witness to a will named John D. Lynn signed the name of Jno. R. Jacobs, the name of the decedent, it was held that he had signed his name as witness under the statute; In re Jacob's Will, 73 Misc. Rep. 162, 132 N. Y. Supp. 481; it was said in that case that where a testator signs his will or a witness attests it under a fictitious name, it is sufficient. Where a witness to the will of Mr. Sperling signed only these words "Servant to Mr. Sperling" omitting his name, it was held good; Goods of Sperling, 3 Swa. & Tr. 272. Where "Richard Edmunds, Solicitor," witnessed a will, and his clerk signed by mistake "John Clerk, His Clerk," it was held good; Goods of Oliver, 2 Spinks 57; but where C. G. Warren witnessed the will of Ozias Walker and signed "C. G. Walker," it was held not a proper attestation, three judges dissenting; In re Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. The "full name," required for a signature to a limited partnership statement, under a statute, is complied with when the signature is in the form habitually used in business, though only a surname and initial; Laflin & Rand Co. v. Steytler, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690. A contract purporting in its body to be an obligation of a corporation and signed by one as manager, having authority to do so, is the contract of the corporation. It is not essential that the name of the corporation should appear in the signature; Kessel v. Austin Min. Co., 144 Fed. 859.

Apart from any expressed or implied requirement of law, a signature by a stamp, applied by the party or by another at his direction, binds him; In re Deep River Nat'l Bank, 73 Conn. 341, 47 Atl. 675; Hamilton v. State, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491.

The possession of a rubber stamp of his signature by a depositor in a bank, kept without negligence, but without notice to the bank, does not relieve the latter for having paid out money on a forged check, made from the stamp. Here an employé used the stamp to obtain a tracing of the depositor's signature; Robb v. Penna. Co., 186 Pa. 456, 40 Atl. 969, 65 Am. St. Rep. 868.

A person who is *sui juris*, will not, in the absence of a fraud, be permitted to avoid his written obligation by showing that he did not read it or hear it read; Taylor v. Fox, 16 Mo. App. 527. One who signs a contract is conclusively presumed to know its contents and has no right to rely on representations of another person as to its legal effect; Vaillancourt v. Grand Trunk Ry. Co. of Canada, 82 Vt. 416, 74 Atl. 99; and one having average intelligence to read a contract, who signs it not under any emergency, nor under any trick or artifice, cannot afterwards avoid it on the ground of fraud; Truitt-Silvey Hat Co. v. Callaway & Truitt, 130 Ga. 637, 61 S. E. 481; there must be a statement of fact knowingly untrue; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219. And where a promissory note was signed under the impression that it was one of some unimportant papers, the signature was held valid in the hands of an innocent third party; McCoy v. Gouvion's Ex'r, 102 Ky. 386, 43 S. W. 699.

One who cannot read a contract which he is about to execute is bound to procure it to be read and explained to him before he signs it, and is chargeable with knowledge of its contents whether he does so or not; Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 28 C. C. A. 358. But where the other party misread the paper in such manner as to create the impression that it contained the same matter which had been orally agreed to, and thereby procured the signature, the failure to read it before signing did not prevent the avoidance of the contract; Western Mfg. Co. v. Cotton & Long,

126 Ky. 749, 104 S. W. 758, 12 L. R. A. (N. S.) 427.

"If a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum*, to show that a misrepresentation was made to him as to the contents of the deed"; [1907] 1 Ch. 537, quoted with approval in [1908] 1 Ch. 1; but see [1911] 1 K. B. 489, where the Court of Appeals seems to take a different view. The view expressed in [1908].1 Ch. 1, was that the old cases on misrepresentation as to the contents of a deed were really based upon the illiteracy of the person, to whom the deed was read, and that an illiterate man was treated as a blind man, and an educated person is estopped to avail himself of the plea of *non est factum* against a person who innocently acts upon the faith of the deed being valid.

The signature is usually made at the bottom of the instrument; but in wills it has been held that when a testator commenced his will with these words, "I, A B, make this my will," it was a sufficient signing; 3 Lev. 1. And see Sudg. Vend. 71; 2 Stark. Ev. 605, 613. But this decision is said to be absurd; 1 Brown, Civ. Law 278, n. 16; Schoul. Wills 315. See Merlin, *Répert. Signature*, for a history of the origin of the signature; and, also, 4 Cruise, Dig. 32, c. 2, § 73.

SIGNET. A seal commonly used for the sign manual of the sovereign. Whart. Lex.

In Scotland, a seal by which royal warrants connected with the administration of justice were formerly authenticated. See WRITERS TO THE SIGNET.

In England, a seal for the authentication of royal grants, affixed to documents before passing the privy seal.

Prior to 1848, all letters-patent and other documents, before passing the privy seal, were required first to have the signet affixed, and passed from the signet office to the office of the privy seal where the privy seal was attached. By Act 11 & 12 Vict. c. 82, warrants under the royal sign manual, countersigned by one of the principal secretaries of state, have been made, *per se*, sufficient authority for the privy seal to be affixed and the signet office has been abolished. Int. Cyc.

SIGNIFICATION (Lat. *signum*, a sign, *facere*, to make). **In French Law.** The notice given of a decree, sentence, or other judicial act.

SIGNIFICAVIT (Lat.). **In Ecclesiastical Law.** When this word is used alone, it means the bishop's certificate to the court of chancery in order to obtain the writ of excommunication; but where the words *writ of significavit* are used, the meaning is the same as *writ de excommunicato capiendo*. 2 Burn, Eccl. Law 248; Shelf. Marr. & D. 502. Obsolete.

SIGNING JUDGMENT. In English Practice. The plaintiff or defendant, when the cause has reached such a stage that he is entitled to a judgment, obtains the signature or allowance of the proper officer; and this is called signing judgment, and is instead of the delivery of judgment in open court. Steph. Pl., And. ed. 196. It is the leave of the master of the office to enter up judgment, and may be had in vacation. 3 B. & C. 317; Tidd, Pr. 616.

In American Practice, it is an actual signing of the judgment on the record, by the judge or other officer duly authorized. Graham, Pr. 341.

SILENCE. The state of a person who does not speak, or of one who refrains from speaking.

Mere silence cannot be considered as a consent to a contract, except in cases where the silent person is bound in good faith to explain himself; in which case silence gives consent; Moore v. Smith, 14 S. & R. (Pa.) 393; L. R. 6 Q. B. 597; French v. Vining, 102 Mass. 135, 3 Am. Rep. 440. But no assent will be inferred from a man's silence unless he knows his rights and knows what he is doing, nor unless his silence is voluntary.

When any person is accused of a crime or charged with any fact, and he does not deny it, in general, the presumption is very strong that the charge is correct; 5 C. & P. 332; 7 *id.* 832; Joy, Conf. 77. The rule does not extend to the silence of the prisoner when, on his examination before a magistrate, he is charged by another prisoner with having joined with him in the commission of an offence; Steph. Ev. art. 7. Silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not; 14 C. L. R. 114 (High Ct. Australia); [1891] 12 Q. B. 534.

When an oath is administered to a witness, instead of expressly promising to keep it, he gives his assent by his silence and kissing the book.

The person to be affected by the silence must be one not disqualified to act, as, *non compos*, an infant, or the like; for even the express promise of such a person would not bind him to the performance of any contract.

SILENTIARIUS. One of the privy council; an usher who saw that good rule and silence were kept in the court.

SILK. Under a statute referring to silk in a manufactured or unmanufactured state, any fabric which contains silk will not necessarily be included, but silk watch-guards and silk dresses; 28 L. J. C. P. 265; silk hose: *id.*; and elastic webbing composed of one-third silk; 33 L. J. Ex. 187, will be so considered.

SILK GOWN. Used especially of the gowns worn by queen's counsel; hence, "te

take silk" means to attain the rank of queen's counsel. Moz. & W. See BARRISTER.

SILVA CÆDUA (Lat.). By these words, in England, is understood every sort of wood, except gross wood of the age of twenty years. Bac. Abr. *Tythes* (C).

SILVER. The legislation on the subject of silver coinage is stated up to that date in a note to R. S. 1 Supp. 774, which with the addition of legislation subsequent to that date is as follows: Laws on silver coinage are as follows: By R. S. §§ 3513, 3516, the silver coins of the United States are limited to a trade dollar, a half dollar, a quarter dollar, and a dime. By § 3526 silver bullion is to be purchased with the bullion fund. By § 3586 the silver coins of the United States are legal tender in amounts not exceeding $5. By act of 1875, Jan. 14, ch. 15, fractional silver is to be issued in redemption of fractional currency. By act of 1876, April 17, ch. 63, this is repeated with some amendments. By Res. No. 17, of 1876, July 22, the silver coin in the treasury is to be issued in exchange for legal tender notes. The issue of fractional silver to fifty million dollars is authorized. By act of 1878, Feb. 28, ch. 20, the coinage of the standard silver dollar and the issuance of silver certificates of $10 or over is authorized. By act of 1879, June 9, ch. 12, fractional silver and lawful money of the United States may be reciprocally exchanged at the treasury or any sub-treasury in sums of $20, and fractional silver is made legal tender up to $10. By act of 1882, August 7, ch. 433, par. 5, free transportation of silver coins is authorized. By act of 1887, March 3, ch. 362, the issuance of silver certificates of one, two, and five dollars is authorized in lieu of higher denominations.

March 4, 1907, provision was made that whenever the outstanding silver certificates of certain small denominations are insufficient to meet the public demand therefor, an equal amount of United States notes of higher denominations may be retired and cancelled and such certificates of smaller denominations issued. U. S. R. S. § 3526.

By act of July 14, 1890, the purchasing clause of the act of 1878 was repealed and the secretary of the treasury was authorized to purchase not to exceed 4,500,000 ounces of silver per month and to issue in payment therefor treasury notes. By act of 1890, Sept. 26, ch. 944, changes in the design of coins are authorized. The trade dollar was declared not a legal tender by Res. No. 17, of 1876, July 22, and by act of 1887, March 3, ch. 396, § 2 (24 Stat. L. 643), its coinage was terminated and its redemption and recoinage into standard dollars was directed. By act of 1893, Nov. 1, the purchasing clause of the act of July 14, 1890, was repealed.

SIMILAR. Denotes partial resemblance, and also sameness in all essential particulars; Com. v. Fontain, 127 Mass. 454. Similar offence may mean an offence identical in kind. *Id.*

SIMILAR DESCRIPTION. Such words as used in a tariff act import that the goods are similar in product and adapted to similar uses; not necessarily that they have been produced by similar methods of manufacture; Greenleaf v. Goodrich, 1 Hask. 586, Fed. Cas. No. 5,778.

SIMILITER (Lat. likewise). **In Pleading.** The plaintiff's reply, that, as the defendant has put himself upon the country, he, the plaintiff, does the like. It occurs only when the plea has the conclusion to the country, and its effect is to join the plaintiff in the issue thus tendered by the defendant; Co. Litt. 126 *a*. The word *similiter* was the effective word when the proceedings were in Latin; 1 Chitty, Pl. 519; Archb. Civ. Pl. 250. See Steph. Pl. 255; 2 Saund. 319 *b*; Shaw v. Redmond, 11 S. & R. (Pa.) 32.

SIMONY. In Ecclesiastical Law. The selling and buying of holy orders or an ecclesiastical benefice. Bacon, Abr. *Simony*. By simony is also understood an unlawful agreement to receive a temporal reward for something holy or spiritual. Code 1. 3. 31; Ayliffe, Parerg. 496.

Giving or receiving any material advantage in return for spiritual promotion, whether such advantage be actually received or only stipulated for. Jenks, Mod. Land L. 220.

A presentation proved to be influenced by pecuniary motives is void and there is a forfeiture of the turn to the crown. Cases of constructive simony are conveyance of a next presentation during vacancy; the purchase of a next presentation by a clerk (clergyman), if it be followed by his own presentation; and the acceptance of a benefice subject to an engagement for resignation. But a cleric may buy a life interest in an admission and present himself or buy an admission and present himself, and after induction sell it; *id.*

General resignation bonds (to resign on request) are void; see Cunningham, Simony; as also are specific bonds (to resign in favor of a specified person); 3 Bing. 501.

SIMPLE AVERAGE. Particular average. See AVERAGE.

SIMPLE CONTRACT. A contract the evidence of which is merely oral or in writing, not under seal nor of record. 1 Chitty, Contr., 12th ed. 6. See Stackpole v. Arnold, 11 Mass. 30, 6 Am. Dec. 150; 4 B. & Ald. 588; 2 Bla. Com. 472. See CONTRACT; PAROL.

SIMPLE LARCENY. The felonious taking and carrying away the personal goods of another, unattended by acts of violence: it is distinguished from compound larceny, which is stealing from the person or with violence. LARCENY.

SIMPLE OBLIGATION. An unconditional obligation; one which is to be performed without depending upon any event provided by the parties to it.

SIMPLE TOOL DOCTRINE. It has been held that the rule requiring the master to furnish reasonably safe appliances does not apply where the injury was caused by a "simple tool"; Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; in another case, that he is not bound to foresee that injuries may be caused by such when they become defective; House v. R. Co., 152 N. C. 397, 67 S. E. 981. It is held in other cases that he is not liable for injury caused by such tools; Dunn v. R. Co., 151 N. C. 313, 66 S. E. 134; McMillan v. Minetto Shade Cloth Co., 134 App. Div. 28, 117 N. Y. Supp. 1081. It is held that the master is not bound to inspect such tools continually, if they are simple appliances of which he keeps a supply on hand; Pennsylvania R. Co. v. Forstall, 159 Fed. 893, 87 C. C. A. 73; nor to instruct the servant in their use; Flaig v. Andrews Steel Co., 141 Ky. 391, 132 S. W. 1015. A steel chisel for cutting steel rails is not a simple tool; New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118.

The cases are collected in 3 Labatt, Master & Serv. § 924a. See NEGLIGENCE.

SIMPLE TRUST. A simple trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settlor, is left to the construction of law. It differs from a *special trust*. 2 Bouvier, Inst. n. 1896.

SIMPLE WARRANDICE. See WARRANDICE.

SIMPLEX (Lat.). Simple or single; as, *charta simplex* is a deed-poll or single deed. Jacob, Law Dict.

SIMPLEX JUSTICIARIUS. A style formerly used for any *puisne* judge who was not chief in any court.

SIMPLEX OBLIGATIO. A single unconditional bond.

SIMPLICITER (Lat.). Simply; without ceremony; in a summary manner.

SIMUL CUM (Lat. together with). Words used in indictments and declarations of trespass against several persons, when some of them are known and others are unknown.

In cases of riots, it is usual to charge that A B, together with others unknown, did the act complained of; 2 Chitty, Cr. Law 488; 2 Salk. 593.

When a party sued with another pleads separately, the plea is generally entitled in the name of the person pleading, adding, "sued with ——," naming the other party. When this occurred, it was, in the old phraseology, called pleading with a *simul cum*.

SIMULATIO LATENS. A species of feigned disease in which disease is actually present, but where the symptoms are falsely aggravated. Beck, Med. Jur. 3.

SIMULATION (Lat. *simul*, together). **In French Law.** The concert or agreement of two or more persons to give to one thing the appearance of another, for the purpose of fraud. Merlin. *Répert.*

SINCE. The proper signification is after, and in its apparent sense includes the whole period between the event and the present time; Jones v. Bank, 79 Me. 195, 9 Atl. 22; *since* the day named, does not necessarily include that day; Monroe v. Acworth, 41 N. H. 201.

SINE DIE (Lat.). Without day. A judgment for a defendant in many cases is *quod eat sine die*, that he may go without day. While the cause is pending and undetermined, it may be continued from term to term by *dies datus*. See CONTINUANCE; Co. Litt. 362 *b*. When the court or other body rise at the end of a session or term, they adjourn *sine die*.

SINE HOC. A phrase formerly used in pleading as equivalent to *absque hoc* (*q. v.*).

SINE PROLE. Without issue. Used in genealogical tables, and often abbreviated into "s. p."

SINECURE. In Ecclesiastical Law. A term used to signify that an ecclesiastical officer is without a charge or cure.

In common parlance, it means the receipt of a salary for an office when there are no duties to be performed.

SINGLE BILL. One without any condition, which does not depend upon any future event to give it validity.

SINGLE BOND. A deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money to the obligee at the day named.

SINGLE ESCHEAT. The reversion of a person's movables to the crown because of his being declared a rebel.

SINGLE WOMAN. The words include a widow; 12 L. J. W. C. 74; and a married woman living apart from her husband; 12 Q. B. D. 681.

SINGULAR. In grammar, the singular is used to express only one; not plural. Johnson.

In law, the singular frequently includes the plural. A bequest to "*my nearest relation*," for example, will be considered as a bequest to all the relations in the same degree who are nearest to the testator; 1 Ves. Sen. 357; 1 Bro. C. C. 293. A bequest made to "*my heir*," by a person who had three heirs, will be construed in the plural; 4 Russ. Cr. Cas. 384.

Under the 13 & 14 Vict. c. 21, s. 4, words in acts of parliament importing the singular shall include the plural, and *vice versa*, unless the contrary is expressly provided; Whart. Lex.

SINKING FUND. A fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan and for the gradual payment of the principal. This definition was quoted and approved in Union Pac. R. Co. v. Buffalo Co., 9 Neb. 453, 4 N. W. 53. A fund created for extinguishing or paying a funded debt. Ketchum v. Buffalo, 14 N. Y. 379, cited in Chicago & I. R. Co. v. Pyne, 30 Fed. 89. See a definition in Elser v. Ft. Worth (Tex.) 27 S. W. 740; see Bank for Savings v. Grace, 102 N. Y. 313, 7 N. E. 162.

Formerly corporation mortgages usually contained a provision for a sinking fund. They are now less common.

A sinking fund tax is one levied to retire a loan, and the proceeds cannot go to pay floating debt; Union Pac. R. Co. v. York County, 10 Neb. 612, 7 N. W. 270.

The constitution of Pennsylvania provides that every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt. Under this provision commissioners of the sinking fund may apply the money in the sinking fund to the purchase of the funded debt of the city, and the debt to that extent is thereby paid, and it is immaterial in determining the actual debt that the commissioners of the sinking fund have no authority immediately upon purchase to cancel or destroy the obligation of the city which they have bought. Securities other than those of the city held by the sinking fund are merely an asset of the city and do not operate to the reduction of the funded debt. If payments are not made into the sinking fund as required by law the commissioner must see to it that they are made, even to the institution of legal proceedings against the city to compel payment; Brooke v. Philadelphia, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781. See Bruce v. Pittsburg, 166 Pa. 152, 30 Atl. 831.

Some modern writers consider them as a very expensive method for the borrower; in Massachusetts, the act of 1913 prohibits them for municipal loans.

See Leake, Use and Misuse of the Sinking Fund [1912]; Browne, The Sinking Fund; Sargant; Turner, Sinking Funds; Alfred D. Chandler, Amortization, in Amer. Econ. Rev. III, No. 4; FUNDING SYSTEM.

A company formed under the Companies Act to work a wasting property (a mine or patent, etc.) need not set aside a sinking fund to meet the depreciation thereof; 41 Ch. Div. 1.

SISTER. A woman who has the same father and mother with another, or has one of them only. In the first case, she is called sister, simply; in the second, half-sister. Approved in Wood v. Mitchell, 61 How. Prac. (N. Y.) 48.

SISTER, DECEASED WIFE'S. Marriage with a deceased wife's sister was formerly within the prohibited degrees and void in England, under the act of 1835. By the act of 1907, the prohibition was removed; but clergymen are relieved from the duty of celebrating such marriages.

SITIO. A measure used in Mexican land grants, equivalent to 4338.464 acres. A *sitio de ganado menor* or sheep ranch is equivalent to 1928.133 acres. Ainsa v. U. S., 161 U. S. 219, 16 Sup. Ct. 544, 40 L. Ed. 673.

SITTINGS IN BANK, or BANC. The sittings which the respective superior courts of common law hold during every term for the purpose of hearing and determining the various *matters of law* argued before them.

The sittings of the Court of Appeals and High Court of Justice are: Michaelmas sittings, October 12 to December 21; Hilary, January 11 to Wednesday before Easter; Easter sittings, Tuesday after Easter week to Friday before Whit Sunday.

They are so called in contradistinction to the sittings at *nisi prius*, which are held for the purpose of trying issues of fact.

In America, the practice is essentially the same, all the judges, or a majority of them usually, sitting *in banc*, and but one holding the court for jury trials; and the term has the same application here as in England. See LONDON AND MIDDLESEX SITTINGS.

SITTINGS IN CAMERA. See CHAMBERS.

SITUS (Lat.). Situation; location. Smith v. Bank, 5 Pet. (U. S.) 524, 8 L. Ed. 212.

Generally, property, in order to be the subject of taxation, must be within the jurisdiction of the power assuming to tax; Buck v. Beach, 206 U. S. 400, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732; In regard to tangible property the old rule was *mobilia sequuntur personam* (said by Dicey, Confl. L., to be often misleading), by which personal property was supposed to follow the person of its owner, and to be subject to the law of the owner's domicil. For the purpose of taxation, however, it has long been held that personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of his own domicil, and even if he is not a citizen or resident of the state which imposes the tax; Buck v. Beach, 206 U. S. 401, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732.

The question of the locality of choses in action has, it is said, come up most frequently in the following classes of cases: 1. Those relating to the administration of estates of deceased persons; 2. Cases of gifts by will or personal property in a particular locality;

3. Cases of taxation; 4. Cases of foreign attachment; 5. Cases under state insolvent laws; 11 Harv. L. Rev. 96.

Notes, bonds and mortgages may acquire a situs at the place where they are held; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232; Carstairs v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. Ed. 596; Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619.

Bank bills and municipal bonds, notes and mortgages, are in such a concrete tangible form as to be subject to taxation where found, irrespective of the domicil of the owner; they are subject to levy and sale on execution, and to seizure and delivery in replevin; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174.

Shares of stock in national banks, though in a certain sense intangible and incorporeal personal property, may be in law separated from the persons of their owners for purposes of taxation and given a *situs* of their own; Tappan v. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

Credits on open account (premiums due an insurance company) have no actual *situs;* they are property and are taxable by the power having jurisdiction; Liverpool & London & Globe Ins. Co. v. Board, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762.

An insurance policy, issued and payable in New York, on the life of a person domiciled in Virginia, was held to have passed to his administrator in Virginia, although it was deposited with a person in Mississippi, who as administrator there, sought to collect it; Mayo v. Assurance Soc., 71 Miss. 590, 15 South. 791. See note to Dicey, Confl. Laws 331.

A life insurance policy is assets, for the purpose of founding an administration, in a state into which it is brought after the death of the insured; New England Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379.

A claim against the United States is not a local asset in the District of Columbia; King v. U. S., 27 Ct. Cl. 529. A bond does not come within the rule as to simple contract debts, but is assets for the purpose of administration in the place in which it is found; Beers v. Shannon, 73 N. Y. 292.

A mortgage, for taxing purposes, may be treated as being within the state where the land lies, or within the state of the residence of the holder; Savings & Loan Soc. v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803.

As between the states of the United States, a ship at sea is presumed to be situate in the state in which it is registered; Crapo v. Kelly, 16 Wall. (U. S.) 610, 21 L. Ed. 430.

A British ship belonging to a deceased person, and registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port. Goods on the high seas, which are capable of being dealt with in England by means of bills of lading in that country, are held situate in England, and goods which at the death of the deceased owner are *in transitu* to that country, and arrive there after his death, are apparently to be held situate in England at his death. Money in a bank in Canada belonging to one who dies in England is considered as virtually *in transitu.* Bonds or other securities forming part of the property of a deceased person, if they are in fact in England and are marketable securities there, saleable and transferable there by delivery only, without its being necessary to do any act out of England to make the transfer valid, are situate in England, though the debts or money are owing from foreigners. Such bonds differ essentially from foreign loans, which cannot be fully transferred without doing some act in a foreign country. A debt due on a deed situate in England from a debtor resident abroad, and a debt due on a deed situate abroad from a debtor resident in England, are situate in England. A judgment debt is assets where the judgment is recorded; 4 M. & W. 171. A share in a partnership business is situate where the business is carried on, but it has been said to be only a claim, and therefore situate wherever it can be enforced. See Massachusetts Mut. Acc. Ass'n v. Dudley, 15 App. Cas. (D. C.) 482. Most of the cases arise upon the liability of a decedent's property to the payment of probate duties, but sometimes on the question of jurisdiction; Dicey, Confl. Laws, Moore's ed. 318.

A license to use a patent in New South Wales could not be said to be locally situate anywhere. However, for the purposes of probate duty, property is capable of being localized, yet, for any other purposes, incorporeal rights could not be said to have any local situation; [1896] 2 Q. B. 178. See 22 Law Mag. & Rev. 116.

"The general rule of law is well settled that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because * * * the bill or note is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068, citing Pinney v. McGrego-

ry, 102 Mass. 186; Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 502; 4 M. & W. 171.

The law, treating equitable interests in land like legal interests, holds such interests are governed by the law of the *situs;* the question whether a trust in land exists in favor of a certain claimant will in every court be determined as in the court of the *situs;* Keer v. White, 52 Ga. 362; though the law of the forum would not create a trust under the circumstances; In re Fitzgerald, [1904] 1 Ch. 573; and even though by the law of the forum the creation of equitable interests is forbidden; 2 Beale, Cas. on Conf. of Laws 204, translating Siebberas v. De Geroninio, Journal du Palais 1895, IV. 28 (court of cassation, Palermo, 1899). On the other hand, if, by the law of the *situs* the transaction did not create a valid trust, a trust will not be held to exist, either in the court of the *situs;* Perin v. McMicken's Heirs, 15 La. Ann. 154; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; 7 Ont. App. 614; or even in another state where the law would have created a valid trust as a result of the transaction; [1895] 1 Ch. 83; Acker v. Priest, 92 Ia. 610, 61 N. W. 235; 26 Can. 412. In Hawley v. James, 7 Paige (N. Y.) 213, 32 Am. Dec. 623, the trust was clearly invalid by the law of the forum but the court, holding that the validity of the trust must be determined by the law of the *situs* investigated that law and found the trust invalid by that law also.

The same doctrine applies to a determination of the rights in real estate created by a foreign contract of marriage or marriage settlement. Such rights must be created in accordance with the law of the *situs;* Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242; Heine v. Ins. Co., 45 La. Ann. 770, 13 South. 1; Richardson v. De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426. This is said by the writer quoted (20 H. L. R. 382) to be also the doctrine of the continental courts. But in England in a case where a marriage had been contracted in France under the community system and the husband and wife emigrated to England where the husband acquired land and died, the wife was held entitled to a community interest in the land; [1902] 2 Ch. 410.

The question whether a certain transaction constitutes a charge upon the separate estate of a married woman must be determined by the law of the *situs;* Read v. Brewer (Miss.) 16 South. 350; Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587; as where a married woman made an agreement in Louisiana, invalid by the law of Louisiana, the invalid agreement would nevertheless charge her separate estate in Mississippi land, if such was the law of Mississippi; Frierson v. Williams, 57 Miss. 451.

But courts of equity of another country may, in a sense exercise power over foreign land, and deal with it as if equitable rights in it existed. Such courts may in certain cases decree a conveyance of foreign land in specific performance of a contract to convey; Toller v. Carteret, 2 Vern. 494; or require mutual deeds to rectify the boundaries of foreign lands; Penn v. Lord Baltimore, 1 Ves. 444; or decree a reconveyance for fraud; Arglasse v. Muschamp, 1 Vern. 75; Massie v. Watts, 6 Cra. (U. S.) 148, 3 L. Ed. 181. Such action is usually taken on the ground that the contract or the fraud creates a constructive trust, which equity is enforcing, and where the law of the *situs* creates such a constructive trust, there is no obstacle to prevent a court of equity in another state, having jurisdiction of the parties, from enforcing the trust; 20 H. L. R. 382. In Scott v. Nesbitt, 14 Ves. 438, Lord Eldon, upon principles of natural justice, charged upon a West Indian estate the balance of an account in favor of a managing co-owner, though the law of the *situs* allowed no charge; 20 H. L. R. 386.

If a contract creates an equitable interest in the land in the nature of a constructive trust, by the law of the *situs*, this interest in the land will be everywhere recognized, as where title deeds to land in New York were deposited by the owner as security, and this transaction by the law of New York created an equitable mortgage, the existence of the equitable interest was recognized in a suit in New Jersey, although such a deposit of deeds did not by the law of New Jersey create an equitable interest in the land; Griffin v. Griffin, 18 N. J. Eq. 104; and where a contract concerning land in Massachusetts was made in North Carolina, the Massachusetts court recognized and enforced the interest in land thereby created by Massachusetts law though the contract, being one between husband and wife, was one which could not have been made in Massachusetts, nor could suit be brought in that state on the contract; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452.

Where Scotch immovables had been settled upon trust without power of alienation, and the trustees had sold the Scotch property and invested the proceeds in English Securities, the trusts in the proceeds were held still to depend upon Scotch law; In re Fitzgerald, [1904] 1 Ch. 573.

See LEX LOCI; LEX FORI; CONFLICT OF LAWS; TAX; GARNISHMENT.

SIX ACTS. The acts passed in 1819 for the pacification of England.

SIX ARTICLES, LAW OF THE. A celebrated act entitled "An act for abolishing diversity of opinion," 31 Hen. VIII. c. 14; enforcing conformity under the severest penalties on six of the strongest points in the Roman Catholic religion: Transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession. 4 Steph. Com. 183. Repealed by 1 Eliz. c. 1.

SIX CLERKS IN CHANCERY. Officers who received and filed all proceedings, signed office copies, attended court to read the pleadings, etc. Abolished by 5 Vict. c. 5. 3 Sharsw. Bla. Com. 443*; Spence, Eq. Jur.

SIX MONTHS' RULE. See MORTGAGE; RECEIVER.

SIXTEEN HOUR LAW. Section 2 of the Hours of Service Act (March, 1907) provides that it shall be unlawful for any common carrier to require or permit any employé to be or remain on duty for a longer period than sixteen consecutive hours and that when any such employé shall have been continuously on duty for sixteen consecutive hours he shall be relieved and not required again to go on duty until he has had at least ten consecutive hours off duty. The expression "on duty" as here used means to be actually engaged in work or to be charged with present responsibility for such, should the occasion for it arise; U. S. v. R. Co., 197 Fed. 629. That brief periods were given the employés for meals, of no more than an hour each, does not break the continuity of the service, nor does the laying off of a train crew while waiting for a helper engine for an indefinite time, which proved to be about three hours; U. S. v. R. Co., 197 Fed. 624.

SKELETON BILL. In Commercial Law. A blank paper, properly stamped, in those countries where stamps are required, with the name of the person signed at the bottom.

In such case the person signing the paper will be held as the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name, to the sum of which the stamp is applicable; 1 Bell, Com. 390.

SKIAGRAPH. A radiograph, which see.

SKILL. The art of doing a thing as it ought to be done.

Every person who purports to have skill in a business, and undertakes for hire to perform it, is bound to do it with ordinary skill, and is responsible civilly in damages for the want of it; 11 M. & W. 483; and sometimes he is responsible criminally. See PHYSICIAN; 2 Russ. Cr. 288.

The degree of skill and diligence required rises in proportion to the value of the article and the delicacy of the operation: more skill is required, for example, to repair a very delicate mathematical instrument, than upon a common instrument; Jones, Bailm. 91; 2 Kent 458, 463; Ayliffe, Pand. 466; 1 Rolle Abr. 10; Story, Bailm. § 431; 2 Greenl. Ev. § 144.

SLANDER. In Torts. Words falsely spoken, which are injurious to the reputation of another.

False, defamatory words spoken of another. See Odger, Libel & S. *7.

There is a distinction, probably the result of some historical accident, between slander and libel; in libel any defamatory matter is *prima facie* libellous while the same matter when spoken would require proof of special damage, excepting in the classes of cases mentioned *infra*, which are actionable *per se*.

Verbal slander. Actionable words are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in respect of some actual consequential damages.

Words of the *first* description must impute:

First, the guilt of some offence for which the party, if guilty, might be indicted and punished by the criminal courts; as, to call a person a "traitor," "thief," "highwayman," or to say that he is guilty of "perjury," "forgery," "murder," and the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable; Cro. Jac. 114, 142; 5 B. & P. 335; Gaines v. Belding, 56 Ark. 100, 19 S. W. 236; Savoie v. Scanlan, 43 La. Ann. 967, 9 South. 916, 26 Am. St. Rep. 200; Harman v. Cundiff, 82 Va. 239; it is enough if the offence charged be a misdemeanor involving moral turpitude; Bigel. Torts 44. If the charge is that the plaintiff has already suffered the punishment, the words, if false, are actionable; *ibid.*; see Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921. Words imputing unchastity to an unmarried woman, though the acts charged are not criminal, were held actionable without alleging or proving special damage; Battles v. Tyson, 77 Neb. 563, 110 N. W. 299, 24 L. R. A. (N. S.) 577, 15 Ann. Cas. 1241; Cooper v. Seaverns, 81 Kan. 267, 105 Pac. 509, 25 L. R. A. (N. S.) 517, 135 Am. St. Rep. 359, where the court refused to follow the common law rule. See Battles v. Tyson, 77 Neb. 563, 110 N. W. 299, 24 L. R. A. (N. S.) 577, 15 Ann. Cas. 1241.

Second, that the party has a disease or distemper which renders him unfit for society; Bac. Abr. *Slander* (B, 2). An action can, therefore, be sustained for calling a man a leper; Cro. Jac. 144. Imputations of having at the present time a venereal disease are actionable in themselves; 8 C. B. N. S. 9; Golderman v. Stearns, 7 Gray (Mass.) 181; Williams v. Holdredge, 22 Barb. (N. Y.) 396; Watson v. McCarthy, 2 Ga. 57, 46 Am. Dec. 380. But charging another with *having had* a contagious disease is not actionable, as he will not on that account be excluded from society; 2 Term 473; 2 Stra. 1189.

Third, unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office; in such a case an action lies; 4 Co. 16 *a*; 5 *id.* 125; 2 Ld. Raym. 1369; Bull. N. P. 4. The holder of an office, not being an office of profit, cannot, in the absence of special damage, maintain an action of slander for words imputing

to him misconduct and consequent unfitness for the office, unless the imputation relates to his conduct in the office, or unless, if true, it would lead to his removal therefrom; [1892] 1 Q. B. 797; or where the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not; [1895] 1 Q. B. 571.

Fourth, the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, in which the party is engaged, is actionable; as, to accuse an attorney or artist of inability, inattention, or want of integrity; 3 Wils. 187; 2 W. Bla. 750; or a clergyman of being a drunkard; M'Millan v. Birch, 1 Binn. (Pa.) 178, 2 Am. Dec. 426, is actionable. Words spoken of a butcher, charging him with slaughtering diseased cattle for sale for human food are actionable *per se;* Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266.

In the absence of special damage, words alleging that a solicitor had lost "thousands instead of hundreds" are not actionable; [1901] 2 K. B. 441; and to make actionable a verbal charge that a merchant is not worth a dollar, it must be shown that it was spoken of him in relation to his business; Dallavo v. Snider, 143 Mich. 542, 107 N. W. 271, 4 L. R. A. (N. S.) 973, 114 Am. St. Rep. 684, 8 Ann. Cas. 212.

Fifth. Bigelow (Torts 48) gives as a fifth class words tending to defeat an expected title: as to call an heir apparent to estates a bastard. See Cro. Car. 469.

Of the *second* class are words which are actionable only in respect of special damages sustained by the party slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained the party aggrieved may support an action for the publication of an untruth; 1 Lev. 53; unless the assertion be made for the assertion of a supposed claim; Com. Dig. *Action upon the Case for Defamation* (D 30); Bac. Abr. *Slander* (B); but it lies if maliciously spoken. In this case special damage is the gist of the action, and must be particularly specified in the declaration. For it is an established rule that no evidence shall be received of any loss or injury which the plaintiff had sustained by the speaking of the words unless it be specially stated in the declaration. And this rule applies equally where the special damage is the gist of the action and where the words are in themselves actionable; Heard, Libel & S. § 51.

The charge must be false; 5 Co. 125. The falsity of the accusation is to be implied till the contrary is shown; 2 East 436; 1 Saund. 242. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception, in that case there being a presumption, from the occasion of speaking, that the words were true; 3 B. & P. 587.

The slander must, of course, be published,—that is, must be communicated to a third person,—and in a language which he understands; otherwise the plaintiff's reputation is not impaired; 1 Rolle, Abr. 74; Cro. Eliz. 857; 1 Saund. 242, n. 3; Bac. Abr. *Slander* (D, 3). There is no publication if the words were not understood by the persons present, nor repeated by them; Sullivan v. Sullivan, 48 Ill. App. 435. The slander must be published respecting the plaintiff. A statement by defendant accusing plaintiff of theft made in the presence of a policeman is not a publication where plaintiff solicited the statement and sent for the officer for the express purpose of having defendant repeat it in his presence; Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

It is not enough to say that by some person or other the words used might be understood in a defamatory sense; [1897] A. C. 68. Because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavorable inference, it does not follow that such matter is libellous; 5 C. P. D. 541. Witnesses to publication are allowed to give their understanding of the words spoken, as an exception to the general rule that witnesses must state facts and not their inferences; Booker & Prince v. Bass, 127 Ga. 134, 56 S. E. 283.

It will afford no justification that the defamatory matter has been previously published by a third person, that the defendant at the time of *his* publication disclosed the name of that third person and believed all the statements to be true; Heard, Libel & S. § 148. And a repetition of oral slander already in circulation, without expressing any disbelief of it or any purpose of inquiring as to its truth, though without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, is actionable; Kenney v. McLaughlin, 5 Gray (Mass.) 3, 66 Am. Dec. 345. It is no defence in an action of slander that the words were used to and not of plaintiff, when others were present and heard the words spoken; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822.

To render the words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another; in others it is excusable, provided it be uttered without express malice; Bac. Abr. *Slander* (D, 4); Rolle, Abr. 87; 1 Viner, Abr. 540. It is justifiable for an attorney to use scandalous expressions in support of his client's cause and pertinent thereto; 1 Maule & S. 280; 1 B. & Ald. 232. See Kean v. McLaughlin, 2 S. & R. (Pa.) 469; Mower v. Watson, 11 Vt. 536, 34 Am. Dec. 704. The *bona fide* statements of one church member, on the trial of another before a church tribunal, that such other had committed adultery with plaintiff, not a member of the

church, are privileged communications; Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680. Members of congress and other legislative assemblies cannot be called to account for anything said in debate.

The statement of an employer of his reasons for discharging a girl, made to her father at his request, is privileged; but if the employer voluntarily makes the statement, it would not be privileged; Rosenbaum v. Roche, 46 Tex. Civ. App. 237, 101 S. W. 1164.

To justify the speaking of slanderous words on the ground of privilege, it must appear not only that the defendant believed he was speaking the truth, but that there were reasonable grounds for such belief; Toothaker v. Conant, 91 Me. 438, 40 Atl. 331.

See PRIVILEGED COMMUNICATIONS.

Malice is essential to the support of an action for slanderous words. Odgers, Lib. & Sl. 271. But malice is, in general, to be presumed until the contrary be proved; 4 B. & C. 247; 1 Saund. 242, n. 2; 5 B. & P. 385; see Smith v. Printing & Pub. Ass'n, 55 Fed. 240, 5 C. C. A. 91; except in those cases where the occasion *prima facie* excuses the publication; 4 B. & C. 247. See M'Almont v. McClelland, 14 S. & R. (Pa.) 359; Colby v. McGee, 48 Ill. App. 294. Repetition of the slander after suit begun may be shown to prove malice and aggravate damages; Halsey v. Stillman, 48 Ill. App. 413. Defendant is not required, in an action for slander in charging plaintiff with theft, to prove the truth of the charge beyond a reasonable doubt, but a preponderance of evidence is sufficient; Lewis v. Shull, 67 Hun (N. Y.) 543, 22 N. Y. Supp. 484. An admission by defendant at plaintiff's request and in the presence of a third party that on a previous occasion he had used the alleged slanderous words, is no ground of action when it does not appear that the language was originally used in the presence of a third party; O'Donnell v. Nee, 86 Fed. 96.

The word "malicious" in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than interest of the public; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362. See MALICE.

A corporation may be liable for slander committed by its employé; Sawyer v. Railroad, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440; while acting within the scope of his employment and in the actual performance of duties touching the matter in question; Rivers v. R. Co., 90 Miss. 196, 43 South. 471, 9 L. R. A. (N. S.) 931; Hypes v. R. Co., 82 S. C. 315, 64 S. E. 395, **21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620**; but it must be in the course of the employment; Kane v. Ins. Co., 200 Mass. 265. A corporation cannot maintain an action for slander on one of its stockholders who is an officer, nor can it recover for consequential injuries, without averring and proving that the slander was spoken of the individual in direct relation to the trade or business of the corporation; Brayton v. Cleveland Special Police Co., 63 Ohio St. 83, 57 N. E. 1085, 52 L. R. A. 525.

See, generally, Comyns, Dig.; Bacon, Abr.; 1 Viner, Abr. 187; Starkie, Slander; Heard, Libel & Slander; Odger, Slander; Bigelow, L. C. Torts; JUSTIFICATION; PUBLICATION; LIBEL.

SLANDER OF TITLE. A statement tending to cut down the extent of one's title.

"An action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." 3 Bing. N. C. 371.

Malice, that is, absence of good faith, is an essential condition of liability; 19 Ch. Div. 386; or actual malice, as well as special damage; Poll. Torts 294.

The action formerly applied only to real property; but now extends to chattels and to property rights, such as those under patents. See LIBEL.

An assertion of title made by way of self-defence or as a warning to others, is not actionable, though the claim be mistaken, if made in good faith; Poll. Torts 295; L. R. 4 Q. B. 730. To say to a prospective purchaser of land, "I know one that hath two leases of his land who will not part with them at any reasonable rate," is a slander of plaintiff's title; Cro. Eliz. 427.

An action for *slander of title* is not properly an action for words spoken, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. The property may be either real or personal, and the plaintiff's interest therein may be anything that has a market value. It makes no difference whether the defendant's words be spoken, written, or printed, save as affecting the damages, which should be larger when the publication is more permanent or extensive, as by advertisement. The action is ranged under that division of actions in the digests and other writers on the text law, and is so held by the courts of the present day. The slander may be of such a nature as to fall within the scope of ordinary slander. It is essential, to give a cause of action, that the statement *should* be false. It is essential, also, that it should be malicious,—not malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie however malicious the defendant's intention might be; Heard, Libel & S. §§ 10, 59; Poll. Torts 389. See Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151.

Where a person claims a right in himself which he intends to enforce against a pur-

chaser, he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention; and no action will lie for giving such preliminary warning, unless it can be shown either that the threat was made *mala fide*, only with intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful; L. R. 4 Q. B. 730; Odger, Libel & S. 138. The denial of a complaining party's title made *bona fide* in assertion of the title (real or honestly believed to exist) of the party making such denial, will not sustain an action for slander of title; Harriss v. Sneeden, 101 N. C. 273, 7 S. E. 801.

It is sufficient to allege and prove the ownership of land and the false claim of title by defendant which prevented the sale of the land; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; Collins v. Whitehead, 34 Fed. 121, where it was held that on the evidence of merely filing a deed for record which prevented the sale of the land, substantial damages might be recovered; but in another case it was held that not only must the declaration allege that the words complained of were falsely and maliciously uttered, but there must also be an expressed allegation of special damage resulting therefrom as the natural and direct consequence of the words complained of; 20 U. C. C. P. 471.

SLANDERER. A calumniator who maliciously and without reason imputes a crime or fault to another of which he is innocent. See SLANDER.

SLAVE. One over whose life, liberty, and property another has unlimited control.

Every limitation placed by law upon the absolute control modifies and to that extent changes the condition of the slave. In every slaveholding state of the United States the life and limbs of a slave were protected from violence inflicted by the master or third persons.

Among the Romans the slave was classed among things (*res*). He was *homo sed non persona*. Heineccius, Elem. Jur. l. 1, § 75. He was considered *pro nullo et mortuo, quia nec statu familiæ nec civitatis nec libertatis gaudet. Id.* § 77. See, also, State v. Edmund, 15 N. C. 340; Neal v. Farmer, 9 Ga. 582. In the United States, as a person, he was capable of committing crimes, of receiving his freedom, of being the subject of homicide, and of modifying by his volition very materially the rules applicable to other species of property. His existence as a person being recognized by the law, that existence was protected by the law; State v. Tackett, 8 N. C. 217; State v. Jones, Walk. 83.

Among the German peoples slavery was of a different kind from that in Rome. Slaves had their own religion and dwelling place, and they were bound to perform only certain and fixed duties for their owners. They were rather prædial serfs than slaves. Such slavery might arise from capture in war, or conviction for crimes; men sold themselves into slavery; a father could sell his children; often persons were kidnapped and sold into slavery. The slave was in some respects regarded as a chattel; he might be alienated by his master, ill-treated and perhaps slain. He could not sue a free man. But his condition was in the course of time and in various ways ameliorated by the church; 2 Holdsw. Hist. E. L. 31.

Somerset's case, Somerset v. Stewart, Lofft 1 (1772), was the first express adjudication that a slave while in England was free (Lord Mansfield's famous judgment). In Smith v. Gould, Ld. Raym. 1274, which was an action of trover for a negro, it was held that "the law takes no notice of negroes being different from other men," and that "there is no such thing as a slave by the law of England." In 1674-75, Sir Leoline Jenkins charged in an admiralty case in Old Bailey that there was "no such thing as a slave in England." Republished in 10 Law Mag. & Rev. (4th Ser.) 424. See Taswell-Langmead's Eng. Const. Hist. 316; The Case of James Sommersett, a Negro, 20 How. St. Tr. 1.

As to the serfs in early English history, see Maitl. Domesday & Beyond; Holdsw. Hist. E. L.; SERF.

In the slaveholding states the relations of husband and wife and parent and child were recognized by statutes in relation to public sales, and by the courts in all cases where such relations were material to elucidate the motives of their acts.

A slave had no political rights. His civil rights, though necessarily more restricted than the freemen's, were based upon the law of the land. He had none but such as were by that law and the law of nature given to him. The civil-law rule, *"partus sequitur ventrem,"* was adopted in all the slaveholding states, the status of the mother at the time of birth deciding the status of the issue; Barrington v. Logan's Adm'rs, 2 Dana (Ky.) 432; Rawlings v. Boston, 3 H. & McH. (Md.) 139; Overseers of Poor of Marbletown v. Overseers of Poor of Kingston, 20 Johns. (N. Y.) 1; Williamson v. Daniel, 12 Wheat. (U. S.) 568, 6 L. Ed. 731; Adams v. Roberts, 2 How. (U. S.) 496, 11 L. Ed. 349.

The slave could not acquire property: his acquisitions belonged to his master; Jackson v. Lervey, 5 Cow. (N. Y.) 397; Jenkins v. Brown, 6 Humphr. (Tenn.) 299; Hall v. U. S., 92 U. S. 27, 23 L. Ed. 597. The *peculium* of the Roman slave was *ex gratia*, and not of right; Inst. 2. 9. 3. In like manner, negro slaves in the United States were, as a matter of fact, sometimes permitted by their masters *ex gratia*, to obtain and retain property. The slave could not be a witness, except for and against slaves or free negroes. This was, perhaps, the rule of the common law. None but a freeman was *othesworth*. In the United States the rule of exclusion which we have mentioned was enforced in all cases where the evidence was offered for or against white persons; Winn v. Jones, 6 Leigh (Va.) 74. In most of the states this exclusion was by express statutes, while in others it existed by custom and the decision of the courts; Berry v. State, 10 Ga. 519. In the slaveholding states, and in Ohio, Indiana, Illinois, and Iowa, by statute, the rule was extended to include free persons of color or emancipated slaves; Jordan v. Smith, 14 Ohio, 199; Rusk v. Sowerwine, 3 Harr. & J. (Md.) 97. The slave could be a suitor in court only for his freedom. For all other wrongs he appeared through his master, for whose benefit the recovery was had; Bland v. Dowling, 9 Gill & J. (Md.) 19; Berard v. Berard, 9 La. 156. The suit for freedom was favored; Lee v. Lee, 8 Pet. (U. S.) 44, 8 L. Ed. 860; Rankin v. Lydia, 2 A. K. Marsh. (Ky.) 467. Lapse of time worked no forfeiture by reason of his dependent condition; Gatliff's Adm'r v. Rose, 8 B. Monr. (Ky.) 631; Hudgins v. Wrights, 1 Hen. & M. (Va.) 141. The master was bound to maintain, support, and defend his slave, however helpless or impotent. If he failed to do so, public officers were provided to supply his deficiency at his expense.

Cruel treatment was a penal offense of a high grade. Emancipation of the slave was the consequence of conviction in Louisiana; and the sale of the slave to another master was a part of the penalty in Alabama and Texas.

It will be presumed that a person who was a slave before 1865 in this country is a negro; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823.

The enfranchisement of a slave was called manumission. See BONDAGE; MANUMISSION;

SERVUS; FREEDOM. Slavery was abolished in the United States by the thirteenth amendment to the constitution.

In U. S. v. Ah Sou, 132 Fed. 878, in the case of a Chinese woman who had been sold into slavery in China and brought into this country, it was held that, as her deportation would be a remanding into slavery, such action would violate in spirit at least the 13th amendment to the federal constitution.

SLAVE-TRADE. The traffic in slaves, or the buying and selling of slaves for profit. It is either foreign or domestic.

The history of the slave-trade is as old as the authentic records of the race. Joseph was sold to Ishmaelitish slave-traders, and Egypt has been a mart for the traffic from that day to this. The negro early became a subject of it. In every slave-market he has been found, and never as a master except in Africa. The Roman mart, however, exhibited a variety of all the conquered races of the world. At Bristol, in England, for many years about the eleventh century, a brisk trade was carried on in purchasing Englishmen and exporting them to Ireland for sale. And William of Malmsbury states that it seems to be a natural custom with the people of Northumberland to sell their nearest relations.

The African slave-trade on the eastern coast has been carried on with India and Arabia from a period difficult to be established, and was continued with British India while British ships-of-war hovered on the western coast to capture the pirates engaged in the same trade. On the western coast the trade dates from 1442. The Spaniards for a time monopolized it. The Portuguese soon rivalled them in its prosecution. Sir John Hawkins, in 1562, was the first Englishman who engaged in it; and queen Elizabeth was the first Englishwoman known to share in the profits

Immense numbers of African negroes were transported to the New World, although thousands were landed in England and France and owned and used as servants. The large profits of the trade stimulated the avarice of bad men to forget all the claims of humanity; and the horrors of the middle passage, though much exaggerated, were undoubtedly very great.

The American Colonies raised the first voice in Christendom for the suppression of the slave-trade, but the interests of British merchants were too powerful with the king, who stifled their complaints. The constitution of the United States, in 1789, was the first governmental act towards its abolition. By it, congress was forbidden to prohibit the trade until the year 1808. This limitation was made at the suggestion of South Carolina and Georgia, aided by some of the New England states. Yet both of those states, by state action, prohibited the trade many years before the time limited,—Georgia as early as 1793. In 1807, an act of congress was passed which prohibited the trade after 1808, and by subsequent acts it was declared piracy. The federal legislation on the subject will be found in acts of congress passed respectively March 22, 1794, May 10, 1800, March 2, 1807, April 20, 1818, March 3, 1819, and May 15, 1820. In the year 1807, the British parliament also passed an act for the abolition of the slave-trade, —the consummation of a parliamentary struggle continued for nineteen years, and fourteen years after a similar act had been adopted by Georgia. Great efforts have been made by Great Britain, by treaties and otherwise, to suppress this trade, one being entered into at Brussels in 1896. As to the present condition of the slave trade throughout the world, see Rep. Int. L. Assn. (1895) 155. See Buxton's Slave-Trade, etc.; Carey's Slave-Trade; Cobb's Historical Sketch of Slavery.

SLAY. When not used in relation to battle the word is synonymous with kill. State v. Thomas, 32 La. Ann. 351.

SLEDGE. A hurdle used to draw traitors to execution. 1 Hale, P. C. 82.

SLEEPING-CAR. The servants and employés in charge of sleeping or drawing-room cars are considered in the same light as if they were employed by the railroad company, notwithstanding the existence of a separate agreement between the railroad and the sleeping-car company, whereby the latter furnishes its own servants and conductors, and has exclusive control of the cars used on the former company's road; Kinsley v. R. Co., 125 Mass. 54, 28 Am. Rep. 200.

Sleeping car companies are not liable as inn-keeepers; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Welch v. Pullman Palace Car Co., 16 Abb. Pr. (N. S. N. Y.) 352; Falls River & Mach. Co. v. Pullman Palace Car Co., 6 Ohio Dec. 85; *contra*, Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325; but see Pullman Palace Car Co. v. Woods, 76 Neb. 694, 107 N. W. 858 (where, without comment on the prior cases, the liability is put upon the ground of negligence); nor as common carriers; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Lewis v. New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512; Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78; Calhoun v. Pullman Co., 159 Fed. 387, 86 C. C. A. 387, 16 L. R. A. (N. S.) 575; Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Lemon v. Pullman Palace Car Co., 52 Fed. 262; nor as a carrier providing staterooms for his passengers; Crozier v. Steamboat Co., 43 How. Pr. (N. Y.) 466. They are liable for negligence as bailees for hire; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Illinois Central R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846, and note; Morrow v. Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407, and note collecting cases on the duty of the company as to baggage and effects of passengers. See also 21 Harv. L. Rev. 367. The liability rests solely on the breach of the implied obligation to furnish such accommodations as the company holds itself out as offering to the public; Calhoun v. Palace Car Co., 149 Fed. 546. It impliedly undertakes to keep a reasonable watch on the passenger and his property; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Lewis v. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; but no more; Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep.

279; it is liable only where there is a lack of ordinary care; Falls River & Mach. Co. v. Palace Car Co., 6 Ohio Dec. 85; Lewis v. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; whether the passenger is in his berth or in the washroom; Root v. Sleeping Car Co., 28 Mo. App. 199; Kates v. Palace Car Co., 95 Ga. 810, 23 S. E. 186; while he is asleep; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Scaling v. Palace Car Co., 24 Mo. App. 29; or while occupying his berth; Lewis v. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135. To exercise this care and keep due watch is the contract; Pullman's Palace Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; the company is liable for theft of a passenger's property due to disobedience of its regulations by its servants; Pullman Car Co. v. Gardner, 3 Penny. (Pa.) 78.

The company is liable—in any case—only for a reasonable amount of money and personal belongings appropriate to the circumstances of the plaintiff; Barrott v. Palace Car Co., 51 Fed. 796; Lewis v. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Root v. Sleeping Car Co., 28 Mo. App. 199; Hillis v. R. Co., 72 Ia. 228, 33 N. W. 643; Williams v. Webb, 22 Misc. Rep. 513, 49 N. Y. Supp. 1111. In the absence of evidence of what is a reasonable amount, it has been held that the verdict must be for nominal damages only; Wilson v. R. Co., 32 Mo. App. 682.

It cannot avoid its liability by posting in the car a notice disclaiming responsibility for personal property left in berths, if such notice is not known to the passenger; Lewis v. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Woodruff Sleeping & P. C. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; negligence of the passenger in losing his property is no defense to the company's liability for it, if stolen by a servant of the company; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873; Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902; Pullman Co. v. Vanderhoeven, 48 Tex. Civ. App. 414, 107 S. W. 147; Root v. Sleeping Car Co., 28 Mo. App. 199; but the company is not liable if his property is carelessly left within the reach of persons outside; Whitney v. Pullman's Palace Car Co., 143 Mass. 243, 9 N. E. 619; Florida v. Pullman Palace Car Co., 37 Mo. App. 600; unless it was left with the porter; Chamberlain v. Pullman Palace Car Co., 55 Mo. App. 474; or unless an agent of the company knew that it had been so left; Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; it is not ordinarily liable for property stolen by another passenger; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; but it is so liable when the porter takes charge of it to remove it from the car; Voss v. Wagner Palace Car Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010.

Negligence on the part of the sleeping car company's servants is not to be presumed from the mere fact of the loss, but must be shown; Root v. New York Central Sleeping-Car Co., 28 Mo. App. 199; Falls River & Mach. Co. v. Pullman Palace Car Co., 6 Ohio Dec. 85; Carpenter v. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Tracy v. Pullman Palace Car Co., 67 How. Pr. (N. Y.) 154; Hillis v. R. Co., 72 Ia. 228, 33 N. W. 643; Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 5 S. W. 814, 5 Am. St. Rep. 31. Contributory negligence on the part of plaintiff may defeat his recovery; Lewis v. New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 8 Am. Rep. 135; Barrott v. Pullman's Palace Car Co., 51 Fed. 796; Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; but in the case of theft by a servant of the company or his neglect of duty not requested by the defendant, this defence is not effectual; Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 12 S. W. 744, 15 Am. St. Rep. 873. The presumption of negligence arising from proof of loss is rebutted by the porter's uncontradicted evidence that he watched the car till after the loss; Pullman Palace Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578.

The railroad company is liable to a passenger who is injured through the negligence of a servant of a sleeping-car company; Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; though riding in a different car from the one in which he has purchased a seat; *id.*, 102 U. S. 451, 26 L. Ed. 141; even though he knew that the sleeping-car was operated by a separate corporation; see *id.*, 102 U. S. 451, 26 L. Ed. 141; Wood, Ry. 1700; though the question of his knowledge was deemed important in Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433.

For an unjustifiable and wanton assault by a porter on a passenger on a railroad train who had not purchased a sleeping-car ticket, it was held that the railway company was liable, but that the sleeping-car company was not; Williams v. Palace Car Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512, *id.*, 40 La. Ann. 417, 4 South. 85, 8 Am. St. Rep. 538. Whether the latter is to be held liable for the violent act of a porter depends upon whether the act was done while he was acting within the scope of his employment; Heenrich v. Palace Car Co., 20 Fed. 100; if it was so the company is liable; *id.*; Campbell v. Palace Car Co., 42 Fed. 484, where it was said that the sleeping-car company represents that its cars may be occupied with reasonable

safety and comfort and its contract implies ordinary care to secure them. The porter was held to be the servant of the railroad company in Dwinelle v. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141. Where a passenger is ejected from a sleeping-car by train hands, their act is the act of the railroad company, not of the sleeping-car company; Pullman Palace Car Co. v. Lee, 49 Ill. App. 75.

It cannot be said on demurrer that a company is not liable for injury to a passenger caused by the excessively low temperature of a car; Hughes v. Palace Car Co., 74 Fed. 499.

A railroad company cannot, by any arrangement with a sleeping-car company, evade the duty of providing proper means for the safe carriage of passengers; Pennsylvania Co. v. Roy, 102 U. S. 457, 26 L. Ed. 141; Kinsley v. R. Co., 125 Mass. 54, 28 Am. Rep. 200.

A passenger travelling on a free pass, by which he waived action for injuries, purchased a seat in a sleeping-car, and while riding in it was injured; it was held that he was still bound by his waiver; Ulrich v. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369.

A rule of a railroad company requiring a passenger to have a first-class ticket for his transportation before he can be assigned to a berth in a sleeping-car, is a reasonable one; Pullman Palace Car Co. v. Lee, 49 Ill. App. 75.

A sleeping-car company is bound to afford equal facilities to all travellers who apply for them in compliance with reasonable regulations; Nevin v. Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Searles v. Boudoir Car Co., 45 Fed. 330; but it has a right to sell a section to one passenger and is not liable to a passenger to whom it has refused to sell one of the berths in such section, though it was not occupied; Searles v. Boudoir Car Co., 45 Fed. 330. And it is not bound to furnish a berth to one who by the rules of the railroad company is not entitled thereto; Lawrence v. Palace Car Co., 144 Mass. 6, 10 N. E. 723, 59 Am. Rep. 58; Lemon v. Palace Car Co., 52 Fed. 262.

A purchaser of a section may share its use with any proper person whom he invites into it; Searles v. Boudoir Car Co., 45 Fed. 330; and he may, on leaving the train, transfer the use of his section to another first-class passenger for the rest of the trip; 34 Am. L. Reg. 709 (Super. Ct. of Baltimore); s. c. 28 Chic. L. N. 68 (apparently not elsewhere reported); and see comments on this case in 9 Harv. L. Rev. 354, where it is suggested that the decision can only be supported on the ground of a difference between sleeping-car and ordinary railroad ticket, the existence of which is at least doubtful. There seem to be no other cases to the same point.

It is the duty of a sleeping-car company to furnish a berth on the payment of the usual fare to a passenger holding a first-class ticket and to whom no personal objection attaches, provided the company has a vacant one at its disposal, and the passenger makes application at the proper time and in the proper manner; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Braun v. Webb, 32 Misc. Rep. 243, 65 N. Y. Supp. 668; Pullman Palace Car Co. v. Cain, 15 Tex. Civ. App. 503, 40 S. W. 220; Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289; Patterson v. Steamship Co., 140 N. C. 412, 53 S. E. 224, 5 L. R. A. (N. S.) 1012, 111 Am. St. Rep. 848; It must furnish the berth it has agreed to furnish; Pullman Palace Car Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57; Aplington v Pullman Co., 110 App. Div. 250, 97 N. Y. Supp. 329; Pullman Palace-Car Co. v. Booth (Tex.) 28 S. W. 719; and the passenger is entitled to accept only that paid for and specified in his ticket; Pullman Palace Car Co. v. Bales, 80 Tex. 211, 15 S. W. 785. One suffering from a contagious disease may be expelled; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218. A company may sell a whole section to one passenger who occupies but one berth therein, and refuse to sell the unoccupied berth to another; Searles v. Car Co., 45 Fed. 330.

An act requiring the company to leave the upper berth open or closed (when not sold) according to the direction given by the holder of the lower berth, was held unconstitutional; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408, 14 L. R. A. (N. S.) 229, where it is said in the note that diligent search had failed to disclose any case upon the legislative power to prescribe conditions in which sleeping or passenger cars should be maintained or used where such attempted regulation tends merely to the comfort and not to the preservation of the health or safety of the occupant.

An act requiring upper berths to be kept closed till occupied, when the lower berth is engaged or occupied, is not an interference with interstate commerce carried on in cars doing both inter- and intra-state commerce; State v. R. Co., 152 Wis. 341, 140 N. W. 70. And see notes on police power, deprecating unwise extensions of it; 17 Yale L. J. 393; 21 H. L. R. 372.

One who has paid for a berth from one point to another is entitled to a continuous passage in it, or in one equally good, and cannot be transferrred to another berth or another car at the arbitrary discretion of the company; Pullman Palace Car Co. v Taylor, 65 Ind. 153, 32 Am. Rep. 57.

In the contract for the use of the berth

there is directly involved an obligation to awaken and notify the passenger in time for him to prepare safely and comfortably to leave the train at his destination; Pullman Palace Car Co. v. Smith, 79 Tex. 468, 14 S. W. 993, 13 L. R. A. 215, 23 Am. St. Rep. 356; Airey v. Car Co., 50 La. Ann. 648, 23 South. 512; McKeon v. R. Co., 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. Rep. 910; even though the journey was entirely by day and the passenger had no berth; Pullman Co. v. Kelly, 86 Miss. 87, 38 South. 317; and a person not so awakened and notified may recover punitive damages; Pullman Co. v. Lutz, 154 Ala. 517, 45 South. 675, 14 L. R. A. (N. S.) 907, 129 Am. St. Rep. 67. But when the sleeping-car conductor, in the presence of the train conductor permits a passenger to ride in a Pullman car until her own car is connected, promising to put her on it, and neglects to do so, she is not a passenger on that car, and for the consequence of her missing her car the railroad company is liable and the sleeping-car company is not; Cin., N. O. & T. P. R. Co. v. Raine, 130 Ky. 454, 113 S. W. 495, 19 L. R. A. (N. S.) 753, 132 Am. St. Rep. 400. A railroad company is liable for the wrongful act of the sleeping-car employees; Airey v. Palace Car Co., 50 La. Ann. 648, 23 South. 512; Campbell v. Air Line R. Co., 83 S. C. 448, 65 S. E. 628, 23 L. R. A. (N. S.) 1056, 137 Am. St. Rep. 824; such employees are the agents of the railroad company; Railroad v. Ray, 101 Tenn. 1, 46 S. W. 554; Louisville & N. R. Co. v. Church, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29; Calhoun v. Pullman Co., 159 Fed. 387, 86 C. C. A. 387, 16 L. R. A. (N. S.) 575; Divinelle v. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Gannon v. R. Co., 141 Ia. 37, 117 N. W. 966; Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817. Brewer, J., charged a jury that where a passenger was wrongfully expelled the railroad company was not liable for the action of agents of the sleeping-car company and the latter was not liable for the action of the former; Paddock v. R. Co., 37 Fed. 841, 4 L. R. A. 231. The company was held liable for negligence in not removing a person, known to its servants to be insane, who killed another passenger; Meyer v. R. Co., 54 Fed. 116, 4 C. C. A. 221.

SLEEPING RENT. A fixed rent, as opposed to one varying with the profits. 2 Harr. & W. 43.

SLIP. In negotiations for a policy of insurance the "slip" is a memorandum between the parties containing the terms of the proposed insurance, and initialled by the underwriters.

SLIPPA. A stirrup. There is a tenure of land in Cambridgeshire by holding the sovereign's stirrup.

SLOUGH. An arm of a river flowing between islands and the main land. Dunlieth & D. B. Co. v. Dubuque, 55 Ia. 565, 8 N. W. 443.

SMALL DEBTS COURTS. The several county courts established by 9 & 10 Vict. c. 95, for the purpose of bringing justice home to every man's door.

SMART-MONEY. Vindictive or exemplary damages given beyond the actual damage, by way of punishment and example, in cases of gross misconduct of defendant. Woert v. Jenkins, 14 Johns. (N. Y.) 352. That it cannot be given by jury, see 2 Greenl. Ev. § 253, n. See EXEMPLARY DAMAGES.

SMELTING. Smelting, though by derivation synonymous with melting, has come to mean a melting of ores in the presence of some re-agent which operates to separate the metallic element by combining with a non-metallic element. Lowrey v. Smelting & Aluminum Co., 68 Fed. 354.

SMOKE. A city ordinance prohibiting the emission of dark smoke from chimneys during certain hours, and providing a penalty for its violation, is within the city's police power, and the question of its reasonableness was not open in the court of appeals after it had been sustained by the county court and the appellate division; Rochester v. Mill. Co., 199 N. Y. 207, 92 N. E. 641, 32 L. R. A. (N. S.) 554. See NUISANCE.

SMOKE-SILVER. A *modus* of sixpence in lieu of tithe-wood. Twisdale, Hist. Vindicat. 77.

SMUGGLING. The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited. (Quoted and approved by Brewer, J., in Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.)

"Smuggling consists in the *bringing on shore*, or carrying from the shore, goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited." 6 Bac. Abr. 258; so, in almost precisely the same words in 1 Hawk. Pl. Cr. 661; 1 Russ. Cr. 172.

In the Act of June 22, 1874, it was provided: "That *for the purpose of this act*, smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house, or submitting them to the officers of the revenue, for examination." 18 U. S. Statutes at Large, ch. 391, p. 186.

"Smuggling" and to clandestinely introduce into the country mean the same thing. Mere acts of concealment of merchandise on entering the waters of the United States do not of themselves constitute smuggling; Keck v. U. S., 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505. Where one having dutiable goods

secreted on his person knowingly passed the customs office at the dock and ignored three distinct calls of the customs officer before his further progress was arrested and the goods disclosed, when he stated for the first time that he expected to enter the goods at the main custom house some distance away, instead of at the dock, he was held to have committed the offense of smuggling; Rogers v. U. S., 180 Fed. 54, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264.

In proceedings to forfeit imported goods, the burden of proof to show that the importation was lawful rests on the claimant; U. S. v. One Bag of Crushed Wheat, 166 Fed. 562.

SO. The terms "hence" and "therefore" are sometimes the equivalent of "so," and the latter word is thus understood whenever what follows is an illustration of or conclusion from what has gone before. Clem v. State, 33 Ind. 431.

SO HELP YOU GOD. See OATH.

SOC. See SOCAGE.

SOCAGE. A species of tenure, whereby the tenant held his lands of the lord by any certain service in lieu of all other services, so that the service was not a knight's service. Its principal feature was its certainty; as, to hold by fealty and a certain rent, or by fealty-homage and a certain rent, or by homage and fealty without rent, or by fealty and certain corporal service, as ploughing the lord's land for a specified number of days. 2 Bla. Com. 80.

The term socage was afterwards extended to all services which were not of a military character, provided they were fixed: as, by the annual payment of a rose, a pair of gilt spurs, a certain number of capons, or of so many bushels of corn. Of some tenements the service was to be hangman, or executioner of persons condemned in the lord's court; for in olden times such officers were not volunteers, nor to be hired for lucre, and could only be bound thereto by tenure. There were three different species of these socage tenures —one in frank tenure, another in ancient tenure, and the third in base tenure: the second and third kinds are now called, respectively, tenure in ancient demesne, and copyhold tenure. The first is called free and common socage, to distinguish it from the other two; but, as the term socage has long ceased to be applied to the two latter, socage and free and common socage now mean the same thing. Bracton; Co. Litt. 17, 86.

Free socage was the tenure by which all freehold lands were held, if they were not held by frankalmoin, knight service or serjeanty. Little can be said about the services which were due. Military service or scutage was not due; there was no wardship or marriage. Generally a money rent was due, and occasionally agricultural services. Primarily the tenant by free socage was a dependent tenant, paying rent, or labor services, or both. Tenure by free socage came to embrace, not only the class of well-to-do farmers, but also all the class who hold at a rent. It was the least encumbered of all the tenures with obsolete and oppressive incidents.

By the statute of 12 Car. II, c. 24, the ancient tenures by knight's service were abolished, and all lands, with the exception of copyholds and of ecclesiastical lands, which continued to be held in free alms (frankalmoin), were turned into free and common socage and the great bulk of real property in England is now held under this ancient tenure. Many grants of land in the United States, made, previous to the revolution, by the British Crown, created the same tenure among us, until they were formally abolished by the legislatures of the different states. In 1787, the state of New York converted all feudal tenures within its boundaries into a tenure by free and common socage; but in 1830 it abolished this latter tenure, with all its incidents, and declared that from thenceforth all lands in the state should be held upon a uniform allodial tenure, and vested an absolute property in the owners according to their respective estates. Similar provisions have been adopted by other states; and the ownership of land throughout the United States is now essentially free and unrestricted. See TENURE.

SOCER (Lat.). The father of one's wife; a father-in-law.

SOCIAL CONTRACT, or COMPACT. In political philosophy, a term applied to the theory of the origin of society associated chiefly with the names of Hobbes, Locke and Rousseau, though it can be traced back to the Greek Sophists. Rousseau (Contrat Social) held that in the pre-social state man was unwarlike and timid. Laws resulted from the combination of men who agreed, for mutual protection, to surrender individual freedom of action. Government must therefore rest on the consent of the governed. Encycl. Br.

SOCIAL ENJOYMENT. These words are too comprehensive to state as the object for which a corporation is to be formed, as some social enjoyments are unlawful. Nether Providence Ass'n's Charter, 2 Pa. Dist. R. 702.

SOCIALISM. Any theory or system of social organization which would abolish, entirely or in great part, the individual effort and competition on which modern society rests, and substitute for it co-operative action, would introduce a more perfect and equal distribution of the products of labor, and would make land and capital, as the instruments and means of production, the joint possession of the members of the community.

SOCIDA. In Civil Law. The name of a contract by which one man delivers to another, either for a small recompense or for

a part of the profits, certain animals on condition that if any of them perish they shall be replaced by the bailee or he shall pay their value.

A contract of hiring, with the condition that the bailee takes upon him the risk of the loss of the thing hired. Wolff § 638.

SOCIETAS. **In Civil Law.** A contract in good faith made to share in common the profit and loss of a certain business or thing, or of all the possessions of the parties. Calvinus, Lex.; Inst. 3. 26; Dig. 17. 21. See PARTNERSHIP.

SOCIETAS LEONINA (Lat.). **In Roman Law.** That kind of society or partnership by which the entire profits should belong to some of the partners in exclusion of the rest.

It was so called in allusion to the fable of the lion and other animals, who having entered into partnership for the purpose of hunting, the lion appropriated all the prey to himself; Dig. 17. 2. 29. 2; Poth. *Traité de Société*, n. 12. See Lowry v. Brooks, 2 McCord (S. C.) 421; Bailey v. Clark, 6 Pick. (Mass.) 372.

SOCIÉTÉ. **In French Law.** Partnership. *Société en nom collectif.* A partnership in which all the members are jointly and severally liable. *Société en participation.* A joint adventure. *Société par actions.* A joint stock company. *Société d'acquêts.* A written contract between husband and wife to regard as community property only those things which are acquired during the marriage. *Société en commandite.* In Louisiana, a partnership formed by a contract by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more. La. Civ. Code, art. 2810; *Code de Comm.* 26, 33; 4 Pardessus, *Dr. Com.* n. 1027; Dalloz, Dict. *Société Commerciale*, n. 166. See Goirand, Code; COMMENDAM; PARTNERSHIP.

SOCIÉTÉ ANONYME. In French law originally a partnership conducted in the name of one of the members; the others were strictly secret partners. To creditors of the firm they came into no relation and under no liability. They made their contribution to the capital, and were held to indemnify the active partner for what he might have to pay in excess of the capital. In the Code Napoléon it came to signify a private business corporation, but never organized in perpetuity. It was formed with the consent of the government. In 1867 the requirement of this consent was replaced under a general incorporation law; Baldwin, Mod. Pol. Inst. 182.

SOCIETY. A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose.

Societies are either incorporated and known to the law, or unincorporated, of which the law does not generally take notice.

By *civil society* is usually understood a state, a nation, or a body politic. Rutherforth, Inst. c. 1, 2.

SODOMITE. One who has been guilty of sodomy. Formerly such offender was punished with great severity, and was deprived of the power of making a will.

SODOMY. A carnal copulation by human beings with each other against nature, or with a beast. See 2 Bish. Cr. Law § 1191; Whart. Cr. Law 579.

It may be committed between two persons both of whom consent, even between husband and wife; 8 C. & P. 604; and both may be indicted; 1 Den. Cr. Cas. 464; 2 C. & K. 869; when committed on the wife, against her consent, it is a matrimonial offence under the English act of 1857; 22 T. L. R. 26. Penetration of the mouth is not sodomy; Russ. & R. 331; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833. As to emission, see 12 Co. 36; Com. v. Thomas, 1 Va. Cas. 307. See 1 Russ. Cr. 698; 1 Mood. Cr. Cas. 34; 8 C. & P. 417; People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321.

A minor 12 years of age cannot consent to an act of sodomy committed on his person; and if he submits to it without resistance the act is still done by force; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 966, 29 Am. St. Rep. 195.

A domestic fowl is an "animal" within 24 & 25 Vict. c. 100, punishing unnatural offences; 24 Q. B. Div. 357. But see 1 Russ. Cr. 698.

SOIL. The superficies of the earth on which buildings are erected or may be erected. The soil is the principal, and the building, when erected, is the accessory.

SOIT DROIT FAIT AL PARTIE. **In English Law.** Let right be done to the party. A phrase written on a petition of right, and subscribed by the king. See PETITION OF RIGHT.

SOIT FAIT COMME IL EST DESIRÉ. Let it be as it is desired. The form of giving the royal assent to private acts of parliament.

SOKE, SOC, SOK. Jurisdiction; a power or privilege to administer justice and execute the laws; also a shire, circuit, or territory. Cowell.

In the Domesday Book and the Leges Henrici, the distinction between "*sake* and *soke*" is obliterated. *Soke* means jurisdiction and "*sake* and *soke*" is but a pleonastic phrase, which means no more than *soke*. Before the Norman times the idea of jurisdiction was expressed by a technical word, the meaning of which was rigorously observed. This is *sacu* and the word has strangely vanished from our legal vocabulary, but is still pre-

served even in its technical sense by the German *sache;* Maitl. Domesd. 259. The same writer says that of the two words *soke* is by far the commoner, and that *sake* is rarely found except in connection with *soke*, and when so found it seems to be merely an equivalent for the latter word. *Sake* originally signified a matter, a thing; hence, a matter or cause in the lawyers' sense of these terms. A "matter" in dispute between litigants, a "cause" before a court. While *soke, socna, soka*, is the Anglo-Saxon *socn*, and has for its primary meaning a seeking. The phrase "holding with *sake* and *soke*" seems to be equivalent after the Conquest with "he held freely;" Maitl. Domesd. 80; which see for a learned discussion as to the distinction between the two words.

See FOLD SOKE.

SOKEMANS, SOCMEN. Freeholders whose holdings might be no larger than those of the villeins, but who would generally, instead of the heavy services, pay fixed and not heavy rent; 1 Soc. Eng. 360. Those who held their land in socage; 2 Bla. Com. 100.

SOLAR DAY. That period of time which begins at sunrise and ends at sunset; the same as "artificial day." Co. Litt. 135 *a*.

SOLAR MONTH. A calendar month. Co. Litt. 135 *b;* 1 W. Bla. 450; 1 Maule & S. 111; 1 Bingh. 307.

SOLARES. In Spanish Law. Lots of ground. This term is frequently found in grants from the Spanish government of lands in America. 2 White, Recop. 474.

SOLATIUM. Compensation.

SOLD NOTE. The name of an instrument in writing, given by a broker to a buyer of merchandise, in which it is stated that the goods therein mentioned have been sold to him. 1 Bell, Com. 435; Story, Ag. § 28. Some confusion may be found in the books as to the name of these notes: they are sometimes called *bought notes.*

SOLDIER. A military man; a private in the army.

Soldiers re-enlisted "for clerical service and messenger duty," under act of congress of July 29, 1886, are still in the service, and under U. S. Rev. St. § 1285, are entitled to the additional pay for certificates of merit. Bell v. U. S., 28 Ct. Cl. 462. See LONGEVITY PAY; FOREIGN TROOPS.

SOLE. Alone, single; used in contradistinction to *joint* or *married.* A sole tenant, therefore, is one who holds lands in his own right, without being joined with any other. A *feme sole* is a single woman; a sole corporation is one composed of only one natural person. See CORPORATION.

SOLEMN FORM. An action to prove a will in solemn form, or *per testes*, is heard in England before the probate division of the High Court. Proceedings are usually brought by the executor, but may be by a legatee or devisee. 3 Steph. Com. 62.

SOLEMNITY. The formality established by law to render a contract, agreement, or other act valid.

As the solemnization of a marriage is the consummation of a valid marriage; 33 L. J. Ch. 139; 49 *id.* 193; and an oath to be taken solemnly does not merely mean religiously, but with all due solemnities; 14 Q. B. D. 667. See MARRIAGE.

SOLICITATION. Solicitation to commit a crime is usually held to be punishable as a misdemeanor, though the offence solicited may not be committed; Com. v. Flagg, 135 Mass. 545; State v. Murphy, 27 N. J. L. 112; but it has been held otherwise, as, where a letter was written requesting one to commit murder, which never reached the person to whom it was addressed; 19 W. R. 109. See McDade v. People, 29 Mich. 50; Grady v. State, 11 Ga. 253. If the offence requires the concurrent action of two or more persons, it is doubtful whether a solicitation of one person by another to commit the offence is in itself criminal; 1 McClain, Cr. Law § 220.

The offence of this character most frequently mentioned in criminal law books is what is termed solicitation of chastity. The asking a person to commit adultery or fornication of itself is not an indictable offence; Salk. 382; 2 Chitty, Pr. 478; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; *contra*, State v. Avery, 7 Conn. 267, 18 Am. Dec. 105; Bish. N. Cr. L. § 768. The distinction is sharply drawn by the Pennsylvania case and the Connecticut case. In the latter, solicitation to commit adultery, which was a statutory felony, was held indictable, in the former where the offence was a misdemeanor, it was not. See also Whart. Cr. L., 9th ed. § 179, and a criticism thereon in Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782. If both are punishable for adultery, solicitation to adultery may be a common law offence; otherwise if there is a mere invitation; Whart. Cr. L. § 2085. In England, the bare solicitation of chastity was punishable in the ecclesiastical courts; 2 Chitty, Pr. 478. See 2 Ld. Raym. 809; Bish. Cr. Law § 767.

The civil law punished arbitrarily the person who solicited the chastity of another; Dig. 47. 11. 1.

The solicitation of a bribe is not an attempt to receive a bribe; State v. Bowles, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176. See note in 25 L. R. A. 434.

The term solicitation is also used in connection with other offences, as, solicitation to larceny, sodomy, bribery, threatening notice. 1 Bish. Cr. L. § 767. Under the stat. of 24 & 25 Vict. c. 100, § 4, whoever shall solicit any one to murder any other person, shall be guilty of a misdemeanor. Under this act the editor of a German paper in London was indicted and found guilty, for having published an article commending the assassination of the emperor of Russia; 7 Q. B. Div. 244; 1 Bish. Cr. L.

768a. Solicitation and an offer of money to commit murder, meet the test of a common-law crime (see MISDEMEANOR), constituting an act done, a step in the direction of that crime; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782. On an indictment for solicitation to commit arson, evidence that the prisoner solicited other parties to burn the same building is admissible; Com. v. Hutchinson, 19 Pa. Co. Ct. Rep. 360.

SOLICITOR. A person whose business is to be employed in the care and management of suits depending in courts of chancery.

Formerly, in England, they corresponded to attorneys in common law practice. By the Judicature Act, 1873, all solicitors, attorneys and proctors are to be called solicitors of the supreme court. They are stringently regulated by various acts. They are required to pass an entrance examination before the Law Society, which hears applications to strike them off the roll. A solicitor must be a British subject, who has served as a clerk to a practicing solicitor under binding articles from three to five years, passed various examinations and entered on the roll of solicitors by the Law Society. But a barrister of not less than five years standing may have himself disbarred and become a solicitor without examination except the final examination.

After his name is on the roll, he must annually take out a certificate duly stamped. The certificate of a country solicitor does not enable him to practice in town; hence nearly every country solicitor employs a London solicitor as his town agent.

In the High Court of Justice, in the Court of Appeal and in the House of Lords, and before the Judicial Committee of Privy Council, a barrister must be employed, as well as a solicitor; but a solicitor can plead before justices or any magistrate, sheriff's court, a coroner, revising barrister, ecclesiastical courts, in every county court, etc., courts of petty sessions, and at chambers in the High Court, but not in the mayor's court of London, and in the court of quarter sessions only for those counties for which no bar regularly attends. No person who is not a solicitor can act as one or sue out any proceeding or defend any action.

A solicitor has very extensive authority, especially in litigious matters, but in other matters is more restricted. His charges are fixed by law. He must first deliver a bill of costs and ordinarily wait a full calendar month before he can bring suit for it. A solicitor may not receive anything beyond his regular charges; [1895] 2 Q. B. 679. Any gift would be presumed to be the result of undue influence, but the presumption may be rebutted. By recent acts solicitors are permitted to act as proctors in all ecclesiastical courts, and proctors are not now a separate profession; Odger, C. L. 1431. He may become an English barrister after five years consecutive practice. To do so he must enter at one of the Inns of Court and at the end of twelve months pass the bar examination.

SOLICITOR-GENERAL. The solicitor-general of the United States is appointed by the president to assist the attorney-general in the performance of his duties, and in case of a vacancy in the office of attorney-general, or of his absence or disability, has the power to exercise all the duties of that office. Except when the attorney-general in particular cases otherwise directs, he and the solicitor-general argue cases in the supreme court in which the United States is interested. R. S. §§ 347, 359. Where the solicitor-general signed a commission as Acting Attorney-General and not as Solicitor-General, it was held immaterial; U. S. v. Twining, 132 Fed. 129.

In English Law. A law officer of the crown, appointed by patent during the royal pleasure, who assists the attorney-general in managing the law business of the crown. Selden 1. 6. 7. He is first in right of preaudience; 3 Sharsw. Bl. Com. 28, n. (a), n. 9; Encyc. Brit. The first was Sir Francis North, afterwards Lord Keeper under Charles II.

SOLICITOR OF THE SUPREME COURT. The solicitors before the supreme courts, in Scotland, are a body of solicitors entitled to practice in the court of session, etc. Their charter of incorporation bears date August 10, 1797.

SOLICITOR OF THE TREASURY. The title of one of the officers of the United States, created by the act of May 29, 1830; he is appointed by the president, by and with the advice and consent of the senate, and is under the supervision of the department of justice. R. S. § 349.

SOLIDO, IN. See IN SOLIDUM.

SOLITARY CONFINEMENT. In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailer; in a stricter sense, the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction. See Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835, where an *ex post facto* statute which added to the punishment of death (in effect when the crime was committed), the further punishment of solitary confinement until execution, was held void. The opinion by Miller, J., gives much historical information on the subject.

See PENITENTIARY; PUNISHMENT.

SOLUTIO (Lat. release). **In Civil Law.** Payment. By this term is understood every species of discharge or liberation, which is called satisfaction, and with which the creditor is satisfied. Dig. 46. 3. 54; Code 8. 43. 17; Inst. 3. 30. This term has rather a reference to the substance of the obligation than

to the numeration or counting of the money. Dig. 50. 16. 176.

SOLUTIO INDEBITI (Lat.). **In Civil Law.** The case where one has paid a debt, or done an act or remitted a claim because he thought that he was bound in law to do so, when he was not. In such cases of mistake there is an implied obligation (*quasi ex contractu*) to pay back the money, etc.; Poll. Contr, 439; Mackeldey, Civ. Law § 458.

SOLVENCY. The state of a person who is able to pay all his debts: as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts. Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; Thompson v. Thompson, 4 Cush. (Mass.) 127. The opposite of *insolvency* (*q. v.*).

SOLVENDUM IN FUTURO (Lat.). To be paid in the future. Used of an indebtedness which is said to be *debitum in presenti* (due now) and *solvendum in futuro* (payable in the future). An interest in an estate may be rested *in presenti*, though it be *solvendum in futuro*, enjoyable in the future.

SOLVENT. One who has sufficient to pay his debts and all obligations. Dig. 50. 16. 114.

A person is solvent who owns property enough and so situated that all his debts can be collected from it by legal proceedings; People v. Halsey, 53 Barb. (N. Y.) 547. But other cases hold that to be solvent one must be able to pay all his debts in the ordinary course of trade. See 2 N. B. R. 149; State v. Cadwell, 79 Ia. 432, 44 N. W. 700. See INSOLVENCY.

SOLVERE (Lat. to unbind; to untie). To release; to pay; *solvere dicimus cum qui fecit quod facere promisit.* 1 Bouvier, Inst. n. 807.

SOLVIT AD DIEM (Lat. he paid at the day). The name of a plea to an action on a bond, or other obligation to pay money, by which the defendant pleads that he paid the money on the day it was due. See 1 Stra. 652; Rep. *temp.* Hardw. 133; Comyns, Dig. *Pleader* (2 W. 29).

This plea ought to conclude with an averment, and not to the country; 1 Sid. 215; Jackson v. Louw, 12 Johns. (N. Y.) 253.

SOLVIT POST DIEM (Lat. he paid after the day). The name of a special plea in bar to an action of debt on a bond, by which the defendant asserts that he paid the money after the day it became due. 1 Chitty, Pl. 480, 555.

SOMNAMBULISM (Lat. *somnium*, sleep; *ambulo*, to walk). Sleep-walking.

The mental condition in this affection is not very unlike that of dreaming. Many of their phenomena are the same; and the former differs from the latter chiefly in the larger number of the functions involved in the abnormal process. In addition to the mental activity common to both, the somnambulist enjoys the use of his senses in some degree, and the power of locomotion. He is thereby enabled to perform manual operations as well, frequently, as in his waking state. Usually, however, the action of the senses is more or less imperfect, many of the impressions being incorrectly or not at all perceived. The person walks against a wall, or stumbles over an object in his path; he mistakes some projections for a horse, strides across it, and imagines himself to be riding; he hears the faintest sound connected with what he is doing, while the voices of persons near him, and even the blast of a trumpet, are entirely unnoticed. For the most part, the operations of the somnambulist consist in getting up while asleep, groping about in the dark, endeavoring to make his way out of the house through doors or windows, making some inarticulate sounds, perhaps, and all the while unconscious of persons or things around him. The power of the perceptive faculties, as well as that of the senses, is sometimes increased in a wonderful degree.

The somnambulist always awakes suddenly, and has but a faint conception, if any, of what he has been thinking and doing. If conscious of anything, it is of an unpleasant dream imperfectly remembered. This fact, not being generally known, will often enable us to detect simulated somnambulism. If the person on waking continues the same train of thought and pursues the same plans and purposes which he did while asleep, there can be no doubt that he is feigning the affection. When a real somnambulist, for some criminal purpose, undertakes to simulate a paroxysm, he is not at all likely to imitate one of his own previous paroxysms, for the simple reason that he knows less than others how he appeared while in them. If, therefore, somnambulism is alleged in any given case, with no other proof than the occurrence of former paroxysms unquestionably genuine, it must be viewed with suspicion if the character of the alleged paroxysm differs materially from that of the genuine ones. In one way or another, a case of simulation would generally be detected by means of a close and intelligent scrutiny, so difficult is it to imitate that mixture of consciousness and unconsciousness, of dull and sharp perceptions, which somnambulism presents. The history of the individual may throw some light on the matter. If he has had an opportunity of witnessing the movements of a somnambulist in the course of his life, this fact alone would rouse suspicion, which would be greatly increased if the alleged paroxysm presented many traits like those of the paroxysms previously witnessed.

The legal consequences of somnambulism should be precisely those of insanity, which it so nearly resembles. The party should be exempt from punishment for his criminal acts, and be held amenable in damages for torts and trespasses. Somnambulism, though possibly not technical insanity, will sometimes have the same effect as excusing crime; Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213; 1 Bish. N. Cr. L. § 395; "simply because the person committing it would not know what he was doing;" Stephen, J., in 23 Q. B. D. 168. The only possible exceptions to this principle are to be found in those cases where the somnambulist, by meditating long on a criminal act while awake, is thereby led to commit it in his next paroxysm. Hoffbauer contends that, such being generally the fact, too much indulgence ought not to be shown to the criminal acts of the somnambulist. *Die Psychologie, etc.*, c. 4, art. 2. But surely this is a rather refined and hazardous speculation, and seems like punishing men

solely for bad intentions,—because the acts, though ostensibly the ground of punishment, are actually those of a person deprived of his reason. The truth is, however, that criminal acts have been committed in a state of somnambulism by persons of irreproachable character. Tayl. Med. Jur. 744. See Gray, Med. Jur. 265; Whart. & S. Med. Jur. § 492; Rush on the Mind 302; 18 Am. Journ. of Ins. 236. Tirrell's Case, Mass.

SON. An immediate male descendant. In its technical meaning in devises, this is a word of purchase; but the testator may make it a word of descent. Sometimes it is extended to more remote descendants. 2 Des. 123, n.

SON ASSAULT DEMESNE (L. Fr. his own first assault). **In Pleading.** A form of a plea to justify an assault and battery, by which the defendant asserts that the plaintiff committed an assault upon him and the defendant merely defended himself.

When the plea is supported by evidence, it is a sufficient justification, unless the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received; 1 East, Pl. Cr. 406; Scribner v. Beach, 4 Denio (N. Y.) 448, 47 Am. Dec. 265.

SON-IN-LAW. The husband of one's daughter.

SOON. Within a reasonable time. Sanford v. Shepard, 14 Kan. 232.

SORCERY. It was punished in England like witchcraft, which see.

SORS (Lat.). **In Civil Law.** A lot; chance; fortune. Calvinus, Lex.; Ainsworth, Dict. Sort. Kind. The little scroll on which the thing to be drawn by lot was written. Carpentier, Gloss. A principal or capital sum: *e. g.* the capital of a partnership. Calvinus, Lex.

In Old English Law. A principal lent on interest, as distinguished from the interest itself. Pryn. Collect. p. 161; Cowell.

SORTITIO. A casting of lots. *Sortitio judicum*, a drawing of judges, on criminal trials, similar to the modern practice of drawing a jury. 3 Bla. Com. 366.

SOUL SCOT. A mortuary, or customary gift due ministers, in many parishes of England, on the death of parishioners. It was originally voluntary and intended as amends for ecclesiastical dues neglected to be paid in the lifetime. 2 Sharsw. Bla. Com. *425. It was called in King Canute's laws *symbolum animæ;* it was the second best chattel; the heriot or best goods went to the lord. It was brought to the church with the corpse, and was called a *corpse-present.*

SOUND MIND. That state of a man's mind which is adequate to reason and comes to a judgment upon ordinary subjects like other rational men. 2 Hamilton, Syst. Leg. Med. 28.

The law presumes that every person who has acquired his full age is of sound mind, and, consequently, competent to make contracts and perform all his civil duties; and he who asserts to the contrary must prove the affirmation of his position by explicit evidence, and not by conjectural proof; 2 Hagg. Eccl. 434; 3 Add. Eccl. 86; Boyd v. Eby, 8 Watts (Pa.) 66; Ray, Med. Jur. § 92; 3 Curt. Eccl. 671.

SOUND MIND AND MEMORY. This phrase does not mean a mind without a flaw, or a memory without a fault. In re Blair, 16 N. Y. Supp. 874. See WILL.

SOUNDING IN DAMAGES. When an action is brought, not for the recovery of lands, goods, or sums of money (as is the case in real or mixed actions or the personal action of debt or detinue), but for damages only, as in covenant, trespass, etc., the action is said to be *sounding in damages.* Steph. Pl. 126.

SOUNDNESS. General health; freedom from any permanent disease. 1 Carr. & M. 291. To create unsoundness, it is requisite that the animal should not be useful for the purpose for which he is bought, and that inability to be so useful should arise from disease or accident. 2 Mood. & R. 113, 137; 9 M. & W. 670.

In the sale of animals they are sometimes warranted by the seller to be sound; and it becomes important to ascertain what is soundness. Horses affected by roaring; a temporary lameness, which rendered the horse less fit for service; 4 Camp. 271; but see 2 Esp. Cas. 573; a cough, unless proved to be of a temporary nature; 2 Chitty, Bail. 245, 416; and a nerved horse; Ry. & M. 290: have been held to be unsound. But crib-biting is not a breach of a general warranty of soundness; 1 Holt, Cas. 630; but see Washburn v. Cuddihy, 8 Gray (Mass.) 430; Walker v. Hoisington, 43 Vt. 608. The true test is whether the defect complained of renders the horse less than reasonably fit for present use; 9 M. & W. 668. See Oliph.; Hanover on Horses; Benj. Sales § 619.

An action on the case is the proper remedy for a verbal warrant of soundness; 1 H. Bla. 17; 9 B. & C. 259; Bac. Abr. *Action on the Case* (E).

See SALE; WARRANTY.

SOURCES OF THE LAW. The authority from which the laws derive their force. A term used to include all the reliable testimonials of what constitutes the law.

The power of making all laws is in the people or their representatives, and none can have any force whatever which are derived from any other source. But it is not required that the legislator shall expressly pass upon all laws, and give the sanction of his seal, before they can have life or existence. The laws are, therefore, such as have received an ex-

press sanction, and such as derive their force and effect from implication.

The *express* laws are—first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws made by the several state legislatures; sixthly, the laws made by inferior legislative bodies, such as the councils of municipal corporations, and the general rules made by the courts.

The constitutions of the respective states, if not opposed to the provisions of the constitution of the United States, are of binding force in the states respectively; and no act of the state legislature has any force which is made in contravention of the state constitution.

The laws of the several states constitutionally made by the state legislatures have full and complete authority in the respective states.

Laws are frequently made by inferior legislative bodies which are authorized by the legislature: such are the municipal councils of cities or boroughs. Their laws are generally known by the name of ordinances, and when lawfully ordained they are binding on the people. The courts, perhaps by a necessary usurpation, have been in the practice of making general rules and orders, which sometimes affect suitors and parties as much as the most regular laws enacted by congress. These apply to all future cases. There are also rules made in particular cases as they arise: but these are rather decrees or judgments than laws.

The *tacit* laws, which derive their authority from the consent of the people without any legislative enactment, may be subdivided into,—

The *common law,* which is derived from two sources, the common law of England, and the practice and decisions of our own courts. In some states it has been enacted that the common law of England shall be the law, except where the same is inconsistent with our constitutions and laws. See LAW.

Customs which have been generally adopted by the people have the force of law.

The principles of *Roman* law. See CIVIL LAW.

The *Canon* law, which was adopted by the ecclesiastical courts, figures in our laws respecting marriage, divorces, wills and testaments, executors and administrators, and many other subjects.

The *jurisprudence,* or decisions of the various courts, have contributed their full share of what makes the law. These decisions are made by following precedents, by borrowing from the sources already mentioned, and sometimes by the less excusable disposition of the judges to legislate on the bench.

The monument where the common law is to be found are the records, reports of cases adjudicated by the courts, and the treatises of learned men. The books of reports are the best proof of what is the common law; but, owing to the difficulty of finding out any systematic arrangement, recourse is had to treatises upon the various branches of the law. The records, owing to their being kept in one particular place and therefore not generally accessible, are seldom used.

"Laws derive their authority from possession and use; 'tis dangerous to trace them back to their beginning; they grow great and ennoble themselves, like our rivers, by running; follow them upward to their source, 'tis but a little spring, scarce discernible, that swells thus and thus fortifies itself by growing old. Do but consult the ancient considerations that gave the first motion to this famous torrent, so full of dignity, awe, and reverence; you will find them so light and weak that it is no wonder if these people, who weigh and reduce everything to reason, and who admit nothing by authority or upon trust, have their judgments very remote and differing from those of the public." Montaigne, Essays, II, ch. xii.

See LAW; PRECEDENT; JUDGE-MADE LAW; JUDICIAL POWER; LEGISLATIVE POWER; STARE DECISIS; CONSTITUTIONAL; TREATY; STATUTE; COMMON LAW; CIVIL LAW; PRIZE COURT; INTERNATIONAL LAW; ROMAN-DUTCH LAW; Gray, Nature and Sources of the Law.

SOUS SEING PRIVÉ. **In Louisiana.** An act or contract evidenced by writing under the *private signature* of the parties to it. The term is used in opposition to the *authentic act,* which is an agreement entered into in the presence of a notary or other public officer.

SOUTH CAROLINA. One of the original thirteen United States.

This state was originally part of the British province of *Carolina,* then comprehending both North Carolina and South Carolina. That province was granted by Charles II., by charter issued to eight lord proprietors, in 1663, and amended in 1665 so as to extend it between twenty-nine and thirty-six degrees thirty minutes, north latitude, drawn from the Atlantic to the Pacific ocean. The first permanent settlement in South Carolina was effected in 1670 by emigrants from England who landed at Beaufort, then Port Royal, in the same year and removed to the point on the river Ashley nearly opposite the present site of Charleston; but, abandoning this position, they again removed, in 1680, to Oyster Point, at the confluence of the Ashley and Cooper, where they founded Charleston.

In 1719, the colonial legislature disowned the proprietary government and threw the colony into the hands of the king, who, accordingly, assumed the control of it, but not until 1729 was the charter surrendered. In that year the shares of seven out of the eight lords proprietors were ceded. The eighth share, which belonged to the family of Lord Granville, formerly Cartaret, was retained, and laid off in North Carolina,—which was about the same time finally divided from South Carolina.

In 1732, that part of South Carolina lying west of the river Savannah was granted by the crown to the Georgia Company, under Oglethorpe. Thus South Carolina was reduced in extent, and, in consequence of subsequent arrangements, made with Georgia in 1787 in the treaty of Beaufort, and with North Carolina in the early part of the present century, the present boundaries were established.

On March 26, 1776, the first constitution was adopted,—the earliest it is believed, of the American constitutions. This constitution was replaced in 1778 by another, and that in 1790 by yet another. Some amendments were made in 1808, 1810, 1816, 1828, and 1834. In 1865 a new constitution was adopted. This in its time was succeeded by that of 1868, which was amended in 1873 and 1876. The present constitution of the state was adopted Dec. 4, 1895.

SOUTH DAKOTA. One of the states of the United States.

It was admitted to the Union under the act of Feb. 22, 1889, which included also North Dakota, Montana, and Washington, which together constituted the territories of Dakota, Montana, and Washington. The constitution was amended, in 1913, by providing for a new primary law, for equal suffrage, for the organization of irrigation districts, and for the initiative and referendum. See NORTH DAKOTA.

SOVEREIGN. A person, body, or state in which independent and supreme authority is vested.

A chief ruler with supreme power; a king or other ruler with limited power.

The term is used to express, not merely the chief ruler or executive, but the state itself as an entity in which is vested the attributes of sovereignty. Thus it is usual to speak of the United States or one of the states as the sovereign.

The sovereign, whether the term be used

with respect to a state or to the chief ruler of one, is accorded an immunity from suit in courts of justice. This doctrine obtains both in England and in this country.

An action is not maintainable against a foreign sovereign; 44 L. T. Rep. N. S. 199; [1894] 1 Q. B. 149; 2 H. L. Cas. 1. Courts of England will take judicial notice of the status of a foreign sovereign and will not take jurisdiction over him, unless he voluntarily submits to it; [1894] 1 Q. B. 149. This doctrine is applied in this country; Hatch v. Baez, 7 Hun (N. Y.) 596; Sharp's Rifle Mfg. Co. v. Rowan, 34 Conn, 329, 91 Am. Dec. 728. A state cannot sue the United States without its consent; Kansas v. U. S., 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510.

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right against the authority which makes the law on which the right depends;" and a territory of the United States, while not sovereign in the full sense of the word, is such so far as exemption from suit is concerned, because it may originate and change at will the law of contract and property, from which persons within the jurisdiction derive their rights; Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834.

A sovereign is not subject to the jurisdiction of another country, though traveling there under an assumed name; [1894] 1 Q. B 149; he may consent to the jurisdiction, or he may himself bring suit; L. R. 2 Ch. 582; and if he sues, he submits to whatever is incident to that proceeding; 3 Y. & C. 594.

It is a general rule that the sovereign cannot be sued in his own court without his consent, and this was so from the days of Bracton, nor could a feudal lord; 3 Holdsw. Hist. E. L. 311; and hence no direct judgment can be rendered against him therein for costs, except in the manner and on the condition he has prescribed; State v. Lazarus, 40 La. Ann. 856, 5 South. 289; The Antelope, 12 Wheat. (U. S.) 549, 6 L. Ed. 723; U. S. v. Ringgold, 8 Pet. (U. S.) 163, 8 L. Ed. 899. And in 2 St. Tr. 320, when counsel for the king of Spain asked for costs, Lyndhurst, C., said: "We will not disparage the dignity of the king of Spain by giving him costs." While a sovereign is thus exempt from being made defendant in a suit, he may himself submit to the jurisdiction of a domestic or foreign court by bringing suit. While a foreign sovereign may sue to enforce a juristic right, it is otherwise where it seeks aid in maintaining its authority; Moore, Act of State 148.

A foreign sovereign can bring a civil suit in the courts of the United States; King of Spain v. Oliver, 2 Wash. C. C. 431, Fed. Cas. No. 7,814; The Sapphire, 11 Wall. (U. S.) 164, 20 L. Ed. 127, where many cases are cited; and such a suit does not abate by a change in the person of the sovereign, as the change may be suggested on the record; *id.* And a suit on behalf of a sovereign may be instituted by his proper official representative in charge of the business. There is no such rule as that the monarch or other titular head of a foreign state is the only person who can sue in respect to the public property or interest of that state; [1902] A. C. 524, where it was held that the Spanish minister of marine for the time being could sue a Scottish ship building company for damages for non-delivery of a warship, under a contract which was executed by his predecessor in office, on behalf of the Spanish government. When a sovereign waives his immunity so far as to become a suitor, he subjects himself to some extent to judicial control. The principle is said to be that the sovereign who brings suit would seem to submit to the jurisdiction of the court as though he were an individual, so far as that no well-recognized prerogative of sovereignty is infringed without his express consent; 1 Cl. & Fin. 333.

"When a foreign sovereign comes into court for the purpose of obtaining a remedy, then, by way of defence to that proceeding (by counter-claim, if necessary), to the extent of defeating that claim, the person sued may file a cross claim . . . for the purpose of enabling complete justice to be done between them;" 29 W. R. 125, per James, L. J. In England where a foreign sovereign brought suit to restrain defendants from using funds in their hands for certain purposes, and the latter set up a claim for damages, it was held that, while, by suing in England, he submitted to the jurisdiction for the purpose of allowing discovery in aid of the defendant, he did not thereby submit to what was in its real nature a cross action; [1898] 1 Ch. 190.

The rule that a tort can be ratified so as to make an act done by a servant in the course of the principal's business and purporting to be done in his name his tort, and exonerate the servant, is applied to a greater or less extent when the master is the sovereign; O'Reilly de Camara v. Brooke, 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676.

A prerogative which is undoubtedly to be recognized is the immunity from an affirmative judgment against him; People v. Dennison, 84 N. Y. 272; U. S. v. Hooe, 3 Cra. (U. S.) 73, 2 L. Ed. 370.

Where the United States had libelled a vessel for injuries caused by a collision with a government vessel, a cross libel could not be entertained; Bowker v. U. S., 105 Fed. 398; but this case is criticised in 15 Harv. L. Rev. 59, where it is suggested that the same principle should be applied as in the case of individuals, where fault is shown in both parties, and that a proper exercise of the discretion of the court would have been to stay the original proceedings until the United States should consent to the filing of the cross

libel, or, if both were at fault, the judgment should be entered only upon condition of payment of a proper contribution to the defendants, which was the proceeding followed in 3 Wm. Rob. 38.

The doctrine of inviolability extends to securing immunity from lien on government property which would disturb the government's possession; Briggs v. Light-Boat, 11 Allen (Mass.) 157; 89 L. T. 374. Where enforcement of a lien has been permitted, it has apparently not been remembered that there is a difference between its existence and its enforcement; The Revenue Cutter No. 1, Brown, Adm. 76, Fed. Cas. No. 11,713. The United States courts had no jurisdiction over a public armed vessel in the service of a sovereign at peace with us; U. S. v. Goodwin, 7 Cra. (U. S.) 110, 3 L. Ed. 284. Similar cases were decided in England with respect to a warship of the United States; L. R. 4 P. D. 39; and one owned by the Roumanian government and employed for public purposes in connection with national railways in that country; L. R. 16 P. D. 270. On the same principle a court cannot, by proceedings *in rem*, dispose of a fund belonging to a foreign government in the hands of agents residing within its jurisdiction; Leavitt v. Dabney, 37 How. Pr. (N. Y.) 264; nor compel the defendants, who held the proceeds of merchandise shipped by a foreign government, to apply the same, pursuant to a contract of hypothecation, to a loan contracted by that government; L. R. 8 Eq. 198. But the general principle of immunity would not prevent the joinder of a foreign state with other defendants for the purpose of giving it an opportunity to appear and thus enable the court to decide more intelligently with respect to the demands against the other defendants; Manning v. Nicaragua, 14 How. Pr. (N. Y.) 517; and where a foreign government had made a contract in England and lodged money in the hands of an agent there for the payment of what would become due under the contract, the court would not refuse relief to the contractor because the contract was with a foreign government, nor because it did not appear in the cause; L. R. 7 Ch. 550.

This immunity has not always been observed as to property of the United States. It has been subjected to a carrier's lien for freight; Union Pac. R. Co. v. U. S., 2 Wyo. 170; and a lien for salvage; The Davis, 10 Wall. (U. S.) 15, 19 L. Ed. 875 (though it could not be enforced by a suit against the United States); and such a lien was allowed on the cargo of a vessel carrying United States mails, but there was no allowance for the mails, as they could not be sold for salvage; The Merchant, 4 Adm. Rec. 544, Fed. Cas. No. 9,435; nor made to contribute for general average; U. S. v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694; and this has been said to have always been the law in England; 1 Pars. Mar. L. 324; *contra*, an innkeeper was held indictable for obstructing the passage of the mails by detaining the coach horses under a claim of an innkeeper's lien; U. S. v. Barney, 3 Hughes 545, Fed. Cas. No. 14,525. If, however, to recover the property which has been taken from its possession, the government resorts to the process of the courts to regain it, it would seem to be a waiver of the exemption; The Siren, 7 Wall. (U. S.) 152, 19 L. Ed. 129.

Interesting questions respecting the inviolability of a sovereign with respect to suits have arisen in the British colonies in the case of state-owned railroads. In Victoria the railroads were vested in a board of land and works, an incorporated governmental department, and, in an action for negligence, it was contended that the board was a mere trustee for the crown and no more liable to suit than the crown itself, but it was held that as incorporated trustees to whom was intrusted certain property, with which they were transacting the business of carriers, it was no part of the government service. They were held subject to all the ordinary liabilities of companies engaged in similar business; 4 Vict. L. Rep. 440; 7 Vict. L. Rep. 461 (L). Where, however, the railroad is vested in the crown itself, the nature of the undertaking is immaterial; 8 Can. 1; 7 Can. 216. In an American case, where the suit was against an incorporated railway in Canada, owned and operated by the British crown, for damages for personal injuries received within his dominions, it was held that the court had no jurisdiction; Mason v. Ry. Co., 197 Mass. 349, 83 N. E. 876, 16 L. R. A. (N. S.) 276, and note, 125 Am. St. Rep. 371, 14 Ann. Cas. 574.

Where suit was brought against the postmaster-general in connection with the management of the telegraph business, it was contended that his management of it was a branch of the public service and an essential part of government, as had been held in 2 Cowp. 765; but in a later case it was considered that the undertaking of the telegraph companies transferred to him was connected with no new purpose or object of a substantive kind, but merely new instruments for the accomplishment of the purpose which belonged to the business in the past; [1906] 1 K. B. 178. Where the public works commissioners had been incorporated, it was held by Phillimore, J., that that body was liable to be sued on its contracts; [1901] 2 K. B. 781; but the commissioners were held by the Exchequer Chamber to be exempt from the payment of rates; L. R. 3 Q. B. 677; and, by the Court of Appeals, as not entitled to the crown's immunity from the payment of costs; 31 Ch. Div. 621. So a board of guardians, who were managers of insane asylums under the local government board, were held not responsible for the negligence of officers in the treatment of patients; [1878] 2 L. R. Ir. 42; and a similar decision as to the non-

liability of local authorities, charged with the duty of appointing officers to administer functions of a general public nature, was made in [1905] 2 K. B. 338. This decision was put by Wills, J., on a broad ground in the line of the American doctrine of non-liability of a municipal corporation for illegal action of its police, as laid down in Buttrick v. Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721, and, generally, for whatever may result from the exercise by such corporation of merely governmental functions, in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332. In the High Court of Australia it was held that an action would not lie against the Tasmanian government, *qua* employer, for the illegal action of a constable in the execution of his duty as a peace officer, notwithstanding that the state was suable in tort and the policeman was a servant and exclusively controlled by the central government; [1906] 3 Commonwealth L. R. 969. See an article on "Liability for Acts of Public Servants," by W. H. Moore, in 23 L. Q. R. 12. As to the doctrine followed in this country as to the non-liability for the action of public servants in the performance of public or governmental duties, see MUNICIPAL CORPORATIONS. And see, generally, SOVEREIGNTY; STATE; UNITED STATES OF AMERICA.

In English Law. A gold coin of Great Britain, of the value of a pound sterling.

SOVEREIGN POWER. In the House of Commons, in considering the Petition of Right, when the Lords had proposed to "leave entire" the King's sovereign power, Pym refused to speak to the question, saying that he knew not what it was. He knew how to add sovereignty to the King's person, but not to his power. Coke said: "I know that prerogative is part of the law; but 'sovereign power' is no parliamentary word; should we now add it we would weaken the foundations of law and then the building must needs fall." See Taswell-Langmead, Eng. Const. Hist. 428.

SOVEREIGN STATE. One which governs itself independently of any foreign power. See SOVEREIGNTY; STATE.

SOVEREIGNTY. The union and exercise of all human power possessed in a state: it is a combination of all power; it is the power to do everything in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. § 207.

The artificial soul of that artificial body, the state. Spencer.

As long as it is accurately employed . . . it is a merely legal conception and means simply the power of law-making unrestricted by any legal limit. But it is sometimes employed in a political rather than a legal sense. Dicey, Engl. Constitution.

Abstractly, sovereignty resides in the body of the nation and belongs to the people. But these powers are generally exercised by delegation.

When analyzed, sovereignty is naturally divided into three great powers: namely, the legislative, the executive, and the judiciary; the first is the power to make new laws and to collect and repeal the old; the second is the power to execute the laws, both at home and abroad; and the last is the power to apply the laws to particular facts, to judge the disputes which arise among the citizens, and to punish crimes. See EXECUTIVE POWER; LEGISLATIVE POWER; JUDICIAL POWER.

Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state; Chisholm v. Georgia, 2 Dall. (U. S.) 471, 1 L. Ed. 440.

In international law a state is considered sovereign when it is organized for political purposes and permanently occupies a fixed territory. It must have an organized government capable of enforcing law and be free from all external control. A wandering tribe of savages, or nomads, or people united merely for commercial purposes or under control of another state cannot be considered as a sovereign state. Until a state becomes sovereign in the sense above described, it is not subject to international law. The states of the American Union are each, in a certain sense, sovereign in their domestic concerns, but not in international law, and Norway is an instance of a community not sovereign in international law because bound in a union with Sweden. The fact of sovereignty is usually established by general recognition of other states, and, until such recognition is universal, no community can be considered as sovereign; Snow, Int. Law 19. See INTERNATIONAL LAW.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

"The transactions of independent states between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." 13 Moore, P. C. 75. And the same is the case with their dealings with the subjects of other states; Pollock, Torts 105.

Public agents, military or civil, or foreign governments, whether such governments be *de jure* or *de facto*, cannot be held responsi-

ble in any courts of the United States for things done in their own states in the exercise of the sovereignty thereof, in pursuance of the directions of their governments; Underhill v. Hernandez, 65 Fed. 577, 13 C. C. A. 51, 38 L. R. A. 405. The government of one country will not sit in judgment on the acts of the government of another country, done within its own territory; Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

Sovereignty means that the decree of the sovereign makes law; and foreign courts cannot condemn the influences persuading the sovereign to make the decree; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.

The idea of sovereignty was not associated in the Teutonic mind with dominion over a particular portion of the earth's surface; it was distinctly personal or tribal; and so was their conception of law. Taylor, Science of Jurispr. 133.

See SOVEREIGN; STATE.

SOWNE. A corruption of the French *souvenu*, remembered. Estreats that are *sowne* are such as the sheriff may gather. Cowell. See ESTREATS.

SPADONES (Lat.). **In Civil Law.** Those who, on account of their temperament or some accident they have suffered, are unable to procreate. Inst. 1. 11. 9; Dig. 1. 7. 2. 1. And see IMPOTENCE.

SPAIN. A constitutional monarchy, based on the constitution of June 30, 1876. The descent of the crown is provided for, but if the line runs out, the Cortez shall elect a king. He has a body of responsible ministers. Royal decrees must also be signed by a minister. The legislative power is vested in a senate and chamber of deputies. The former consists of: 1. The princes, nobles with an income of over 60,000 pesetas and who are also grandees, captains-general of the army, admirals of the navy, the patriarch of the Indies, archbishops, cardinals and other high officers. 2. Life members appointed by the sovereign. 3. Members elected, three each by 49 provinces and the rest by academies, universities, dioceses and state corporations. The number of the first and second classes shall not exceed 180 and of the third class the same number. The deputies are elected by universal male suffrage, since June 29, 1890.

The laws are founded on the Roman law, the Gothic common law and the Code of 1501 (Leyes de Toro), now formulated in several codes. See CODE.

The supreme court sits at Madrid and rules on points of law. There are 15 audiencias territoriales, or courts of appeal, and 495 partidas judiciales, or courts of first instance. See Encycl. Br.

SPARSIM (Lat.). Here and there; in a scattered manner; sparsely; dispersedly. For example, the plaintiff may recover the place wasted, not only where the injury has been total, but where trees growing *sparsim* in a close are cut. Bac. Abr. *Waste* (M).

SPEAKER. The title of the presiding officer of the house of representatives of the United States. The position is one of great importance, as the speaker appoints the standing committees of the house. The presiding officer of either branch of the state legislature generally is called the speaker.

See Hinds, Rules of the House of Representatives.

Both houses of parliament are presided over by a speaker. That of the House of Lords is commonly the Lord Chancellor, or Lord Keeper of the Great Seal, though the latter office is practically merged in that of Lord Chancellor. This is by prescription. Or the appointment may be by royal commission. In the commons, he is elected by the house, with the approval of the crown. He holds over from one parliament to another, without regard to the political complexion of the majority of the house. He never votes, except when the votes are equal, nor debates, but when the house is in committee, the speaker leaves the chair, and may then address the committee. In the lords, if he be a peer, he has a vote with the rest of the house. See May, P. L. ch. 7. The first speaker of the house was in 1377.

See QUORUM; PROLOCUTOR; MacConochie, Congressional Committees; Follett, The Speaker; 2 Steph. Com. 483.

SPEAKING DEMURRER. **In Pleading.** One which alleges new matter in addition to that contained in the bill as a cause for demurrer. 4 Bro. C. C. 254; 2 Ves. 83; Brooks v. Gibbons, 4 Paige (N. Y.) 374; Ramage v. Towles, 85 Ala. 589, 5 South. 342.

SPEAKING WITH PROSECUTOR. A kind of imparlance, allowed in English practice, where the court permits a defendant convicted of a misdemeanor to speak with the prosecutor before judgment is pronounced; if the prosecutor declares himself satisfied, the court may inflict a trivial punishment. It applies chiefly to offences affecting the individual, as battery, etc. 4 Steph. Com. 209.

SPECIAL. That which relates to a particular species or kind; opposed to general: as, special verdict and general verdict; special imparlance and general imparlance; special jury, or one selected for a particular case, and general jury; special issue and general issue, etc.

The meaning of special, as used in a constitutional provision authorizing the legislature to confer jurisdiction in *special cases*, has been the subject of much discussion in the court of appeals of the state of New

York. See Kundolf v. Thalheimer, 12 N. Y. 593; Arnold v. Rees, 18 N. Y. 57.

SPECIAL ACCEPTANCE. The qualified acceptance of a bill of exchange, as payable at a particular place, and there only. Byles, Bills 260. See ACCEPTANCE.

SPECIAL ACT. See STATUTE.

SPECIAL AGENT. One authorized to do one or two special things. Ross, Cont. 44. One appointed only for a particular purpose, and vested with limited powers. Chit. Cont. 285; Gibson v. Hardware Co., 94 Ala. 346, 10 South. 304.

It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind his principal beyond what he is authorized to do; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219. Story, Ag. 17. See PRINCIPAL AND AGENT.

SPECIAL ASSESSMENTS. They differ from general taxation, in that they are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. Ittner v. Robinson, 35 Neb. 133, 52 N. W. 846.

SPECIAL ASSUMPSIT. An action of assumpsit brought on a special contract, which the plaintiff declares upon setting out its particular language or its legal effect.

It is distinguished from a general assumpsit, where the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a debt arising out of the execution of the contract, where that constitutes the debt. 3 Bouvier, Inst. n. 3426.

SPECIAL BAIL. See BAIL; BILL OF MIDDLESEX.

SPECIAL BAILIFF. A bound bailiff (*q. v.*).

SPECIAL BASTARD. One whose parents afterwards intermarry. 3 Bla. Com. 335.

SPECIAL CASE. See CASE STATED.

SPECIAL COMMISSION. An extraordinary commission of oyer and terminer and gaol delivery, issued by the crown to the judges when it is necessary that offences should be immediately tried and punished. Whart. Law Lex.

SPECIAL CONSTABLE. One who has been appointed a constable for a particular occasion, as in the case of an actual tumult or a riot, or for the purpose of serving a particular process.

SPECIAL COUNT. As opposed to the common counts, in pleading, a special count is a statement of the actual facts of the particular case.

SPECIAL CUSTOM. A particular or local custom. Bodfish v. Fox, 23 Me. 95, 39 Am. Dec. 611. See CUSTOM.

SPECIAL DAMAGES. See MEASURE OF DAMAGES.

SPECIAL DEMURRER. See DEMURRER.

SPECIAL DEPOSIT. A deposit made of a particular thing with the depositary: it is distinguished from an irregular deposit.

A deposit made with the understanding that the identical money deposited shall be returned to the depositor. Mutual Accident Ass'n v. Jacobs, 43 Ill. App. 340.

When a thing has been specially deposited with a depositary, the title to it remains with the depositor, and if it should be lost the loss will fall upon him. When, on the contrary, the deposit is irregular, as where money is deposited in a bank, the title to which is transferred to the bank, if it be lost, the loss will be borne by the bank. This will result from the same principle: the loss will fall in both instances, on the owner of the thing, according to the rule *res periit domino*. See Edw. Bailm. 48; BAILMENT.

SPECIAL ERRORS. Special pleas in error are those which assign for error matters in confession and avoidance, as a release of errors, the act of limitations, and the like, to which the plaintiff in error may reply or demur. See PLEA.

SPECIAL EXAMINER. An examiner appointed by a court of equity in a particular case. See EXAMINERS IN CHANCERY.

Any fit person may be a special examiner. The taking of testimony by a special examiner is conducted in the same manner as before a standing examiner in chancery. The examination should take place in the presence of the parties and their attorneys; the testimony is, under the English chancery practice, taken in the narrative form, and the examiner may take down the questions and answers if he thinks fit; he cannot pass upon the materiality or relevancy of any question. When there is an objection, it should be noted, and the examiner will state his opinion thereon to the attorney and refer to it in the depositions.

The depositions should not be prepared beforehand; Hickok v. Bank, 35 Vt. 476. Formerly it was considered that the whole of the deposition should be written down by the examiner, with his own hand; 1 Dan. Ch. Pr. *906; but such is not now the usual practice. An examiner is a ministerial officer and has no power to lay down rules as to the most convenient time of taking examinations; L. R. 16 Eq. 102. He may exclude the public from the hearings; 1 Dan. Ch. Pr. *906. Subpœnas may issue to bring witnesses before him. If an examiner in England dies, his successor may sign the deposition; 1 Dan. Ch. Pr. *910. If the witness refuse to

sign his deposition, the examiner signs it. See EXAMINERS IN CHANCERY; DEPOSITIONS.

SPECIAL EXECUTION. A copy of a judgment with a direction to the sheriff indorsed thereon to execute it. Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

SPECIAL FINDING. Where a jury find specially a particular fact, presumably material to the general question before them, but which does not involve the whole of that question. Moz. & W. The special findings referred to in the Revised Statutes, § 700, is not a report of the evidence, but it must be like the special verdict of a jury, a finding of the ultimate facts which the evidence establishes; Mercantile Trust Co. v. Wood, 60 Fed. 346, 8 C. C. A. 658, 19 U. S. App. 567.

Special findings have the same weight and must be given the same effect as like findings by the court if a jury had been waived; Metropolitan Nat. Bank v. Jansen, 108 Fed. 572, 47 C. C. A. 497.

SPECIAL IMPARLANCE. In Pleading. An imparlance which contains the clause, "saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid." 2 Chitty, Pl. 407. See IMPARLANCE.

SPECIAL INDORSEMENT. An indorsement in *full*, which, besides the signature of the indorser, expresses in whose favor the indorsement is made; thus "Pay C D, or order, A B." See Byles, Bills, 15th ed. 172; Tiedm. Com. Paper 266.

In English practice, under the Judicature Act of 1875, a special indorsement on a writ of summons is one which may be made in all cases where a definite sum of money is claimed. When the writ is thus indorsed and the defendant does not appear within the time appointed, the plaintiff may then sign final judgment for any sum not exceeding that indorsed on the writ. See 3 Steph. Com., 530. See INDORSEMENT.

SPECIAL INJUNCTION. An injunction obtained only on motion, usually with notice to the other party. It is applied for sometimes on affidavit before answer, and frequently upon merits disclosed in the defendant's answer. See INJUNCTION.

SPECIAL ISSUE. In Pleading. A plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. It differs from the general issue which traverses or denies the whole declaration or indictment. Gould, Pl. c. 2, § 38. See GENERAL ISSUE; ISSUE.

SPECIAL JURY. One selected in a particular way by the parties. See JURY.

SPECIAL LAWS. See STATUTE; GENERAL LAWS.

SPECIAL LEGISLATION. See GENERAL LAWS; STATUTE.

SPECIAL LICENSE. One granted by the Archbishop of Canterbury to authorize a marriage at any time or place. 2 Steph. Com. 247.

SPECIAL MATTER. Under a plea of the general issue, a defendant may, instead of pleading specially, give the plaintiff notice, that on the trial he will give some special matter, of such and such a nature, in evidence.

Such notice is not required in an action on a sealed instrument where consideration need not be averred in the declaration, except when a failure of consideration is set up as an equitable defence.

Notice of special matter is required by R. S. § 4920 in actions at law on letters patent, in some cases. It must be given thirty days "before trial," which is said to be before the opening of the term. See 3 Rob. Pat. § 1019. But the latter statement is certainly not the usual practice.

See PLEA; PLEADING.

SPECIAL NON EST FACTUM. The name of a plea by which the defendant says that the deed which he has executed is not his own or binding upon him, because of some circumstance which shows that it was not intended to be his deed, or because it was not binding upon him for some lawful reason.

SPECIAL OCCUPANT. When an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed, and is called a special occupant. 2 Bla. Com. 259. In the United States the statute provisions of the different states vary considerably upon this subject. In New York and New Jersey, special occupancy is abolished. Virginia, and probably Maryland, follow the English statutes. In Massachusetts and other states, where the real and personal estates of intestates are distributed in the same way and manner, the question does not seem to be material; 4 Kent 27.

SPECIAL PAPER. A list kept in the courts of common law, and afterwards in the Queen's Bench Division of the High Court, in which list special cases, etc., to be argued are set down. Whart. Law Lex.

SPECIAL PARTNERSHIP. See PARTNERSHIP.

SPECIAL PLEA IN BAR. See PLEA.

SPECIAL PLEADER. In English Practice. A lawyer whose professional occupation is to give verbal or written opinions upon statements submitted to him, either in writing or verbally, and to draw pleadings, civil or criminal, and such practical proceedings as may be out of the general course. 2 Chitty, Pr. 42.

Special pleaders were not necessarily at the bar; but those that were not required to take out annual certificates under 33 & 34 Vict. c. 97, §§ 60, 63; Moz. & W.

SPECIAL PLEADING. The allegation of special or new matter to avoid the effect of the previous allegations of the opposite par-

ty, as distinguished from a direct denial of matter previously alleged on the opposite side. Gould, Pl. c. 1, § 18; Gelston v. Hoyt, 3 Wheat. (U. S.) 246, 4 L. Ed. 381; Com. Dig. *Pleader* (E 15); Steph. Pl., And. ed. 240, n. See PLEADING, SPECIAL.

SPECIAL PROPERTY. That property in a thing which gives a qualified or limited right. See PROPERTY.

SPECIAL REQUEST. A request actually made, at a particular time and place; this term is used in contradiction to a general request, which need not state the time when nor place where made. 3 Bouvier, Inst. n. 2843.

SPECIAL RULE. See RULE OF COURT.

SPECIAL SESSIONS. See SESSIONS OF THE PEACE.

SPECIAL TAIL. See ESTATE TAIL.

SPECIAL TERM OR TERMS. See TERM.

SPECIAL TRAVERSE. See TRAVERSE.

SPECIAL TRUST. A special trust is one where a trustee is interposed for the execution of some purpose particularly pointed out, and is not, as in case of a simple trust, a mere passive depositary of the estate, but is required to exert himself actively in the execution of the settler's intention: as, where a conveyance is made to trustees upon trust to reconvey, or to sell for the payment of debts. Lew. Tr. 3, 16. See TRUST.

SPECIAL VERDICT. A special verdict is one by which the facts of the case are put on the record, and the law is submitted to the judges. An agreed statement of facts may be the equivalent of a special verdict; U. S. Trust Co. v. N. M., 183 U. S. 535, 22 Sup. Ct. 172, 46 L. Ed. 315.

Acts providing for special verdicts are not violative of the right of trial by jury; Adams' Adm'r v. R. Co., 82 Ky. 603; Walker v. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; Pittsburg, C., C. & St. L. R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873.

See VERDICT; Bac. Abr. *Verdict* (D).

SPECIALTY. A writing sealed and delivered, containing some agreement or promise. Taylor v. Glaser, 2 S. & R. (Pa.) 503; 1 P. Wms. 130. A writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. Bac. Abr. *Obligation* (A).

Although in the body of the writing it is not said that the parties have set their hands and seals, yet if the instrument be really sealed it is a specialty, and if it be not sealed it is not a specialty, although the parties in the body of the writing make mention of a seal; Taylor v. Glaser, 2 S. & R. (Pa.) 504; 2 Co. 5 *a*.

A specialty was the contract itself. If it was lost the right of action on it was lost. In the 17th century, chancery, upon the obligee's affidavit of the loss or destruction of the instrument, compelled the obligor to perform his duty; a century later the common law judges decided that if profert of a specialty was impossible by reason of its loss, the plaintiff might recover upon secondary evidence of its contents. 3 T. R. 151. See Ames, Lect. Leg. Hist. 104.

See BOND; DEBT; OBLIGATION; SEAL.

SPECIE. Metallic money issued by public authority. See also IN SPECIE.

This term is used in contradistinction to paper money, which in some countries is issued by the government, and is a mere engagement which represents specie. In cases of salvage, specie on board is treated like any other cargo; 1 Pet. Adm. 416; 44 L. T. Rep. N. S. 254; The St. Paul, 86 Fed. 340, 30 C. C. A. 70. See 15 Am. L. Rev. 416; SALVAGE.

SPECIFIC GRAVITY. The ratio of the weight of a body to the weight of an equal volume of some other body, taken as the standard or unit. This standard is usually distilled water for liquids and solids, and air for gases. Louisville Public Warehouse Co. v. Collector of Customs, 49 Fed. 561, 1 C. C. A. 371, 6 U. S. App. 53.

SPECIFIC LEGACY. See LEGACY.

SPECIFIC PERFORMANCE. The actual performance of a contract by the party bound to fulfil it. As the exact fulfilment of an agreement is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance; Waterm. Spec. Perf. § 1.

Many contracts are entered into by parties to fulfil certain things, and then the contracting parties neglect or refuse to fulfil their engagements. In such cases the party aggrieved has generally a remedy at law, and may recover damages for the breach of the contract; but in many cases the recovery of damages is an inadequate remedy, and the party seeks to recover a specific performance of the agreement.

It is a general rule that courts of equity will entertain jurisdiction for a specific performance of agreements, whenever courts of law can give but an inadequate remedy; and it is immaterial whether the subject relate to real or personal estate; 2 Story, Eq. § 717; Pom. Contr. 28; 1 S. & S. 607; 1 P. Wms. 570; Porter v. Water Co., 84 Me. 195, 24 Atl. 814. But the rule is confined to cases where courts of law cannot give an adequate remedy; Finley v. Aiken, 1 Grant Cas. (Pa.) 83; Justices of Inferior Court of Dougherty Co. v. Croft, 18 Ga. 473; 2 Story, Eq. Jur. § 718; if there is an adequate legal remedy, the court will refuse specific performance, unless under all the circumstances it would be inequitable and unjust to do so; Simon v. Wildt, 84 Ky. 157; Knott v. Mfg. Co., 30 W. Va. 790, 5 S. E. 266.

Specific performance is not of absolute right, but one which rests entirely in judicial discretion; exercised according to the settled

principles of equity and with reference to the facts of the particular case, and not arbitrarily or capriciously; Wesley v. Eells, 177 U. S. 370, 20 Sup. Ct. 661, 44 L. Ed. 810; Hennessy v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Barrett v. Forney, 82 Va. 269; Ramsay v. Gheen, 99 N. C. 215, 6 S. E. 75; King v. Gsantner, 23 Neb. 795, 37 N. W. 654; it rests in judicial discretion, based upon settled principles of equity, and with reference to the particular facts. If based on part performance, the acts done must be such that damages would not be adequate relief; Haffner v. Dobrinski, 215 U. S. 446, 30 Sup. Ct. 172, 54 L. Ed. 277.

A vendor of real estate may either sue at law for the purchase-money or resort to equity for specific performance; Raymond v. Land & Water Co., 53 Fed. 883, 4 C. C. A. 89, 10 U. S. App. 601. An action at law for breach of contract to convey real estate is not an adequate remedy, and the existence of the right to it does not forbid the maintenance of a suit for specific performance; Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; nor is it an adequate remedy for a failure to execute a trust; Rogers v. Mining Co., 154 Fed. 606, 83 C. C. A. 380. Equity will take jurisdiction for specific performance to avoid multiplicity of suits; Grand Trunk W. Ry. Co. v. R. Co., 141 Fed. 785, 73 C. C. A. 43; where damages are not susceptible of proof; American Fisheries' Co. v. Lennen, 118 Fed. 869; to enforce a compromise agreement between heirs where there is already a right of action in the probate court; Blount v. Wheeler, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; or a contract for the purchase of waterworks by a city, where the remedy at law is clearly inadequate; Castle Creek Water Co. v. Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; the objection of an adequate remedy at law may be raised at any stage of the proceedings either by the parties or the court; Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360; Kane v. Luckman, 131 Fed. 609.

As the doctrine of a specific performance in equity arises from the occasional inadequacy of the remedy at law upon a violated contract, it follows that the contract must be such a one as is binding at law; Evans v. Kittrell, 33 Ala. 449; Kleinhaus v. Jones, 68 Fed. 742, 15 C. C. A. 644, 37 U. S. App. 185; and where the existence of a contract is in doubt, equity will not, as a rule, decree specific performance, especially when it appears that the property in question was rapidly rising in value; De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956 (but a mere denial of the contract will not prevent its specific performance; Sprague v. Jessup, 48 Or. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. [N. S.] 410); and it must be executory, certain in its terms, and fair in all its parts.

The adequacy of consideration is to be measured by the breadth of plaintiff's undertaking; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582. Mere inadequacy of consideration will not be sufficient for withholding specific performance; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120; Townsend v. Blanchard, 117 Ia. 36, 90 N. W. 519; Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938; but where the consideration is grossly inadequate, equity will not enforce the contract; *id.*; 2 Ves. Sr. 125; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; Rogers Locomotive & Mach. Works v. Helm, 154 U. S. 610, 14 Sup. Ct. 1177, 22 L. Ed. 562; Barrett v. Geisinger, 148 Ill. 98, 35 N. E. 354; Briles v. Goodrich, 116 Ia. 517, 90 N. W. 354; Pennybacker v. Maupin, 96 Va. 461, 31 S. E. 607; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120; where there is a promise of support for life contained in a letter proposing marriage, and the marriage is subsequently entered into by the parties, equity will specifically enforce the terms; Offutt v. Offutt, 106 Md. 236, 67 Atl. 138, 12 L. R. A. (N. S.) 232, 124 Am. St. Rep. 491.

It must also be founded upon a valuable consideration, and its performance in *specie* must be practicable and necessary; and, if it be one of the contracts which is embraced in the statute of frauds, it must be evidenced in writing; 2 Story, Eq. Jur. § 751; Adams, Eq. 77.

The *first* requisite is that the contract must be founded *upon a valuable consideration;* Shields v. Trammell, 19 Ark. 51; either in the way of benefit bestowed or of disadvantage sustained by the party in whose favor it is sought to be enforced; Society for Establishing Useful Manufactures v. Butler, 12 N. J. Eq. 498; and this consideration must be proved even though the contract be under seal; Thompson v. Allen, 12 Ind. 539; Short v. Price, 17 Tex. 397; a promise against a promise is not such a consideration as will support a decree of specific performance, nor does the presence of seals import such a consideration; Winter v. Goebner, 2 Colo. App. 259, 30 Pac. 51. The consideration must be strictly a valuable one, and not one merely arising from a moral duty or affection, as towards a wife and children; although it need not necessarily be an adequate one; Adams, Eq. 78. See Moore v. Pierson, 6 Ia. 279, 71 Am. Dec. 409; Jones v. Tyler, 6 Mich. 364.

The contract must be clearly and unequivocally proved and its subject matter, consideration and all other essentials must be specific and unambiguous; Pressed Steel Car Co. v. Hansen, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; and so where the description is sufficiently definite to

enable the court to determine with certainty what property was intended to be conveyed; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582; or to enable the vendee to find and examine it; Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; the court must be satisfied with the truth of the allegations of the complaint; Sprague v. Jessup, 48 Or. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. (N. S.) 410.

The *second* requisite is that the *mutual enforcement* of the contract must be practicable; for if this cannot be judicially secured on both sides, it ought not to be compelled against either party. Among the cases which the court deems impracticable is that of a covenant by a husband to convey his wife's land, because this cannot be effectuated without danger of infringing upon that freedom of will which the policy of the law allows the wife in the alienation of her real estate; 2 Story, Eq. Jur. § 731; Meason v. Kaine, 63 Pa. 335. See Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. To justify a decree the proof must be clear both as to the existence of the agreement and the terms. Equity will not enforce a contract in favor of an employer as against an employé which is against conscience; Dalzell v. Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749. And the contract must be mutual at the time it is entered into; Dodson v. Hays, 29 W. Va. 577, 2 S. E. 415; and specific performance of a contract will not be enforced, unless the remedy as well as the obligation is mutual, and alike attainable by both parties to the agreement; Iron Age Publishing Co. v. Tel. Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; Gold v. Ins. Co., 73 Cal. 216, 14 Pac. 786. If one of the parties cannot be specifically ordered to perform his part of the agreement there is not the requisite mutuality of remedy for equity to take jurisdiction; General Electric Co. v. Mfg. Co., 144 Fed. 458; Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344; Soloman v. Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391; contracts for personal services when lacking in mutuality of remedy cannot be specifically enforced; Brooklyn Baseball Club v. McGuire, 116 Fed. 782; Taussig v. Corbin, 142 Fed. 660, 73 C. C. A. 656; but where there has been full performance by one party equity will enforce the contract against the other party; Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707; mutuality of remedy does not require that each party should have precisely the same remedy; Phila. Ball Club, Ltd., v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627.

The *third* requisite is that the enforcement in *specie* must be necessary; that is, it must be really important to the plaintiff, and not oppressive to the defendant; Society for Establishing Useful Manufactures v. Butler, 12 N. J. Eq. 498. However strong, clear, and emphatic a contract may be, and however plain the right at law, specific performance will not be decreed if it would cause a result harsh, inequitable, or contrary to good conscience; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; see Pope Mfg. Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. Ed. 414; and the court is not bound to shut its eyes to the evident character of the transaction; it will never lend its aid to carry out an unconscionable bargain, but will leave a party to his remedy at law; Randolph v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; nor where it would work hardship to the defendant; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120.

Specific performance was refused of a contract for an unexpired term of years by which one party agreed to perform continuous mechanical services (in the generation of electricity), demanding the highest degree of skill, and the other to maintain costly machinery and the daily use of cars moved by electricity on the line of its railway; Electric Lighting Co. of Mobile v. R. Co., 109 Ala. 190, 19 South. 721, 55 Am. St. Rep. 927. Mere inadequacy of consideration is not necessarily a bar to a specific performance of a contract; but if it be so great as to induce the suspicion of fraud or imposition, equity will refuse its aid to the party seeking to enforce, and leave him to his remedy at law; Lloyd v. Wheatly, 55 N. C. 267. This is upon the ground that the specific enforcement of the contract would be oppressive to the defendant. The court will equally withhold its aid where such enforcement is not really important to the plaintiff, as it will not be in any case where the damages which he may recover at law will answer his purpose as well as the possession of the thing which was contracted to be conveyed to him; Adams, Eq. 83. As a general rule, a contract to convey real estate will be specifically enforced; unless the title thereto is not marketable; Wesley v. Eells, 177 U. S. 370, 20 Sup. Ct. 661, 44 L. Ed. 810; Cornell v. Andrews, 35 N. J. Eq. 7; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736; Beer v. Leonard, 40 La. Ann. 845, 5 South. 257; while one for the transfer of personal chattels will ordinarily be denied any relief in equity; Waterm. Spec. Perf. § 16; Scott v. Billgerry, 40 Miss. 119. An instrument defective as a deed will not be enforced as a contract to convey, if no valuable consideration passed between the parties; Tunison v. Bradford, 49 N. J. Eq. 210, 22 Atl. 1073.

Even in the case of personal property, if the plaintiff has not an adequate remedy at law, equity will take jurisdiction; and more willingly in America than in England; Story,

Eq. Jur. § 724; Bisph. Eq. 368. When goods were sold and there were no other similar goods in the market, a disposal of them by the seller has been enjoined; 33 L. J. Q. B. 335. Equity will decree the specific delivery of goods of a peculiar value; as heirlooms; 10 Ves. 139; an ancient silver altar; 3 P. Wms. 390; the celebrated Pusey horn; 1 Vern. 273; the decorations of a lodge of Freemasons; 6 Ves. 773; a faithful family slave; Williams v. Howard, 7 N. C. 74.

Specific performance of a contract for the purchase of stock for the purpose of getting control of a corporation was refused in Appeal of Foll, 91 Pa. 436, 36 Am. Rep. 671, and in Rigg v. Ry. Co., 191 Pa. 298, 43 Atl. 212; also where the vendor had transferred the shares to another person; Summerlin v. Mining & Milling Co., 41 Fed. 249; Chaffee v. R. Co., 146 Mass. 224, 16 N. E. 34; but it was decreed where the persons to whom such stock was transferred were made parties and it was alleged that they had knowledge of the prior contract; Northern Cent. R. Co. v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683.

Specific performance may be decreed where the value of the stock is not easily ascertainable or it can not be obtained readily elsewhere, or where there is some particular and reasonable cause for the vendee's requiring the stock to be delivered; Gottschalk v. Stein, 69 Md. 51, 13 Atl. 625; Treasurer v. Mining Co., 23 Cal. 390; Byers v. R. Co., 13 Colo. 556, 22 Pac. 951; Manton v. Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811; as where it has risen in value, if it were purchased with the party's own money; Emigrant Industrial Sav. Bk. v. Roche, 93 N. Y. 377; or where there was an agreement on a valuable consideration by certain stockholders to assign a specified per cent. of their stock to another, on the ground that the action was to enforce a trust; Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668; and to the same effect when the action was to enforce a trust; Draper v. Stone, 71 Me. 175; Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Rep. 621. If there is any good reason why damages for conversion will not be an adequate remedy, specific performance will be granted; Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668; or where the stock has a unique or special value; Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776; Cushman v. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; or has never been placed on the market and the holder has died after making an agreement that the company may elect to take his shares at a value to be determined by appraisement; New England T. Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; or where the agreement for transfer of shares forms part of a contract for the sale of land; Leach v. Fobes, 11 Gray (Mass.) 506, 71 Am. Dec. 732.

Specific performance of a contract to subscribe for stock in a corporation to be incorporated was refused; Strasburg R. Co. v. Echternacht, 21 Pa. 220, 60 Am. Dec. 49; but was decreed in Austin v. Gillaspie, 54 N. C. 261, on the ground that the remedy at law was inadequate, and it was refused because there was an adequate remedy at law in Hissam v. Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; and Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97. It was decreed where the stock was necessary to the corporation in order that the purpose of its charter might be fulfilled; Norristown Traction Co. v. Slingluff, 7 Montg. Co. Law Rep'r (Pa.) 83; and where the stock was in payment for work done which gave it its only value, and it had no general market value; Altoona Electrical, Engineering & Supply Co. v. R. Co., 126 Fed. 559.

Equity will not enforce a contract to sell cows, where there is no evidence of distinctive or peculiar value; Kane v. Luckman, 131 Fed. 609; it will enforce a contract of insurance which is in the nature of an agreement to grant an annuity; Mutual Life Ins. Co. of New York v. Blair, 130 Fed. 971.

A covenant for a renewal of a lease, which is indefinite as to the length of the term and rental to be paid, cannot be enforced specifically; Bamman v. Binzen, 65 Hun (N. Y.) 39, 19 N. Y. Supp. 627; nor a contract which is perpetual; Texas & P. Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385. Equity will not entertain a suit to enjoin violation of a continuous contract; Berliner Gramophone Co. v. Seaman, 110 Fed. 30, 49 C. C. A. 99, nor will it enforce a contract which requires continuous supervision by the court; United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., 194 Fed. 947, 114 C. C. A. 583; York Haven Water & Power Co. v. York Haven Paper Co., 201 Fed. 270, 119 C. C. A. 508; even though its jurisdiction would obviate a multiplicity of suits; Lone Star Salt Co. v. R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828; *contra*, Taylor v. R. Co., 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472, where contracts relating to the operation of railroads were specifically enforced; but if a contractual relation has existed between the parties for nearly 50 years, equity will take jurisdiction to prevent a threatened termination of it; Western Union Tel. Co. v. Pa. Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968.

A right to use a right of way under a traffic agreement between two railroad companies will be enforced in equity; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; and a contract between railroad companies for the joint use of a bridge and seven miles of track; Union Pac. R. Co. v. R. Co., 51 Fed. 309, 2 C. C. A. 174; or a contract by which one had acquired the right to use a part of the other party's railroad line for 999 years; Grand Trunk W. R. Co. v. R. Co., 141

Fed. 785, 73 C. C. A. 43. Option contracts for the purchase or sale of land may be enforced; Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394; and the rule of non-enforcement for want of mutuality has no application to such an option contract; *id.* A written option given for a valuable consideration will be specifically enforced; Marthinson v. King, 150 Fed. 48, 82 C. C. A. 360; absence of consideration may be shown, notwithstanding the instrument is sealed; Rude v. Levy, 43 Colo. 482, 96 Pac. 560, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123. Where the option has not been converted into a binding contract by acceptance according to its provisions, specific performance thereof cannot be enforced; Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

Where time is of the essence of a contract, specific performance will not be decreed after the lapse of the time specified; but it is otherwise when time is not of the essence of the contract; Myers v. League, 62 Fed. 654, 10 C. C. A. 571.

Specific performance of a contract to give security for a debt may be decreed in some cases; as where a mortgage was released under an agreement to execute another mortgage to the releasor; Irvine v. Armstrong, 31 Minn. 216, 17 N. W. 343; and where the purchaser had agreed to execute a mortgage for the purchase money to the vendor and refused to do so; Boston v. Nichols, 47 Ill. 353. It will be decreed of contracts to execute chattel mortgages; Tiernan v. Granger, 65 Ill. 351; Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 Atl. 732.

Equity will not enjoin the running of trains over the main line of a railroad in order to enforce a specific agreement where the rights of the public requiring uninterrupted service would be interfered with; Taylor v. R. Co., 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472.

A court of equity will not refuse to enforce a contract specifically which was fair when made, by reason of the increase in value of the subject-matter; Meehan v. Nelson, 137 Fed. 731, 70 C. C. A. 165. Where the vendee bought property for $300, and paid one dollar down and then did nothing for nine years, and it appeared that the property had reached a value of $15,000, specific performance was refused; McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 256.

Equity will enforce a contract for the exclusive rights under letters patent, and will enjoin the breach of a negative covenant; Hapgood v. Rosenstock, 23 Fed. 86; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; Satterthwait v. Marshall, 4 Del. Ch. 337; Corbin v. Tracy, 34 Conn. 325; including a contract to assign all future inventions relating to a certain art; Appeal of Reese, 122 Pa. 392, 15 Atl. 807; although the agreement be oral; Searle v. Hill, 73 Ia. 367, 35 N. W. 490, 5 Am. St. Rep. 688; but not if the contract be unconscionable; Pope Mfg. Co. v. Gormully, 34 Fed. 877.

A parol agreement to assign the right to a patent for an invention may be specifically enforced; Pressed Steel Car Co. v. Hansen, 128 Fed. 444; and so where the inventor was an employé of the complainant, although the employment was terminable at any time by either party on notice; Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707; but where the plaintiff has an application pending for a patent covering the same invention as that of the defendant and interference proceedings have been taken, equity will not compel the specific performance of the contract to assign; Hildreth v. Thibodeau, 117 Fed. 146.

When the statute of frauds requires that a contract shall be evidenced in writing, that will be a *fourth* requisite to the specific execution of it. In such case the contract must be in writing and certain in its terms; but it will not matter in what form the instrument may be, for it will be enforced even if it appear only in the consideration of a bond secured by a penalty; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; 2 Story, Eq. Jur. § 751. The specific performance of a parol contract to convey land cannot be enforced if defendant urges the statute of frauds; Pitt v. Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

Equity will not decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title; Kennedy v. Hazelton, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576. Where the record title is defective, and parol evidence would be required to sustain it (the title not being good by the statute of limitations), specific performance will not be decreed; McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527. Georgia courts refuse to follow this rule in its strictness; Cowdery v. Greenlee, 126 Ga. 786, 55 S. E. 918, 8 L. R. A. (N. S.) 137, where a deed was not duly attested and was therefore not recordable.

If it appear that the want of title was known to the plaintiff when he began suit, the bill will not be retained for the assessment of damages, but the plaintiff will be left to his remedy at law; Kennedy v. Hazelton, *supra*. A description of land in the contract sufficient to enable the vendee to find and examine it is sufficient to justify specific performance; Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210. A contract to convey property which one party may at any time acquire in the future, such party not having any property at the time of the contract, will not be enforced where the consideration is grossly inadequate to the value of the property subsequently acquired; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120.

Specific performance will be granted where the defendant, having contracted to buy certain land of the plaintiff, refused to perform on the ground that a widow more than seventy years of age might have children who would be entitled to an interest in the property, on the presumption that a woman of such advanced age is incapable of child-bearing; Whitney v. Groo, 40 App. D. C. 496.

In applying the equity of specific performance to real estate, there are some modifications of legal rules, which at first sight appear inconsistent with them and repugnant to the maxim that equity follows the law. The modifications here referred to are those of enforcing parol contracts relating to land, on the ground that they have been already performed in part; of allowing time to make out a title beyond the day which the contract specifies; and of allowing a conveyance with compensation for defects; Adams, Eq. 85; Bisph. Eq. 364.

The principle upon which it is held that part-performance of a contract will in equity take a case out of the operation of the statute of frauds, is that it would be a fraud upon the opposite party if the agreement were not carried into complete execution; Pom. Contr. 103; Hitchens v. Nougues, 11 Cal. 28; McCray v. McCray, 30 Barb. (N. Y.) 633; Watkins v. Watkins, 24 Ga. 402; Dickerson v. Chrisman, 28 Mo. 134; Godfrey v. Dwinell, 40 Me. 94. The act which is alleged to be part-performance must be done in pursuance of the contract and with the assent of the defendant. What will be a sufficient part-performance must depend on circumstances. The taking possession of the land and making improvements thereon will suffice; Hodges v. Howard, 5 R. I. 149; School Dist. No. 3 v. Macloon, 4 Wis. 79; Barrett v. Forney, 82 Va. 269; Sprague v. Jessup, 48 Or. 211; though the payment of a part or even the whole of the purchase-money will not; 4 Kent 451; Odell v. Montross, 68 N. Y. 499. See, however, Townsend v. Houston, 1 Harr. (Del.) 532, 27 Am. Dec. 732; Spear v. Orendorf, 26 Md. 37.

Equity will enforce a parol gift of land where there is possession and valuable improvements have been made thereon by the donee and the terms of the contract are clear and unequivocal; Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271; and so where a railroad corporation contracts to maintain a spur track and depot at a place upon the lands given by the complainant for that purpose, if the complainant, relying upon the promise, incurs great expense in improving his property; Taylor v. R. Co., 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472; but a parol agreement to devise real estate in consideration of support will not be enforced in the absence of possession and improvements, although the promisee furnished the support to the other party, who cared for the parents of both of them; Grindling v. Rehyl, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466. The mere finding that possession was taken, money expended, taxes paid and services rendered to the promisor by the promisee without a finding of the amount expended, or that the improvements were permanent, or the consideration of the services, will not justify specific performance of a contract to convey real estate; Price v. Lloyd, 31 Utah, 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870.

If the purchaser have entered and made improvements upon the land, and the vendor protect himself from a specific performance by taking advantage of the statute, the plaintiff shall be entitled to a decree for the value of his improvements; Boze v. Davis' Adm'r, 14 Tex. 331. The doctrine of part-performance is not recognized in some states; Luckett v. Williamson, 37 Mo. 388; Jacobs v. R. Co., 8 Cush. (Mass.) 223; Box v. Stanford, 13 Sm. & M. (Miss.) 93, 51 Am. Dec. 142.

Specific performance of a parol contract for the sale of lands will not be decreed, unless the terms of the contract clearly appear, and there is sufficient part performance to show that injustice would be done, if the contract was held inoperative; Williams v. Morris, 95 U. S. 444, 24 L. Ed. 360.

The doctrine of allowing time to make out a title beyond the day which the contract specifies, and which is embodied in the maxim that time is not of the essence of a contract in equity, has no doubt been generally adopted in the United States; Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592; Scarlett v. Hunter, 56 N. C. 84; Cooper v. Brown, 2 McLean 495, Fed. Cas. No. 3,191; Snyder v. Spaulding, 57 Ill. 480. But to entitle the purchaser to a specific performance he must show good faith and a reasonable diligence; Washburn v. Washburn, 39 N. C. 306. If during the vendor's delay there has been a material change of circumstances affecting the rights and interests of the parties, equity will not relieve; Tierman v. Roland, 15 Pa. 429. A bill to enforce a contract of a railroad company to locate a station on the land of complainant, more than sixteen years after the time of the agreement, during which time the company had built and maintained a station near the agreed place, will be dismissed; Thurmond v. R. Co., 140 Fed. 697, 72 C. C. A. 191.

The third equity, to wit, that of allowing a conveyance with compensation for defects, applies where a contract has been made for the sale of an estate, which cannot be literally performed *in toto*, either by reason of an unexpected failure in the title to part of the estate; Bell v. Thompson, 34 Ala. 633; Collins v. Smith, 1 Head (Tenn.) 251; Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453; of inaccuracy in the terms of the de-

scription, or of diminution in value by a liability to a charge upon it. In any such case, equity will enforce specific performance, allowing a just compensation for defects, whenever it can do so consistently with the principle of doing exact justice between the parties; Adams, Eq. 89. This doctrine has also been adopted in the United States. See 2 Story, Eq. Jur. 794; Leigh v. Crump, 36 N. C. Eq. 299; Swain v. Burnette, 76 Cal. 299, 18 Pac. 394. Although a vendor has agreed to sell more than he has, the vendee is entitled to take what he can give and to demand compensation for the remainder; Melin v. Woolley, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. (N. S.) 595.

A contract for the sale of land entered into under the belief by both parties that the vendor has title, when in fact he has none, will not be specifically enforced in equity; Hatch v. Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258. The fact that vendor's title is disputed by a third person gives him no right to refuse to convey such title as he has; and will not prevent a decree for specific performance; Bragg v. Olson, 128 Ill. 540, 21 N. E. 519. Where the seller is mistaken in believing that he will get an option on another piece of land from the buyer, equity will not specifically enforce the original contract, although the buyer was innocent of actual misrepresentation; Rudisill v. Whitener, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. (N. S.) 81.

When a vendor files a bill he must show a tender of the title and an offer to perform; McHugh v. Wells, 39 Mich. 175; that is a tender of a deed; Sowle v. Holdridge, 63 Ind. 213; Rude v. Levy, 43 Colo. 482, 96 Pac. 560, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123; Tiedem. Eq. Jur. 499; but it has been held that an offer of a deed in the bill is enough; Thomson v. Smith, 63 N. Y. 301; Winton v. Sherman, 20 Ia. 295; Brace v. Doble, 3 S. D. 110, 52 N. W. 586.

Where a vendee announces that he will not comply with his contract, the vendor need not tender a deed before suing for specific performance; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. See PERFORMANCE. And a vendee must show a tender of the purchase-money; Irvin v. Bleakley, 67 Pa. 24; McComas v. Easley, 21 Gratt. (Va.) 29; Short v. Kieffer, 142 Ill. 258, 31 N. E. 427. And such tender must not be delayed till circumstances have changed; Tarr v. Scott, 4 Brewst. (Pa.) 49. The vendee need not tender the purchase-money where the vendor refuses to consider the question of sale under the contract and denies any obligation thereunder; Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195.

A decree for specific performance will not be made against a vendor whose wife refuses to join in the conveyance; Appeal of Burk, 75 Pa. 141, 15 Am. Rep. 587. A contract of sale of land not signed by wife can only be enforced subject to her dower rights; her verbal agreement to convey made after her husband's death cannot be enforced; Schwoerdfeger v. Kelly, 223 Pa. 631, 72 Atl. 1056.

In a suit for specific performance, the plaintiff must show that he has performed, or was ready to perform, his part of the contract, and that he has not been guilty of laches or unreasonable delay, and where the proof leaves the case doubtful, the plaintiff is not entitled to a decree; Penn v. McCullough, 76 Md. 229, 24 Atl. 424; or where the plaintiff's performance is entirely optional and no offer of it is made; Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 57 C. C. A. 428. A contract of employment will be enforced against an employee if the employer has fully executed his part of the agreement: Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135, 6 Ann. Cas. 707.

Specific performance will not be decreed after an unreasonable delay; Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355, 32 L. Ed. 314; or where a party has been backward in claiming the relief, and has held off until circumstances have changed, so as to give him an opportunity to enforce or abandon the contract, as events might prove most advantageous; Ford v. Euker, 86 Va. 75, 9 S. E. 500; Bacon v. Hennessey, 35 Fed. 174; Requa v. Snow, 76 Cal. 590, 18 Pac. 862.

Specific performance of a contract to leave property by will will not be decreed, where the contract is made by a mere donee of a testamentary power of appointment; [1892] 3 Ch. 510. Specific performance of a contract to devise property in consideration of care and support will not be denied, where the complainant has fully performed her part, although the services rendered may not have been worth the value of the property: Warner v. Marshall, 166 Ind. 88, 75 N. E. 582; *contra*, Grindling v. Rehyl, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466, 12 Ann. Cas. 344.

When a definite contract to leave property by will has been clearly and certainly established and there has been performance on the part of the promisee, equity will grant relief, if the case be free from objection on account of inadequacy of consideration, and there are no circumstances or conditions which render the claim inequitable; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Berg v. Moreau, 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157; Anderson v. Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229; Winne v. Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647. The court will construe such an agreement, unless void under the statute of frauds or for other reasons, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee and to enforce such trust against the heirs of the deceased or others holding under them

charged with notice of the trust. It is in the nature of a covenant to stand seised to the use of the promisee, as if the promisor had agreed to retain a life estate in the property, with remainder to the promisee in the event that the promisor owns it at the time of his death, but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another otherwise than by will; Bolman v. Overall, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107.

Specific performance was decreed of a compromise agreement not to contest a will if the complainant were allowed to share in the estate; Blount v. Wheeler, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; under the English rule that "if an intending litigant *bona fide* forbears a right to litigate . . . he does give up something of value"; L. R. 32 Ch. Div. 266. The reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession; *id.*

Specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or where it is left in doubt whether the party against whom the relief is asked in fact made such an agreement; Hennessy v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; and performance will not be decreed unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms; Dalzell v. Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

A *feme covert* cannot maintain a bill for specific performance; Tarr v. Scott, 4 Brewst. (Pa.) 49.

A provision for liquidated damages does not defeat a right to specific performance; Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210; and equity will not grant pecuniary compensation in lieu of specific performance unless the case is one for equitable interposition; Marks v. Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, 12 Ann. Cas. 120.

Where equity has personal jurisdiction over the parties, it will decree specific performance of a contract relating to land situate in another jurisdiction; Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; White Star Min. Co. v. Hultberg, 220 Ill. 578, 77 N. E. 327; Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101.

Equity has no jurisdiction, in the absence of a statute, of a bill for specific performance of a contract to convey land within its jurisdiction upon service by publication, or service out of the jurisdiction upon a non-resident who does not appear; Spurr v. Scoville, 3 Cush. (Mass.) 578; Silver Camp Mining Co. v. Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, 3 Ann. Cas. 1000; Worthington v. Lee, 61 Md. 530; but a decree for a conveyance may be made effective, under a statute, by appointing a trustee to make the conveyance and to that end the proceedings are *in rem;* Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; a state may by statute confer jurisdiction in such cases where service is only by publication on a non-resident; Clem v. Given's Ex'r, 106 Va. 145, 55 S. E. 567; and the case of Arndt v. Griggs, 134 U. S. 316, seems to sustain this on principle. See Felch v. Hooper, 119 Mass. 52; and Merrill v. Beckwith, 163 Mass. 503, 40 N. E. 855; as to a statute in that state authorizing equity to appoint a trustee to convey land where the holder of the legal title is a non-resident. See generally Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A (N. S.) 924, 17 Ann. Cas. 853; Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. Rep. 168, 2 Ann. Cas. 819; the subject is fully discussed in these L. R. A. notes.

As to specific performance by injunction, see 6 Columbia Law Rev. 82. See 33 Am. L. Rev. 357, as to specific performance of a contract to accept title based on adverse possession. As to the enforcement of decrees for specific performance, see DECREE.

See, generally, Fry; Waterman, on Specific Performance.

Specific Performance of Negative Covenants Relating to Personal Service. It is a maxim of equity that it will not specifically enforce contracts of personal service, either at the suit of the servant; 3 De G. M. & G. 914 [1893] 1 Ch. 116; L. R. 1 Eq. 411; Miller v. Warner, 42 App. Div. 208, 59 N. Y. Supp. 956; Reid Ice Cream Co. v. Stephens, 62 Ill. App. 334; or of the master; 6 T. L. R. 488; Welty v. Jacobs, 171 Ill. 630, 49 N. E. 723, 40 L. R. A. 98. In the exercise of its jurisdiction over trusts, however, equity has sometimes enjoined the trustees of charity schools from dismissing the master; 14 Ves. Jr. 245; 13 Beav. 117; 7 Hare 532; 75 L. T. N. S. 265. The general rule stated does not result from a lack of power. When important public interests are in question, such agreements will be enforced; Southern Cal. R. Co. v. Rutherford, 62 Fed. 796, where it is held that employés of railroads, remaining in their employ, will be compelled by injunction to operate trains, though they have refused to do so because Pullman cars are hauled. Ordinarily, however, such relief is refused, either because of the practical inconvenience of enforcing it, or, as is sometimes said, because such action would result in imposing a state of slavery upon the servant, though this is hardly true unless the employment were for life or a very long time. Though equity will not enforce this sort of contract affirmatively, a chancellor will under certain conditions command obe-

dience to an auxiliary negative covenant, forbidding the servant to work elsewhere. To invoke such equitable jurisdiction the contract must be one for the breach of which the remedy at law is inadequate, though a provision for liquidated damages will not oust the jurisdiction of equity; Ames, Cas. in Eq., 125, n. The services must be of such unique character that a substitute cannot readily be obtained. The services should be "unique"; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; "special, unique and extraordinary"; Bronk v. Riley, 50 Hun (N. Y.) 489, 3 N. Y. Supp. 446; Strobridge Lithographing Co. v. Crane, 58 Hun (N. Y.) 611, 12 N. Y. Supp. 898; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Pom. Eq. Jur. § 1343; Jaccard Jewelry Co. v. O'Brien, 70 Mo. App. 432; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986; an employé in a factory of cutlery is held not to be sufficiently irreplaceable; nor an insurance agent; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986; nor an advertising solicitor; Johnston Co. v. Hunt, 66 Hun (N. Y.) 504, 21 N. Y. Supp. 314; nor a corset demonstrator; Gossard Co. v. Crosby, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115. See Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Dockstader v. Reed, 121 App. Div. 846, 106 N. Y. Supp. 795.

Equity has enjoined an acrobatic performer of great skill; Keith v. Kellermann, 169 Fed. 196; Russian dancers; Comstock v. Lopokowa, 190 Fed. 599; a seller of patterns; Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647; *contra*, Paxson v. Butterick Pub. Co., 136 Ga. 774, 71 S. E. 1105; but not a music teacher; Columbia College of Music & S. of D. Art v. Tunberg, 64 Wash. 19, 116 Pac. 280; and jurisdiction is not conferred by acknowledgment in the contract that the services are unique; Hammerstein v. Mann, 137 App. Div. 580, 122 N. Y. Supp. 276. It seems otherwise in England. In L. R. 16 Eq. 189, where an actor was restrained from appearing elsewhere during the time of his engagement, Malins, V. C., saying that he must treat this defendant "as if he were the greatest actor in the world." The English courts have never considered the quality of the services; 1 De G., M. & G. 604; L. R. 16 Eq. 189; 9 T. L. R. 265, where a ballet teacher restrained two of her pupils; [1891] 2 Ch. 416.

Where the subject matter gives jurisdiction, a negative covenant will usually not be implied from an affirmative one; [1891] 2 Ch. 428; though there may be circumstances under which equity, following the substance rather than the form, will imply a negative agreement from the context. In Finley v. Wagner, 1 De G., M. & G. 604, the leading case, Lord St. Leonards said: "I may at once declare that, if I had only to deal with the affirmative covenant, . . . I should not have granted any injunction." Nevertheless, in L. R. 16 Eq. 189, a broad negative covenant was implied, Malins, V. C., relying on other remarks of Lord St. Leonards. The decisions practically laid down the rule that a negative covenant could be implied where the employé covenanted to give up his whole time or to work exclusively for him or to render definite services on definite promises; see 3 Jur. N. S. 432; 33 Beav. 22; L. R. 16 Eq. 440; but these principles were limited somewhat in [1891] 2 Ch. 428, C. A. The present rule is that a definite negative agreement must be implied from the substance of the contract; L. R. 22 Ch. Div. 835; 75 L. T. N. S. 528.

In this country, the question is not settled. In some older cases a negative stipulation was not implied; Burton v. Marshall, 4 Gill (Md.) 487 45 Am. Dec. 171; Butler v. Galletti, 21 How. Prac. (N. Y.) 465; Mapleson v. Del Puente, 13 Abb. N. C. (N. Y.) 144; recent decisions have followed the rule now abolished in England; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Hoyt v. Fuller, 19 N. Y. Supp. 962; Lawrence v. Dixey, 119 App. Div. 295, 104 N. Y. Supp. 516.

That equity will lend its aid to enforce such negative stipulations, under the conditions stated *supra*, is settled in both countries; 9 T. L. R. 162; L. R. 43 Ch. Div. 165; [1891] 2 Ch. 416; 1 De G. M. & G. 604; 18 Ves. Jr. 437; [1894] 1 Q. B. 125; (*contra*, 6 Sim. 333, now overruled). An injunction was denied in a few early cases; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315; Burton v. Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; but modern decisions here give relief whenever the remedy at law would be inadequate; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; Jaccard Jewelry Co. v. O'Brien, 70 Mo. App. 432; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; Taylor Iron & Steel Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753; Keith v. Kellermann, 169 Fed. 196; Hammond v. Georgian Co., 133 Ga. 1, 65 S. E. 124; McCall Co. v. Wright, 133 App. Div. 62, 117 N. Y. Supp. 775; Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647; Comstock v. Lopokowa, 190 Fed. 599; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; Bailey v. Collins, 59 N. H. 459; see Rice v. D'Arville, 162 Mass. 559, 39 N. E. 180, leaving the question open.

An argument, not often pressed in the courts, that would seem to forbid a specific enforcement of even the negative stipulation, is based upon the principle of equity that contracts will not be specifically enforced unless they are mutual; equity must be able to grant the defendant its peculiar relief as well

as the plaintiff. If A has covenanted to convey land in return for B's personal services, A will not be ordered to convey, although the time for his performance has come, if B has not performed the services; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; Ames, Cas. in Equity 87; so if an opera singer is enjoined from singing for any one else, the manager should be compelled by the decree to allow the opera singer to sing for him, and when the complainant "fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved"; Wood, V. C., in 3 K. & J. 404. This, however, equity cannot do, because it cannot compel the manager to perform his part as he has agreed, and the result is that equity enforces its command upon a party to a contract whom in his turn, it cannot aid.

The defendant contracted to purchase from the plaintiff all the electrical energy that he might require in his hotel for five years; he was enjoined from purchasing electricity from any one else during the period; [1901] 2 Ch. 799.

See H. W. Gossard Co. v. Crosby, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115, where the cases are collected.

SPECIFICATIO. In Civil Law. The process by which, from material either of one kind or different kinds, either belonging to the person using them or to another, a new form or thing is created; as, if from gold or gold and silver a cup be made, or from grapes wine. Calvinus, Lex. Whether the property in the new article was in the owner of the materials or in him who effected the change was a matter of contest between the two great sects of Roman lawyers. Stair, Inst. p. 204, § 41; Mackeldey, Civ. Law § 241.

SPECIFICATION. A particular and detailed account of a thing. When used in the patent law without the word *claim*, it means the description and claims. Wilson v. Coon, 6 Fed. 611. See PATENT.

In Military Law. The clear and particular description of the charges preferred against a person accused of a military offence. Tytler, Courts-Mar. 109.

SPEECH. A formal discourse in public. The liberty of speech is guaranteed to members of the legislature, in debate, and to counsel in court.

The reduction of a speech to writing and its publication is a libel if the matter contained in it is libelous; and the repetition of it upon occasions not warranted by law, when the matter is slanderous, will be slander; and the character of the speaker will be no protection to him from an action; 1 Maule & S. 273; 1 Esp. 226. See DEBATE; LIBERTY OF SPEECH; SLANDER; LIBEL.

SPEED. The test of safe speed is whether it is such as allows the vessel to comply with the duty imposed on her and to avoid collision with other vessels in the situations in which she may reasonably expect to find them; The Luckenbach, 50 Fed. 129, 1 C. C. A. 489, 8 U. S. App. 9.

In a fog a vessel is bound to observe unusual caution and to maintain only such rate of speed as will enable her to come to a standstill by reversing her engines at full speed, before she shall collide with a vessel which she may see; The Laurence, 54 Fed. 542, 4 C. C. A. 501, 8 U. S. App. 312.

A vessel running fifteen knots an hour, when she strikes a fog bank, has not complied with the statutory requirements to go at moderate speed; The Saale, 63 Fed. 478, 11 C. C. A. 302, 26 U. S. App. 164.

Charter authority to enact and enforce such local, police, sanitary and other regulations as do not conflict with general laws, empowers a municipality to require railroads running through its limits to adopt such precautions as to speed of trains as may be needed for the safety of the public; Cincinnati, N. O. & T. P. R. Co. v. Com., 126 Ky. 712, 104 S. W. 771, 17 L. R. A. (N. S.) 561. This extends to interstate trains in the absence of congressional action; Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897.

An ordinance limiting the speed of trains on an interstate railway which carries United States mail, to 10 miles an hour within a city, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail; Peterson v. State, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651.

Running a railroad train 50 miles an hour over an ordinary country road crossing, for which the statutory signals have been given, is not negligence *per se;* Lake Shore & M. S. R. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778; mere speed is not enough to charge the company with negligence; Lehigh Val. R. Co. v. Dupont, 128 Fed. 840, 64 C. C. A. 478.

Operating a street car at a speed in excess of that prescribed by ordinance is of itself no evidence of negligence in an action for injuries caused by collision between a car and a pedestrian; Ford's Adm'r v. Ry., 124 Ky. 488, 99 S. W. 355, 8 L. R. A. (N. S.) 1093, 124 Am. St. Rep. 412. Consideration must be given to the character of the train, the devices which were employed to guard against accident, the condition of the roadbed, the sharpness of the curves and any other circumstances which would show whether the speed tended to increase such natural dangers; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860. But it is held that a railroad company is guilty of a nuisance in running its trains across a much used street in a town, wilfully, habitually and for an unreasonable length of time, at such an unreasonable and unsafe rate of speed as to endanger the lives and safety of persons us-

ing the crossing without customary and usual warning signals; Cincinnati, N. O. & T. P. R. Co. v. Com., 126 Ky. 712, 104 S. W. 771, 17 L. R. A. (N. S.) 561. If in view of all the attending circumstances the servants in charge of the train knew, or by the exercise of a very high degree of care and foresight ought to have known, that the rate of speed at which the train was running tended to increase the dangers which are naturally incident to railway travel, the railroad company would be guilty of negligence; Illinois Cent. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Mitchell v. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; St. Louis, I. M. & S. R. Co. v. Stewart, 68 Ark. 606, 61 S. W. 169, 42 Am. St. Rep. 311; 2 Hutchinson, Carriers, § 926.

Statements in regard to speed are mere expressions of opinion; Borneman v. R. Co., 19 S. D. 459, 104 N. W. 208; such evidence should be received with great caution; Hoppe v. R. Co., 61 Wis. 357, 21 N. W. 227; especially after a lapse of time, or when not based upon anything which especially attracted the witness' notice; The W. E. Gladwish, 17 Blatchf. 77, Fed. Cas. No. 17,355. The testimony of those who are not experts in such matters may, however, be received; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Northrup v. R. Co., 37 Hun (N. Y.) 295.

SPEEDY TRIAL. The right to a speedy trial in all criminal prosecutions is given under the United States constitution.

The speedy trial to which a person charged with crime is entitled under the constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial, and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial, and in such case a party confined, upon application by *habeas corpus*, is entitled to a discharge from custody; U. S. v. Fox, 3 Mont. 512.

SPELLING. The art of putting the proper letters in words in their proper order.

It is a rule that bad spelling will not vitiate a contract when it appears with certainty what is meant: for example, where a man agreed to pay *threty* pounds he was held bound to pay *thirty* pounds; and *seutene* was holden to be *seventeen;* Cro. Jac. 607; 10 Co. 133 *a;* 2 Rolle, Abr. 147. Even in an indictment *undertood* has been holden as *understood;* 1 Chitty, Cr. Law.

A misspelling of a name in a declaration will not be sufficient to defeat the plaintiff, on the ground of variance between the writing produced and the declaration, if such name be *idem sonans:* as, *Kay* for *Key;* 16 East 110; 2 Stark. 29; *Segrave* for *Seagrave;* 2 Stra. 889. See IDEM SONANS; ELECTION.

SPENDTHRIFT. A person who, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or family. Vt. Rev. Stat. c. 65, § 9.

A person having the entire right to dispose of property may settle it or give it by will in trust for another, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such an event; Broadway Nat. Bk. v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; Pope's Ex'rs v. Elliott, 8 B. Mon. (Ky.) 56; Fisher v. Taylor, 2 Rawle (Pa.) 33; Merriman v. Munson, 134 Pa. 114, 19 Atl. 479, 21 Atl. 171; White's Ex'rs v. White, 30 Vt. 338; Garland v. Garland, 87 Va. 758, 13 S. E. 478, 13 L. R. A. 212, 24 Am. St. Rep. 682; Spindle v. Shreve, 4 Fed. 136; Roberts v. Stevens, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719; Wood v. McClelland (Tex.) 53 S. W. 381; Merchants' Nat. Bk. v. Crist, 140 Iowa 308, 118 N. W. 394, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267; Jackson Square Loan & Savings Ass'n v. Bartlett, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416; Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; Bennett v. Bennett, 66 Ill. App. 28; Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005. *Contra,* Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; Nelson v. Nelson, 2 Ky. Law Rep. 64.

The doctrine rests upon the principle of *cujus est dare, ejus est disponere;* it has regard solely to the rights of the donor; consideration for the beneficiary does not in the remotest way enter into it; Morgan's Estate, 223 Pa. 228, 72 Atl. 498, 25 L. R. A. (N. S.) 236, 132 Am. St. Rep. 732.

Where property is devised in trust for a testator's son and his family, the profits to be applied to the extent the trustee sees fit, judgment creditors of the son cannot reach the property or its income; Brooks v. Raynolds, 59 Fed. 923, 8 C. C. A. 370.

An absolute discretion vested in trustees to make payments out of trust property confers no interest on the beneficiary that can be asserted by him or his assignee in bankruptcy; Nichols v. Eaton, 91 U. S. 716, 23 L.

Ed. 254, where the court sustained the doctrine of trusts of this class in a forcible argument.

The income of a spendthrift trust is not subject to the claim of the spendthrift's creditors, even though there is no express provision therefor; Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; where the beneficiary's mother was his creditor, her executor could not apply the income to extinguish the debt; In re Temple, 36 Misc. Rep. 620, 74 N. Y. Supp. 479; the income of a spendthrift trust cannot be attached for the maintenance of the beneficiary's wife and child whom he has deserted; Board of Charities v. Lockard, 198 Pa. 572, 48 Atl. 496, 82 Am. St. Rep. 817; but equity will enforce a physician's claim for services rendered to a spendthrift who habitually indulged in alcoholic excesses; Sherman v. Skuse, 45 App. Div. 335, 60 N. Y. Supp. 1030; *id.*, 166 N. Y. 345, 59 N. E. 990.

The instrument need not call the *cestui que trust* a spendthrift, nor is it necessary that it shall contain all the specifications and qualifications incident to such a trust. If it appear that the donor or testator intended a spendthrift trust, that is enough. The court will not inquire whether he is a spendthrift; Wagner v. Wagner, 244 Ill. 101, 91 N. E. 66, 18 Ann. Cas. 490; it is not necessary to provide expressly that the income shall not be subject to execution in order to create a spendthrift trust; First Nat. Bank of Nashville v. Trust Co. (Tenn.) 62 S. W. 392; nor need there be a devise over after the beneficiary's death; Minnich's Estate, 206 Pa. 405, 55 Atl. 1067.

Where the testator permits trustees to pay income in their discretion, and provides for accumulation, it is a valid spendthrift trust; Mason v. Trust Co., 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Sterling v. Ives, 78 Conn. 498, 62 Atl. 948; and so where the executors are to hold the trust and pay only such part of it as they shall deem necessary for the beneficiary's support and on his death to pay the remainder to his heirs; Russell v. Hilton, 80 App. Div. 178, 80 N. Y. Supp. 563, affirmed in 175 N. Y. 525, 67 N. E. 1089.

A party can not by conveying his property in trust, reserving to himself the income thereof during his life, with remainder over, place his beneficial interest beyond the reach of creditors; Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; Wenzel v. Powder, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; Pacific Nat. Bank v. Windram, 133 Mass. 175.

One cannot create a spendthrift trust of his own property for his own benefit; Appeal of Mackason, 42 Pa. 330, 82 Am. Dec. 517. Nor can there be a valid spendthrift trust where the trustee is also the *cestui que trust*, with the absolute ownership of the subject of the trust; Appeal of Mackason, 42 Pa. 330, 82 Am. Dec. 517; Wanner v. Snyder, 177 Pa. 208, 35 Atl. 604; Pacific Nat. Bank v. Windram, 133 Mass. 175.

A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income, through the instrumentality of a trustee, cannot be created by a married woman or a woman in contemplation of marriage: Brown v. McGill, 87 Md. 161, 39 Atl. 613, 39 L. R. A. 806, 67 Am. St. Rep. 334. A married woman may, however, make a valid spendthrift trust in favor of her husband; Wanner v. Snyder, 177 Pa. 208, 35 Atl. 604.

Upon a petition in equity by a wife living separate from her husband, who was the beneficiary under a spendthrift trust, a decree was made, by the consent of the husband and in pursuance of an agreement between them, directing the trustee to pay to the wife the portions of the income according to the terms of the agreement. Afterwards a bill of review was filed by the husband seeking to annul the decree; the appellate court reversed the decree of the lower court annulling the original decree and reinstated the latter, but upon the ground that the bill of review was not filed for more than two years; Holloway v. Deposit & Trust Co., 122 Md. 620, 90 Atl. 95.

In [1895] A. C. 186, it was regarded as settled law that one taking a vested legacy is entitled to receive it as soon as he can make a valid discharge although there was a declaration to accumulate. This appears to be the opposite from a spendthrift trust. In Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086, the court refused to follow this rule, preferring the contrary rule adopted in Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393, which sustained a gift to a son at 21 and a like sum at 25 and the residue at 30 years of age. The trust was sustained.

If the *cestui que trust* is given an absolute right to the fund or its avails (as a right to occupy land and take its income) or if land is conveyed to him on condition that it shall not be subject to his debts, it is not a spendthrift trust; Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005.

The rule has prevailed in the English courts that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cesser or limitation over of the estate itself, can protect it from his debts or control: 18 Ves. 429; 6 Sim. 524; 1 Russ. & Myl. 395; 9 Hare 475.

Spendthrift trusts, there called alimen-

tary funds, are upheld in Scotland; Gray, Restr. on Alienation 158. The English rule has been adopted in several courts of this country; Patterson & Co. v. Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143; Pace v. Pace, 73 N. C. 119; Heath v. Bishop, 4 Rich. Eq. (S. C.) 46, 55 Am. Dec. 654; Dick v. Pitchford, 21 N. C. 480.

In Arkansas; Lindsay v. Harrison, 8 Ark. 302; Indiana; Martin v. Davis, 82 Ind. 38; and New Hampshire; Banfield v. Wiggin, 58 N. H. 155; the question has been raised, but not decided. Apart from statute, the rule in New Jersey is the same as the English rule; See Wells v. Ely, 11 N. J. Eq. 172; Bolles v. Trust Co., 27 N. J. Eq. 308; Halstead v. Westervelt, 41 N. J. Eq. 100, 3 Atl. 270. In Wisconsin, the question is in doubt. See Bridge v. Ward, 35 Wis. 687; Lamberton v. Pereles, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824. In Connecticut, the status of such trusts is undecided; Leavitt v. Beirne, 21 Conn. 1; Easterly v. Keney, 36 Conn. 18.

By statute, in Kentucky, one cannot vest property or funds in trustees for the use of another without subjecting it to the debts of the *cestui que trust;* Bland's Adm'r v. Bland, 90 Ky. 400, 14 S. W. 423, 9 L. R. A. 599, 29 Am. St. Rep. 390; Anderson v. Briscoe, 12 Bush (Ky.) 344. In New York a statute excludes from proceedings in equity to reach beneficial interests, all cases of trusts for maintenance and support where the trust has proceeded from some person other than the debtor, but makes available to the creditor any surplus beyond what may be necessary for the maintenance and support of the beneficiary; Williams v. Thorn, 70 N. Y. 270.

The subject has been regulated by statute in New York; as interpreted by the courts, the beneficiary of the trust is entitled to receive sufficient income to support him in the manner in which he had been brought up, and the residue may be subjected to his debts, the burden being upon the creditors to prove that the trust fund is larger than afterwards proved to be necessary. See an article in 9 Bench & Bar (N. S.) 59, citing Demuth v. Kemp, 79 Misc. Rep. 516, 140 N. Y. Supp. 152; *id.*, 159 App. Div. 422, 144 N. Y. Supp. 690. Prof. Gray (Restr. on Alienation) speaks of this "remedy" by statute as being, "if not worse, more disgusting than the disease."

A spendthrift trust may be created for a term of years with the remainder to the *cestui que trust* in fee; Ward's Estate, 13 Wkly. Notes Cas. (Pa.) 282.

See Gray, Restr. on Alienation, where the cases are fully considered and a protest made against the validity of such trusts.

SPENT BONDS. See BONDS.

SPENT STATUTES. See OBSOLETE; REPEAL.

SPERATE (Lat. *spero*, to hope). That of which there is hope.

In the accounts of an executor and the inventory of the personal assets, he should distinguish between those which are sperate and those which are desperate: he will be *prima facie* responsible for the former and discharged for the latter; 1 Chitty, Pr. 520; 2 Will. Exec. 644; Toller, Exec. 248. See DESPERATE.

SPES RECUPERANDI (Lat. the hope of recovery). A term applied to cases of capture of an enemy's property as a booty or prize, while it remains in a situation in which it it liable to be recaptured. As between the belligerent parties, the title to the property taken as a prize passes the moment there is no longer any hope of recovery; 2 Burr. 683. See INFRA PRÆSIDIA; POSTLIMINY; BOOTY; PRIZE.

SPHERE OF INFLUENCE. A portion of unappropriated territory over which a state possessing territory contiguous to it claims to exercise such exclusive control, though not amounting to ownership, as to bar the entry of any other power for purposes of colonization. Between 1880 and 1900 a number of treaties were entered into between the European powers defining their respective spheres of influence in Africa.

Also, a portion of the territory of a weak state over which a stronger state assumes to exercise a certain measure of control for the sake of economic or other advantages. An example of an international agreement providing for such spheres of influence is to be found in the treaty between Great Britain and Russia in 1907 by which Persia was partitioned into three zones, one neutral and the other two British and Russian spheres of influence respectively. A. J. I. L. (1912) 155.

SPIGURNEL. The sealer of the royal writs.

SPINNING HOUSE. A house of correction to which the authorities of Oxford and Cambridge may send persons (mostly women of frivolous character) not members of the University who are found consorting with the students, to the detriment of their morals. 4 Steph. Com. 264.

SPINSTER. An addition given, in legal writings, to a woman who never was married. Lovelace, Wills 269. So called because she was supposed to be occupied in spinning.

SPIRITUAL CORPORATIONS. See ECCLESIASTICAL CORPORATIONS.

SPIRITUAL COURTS. Ecclesiastical courts (*q. v.*).

SPIRITUAL LORDS. The two archbishops and twenty-four of the bishops of the Church of England, who sit as peers in the British House of Lords. They are not entitled, as temporal peers are, to be tried by the House of Lords. See HOUSE OF LORDS.

SPIRITUALISM. In law the significance of Spiritualism is chiefly involved with the

conveyance of land and the disposition of property by will by Spiritualists. It is generally held that belief in Spiritualism is not necessarily such evidence of insanity as to make one incompetent to make a conveyance of real estate; Lewis v. Arbuckle, 85 Ia. 335, 52 N. W. 237, 16 L. R. A. 677; and in itself is not insanity; In re Spencer, 96 Cal. 448, 31 Pac. 453; Owen v. Crumbaugh, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442, 10 Ann. Cas. 606; O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662; In re Keeler's Will, 12 N. Y. St. Rep. 157; testamentary capacity is not destroyed by a mere belief in Spiritualism; Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673; In re Smith's Will, 52 Wis. 548, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; Otto v. Doty, 61 Ia. 23, 15 N. W. 578; or in witchcraft; Kelly v. Miller, 39 Miss. 19; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; In re Forman's Will, 54 Barb. (N. Y.) 297; Van Guysling v. Van Kuren, 35 N. Y. 70; and belief in transmigration of human souls, strong enough to induce a bequest to a society for the prevention of cruelty to animals, will not render a will invalid; Bonard's Will, 16 Abb. Prac. (N. S. N. Y.) 128.

The test seems to be whether the testator merely believed in Spiritualism and made his will accordingly, or whether he was so dominated by the will of others or by alleged statements coming from deceased persons, that the testamentary writing was in fact not his, but the will of some one else; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473. The will may be valid although he believed in the statements of mediums; Chafin Will Case, 32 Wis. 560; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; but where the medium used his power to procure a conveyance, it was set aside; L. R. 6 Eq. 655; and so in the case of a will; Thompson v. Hawks, 14 Fed. 902; Greenwood & Smith v. Cline, 7 Or. 17; so where the testator follows blindly the supposed directions of spirits; O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A (N. S.) 989, 119 Am. St. Rep. 662.

It is for the jury to decide whether or not there was undue influence; Steinkuehler v. Wempner, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673. Witnesses cannot testify that testator was a monomaniac merely because he believed in Spiritualism; O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662.

Proof that a defendant professed to be a medium, and charged a fee for a séance held with the assistance of others, is sufficient to convict of a conspiracy with intent to defraud; People v. Gilman, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490. See Lewis v. Arbuckle, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677; Appeal of Kimberly, 68 Conn. 428, 36 Atl. 846, 57 Am. St. Rep. 101, 37 L. R. A. 270, and notes; WILL.

SPIRITUOUS LIQUORS. See LIQUOR LAWS.

SPLITTING A CAUSE OF ACTION. The bringing an action for only a part of the cause of action.

The whole tendency of the cases is to require a plaintiff to try his whole cause of action at one time. He cannot even split up his claim; 1 Salk. 11; Trask v. R. Co., 2 Allen (Mass.) 331; and, *a fortiori*, he cannot divide the grounds of recovery; N. P. R. Co. v. Slaght, 205 U. S. 134, 27 Sup. Ct. 446, 51 L. Ed. 742.

Different suits can be brought on different claims of a patent for infringement against the same defendant, where the two sets of claims covered different inventions, though relating to the same machine; Bates Mach. Co. v. Wm. A. Force & Co., 139 Fed. 746.

A mortgage on several tracts must be foreclosed on all the tracts in one suit; De Weese v. Smith, 97 Fed. 314.

See CAUSE OF ACTION; RES JUDICATA.

SPOLIATION. In English Ecclesiastical Law. The name of a writ sued out in the spiritual court to recover for the fruits of the church or for the church itself. Fitzh. N. B. 85.

A waste of church property by an ecclesiastical person. 3 Bla. Com. 90.

An injury done by one incumbent to another, in taking the fruits of his benefice under a pretended title, and without right. 3 Steph. Com. 345.

In Torts. Destruction of a thing by the act of a stranger: as, the erasure or alteration of a writing by the act of a stranger is called spoliation. This has not the effect to destroy its character or legal effect. 1 Greenl. Ev. § 566. See IN ODIUM SPOLIATORIS.

In Admiralty Law. By spoliation is also understood the total destruction of a thing: as, the spoliation of papers by the captured party is generally regarded as a proof of guilt; but in America it is open to explanation, except in certain cases where there is a vehement presumption of bad faith; The Pizarro, 2 Wheat. (U. S.) 227, 241, 4 L. Ed. 226; 1 Dods. Admr. 480, 486; Bened. Adm. 310. See ALTERATION; FRENCH SPOLIATION CLAIMS.

SPONSALIA STIPULATIO SPONSALITIA (Lat.). A promise lawfully made between persons capable of marrying each other, that at some future time they will marry. See ESPOUSALS; Ersk. Inst. 1. 6. 3.

SPONSIO JUDICIALIS (Lat.). A judicial wager. This corresponded in the Roman law to our feigned issue.

SPONSIONS. In International Law. Agreements or engagements made by certain public officers, as generals or admirals, in time of war, either without authority or by ex-

ceeding the limits of authority under which they purport to be made.

Before these conventions can have any binding authority on the state, they must be confirmed by express or tacit ratification. The former is given in positive terms and in the usual forms; the latter is justly implied from the fact of acting under the agreement as if bound by it, and from any other circumstance from which an assent may be fairly presumed; Wheat. Int. Law, 3d Eng. ed. § 255; Grotius, *de Jur. Bel. ac Pac.* l. 2, c. 15, § 16; *id.* l. 3, c. 22, § 1; Vattel, Law of Nat. b. 2, c. 14, § 209; Wolff, Inst. § 156.

SPONSOR. In Civil Law. He who intervenes for another voluntarily and without being requested. The engagement which he enters into is only accessary to the principal. See Dig. 17. 1. 18; Nov. 4. 1; *Code de Comm.* art. 158, 159; Code Nap. 1236; Wolff, Inst. § 1556.

SPONTANEOUS COMBUSTION. See FIRE.

SPOUSE BREACH. Adultery. Cowell.

SPREADING FALSE NEWS. See FALSE NEWS.

SPRING. A fountain. A natural source of water, of a definite and well-marked extent. 6 Ch. Div. 264 (C. A.). A natural chasm in which water has collected, and from which it either is lost by percolation, or rises in a defined channel. 41 L. T. Rep. (N. S.) 457. The water issuing by natural forces out of the earth at a particular place. It is not a mere place or hole in the ground, nor is it all the water that can be gathered or caused to flow at a particular place. A well is not necessarily a spring, nor is water which by the expenditure of labor can be gathered into a reservoir. Furner v. Seabury, 135 N. Y. 50, 31 N. E. 1004.

The owner of land on which there is a natural spring has a right to use it for domestic and culinary purposes and for watering his cattle, and he may make an aqueduct to another part of his land and use all the water required to keep the aqueduct in order or to keep the water pure; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391. He may also use it for irrigation, provided the volume be not materially decreased; Ang. Waterc. 34. See Twiss v. Baldwin, 9 Conn. 291; Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Merritt v. Parker, 1 N. J. L. 460; Blanchard v. Baker, 8 Greenl. (Me.) 253, 23 Am. Rep. 504. But it is held that a statutory provision that a person on whose land a spring rises shall have a prior right to its flow does not apply to a spring which is the fountain head of living water courses; Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065.

The owner of a spring cannot lawfully turn the current or give it a new direction. He is bound to let it enter the inferior estate on the same level it has been accustomed to, and at the same place, for every man is entitled to a stream of water flowing through his land without diminution or alteration; 6 East 206; Ingraham v. Hutchinson, 2 Conn. 584. See M'Calmont v. Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; Arnold v. Foot, 12 Wend. (N. Y.) 330; Norton v. Volentine, 14 Vt. 239, 39 Am. Dec. 220.

Where one conveyed a spring or well to be enjoyed without interruption, and afterwards conveyed contiguous property to a railway company whose works drained the water from the land before it reached the spring, on an action for breach of agreement, *held*, that the grantor had only conveyed the flow of the water after it had reached the spring, and therefore there was no breach; 41 L. T. (N. S.) 455 (C. A.). See 15 L. J. (N. S.) Ex. 315. Where the value of land was enhanced by a spring, it was held ratable for taxation at such improved value; 1 M. & S. 503.

The owner of the superior inheritance, or of the land on which there is a spring, has no right to deprive the owner of the estate below him; Anthony v. Lapham, 5 Pick. (Mass.) 175; Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405; Evans v. Merriweather, 3 Scam. (Ill.) 492, 38 Am. Dec. 106; nor can he detain the water unreasonably; Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; 2 B. & C. 910. See IRRIGATION; SUBTERRANEAN WATER; SURFACE WATER; WATER-COURSE.

SPRING-BRANCH. A branch of a stream flowing from a spring. Wootton v. Redds' Ex'r, 12 Gratt. (Va.) 196.

SPRING GUN. Setting a spring gun with intent to destroy human life or inflict bodily harm is a criminal offence in England (1861), but the act does not apply to a dwellinghouse between sunset and sunrise. 4 Steph. Com. 79. See HOMICIDE; NEGLIGENCE.

SPRINGING USE. A use limited to arise on a future event where no preceding use is limited, and which does not take effect in derogation of any other interest than that which results to the grantor or remains in him in the meantime. Gilbert, Uses, Sugden ed. 153, n.; 2 Crabb, R. P. 498.

A future use, either vested or contingent, limited to arise without any preceding limitation. Cornish, Uses 91.

It differs from a remainder in not requiring any other particular estate to sustain it than the use resulting to the one who creates it, intermediate between its creation and the subsequent taking effect of the springing use; Dy. 274; Pollexf. 65; McIntyre v. Williamson 1 Edw. Ch. (N. Y.) 34; 4 Drur. & W. 27; Proprietors of Shapleigh v. Pilsbury, 1 Greenl. (Me.) 271. It differs from an executory devise in that a devise is created by will, a use by deed; Fearne, Cont. Rem. 385, Butler's note; Wilson, Uses. It differs from

a shifting use, though often confounded therewith. See, generally, 2 Washb. R. P. *281.

SPY. The chief rules of international law with regard to spies are embodied in Arts. 29–31 of the Convention Concerning the Laws and Customs of War on Land.

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains, or endeavors to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

"Thus, soldiers not wearing a disguise, who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

"A spy taken in the act shall not be punished without previous trial.

"A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

It is still an unsettled question whether balloonists sent out to gain information are to be regarded as spies; and with the advent of airships which will probably be largely used for reconnaissance purposes, the question of the status of those using them for such purposes will, before long, demand a settlement. Spaight, War Rights on Land, 202–215.

SQUATTER. One who settles on the lands of others without any legal authority; this term is applied particularly to persons who settle on the public land. Allard v. Lobau, 3 Mart. N. S. (La.) 293. One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time allowed him preceding actual entry at the land office, is a mere squatter having no rights in the land as against the government or others; U. S. v. Bagnell Timber Co., 178 Fed. 795, 102 C. C. A. 243.

See PRE-EMPTION RIGHT.

STAB. To make a wound with a pointed instrument. A stab differs from a cut or a wound. Russ. & R. 356; Russ. Cr. 597; Bac. Abr. *Maihem* (B).

STABILIA. A writ called by that name, founded on a custom of Normandy, that where a man in power claimed lands in the possession of an inferior, he petitioned the prince that it might be put into his hands till the right was decided, whereupon he had this writ. Whart. Law Lex.

STAGNUM (Lat.). A pool. It is said to consist of land and water; and therefore by the name of *stagnum* the water and the land may be passed. Co. Litt. 5.

STAINS OF BLOOD. Blood is the vital fluid of the body, consisting of certain cellular elements suspended in serum or plasma. It carries nutriment to, and waste products from, the tissues, is freshened or aerated by its passage through the lungs, and possesses the peculiar quality of spontaneous clotting.

Blood stains are the red-brown color left by the contact of blood with any absorbent material, or the evaporated residue of blood left on non-absorbent surfaces and consisting of the cellular elements of the blood and the dried albuminous matters.

The blood cells can at times be recovered more or less intact, if the stained material is soaked or washed in a solution of ordinary salt in the strength of .85 grammes to 100 cubic centimetres of water (normal salt solution, the normal salt concentration of the human blood, in which blood cells retain their color and form indefinitely). Blood cells removed in this manner from a blood stain can be recognized under the microscope, and certain animal bloods can be distinguished by their form and measurements. The principle of hæmolysis can be employed to determine whether the blood cells are those of a human being or of certain animals. This is a remarkably specific test, depending upon the fact that the blood of one species of animal, introduced into the tissues or circulation of an animal of another species, will cause the blood cells of the latter animal to disintegrate or hæmolyze. In certain cases the blood cells of one species (say A) are not affected by the blood serum of another (say B); following the principles of immunity, as seen in a vaccination, it is found that if the blood cells of A are repeatedly injected into the body of B, there develops in the B animal's blood a body (the immune body) which will now quickly disintegrate the blood cells of the animal A. *The specific reaction has been developed.* For the identification of human blood, rabbits are prepared by repeatedly injecting them with small amounts of human blood cells. In the rabbit blood-serum, there develops the specific immune body which, when brought in contact with any human blood cells, will dissolve or hæmolyze them. The blood cells of these animals remain undissolved.

If the blood stains will not yield formed blood elements, they are put into solution, water or in the above described salt solution, and several tests can be made: The spectroscopic; the test for crystals; the test for the presence of hæmoglobin by certain oxydizing chemicals. The first two, when positive, can be relied upon as showing that the

dissolved stains contain blood coloring matter; but they will not distinguish human from animal blood.

The third test is unreliable, and though used in many laboratories, is found not infrequently to show the reactions with many other quite foreign substances. See McWeeney (Proc. Royal Acad. Med., Ireland, 1910); Muir's Studies on Immunity (Oxford, 1909).

STAKE RACE. See SWEEPSTAKES.

STAKEHOLDER. A third person chosen by two or more persons to keep in deposit property the right or possession of which is contested between them, and to be delivered to the one who shall establish his right to it. Thus, each of them is considered as depositing the whole thing. This distinguishes this contract from that which takes place when two or more tenants in common deposit a thing with a bailee. Domat, *Lois Civ.* liv. 1, t. 7, s. 4.

A person having in his hands money or other property claimed by several others is considered in equity as a stakeholder. 1 Vern. 144. A mere depositary for both parties of the money advanced by them respectively with a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract. Fisher v. Hildreth, 117 Mass. 562.

The duties of a stakeholder are to deliver the thing holden by him to the person entitled to it on demand. It is frequently questionable who is entitled to it. In case of an unlawful wager, although he may be justified in delivering the thing to the winner, by the express or implied consent of the loser; McCullum v. Gourlay, 8 Johns. (N. Y.) 147; yet if before the event has happened he has been required by either party to give up the thing deposited with him by such party, he is bound so to deliver it; 3 Taunt. 377; 4 *id.* 492; or if, after the event has happened, the losing party give notice to the stakeholder not to pay the winner, a payment made to him afterwards will be made in his own wrong, and the party who deposited the money or thing may recover it from the stakeholder; McAllister v. Hoffman, 16 S. & R. (Pa.) 147, 16 Am. Dec. 556; 7 Term 536; 2 Marsh. 542. See Brush v. Keeler, 5 Wend. (N. Y.) 250; Corley v. Berry, 1 Bail. (S. C.) 593; WAGER; HORSE RACE.

A deposit of stakes by one of the parties in a match may be recovered back on demand from the stakeholder, as upon a void contract on notice given at any time before payment to the winner; 1 Q. B. D. 189; 5 App. Ca. 342, overruling 5 C. B. 818; [1900] 2 Q. B. 497.

STALE DEMAND. A claim which has been for a long time undemanded: as, for example, where there has been a delay of twelve years unexplained. Willard v. Dorr, 3 Mas. 161, Fed. Cas. No. 17,680. See LACHES.

STALLAGE (Sax. *stal*). The liberty or right of pitching or erecting stalls in fairs or markets, or the money paid for the same. Blount; Whart. Dict.; 6 Q. B. 31. It must be founded upon a reasonable consideration between the public and the grantee, and the tolls must be reasonable; 1 Steph. Com. 450.

STALLARIUS (Lat.). **In Saxon Law.** The *præfectus stabuli*, now master of the horse (Sax. *stalstabulum*). Blount. Sometimes one who has a stall in a fair or market. Fl. lib. 4, c. 28, p. 13.

STAMP. An impression made by order of the government, on paper, which must be used in reducing certain contracts to writing, for the purpose of raising a revenue. See Stark. Ev.; 1 Phill. Ev. 444.

A paper bearing an impression or device authorized by law and adopted for attachment to some subject of duty or excise.

The term in American law is used often in distinction from stamped paper, which latter meaning, as well as that of the device or impression itself, is included in the broader signification of the word.

Stamps or stamped paper are prepared under the direction of officers of the government, and sold at a price equal to the duty or excise to be collected. The stamps are affixed and cancelled; and where stamped paper is used, one use obviously prevents a second use. The Internal Revenue acts of 1862 and subsequent years required stamps to be affixed to a great variety of subjects, under severe penalties in the way of fines, and also under penalty of invalidating written instruments and rendering them incapable of being produced in evidence. The statutes under which these stamps were required had been repealed from time to time, and that method of raising revenue was discontinued except in the case of tobacco and possibly some other articles. The necessity of raising additional revenue to meet the expenditures required for the Spanish-American war of 1898 led to the passage of what was known as the War Revenue Act of June 13, 1898, under which stamps were required on checks, drafts, notes, mortgages, and other instruments.

The stamp tax on a memorandum or contract of sale of a certificate of stock imposed by this act is not unconstitutional as a direct tax on property; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481.

By Act March 2, 1901, the schedule of the act was amended by omitting all such instruments; it took effect at the end of the fiscal year, June 30, 1901. The entire schedule A was repealed April 12, 1902, saving the effect of the act as to stamping instruments while it was in force; Sackett v. McCaffrey, 131 Fed. 219, 65 C. C. A. 205.

An action lies by the United States to recover the amount of a stamp tax upon a deed of lands under this act; and the penal-

ties provided in the act for non-compliance therewith are not exclusive of collection by suit. An action lies wherever there is a sum due, either certain or readily reduced to certainty; provisions for penalties do not necessarily exclude personal liability; they were provided to induce payment of the tax and not as a substitute for payment; U. S. v. Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204.

Instruments not duly stamped are not void or inadmissible in evidence, in the absence of a fraudulent intent; McGovern v. Hoesback, 53 Pa. 176; Rheinstrom v. Cone, 26 Wis. 163, 7 Am. Rep. 51; Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466; in the absence of affirmative proof, a fraudulent intent will not be presumed; cases *supra*. Where objection is made to the admission of a writing for lack of a revenue stamp, the burden is on the objector to show that the stamp was omitted with intent to evade the law; Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 Atl. 271. Where a United States act required a revenue stamp to be attached to a written instrument, and none was attached, the instrument is admissible in evidence after the repeal of the act without a reservation of the right to demand the tax when omitted during the operation of the act or to enforce the penalties or forfeiture for such omission; *id.*

If a foreign instrument is, by the laws of the country where it is made, void for want of a stamp, it cannot be enforced in England. But if those laws merely require that it must be stamped before it can be received in evidence there, it is admissible in England without a stamp; 5 Exch. 279. The absence of an English revenue stamp from a power of attorney does not render the instrument inadmissible in evidence in an American court; Linton v. Ins. Co., 104 Fed. 584, 44 C. C. A. 54.

Under the previous revenue acts imposing stamp taxes the question arose as to the exact legal effect of the requirement that an instrument should be stamped, and whether if an unstamped instrument was wholly invalid the law made it necessary to have certain contracts in writing which would otherwise be valid by parol, as for instance, the contract of insurance. The suggestion that the passage of these laws requiring a stamp might make it necessary that such contracts should be in writing was made in Western Massachusetts Ins. Co. v. Duffey, 2 Kan. 347; but this doctrine is said not to be well founded; 1 May, Ins., 3d ed. § 25; and in New York it was held that the validity of a parol contract for insurance was not affected by the stamp act, that, if in writing, it would require to be stamped, but it might be oral; Fish v. Cottenet, 44 N. Y. 538, 4 Am. Rep. 715. The power of congress to declare unstamped instruments wholly void was seriously doubted; Latham v. Smith, 45 Ill. 29; and the doubt went so far as to deny the constitutional right of the federal government to determine rules of evidence by which the state courts should be governed; May, Ins. § 85; Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339. Some of the cases hold that congress cannot prohibit the making of contracts permitted by state laws, and that to declare them void is not a proper penalty for the enforcement of tax laws; Cooley, Const. Lim., 6th ed. 592; Moore v. Quirk, 105 Mass. 49, 7 Am. Rep. 499; Warren v. Paul, 22 Ind. 276; Smith v. Short, 40 Ala. 385; Jones v. Keep's Estate, 19 Wis. 369; Knox v. Rossi, 25 Nev. 96, 57 Pac. 179, 83 Am. St. Rep. 566, (48 L. R. A. 305 and note), as to the effect of omission to stamp instruments.

STAND. To abide by a thing; to submit to a decision; to comply with an agreement.

STANDARD. In War. An ensign or flag used in war.

In Measures. A weight or measure of certain dimensions, to which all other weights and measures must correspond: as, a standard bushel. Also, the quality of certain metals, to which all others of the same kind ought to be made to conform: as, standard gold, standard silver.

A National Bureau of Standards was established March 3, 1901, to have custody of the standards, the comparison of those used in scientific, etc., matters; their construction, with multiples and subdivisions; the testing and calibration of standard measuring apparatus; the solution of problems in connection with standards; the determination of physical constants and the properties of materials. It exercises its functions for the benefit of the United States, any state or municipality, or any scientific or educational institution, firm, corporation or individual engaged in manufacturing or research requiring standard measuring instruments.

See MEASURES; WEIGHTS.

STANDARD POLICY. See POLICY.

STANDING ASIDE JURORS. In order to mitigate the effect of the statute 33 Edw. I. which forbade the challenging of jurors by the crown excepting for cause shown, a rule of practice gradually arose of permitting the prosecution to direct jurors to stand aside until the whole panel was exhausted, without showing cause. The validity of this practice has been repeatedly upheld in England: 26 How. St. Tr. 1231.

In the United States this statute became a part of the fundamental law after the revolution; Baldw. 78, 82; Jewell v. Com., 22 Pa. 94; and notwithstanding statutes of various states granting to the prosecution a number of peremptory challenges, the custom of standing aside has been preserved. This practice has been opposed where the statutes allowing peremptory challenges are in force, but where the number allowed is very small,

it has heretofore been allowed to continue. See Thomp. & Mer. Juries 147.

The practice applies in misdemeanors as well as felonies, although there is a peremptory right of challenge; 39 Leg. Int. 384.

See CHALLENGE; JURY.

STANDING BY. This term, as so often used in discussing cases of estoppel, does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure. Anderson v. Hubble, 93 Ind. 573, 47 Am. Rep. 394.

STANDING MUTE. See MUTE; PEINE FORTE ET DURE.

STANDING ORDERS. General regulations of the procedure of the two houses of a parliamentary body, respecting the manner in which its business shall be conducted.

STANNARY COURTS. Courts held in the stannaries in England.

The stannaries were mining districts of Devon and Cornwall. Their exact extent was never definitely ascertained. The stannary courts resembled those of the palatine jurisdictions. The earliest charters conferring jurisdiction were in the reign of Richard I and John. Jurisdiction seemed to be only over the miners. A charter of 1305 gave them jurisdiction in all cases except those which touched land, life or limb. In 1640 the jurisdiction was settled; it was confined to a territory where a tin-works was situated; tin-workers could sue each other, and could sue foreigners if the case arose in the jurisdiction or concerned tin-work. The chief official was the Lord Warden, who appointed a vice-warden and stewards. The courts were held by the stewards; they had a loet jurisdiction and a general common law jurisdiction, except as to land, life and limb. There was a jury of six. An appeal lay to the steward, and thence to the court of the vice-warden, the Lord Warden and the Prince of Wales' Council, successively.

The stannaries each had a parliament consisting of twenty-four persons who made and enforced laws.

The Devonshire stannary courts seemed to have disappeared, but were reconstituted in 1856. Those of Cornwall had a continuous history. In 1836 the court of the vice-warden was given a concurrent equity and common law jurisdiction extending to other metals than tin. Appeals were to the Lord Warden, assisted by three or more members of the Judicial Committee of the Privy Council. In 1856, his jurisdiction was extended to the Devonshire stannaries. In 1873 the court of the Lord Warden was merged in the Court of Appeal. In 1896, the jurisdiction of the court of the vice-warden was transferred to such of the county courts as the Lord Chancellor might direct. 1 Holdsw. Hist. E. L. 57.

STAPLE. In International Law. The right of staple, as exercised by a people upon foreign merchants, is defined to be that they may not allow them to set their merchandises and wares to sale but in a certain place.

This practice is not in use in the United States. 1 Chitty, Com. Law 103; Co. 4th Inst. 238; Bac. Abr. *Execution* (B 1). See STATUTE STAPLE.

STAPLE INN. An inn of chancery. See INNS OF COURT.

STAR-CHAMBER. See COURT OF STAR-CHAMBER.

STAR PAGE. The line and word at which the pages of the first edition of a law book began are frequently marked by a star in later editions, and always should be.

STARE DECISIS (Lat.). To abide by, or adhere to, decided cases. *Stare decisis et non quieta movere.* It is a general maxim that when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from. The rule as stated is "to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare.*" Broom, Leg. Max., 7th ed. 147. As it was said by Alderson, B., "My duty is plain. It is to expound and not to make the law; to decide on it as I find it, not as I may wish it to be;" 7 Exch. 543, quoted by Coltman, J., in 4 C. B. 560.

"What I desire to point out is that I wish the law was not so, but being the law I must follow it." Romer, J., in L. R. 1, C. P. 605 (1899). "I agree that it is the law, though I think it is a hard law; but we have nothing to do with the question of hardship." Lord Esher, M. R., in L. R. 24 Q. B. D. 618 (1890).

Settled principles of law cannot be disregarded in order to remove the hardship of special cases; Buchanan v. Litchfield, 102 U. S. 278, 26 L. Ed. 138; the doctrine should not be departed from except in extreme cases; Brennan v. New York, 47 How. Prac. (N. Y.) 178; or except in a case of grave necessity; State v. Ross, 43 Wash. 290, 86 Pac. 575. It is very serious for a judge, who does not agree with particular decisions, to deal in distinctions from those decisions; Jessel, M. R., in L. R. 6 C. P. 559.

The doctrine of *stare decisis* is not always to be relied upon; for the courts find it necessary to overrule cases which have been decided contrary to principle. It should not be pressed too far; 8 Gr. Bag 257. Many hundreds of such overruled cases may be found in the American and English reports.

The rule is founded on public policy and does not require a court to follow a clearly erroneous authority; Mason v. Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am St. Rep. 635; it should be

applied to a judgment of four out of five judges (a majority of the whole number, seven), where the case was fully argued and was considered at great length, where there has been no change in the trend of judicial opinion and the decision has been favorably received by the profession; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236.

"The rule of *stare decisis* means, in general, that when a point has been once settled by judicial decision, it forms a precedent for the guidance of courts in similar cases." It should "in the main be strictly adhered to. An adherence to it is necessary to preserve the certainty, the stability and symmetry of our jurisprudence. Nevertheless there are occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law, and to remedy a continued injustice." These are the two grounds of justification in departing from a decision which has become a precedent. Lamar, J., in The Madrid, 40 Fed. 677, where it was held that decisions of the circuit courts of appeal, not being uniform as to the relative priority of statutory and maritime liens, have not become a rule of property within the doctrine; *id.*

The doctrine is a salutary one and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but the supreme court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene; Pollock v. Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; and there are cases in which a court of last resort has felt constrained by a sense of duty to disregard all precedents, even their own. This is particularly so in constitutional questions involving the validity of statutes affecting public interests, but where no right of property or contract *inter partes* is involved. In such a case, said Bleckley, C. J., the maxim for a supreme court "supreme in the majesty of duty as well as in the majesty of power," is not *stare decisis*, but *fiat justitia ruat coelum*; Ellison v. R. Co., 87 Ga. 691, 13 S. E. 809; and it was said by Howard, J., in quoting this language: "Let this decision be right whether other decisions were right or not;" Denney v. State, 144 Ind. 539, 42 N. E. 929, 31 L. R. A. 726 (involving the validity of statutes of apportionment of legislative representatives). It has been said that the doctrine applies with less force in constitutional cases than in ordinary cases of property rights; Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698; but in Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525, it was held that a long established and steadily adhered to principle of constitutional construction precludes a judicial tribunal from holding a legal enactment, federal or state, unconstitutional and void unless it is manifestly so; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525.

This rule urges the court against reversing a long series of decisions where state legislation has been enacted in reliance thereon and a reversal would involve the promulgation of a new rule of constitutional inhibition on state legislation; New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. —. And a court when asked to do so should consider how far its action would affect transactions entered into and acted upon, under the law as it exists; Sydnor v. Gascoigne, 11 Tex. 455. Where there have been a series of decisions by the supreme judicial tribunal of a state, the rule of *stare decisis* may usually be regarded as impregnable, except by legislative act; Harrow v. Myers, 29 Ind. 470. Especially is this the case where the law has become settled as a rule of property, and titles have become vested on the strength of it; Reed v. Ownby, 44 Mo. 206; Brown v. Finley, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778; and even an isolated decision will not be reversed when it has remained undisputed for a long time, and rights to land have been acquired under it; Hihn v. Courtis, 31 Cal. 402. The court will not overrule cases upon which conveyancers may have relied, even though the court does not consider the case a sensible decision; [1891] 1 Ch. 258.

In Saffell v. Orr, 109 Va. 768, 64 S. E. 1057, there had been two previous decisions overruled by a third, and the title in question had been taken since the two decisions and prior to the third; and the court held that the first two cases established no rule of property and followed the third case. This case is severely criticised in 15 Va. L. Reg. 967.

It has been said that the doctrine of *stare decisis* has greater or less force according to the nature of the question decided, those questions where the decisions do not constitute a business rule, *e. g.* as where personal liberty is involved, will be met only by the general considerations which favor certainty and stability in the law; but where a decision relates to the validity of certain modes of transacting business, and a change of decision must necessarily invalidate everything done in the mode prescribed by the former case, as in the manner of executing deeds or wills, the maxim becomes imperative, and no court is at liberty to change it; Kneeland v. Milwaukee, 15 Wis. 691. An erroneous decision subsequently overruled, though the law of the particular case, and binding on the parties, does not conclude other parties having rights depending on the same question; Bradshaw v. Mill Co., 52 Minn. 59, 53 N. W. 1066. The United

States courts will follow the decisions of those of the several states in interpreting state laws; but when the decisions of the state courts are unsettled and conflicting the rule does not apply; Gelpcke v. Dubuque, 1 Wall. (U. S.) 205, 17 L. Ed. 520; Supervisors v. Schenck, 5 Wall. (U. S.) 772, 18 L. Ed. 556. When titles to real estate depend on any compact between states, the rule of decision will not be drawn from either of the states; Marlatt's Lessee v. Silk, 11 Pet. (U. S.) 1, 9 L. Ed. 609.

In matters relating to the construction of treaties, constitutional provisions, or laws of the United States, the authority of the federal courts is paramount, while *e converso* in the construction of state constitutions and state laws, the decisions of the state courts are final within their jurisdiction; Doe v. Hamilton, 23 Miss. 498, 57 Am. Dec. 149; Wells, Res. Adj. & Stare Decisis 583.

On a question not of statutory construction, but of the application of a rule of the common law, the circuit court of appeals is bound by a decision of the United States supreme court, but not by those of the highest courts of the various states; Methven v. Power Co., 66 Fed. 113, 13 C. C. A. 362, 35 U. S. App. 67.

See Cooley, Const., 2d ed. 137 Greenl. Overruled Cases; 1 Kent 477; Livingston, Syst. of Pen. Law 104.

In [1899] 2 Q. B. 439, there were found two cases in the House of Lords all but contradictory (10 App. Cas. 438 and 14 *id.* 381). The court "did under these circumstances the best they could." They undertook to distinguish the two cases. "Whether their judgment, should it come before the House of Lords, will be upheld, is a matter on which it were rash to pronounce an opinion." 15 L. Q. Rev. 340.

See Jenkins, Century vi., for a list of curious aphorisms on this subject; also an essay on the doctrine, its reasons and extent, by Daniel H. Chamberlain, N. Y. St. Bar Ass'n, 1885; AUTHORITIES; PRECEDENTS; COMITY; LAW OF THE CASE; JUDGE-MADE LAW; JUDICIAL LEGISLATION; JUDICIAL POWER. See Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961, and the dissenting opinion, for a full discussion.

STARE IN JUDICIO (Lat.). To appear before a tribunal, either as plaintiff or defendant.

START. This term is not limited to setting out upon a journey or a race; it means, as well, the commencement of an enterprise or an undertaking. Graw v. Manning, 54 Ia. 721, 7 N. W. 150.

STATE (Lat. *stare*, to place, establish). A body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Cooley, Const. Lim. 1. A self-sufficient body of persons united together in one community for the defence of their rights and to do right and justice to foreigners. In this sense, the state means the whole people united into one *body politic;* and the state, and the people of the state, are equivalent expressions. Chisholm v. Georgia, 2 Dall. (U. S.) 425, 1 L. Ed. 440; 2 Wilson, Lect. 120; 1 Story, Const., § 208. So, frequently, are state and nation; Texas v. White, 7 Wall. (U. S.) 720, 19 L. Ed. 227. See Morse, Citizenship; Wheat. Int. L. 17; but it is said that "a state is distinguished from a nation or a people, since the former may be composed of different races of men all subject to the same supreme authority. . . . The same nation or people may be subject to, or compose, several distinct and separate states. . . . The terms nation and people are frequently used by writers on international law as synonymous terms for state." 1 Halleck, Int. L. 66.

Another writer commenting on the definition of Cicero which is substantially that first above given, says: "This definition is not complete without some additions and restrictions. A state must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign state it must not be subject to any external control. Thus a company of men united for commercial purposes cannot be a state in the sense held in international law; neither can a tribe of wandering people, nor a community, be so considered if their government is permanently incapable of enforcing its own laws or its obligations toward other states. So long as a state possesses the requisite attributes mentioned in the preceding paragraphs, international law does not concern itself with the form of its government; it may be an absolute monarchy, a limited monarchy, or a republic; it may be a centralized state or a federal union; or it may change from one to another of these forms at will, without in the least affecting its position in the view of international law; Snow, Int. L. 19.

In the search for a verbal expression of that entity which has been variously phrased as the state, the nation, the commonwealth, or the public, the first mentioned term was slow in coming into general use. Queen Elizabeth used the word *respublica* in Latin or *commonwealth* in English. A statute referred to Guy Fawkes and others as having attempted "the overthrow of the whole state and commonwealth"; 3 Jac. I, c. 3; the Exchequer Chamber, in 1623, spoke of inconveniences introduced "in the republic" by remote limitations; Palm. 335. The words "republic" and "commonwealth," implying absence of a king, were abandoned only after 1600 when the word "state" came into use. It is little used

in Blackstone, though he does speak of the "danger of the state"; 1 Com. 135. The people did not answer, since there is in opposition the king, and together they constitute the state or commonwealth. See "The Crown as Corporation," by F. W. Maitland, 17 L. Q. R. 131, 136, which begins with this quotation: "The greatest of artificial persons, politically speaking, is the state. But it depends on the legal institutions and forms of every commonwealth whether and how far the state or its titular head is officially treated as an artificial person." Pollock, First Bk. of Jur. 113.

The head of the state occupies the relation, not merely of ruler, but also of *parens patriæ* to the people of the country, and has a power to intervene for their protection, in many instances; this has been recognized by courts of other countries: The emperor of Austria, as representing the collective interests of his Hungarian subjects, was allowed to maintain a bill in equity to restrain the introduction of spurious notes meant to be circulated in Hungary as money, to the detriment of the value of property and commercial dealings in that country; Emperor of Austria v. Kossuth, 3 De. G., F. & J. 217. So an injunction will issue at the suit of a consul (under a treaty authorizing his intervention to protect his countrymen) to restrain the use of the name and portrait of a foreign ruler in a fraudulent advertising scheme intended to lead emigrants from the foreign state to believe it to be under the patronage and approval of such ruler; but not to redress any personal offense to the ruler; Von Thodorovich v. Beneficial Ass'n, 154 Fed. 911.

A state neither loses any of its rights nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. So if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common; Snow, Cas. Int. L. 21. The same writer also thus states the distinctions between a state and a nation: "Though the terms are frequently used interchangeably, strictly speaking, a nation is composed of people of the same race, whereas a state may be composed of several nations. The Jews are considered to be a nation, while Austria-Hungary, as a state, is composed of three distinct races: Germanic, Slavic, and Magyar. This distinction has in recent years become of importance from the fact of the movements towards the unity of races, each under one state. Thus we have the Pan-Slavic movement, the Irridentist party in Italy, and various other minor cases." Snow, Int. L. 20. This distinction, however, cannot be said to be at present recognized to the extent here suggested.

The actual organization of governmental powers: thus, the actual government of the state is designated by the name of the state; hence the expression, the state has passed such a law or prohibited such an act.

The section of territory occupied by a state: as, the state of Pennsylvania.

A union of two or more states under a common sovereign is called a personal union where there is no incorporation, but the component parts are united with equality of rights, as in the case, by way of illustration, when Great Britain and Ireland and Hanover were under one prince but without any interdependence. On the other hand, a real union of different states is where there is a merging of the separate sovereignties in a new and general one, at least as to all international relations; as, in the case of the union of Hungary, Bohemia, and other states prior to 1849. An incorporate union is where there is one sovereign government, though there may be a separate subordinate administration; Halleck, Int. L. §§ 11, 12, 13.

One of the commonwealths which form the United States of America.

The various uses of the word "state" are well expressed in Texas v. White, 7 Wall. 700, 19 L. Ed. 227. It sometimes designates a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country. Often it denotes only the country, or territorial region, inhabited by such a community. Not infrequently it is applied to the government under which the people live. At other times it represents the combined idea of people, territory, and government. In the same case a state in the sense of the United States constitution is defined as a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.

The several states composing the United States are sovereign and independent in all things not surrendered to the national government by the constitution, and are considered, on general principles, by each other as foreign states: yet their mutual relations are rather those of domestic independence than of foreign alienation; Miller, Const. 103; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Gelston v. Hoyt, 3 Wheat. (U. S.) 324, 4 L. Ed. 381.

The *sovereignty* of a state embraces the power to execute its laws and the right to exercise supreme dominion and authority except as limited by the fundamental law, "and all sovereign powers not limited by the federal constitution are vested in the states," except as limited by the state constitutions; People v. Tool, 35 Colo. 225, 229, 231, 86 Pac. 224, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198; Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

A state has jurisdiction over all persons and property within her boundaries, and may subject both to her jurisdictional power, but cannot do so with respect to persons or property not within her jurisdiction; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; but by compact between two states, some extra-territorial jurisdiction may be given to each within the boundaries of the other, and in such compact the word "jurisdiction" will not be construed to mean sovereignty; Central R. R. Co. v. Jersey City, 72 N. J. L. 311, 61 Atl. 1118.

Concurrent jurisdiction of two states over rivers is familiar to our legislation; *e. g.* Kentucky and Ohio, over the Ohio river; Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570; Oregon and Washington, over the Columbia river; Nielsen v. Oregon, 212 U. S. 315, 29 Sup. Ct. 383, 53 L. Ed. 528. Where an act *malum in se* is prohibited by both states, the state first acquiring jurisdiction may punish, but not so where the act is forbidden by only one state. If an act is *malum prohibitum* in one state and is committed in the other, it cannot be punished in the former; *id.*

Legislation by two states authorizing the union of two corporations, one of each state, does not, in the absence of legislation by Congress to the contrary, come within the constitutional prohibition of compacts between states; Mackay v. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768.

The indestructibility of the states of the Union is well illustrated by the recognition of the existence of *de facto* governments, so far as required to preserve their political entity, of the states which composed the Confederate States. The rule laid down by the supreme court as to the validity of their legislation during the civil war was that acts necessary to domestic peace and good order and the administration of the ordinary functions of government must be regarded as valid and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, were void; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716.

A state has an inherent right to fix the character of property acquired by its citizens, and the terms under which it shall be held, independently of the federal government; Curry v. Wilson, 57 Wash. 509, 107 Pac. 367.

There is nothing in the federal constitution to prevent a state from changing the common law, as in authorizing damages where they were not allowed at common law; Ivy v. Telegraph Co., 165 Fed. 371.

Federal laws may be affected by state statutes, not by disputing their authority, but by sometimes changing their application; Maguire v. U. S., 43 Ct. Cl. 400.

The title of the state to the seacoast and the shores of tide rivers is different from the fee simple which an individual holds in lands. It is not a proprietary, but a sovereign right. It is an incident to and is a part of its sovereignty, that cannot be surrendered, alienated or delegated, except for some public purpose or some reasonable use for the public benefit; Coxe v. State, 144 N. Y. 396, 39 N. E. 400; Cooley, Const. Lim. 651, 524.

In New Jersey it was held in an early case that the state as sovereign, having both the legal and equitable estates, might make such disposition of tide lands as they saw fit, but that it could not make a direct and absolute grant, divesting all the citizens of their common rights; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356. This decision was criticised in Gough v. Bell, 22 N. J. L. 459; and in Wooley v. Campbell, 37 N. J. L. 163, where it was said the trust doctrine in regard to the state's title to tide lands in New Jersey may be said to extend no further than that the legislature cannot destroy navigation, to the material injury of the public.

In New York, though the state was said to hold the title as trustee of a public trust, the legislature, as representing the people, was held to be empowered to grant the soil or confer an exclusive privilege in tide waters, or to authorize a use inconsistent with the public rights, subject to the paramount control of congress; People v. New York & S. I. Ferry Co., 68 N. Y. 71; Saunders v. R. Co., 144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729; Langdon v. New York, 93 N. Y. 129. Such privileges should not impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law; State v. Black River Phosphate Co., 32 Fla. 82, 13 South. 640, 21 L. R. A. 189; State v. Gerbing, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337, where a statute providing for limited privileges to individuals to plant oysters in the public waters of a state was held not to authorize the conveyance of title to the land.

A state may lose its sovereignty and jurisdiction over its territory by prescription and acquiescence, where the facts are clearly established; Moore v. McGuire, 142 Fed. 787, where it was said that whether this was so had never been authoritatively determined, but several cases between states were cited at length as tending to show that in the opinion of the supreme court such was the law. The decision of the circuit court was reversed on the facts, and this question was therefore not considered by the supreme court; Moore v. McGuire, 205 U. S. 214, 27 Sup. Ct. 483, 51 L. Ed. 776. That long acquiescence by states in a given situation with respect to the boundary line between them may by length of time become conclusive was held in Franzini v. Layland, 120 Wis. 72, 97 N. W. 499.

The question much discussed both in federal and state courts as to the obligation of the latter to enforce acts of congress, and

how far that body may invest the state courts with judicial power, was considered very fully in an opinion in Zikos v. Oregon R. & N. Co., 179 Fed. 893, where cases on the subject are collected and the conclusion reached that, where substantive rights were created in virtue of the power of congress under a particular subject (as interstate commerce), they may be availed of in any court of competent jurisdiction. The enforcement by the state courts or rights so created does not depend on comity only, but there is a stronger reason growing out of the more intimate relation of the states to the general government. The court said (p. 901): "The constitution of the United States being the supreme law of the land, state and federal courts are alike subject to its provisions, and the refusal of the former to enforce rights conferred by congress would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an anomaly in our system if state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to congressional legislation, should refuse to further do so because of the fact that there has been provided, by a power clearly competent, different rules of liability for those engaged in interstate commerce from those which may be fixed by statute or recognized by decisions in the several states. . . . It is not to be supposed that state courts will or can refuse to abide by the result when the supreme court, the final arbiter, has decided that they have jurisdiction. If that should occur, the constitution would cease to be the supreme law of the land, and its express provision that 'the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding,' would become null and its application inoperative."

The Second Employers' Liability Cases, 223 U. S. 1, 57, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, were cases in which the state court had declined to entertain a suit for the enforcement of rights accruing under the act of congress, holding that such rights could not be enforced, as of right, in the state courts, although their jurisdiction was adequate to the occasion, and the suggestion was made as one of the grounds for declining jurisdiction that the act of congress was not in harmony with the policy of the state. That suggestion was said by the supreme court to be "inadmissible," because it presupposes what in legal contemplation does not exist. The opinion proceeded: "When congress, in the exercise of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. Ed. 833: 'The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and within its jurisdiction paramount, sovereignty. . . . If an act of congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.'"

This decision, in which the opinion was delivered by Van Devanter, J., disposed of two cases, in one of which (Walsh v. R. Co., 173 Fed. 494) the federal Employers' Liability Act of April 22, 1908, was held constitutional by the circuit court in Massachusetts, and in the other of which (Hoxie v. R. Co., 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324) the state court held that it was not bound to enforce that act; in the opinion in the latter case will be found the argument in support of that view. The first case was affirmed and the second reversed, and the opinion of the supreme court may be considered as a sufficient statement of the law on the subject as declared by the tribunal of last resort.

Upon the *admission* of a new state it enters into an indissoluble relation as complete and perpetual as the union between the original states; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227. It was competent for the framers of the state constitution to provide against an interregnum in the government in the

change from the territory to a state; State v. Meadows, 1 Kan. 90.

Since congress has no power to admit a state into the Union except on an equal footing with the original states, the admission fixes its status, anything in the enabling act to the contrary notwithstanding, and confers on the state the exclusive power to enact its own laws regulating intra-state commerce and the introduction and sale of intoxicating liquors; U. S. v. U. S. Express Co., 180 Fed. 1006.

When a state is admitted to the Union, it stands upon the footing of the original states and possesses all the powers which inherently belonged to a state, and its powers are not limited by savings or exceptions in the enabling act; Smith v. State, 28 Okl. 235, 113 Pac. 932; Coyle v. Smith, 28 Okl. 121, 113 Pac. 944, affirmed *id.*, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853; where a condition in the enabling act that the capital of the state should be located at a certain place, and not changed therefrom previous to 1913, ceased to be a valid limitation on the power of the state after its admission; and this applies even where the enabling act also required that the constitutional convention should accept its terms and adopt an ordinance in accordance therewith; McCabe v. Ry. Co., 186 Fed. 966, 109 C. C. A. 110. Congress may not, save in the exercise of a power conferred by the constitution, reserve to itself, in the admission of a new state, police power exercised by the other states; U. S. v. Sandoval, 198 Fed. 539.

An offence committed in a territory before its admission may be prosecuted in the courts of the state after its admission; Ex parte Bailey, 20 Okl. 497, 94 Pac. 553; Ex parte Warford, 3 Okl. Cr. 381, 106 Pac. 559; but the trial must proceed under the laws in force in the territory at the time of admission; Birdwell v. U. S., 4 Okl. Cr. 472, 113 Pac. 205; but where the action was commenced after statehood, the procedure in force in the state applies, though the cause arose prior to statehood; Chicago, R. I. & P. Ry. Co. v. Bank, 32 Okl. 290, 122 Pac. 499.

Constitutional Guarantee of a Republican Form of Government. The fourth section of the fourth article of the constitution directs that "the United States shall guarantee to every state in the Union a republican form of government." Mill. Const. U. S. 640. The form of government is to be *guaranteed*, which supposes a form already *established*; and this is the republican form of government the United States have undertaken to protect. See Story, Const. § 1807.

In the sense of the constitutional guarantee of a republican form of government, the term "state" is used to express the idea of a people or political community, as distinguished from the government; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227.

A republican government, once established, may be endangered so as to call for the action of congress: 1. By the hostile action of some foreign power, and taking possession of the territory of some state, and setting up a government therein not established by the people. 2. By the revolutionary action of the people themselves in forcibly rising against the constituted authorities and setting the government aside, or attempting to do so, for some other. In either of the above cases, it will be the duty of the federal government to protect the people of the state by the employment of military force. Cooley, Const., 2d ed. 202; see Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227; Luther v. Borden, 7 How. (U. S.) 1, 3, 12 L. Ed. 581. Even in strict accordance with the forms prescribed for amending a state constitution, it would be possible for the people of the state to effect such changes as would deprive it of its republican character. It has been suggested that it would then be the duty of congress to intervene. In any case there could probably be no appeal from the decision of congress. Cooley, Const. 196. And such is now definitely settled as the law by the supreme court, which has decided that the guarantee to every state of a republican form of government is a political question belonging to congress; Pacific States Tel. & Tel. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377; Kiernan v. Portland, Oregon, 223 U. S. 151. It means government by the citizens *en masse*, acting directly, though not personally, according to rules established by the majority; Kiernan v. Portland, 57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339.

A provision for the initiative and referendum in a state constitution does not violate this guarantee of the federal constitution; Oregon v. Pacific States Tel. & Tel. Co., 53 Or. 162, 99 Pac. 427; nor does a recall provision in a city charter vesting the powers of government in the people and constituting all inhabitants of the city a body politic; Bonner v. Belsterling, 104 Tex. 432, 138 S. W. 571; nor a state law authorizing cities to adopt the commission form of government including the initiative, referendum and recall, the constitutional guarantee applying only to the government of the state, and not of its local subdivisions; People v. Edmands, 252 Ill. 108, 96 N. E. 914.

Suits by or against a State. A suit by the state is usually entitled in the name of the state, or commonwealth, or people, as prescribed by law or custom in the particular state. The courts of the state and of the United States are open to the state both in its sovereign capacity and by virtue of its corporate rights; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. When a state becomes a suitor in the courts of a foreign state, it is treated as a foreign private corporation; Western Lunatic Asylum v. Miller, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644; and where a foreign state had recovered a judgment for a penalty in its own courts, it

could sue in this country in a state court in its own name; Healy v. Root, 11 Pick. (Mass.) 389. Any inherent power of the governor at common law to sue in the name of the state is superseded by a state constitution defining executive powers and including such authority; Henry v. State, 87 Miss. 1, 39 South. 856. In the absence of a contrary provision by its law, a state may prosecute suits in any court in which other parties institute suits of like character; Commonwealth v. Ford, 29 Grat. (Va.) 683. In Louisiana v. Texas, 176 U. S. 1, 19, 20 Sup. Ct. 251, 44 L. Ed. 347, a state was spoken of as *parens patriæ* of all her citizens in respect of bringing suit against Texas for interdicting interstate commerce by unreasonable quarantine restrictions. As *quasi*-sovereign, the state has a standing in the supreme court to protect its public waters, atmosphere and forests, irrespective of private owners; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956; Georgia v. Copper Co., 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488.

That a state, and not the United States, takes by escheat, see ESCHEAT.

When a state brings a suit against citizens, she thereby voluntarily accepts all the conditions which affect ordinary suitors, except that no affirmative judgment, as for the payment of costs, can be rendered against her; and if the cause is removed to a federal court it will proceed in the same manner as a suit between individuals; Abeel v. Culberson, 56 Fed. 329. So where the state has brought a suit in equity and the cause has been removed to a federal court, the defendant may there file a cross bill against the state; Port Royal & A. R. Co. v. South Carolina, 60 Fed. 552; but if the cross bill seeks any affirmative relief against the state, it cannot be filed, under a constitutional provision that the state shall not be made a defendant in any court of law or equity; Holmes v. State, 100 Ala. 80, 14 South. 864; nor can a cross demand be maintained against a state; State v. Gaines, 46 La. Ann. 431, 15 South. 174.

A state, being a sovereign, is subject to the same law of immunity from suit as that which applies to sovereigns generally, and as to this, see SOVEREIGN. As such it can be sued only by its own consent; Com. v. Weller, 82 Va. 721, 1 S. E. 102; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842. But under the constitution of the United States, the supreme court has original jurisdiction of suits by one state against another, and this jurisdiction has been frequently exercised, particularly in cases involving boundary disputes between the states.

Under the 11th amendment of the United States constitution, it was provided that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." The proposal and adoption of this amendment followed almost immediately the decision in Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440, that a state was liable to be sued in the supreme court by a citizen of another state. In that case, as appears by a note (2 Dall. 480, 1 L. Ed. 466), judgment in default of appearance was rendered for the plaintiff and a writ of enquiry awarded, but it was not sued out and executed, as that cause and all others against states "were swept at once from the records of the court, by the amendment to the federal constitution agreeably to the unanimous determination of the judges, in Hollingsworth v. Virginia," 3 Dall. (U. S.) 378, 1 L. Ed. 644.

In cases arising under and since the adoption of the 11th amendment, the question which has been mainly presented for decision has been whether, where the state itself was not a party to the record, but the action was against some officer of the state, it was in fact a suit against the state and therefore within the provision of the amendment. In Osborn v. Bank of U. S., 9 Wheat. 738, 6 L. Ed. 204, it was held that the 11th amendment applied only to suits in which the state is a party on the record, but subsequently this strict construction was not followed, and it was held that when the state is the real party in interest, though the defendants are its officers or agents, the suit is in substance against the state and within the amendment; Cunningham v. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; though the mere fact that the state may have an interest in the result does not necessarily make it a defendant in the relief sought and will not bring the case within the amendment; U. S. v. Peters, 5 Cra. (U. S.) 115, 3 L. Ed. 53. Whether a suit is in fact against the state, although it is not a party to the record, is of the merits and not to the jurisdiction; Illinois Cent. R. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410.

Suits against state officers held to be in fact against the state are: Those to recover money or property actually in possession of the state and mixed with its general funds; Governor of Ga. v. Madrazo, 1 Pet. (U. S.) 110, 7 L. Ed. 73; to recover taxes illegally assessed; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; to foreclose a mortgage on a railroad of which the state had possession and legal title; Cunningham v. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; to have railroad bonds declared a lien on railroad stock owned by the state; Christian v. R. Co., 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; to set aside a tax sale; Chandler v. Dix, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. Ed. 1129; any suit on

state bonds or coupons or evidence of debt of the state; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; to compel the appropriation of certain funds to their payment; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; or to force the levy of a special tax therefor; North Carolina v. Temple, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. Ed. 849; Louisiana v. Steele, 134 U. S. 230, 10 Sup. Ct. 511, 33 L. Ed. 891; or prevent the use of state bonds to pay a certain debt; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623; to restrain state officers proceeding under a valid statute from reducing bridge tolls from those permitted under a previous law; Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; by a non-resident insurance company which seeks an injunction to restrain the state superintendent of insurance from revoking its license to do business in the state; Metropolitan Life Ins. Co. v. McNall, 81 Fed. 888; a suit against the state dispensary of South Carolina in the course of winding up its business; Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; one against the governor in his official character; Moore v. American Transp. Co., 24 How. (U. S.) 16, 16 L. Ed. 674; one against officers of the state as representing the state's action; Oregon v. Hitchcock, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935; an effort to enjoin state officers charged with the collection of taxes, and seeking to establish exemption from taxation under the state laws and the repayment of amounts previously collected, was, to all intents and purposes, a suit against the state, and in part for the recovery of money, and the state court had no jurisdiction; Bloxham v. R. Co., 35 Fla. 625, 17 South. 902; against the state board of agriculture to recover money alleged to be wrongfully collected by it as a license tax; Lord & Polk Chemical Co. v. Board, 111 N. C. 135, 15 S. E. 1032; a suit by a private citizen to enjoin the erection of a state building at a place other than that prescribed by law; Sherman v. Bellows, 24 Or. 553, 34 Pac. 549; a suit to determine the rights of conflicting claimants to a fund granted by congress to the states for agricultural colleges; Brown University v. Rhode Island College of Agri. & Mech. Arts, 56 Fed. 55.

Since a state is liable to suit only under a statute permitting it, the act authorizing the same must be strictly followed and carefully considered by the court in determining the scope and limitation of its power and jurisdiction; Wright v. State Bd. of Liquidation, 49 La. Ann. 1213, 22 South. 361. A state constitutional provision providing how suits may be brought against the state, has no application to municipal corporations; Goldtree v. San Diego, 8 Cal. App. 505, 97 Pac. 216.

The suit is held not to be against the state wherever it is against an officer of a state, as an individual, for some act done under color of office, pursuant to an unconstitutional statute; Grisar v. McDowell, 6 Wall. (U. S.) 363, 18 L. Ed. 863; Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471; Scott v. Donald (No. 1), 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; where the law imposes upon a state officer a specific duty not affecting the general governmental affairs of the state, by the performance of which an individual has a distinct interest, which may be enforced by mandamus to compel performance or injunction to restrain inconsistent action; Rolston v. Fund. Com'rs, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. Ed. 721; Scott v. Donald (No. 2), 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; as an injunction at suit of a railroad company to restrain railroad commissioners from enforcing an unconstitutional rate law; McNeill v. R. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; *contra*, State v. R. Co., 145 N. C. 495, 59 S. E. 570, 13 L. R. A. (N. S.) 966; or against state land commissioners to restrain them from acts alleged to be in violation of the plaintiff's contract of purchase of the lands from the state; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; or against a state board of officers to restrain them from proceeding against a corporation engaged in interstate commerce, for failure to comply with state and statutory regulations; Louisiana v. Lagarde, 60 Fed. 186; or a proceeding for contempt in the federal courts against a state officer who has seized property in the hands of a receiver in attempting to collect a tax alleged to be illegal and attacked by proceeding in the federal court; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; or by an individual from enforcing an unconstitutional law under which his rights and privileges would be violated; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Gunter v. R. Co., 200 U. S. 273, 26 Sup. Ct. 252, 50 L. Ed. 477; General Oil Co. v. Crain, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; particularly an invalid tax; Litchfield v. Webster Co., 101 U. S. 773, 25 L. Ed. 925; Memphis & L. R. R. Co. v. Railroad Com'rs, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; Allen v. R. Co., 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200.

A citizen of another state cannot sue a state by the use of the name of his own state which he is permitted to use for that purpose; New Hampshire v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656; Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347; but it was held that the supreme court has jurisdiction to enforce a

property right in an action by one state against another; and one state may sue another on bonds of the latter of which the former is the donee and absolute owner; South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448, where in a dissenting opinion, White, J., takes the ground that a state, by acquiring a claim of a private citizen on which under the 11th amendment he could not sue the state, cannot convert it into the subject-matter of a justiciable controversy, since to do so would destroy the prohibition of that amendment. Three justices concurred in the dissent. A state, even if it consents to be sued, cannot be sued by its own citizens in a federal court; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; and a corporation cannot sue a state without its consent; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140.

While a state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property rights are held is void; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842.

The relation of the federal courts to these cases was stated in Central of Georgia Ry. Co. v. Railroad Commission of Alabama, 161 Fed. 925, where it was held that issuing an injunction by a federal court to restrain state officers from enforcing a state law involves no question of state rights or local self-government, and an injunction was granted against the state railroad commission. But the court of appeals reversed the decree upon the facts and dissolved the injunction having in the beginning of their opinion, however, made a general statement as to the law on the subject, as follows: "We assume as true and indisputable that the federal courts have jurisdiction and authority to annul and enjoin acts of a state legislature that are confiscatory or otherwise in conflict with the constitution; that they have no right to decline to exercise such jurisdiction when properly invoked; that every citizen, when the amount involved is sufficient and there is either diverse citizenship or a federal question involved, has the right to invoke such jurisdiction; that when such jurisdiction has attached it is exclusive, in the sense that state courts or state authority cannot interfere with it; that the process of injunction may be lawfully issued to preserve such jurisdiction from invasion by either civil or criminal proceedings; and that an injunctive suit to stay action by state officers under an unconstitutional state law is not necessarily a suit against the state. There is in our minds no doubt as to these general principles, though innumerable difficulties and disputations arise in their practical application;" Railroad Commission of Alabama v. R. Co., 170 Fed. 225, 231, 95 C. C. A. 117. A certiorari was denied; Central of Georgia R. Co. v. R. Comm., 214 U. S. 521, 29 Sup. Ct. 701, 53 L. Ed. 1066.

In a qualified sense separate states are sovereign and independent and the relations between them partake of something like the nature of international law. The supreme court by its decisions of controversies between states is constructing what may be called a body of interstate law; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

The supreme court has jurisdiction and authority to deal with a question between two states which if it were raised between two independent sovereignties might lead to war; Missouri v. Illinois, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 573.

As the remedies resorted to by independent states for the determination of controversies arising between them were withdrawn from the states by the constitution, a wide range of controversies susceptible of adjustment and not purely political in their nature was made justiciable by that instrument; Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; as to the practice, see Com. of Virginia v. West Virginia, 209 U. S. 514, 28 Sup. Ct. 614, 52 L. Ed. 914.

The supreme court has original jurisdiction of a bill filed by one state against another for relief from the deprivation by the direct action of the latter of the water of a river accustomed to flow through and across her country and consequent destruction of property and injury to health; Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; *id.*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

The jurisdiction of the supreme court of controversies in which a state is a party is not affected by the question whether it is plaintiff or defendant, and where a state sought an injunction against a United States officer and the United States was, for the purposes of the case, a real party in interest, the court had jurisdiction; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954.

The supreme court has no jurisdiction where the name of a state is used simply for the prosecution of a private claim; Kansas v. U. S., 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510; although a state may be sued by the United States without its consent, public policy forbids that the United States may without its consent be sued by a state; Kansas v. U. S., 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510.

A state bordering on the sea may, in the exercise of its sovereignty, extend its own borders one marine league from low water

mark and make the region so annexed as much a part of the state as any other part of its territory, and therefore within the federal district; U. S. v. Imp. Co., 173 Fed. 426.

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of congress before it could make a valid agreement with Virginia for the purchase of the land." Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537, followed in Stearns v. Minnesota, 179 U. S. 246, 21 Sup. Ct. 73, 45 L. Ed. 162.

As to the relation between the state and the United States, see UNITED STATES OF AMERICA; JURISDICTION; as to courts, see JUDICIAL POWER; as to legislatures, see LEGISLATIVE POWER; as to governors and executive officers, see EXECUTIVE POWER; as to surrender of fugitives from justice, see EXTRADITION; as to taxation, see TAX; as to constitutional rights and guaranties of citizens of states, see PRIVILEGES AND IMMUNITIES; EQUAL PROTECTION OF THE LAWS; DUE PROCESS OF LAW; CONSTITUTION OF THE UNITED STATES; as to the power to regulate commerce between the states, see COMMERCE; and as to whether states can be compelled to pay their debts, see 12 Am. L. Rev. 625; 15 *id.* 519.

See PARENS PATRIÆ; BOUNDARY.

The District of Columbia and the territories are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; New Orleans v. Winter, 1 Wheat. (U. S.) 91, 4 L. Ed. 44; Barney v. Baltimore City, 6 Wall. (U. S.) 280, 18 L. Ed. 825; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049. But the District of Columbia is a "State of the Union," within the meaning of the treaty of 1853 between the United States and France, relieving Frenchmen from the disability of alienage in disposing of and inheriting property; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642.

In Society. That quality which belongs to a person in society, and which secures to and imposes upon him different rights and duties in consequence of the difference of that quality.

In Practice. To make known specifically; to explain particularly: as, to state an account or to show the different items in an account; to state the cause of action in a declaration.

STATE LANDS. Tide lands belonging to the state are held not to be state lands. Seattle & M. Ry. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217, 38 Am. St. Rep. 866.

STATE PAPER OFFICE. An office established in London in 1578 for the custody of state papers. The head of it was the "Clerk of the Papers."

STATE SECRETS. See SECRETS OF STATE.

STATEMENT. The act of stating, reciting, or presenting verbally or on paper. Montague v. Thomason, 91 Tenn. 168, 18 S. W. 264. See PARTICULAR STATEMENT.

STATEMENT OF AFFAIRS. In English bankruptcy practice, the giving by the debtor of a list of creditors, secured and unsecured with the value of the securities, a list of bills discounted, and a statement of his property. Bank. Act 1869, § 19.

STATEMENT OF CLAIM. The specification of the plaintiff's cause of action. See DECLARATION. The term is now used in Pennsylvania under the Practice Act of 1887.

STATE'S EVIDENCE. See KING'S EVIDENCE; PROVER.

STATING-PART OF A BILL. See BILL.

STATION. In Civil Law. A place where ships may ride in safety. Dig. 49. 12. 1. 13; 50. 15. 59.

A railroad company may exclude from its stations all persons except those using or desirous of using the railway, and may impose upon the rest of the public any terms it may deem proper as the condition of admittance; [1897] A. C. 479; to the same effect, 18 C. B. 46.

Where a railroad company promises to build and maintain a station and stop two trains a day for the use of one who has been induced thereby to purchase land, the railroad may be excused from such promise if its duty to the public is thereby disturbed; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439.

A railroad company is bound to use only such degree of care in constructing its stations and platforms as is sufficient to protect passengers using ordinary care from injury; Lauterer v. R. Co., 128 Fed. 540, 63 C. C. A. 38.

See DEPOT.

STATIONER'S COMPANY. A body formed in 1557 in London of 97 London stationers and their successors, to whom was entrusted, in the first instance, and, under Orders in Council, the censorship of the press.

STATIONERS' HALL. The hall of the Stationers' Company at which every person claiming copyright must register his title, and without such registration no action shall be commenced against persons infringing it.

STATIST. A statesman; a politician; one skilled in government.

STATU LIBERI (Lat.). **In Louisiana.** Slaves for a time, who had acquired the right of being free at a time to come, or on a con-

dition which was not fulfilled, or in a certain event which had not happened, but who in the meantime remained in the state of slavery. La. Civ. Code, art 37. See Valsain v. Cloutier, 3 La. 176, 22 Am. Dec. 179; Moosa v. Allain, 4 Mart. (N. S. La.) 102. This is substantially the definition of the civil law. *Hist. dê la Jur.* l. 40; Dig. 40. 7. 1; Code 7. 2. 13.

STATUS. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community. L. R. 4 P. D. 11. The rights, duties, capacities and incapacities which determine a person to a given class, constitute his status; Campb. Austin 137.

It also means *estate*, because it signifies the condition or circumstances in which one stands with regard to his property. In the Year Books, it was used in this sense; 2 Poll. & Maitl. Hist. E. L. 11.

The movement of progressive society has been from status to contract; Maine, Anc. Law 170.

"Maine's now celebrated dictum as to the movement from status to contract in progressive societies is perhaps to be understood as limited to the law of property, taking that term in its widest sense as inclusive of whatever has a value measurable in exchange. With that limitation the statement is certainly just, and has not ceased to be significant. . . . As regards the actual definition of different personal conditions, and the more personal relations incidental to them, it does not seem that a movement from status to contract can be asserted with any generality. . . . Status may yield ground to contract, but cannot itself be reduced to contract. On the other hand, contract has made attacks on property which have been repulsed. There was a time in the thirteenth century in which it seemed as if there was no rule of tenure that could not be modified by the agreement of parties. Our settled rules that only certain defined forms of interest in property can be created by private acts, our rule against perpetuities, are the answer of the common law to attempts to bring everything under private bargain and control. Maine guarded his position, however, to a considerable extent in the final words of this chapter, for he seems not to include marriage—at all events marriage among Western nations, which is preceded by and results from agreement of the parties—under the head of status. And, if the term is thus restricted, the gravest apparent exception to Maine's dictum is removed. This, of course, involves a sensible narrowing of the term 'status,' a much discussed term which, according to the best modern expositions, includes the sum total of a man's personal rights and duties (Salmond, Jurisprudence 253-257), or, to be verbally accurate, of his capacity for rights and duties (Holland, Jurisprudence 88). It is curious that the word 'estate,' which is nothing but the French form of 'status,' should have come to stand over against it in an almost opposite category. A man's estate is his measurable property; what we call his status is his position as a lawful man, a voter, and so forth. The liability of every citizen to pay rates and taxes is a matter of status; what a given citizen has to pay depends on his estate, or portions of it assigned as the measures of particular imposts. We have, too, an 'estate' in land, which so far preserves the original associations of 'status' that, as we have just noted, contract may not alter its incidents or nature." Pollock's Maine's Anc. Law 184.

As to Mr. Dicey's suggestion (Law and Public Opinion 283) that "the rights of workmen to compensation for accidents have become a matter, not of contract, but of status," Sir F. Pollock points out in the same note to Maine, at page 185, that many other kinds of contracts have long had incidents attached to them by law.

The action of assumpsit must be reckoned a technical instrument which gave no small help to the forces which were making for the transition from status to contract; 3 Holdsw. Hist. E. L. 349.

STATUS QUO. The existing state of things at any given date.

STATUS QUO ANTE BELLUM. A phrase used in international law to indicate the condition of the territory of a belligerent and the ownership of the property of the subjects of such belligerent, as they existed prior to the breaking out of war, which, under the stipulations of some treaties of peace are restored to their former ownership. In other treaties, a belligerent who has possession of an enemy's territory or property at the end of the war retains it. See TREATY OF PEACE; UTI POSSIDETIS.

STATUTA INCERTI TEMPORIS. See NOVA STATUTA.

STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

It is said that "statute" (*statutum*) was first used in an act of 55 Henry III.; 21 Law Mag. & Rev. 310.

This word is used to designate the written law in contradistinction to the unwritten law. See COMMON LAW.

Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises. Sometimes the word is used in contradistinction to the imperial Roman law, which, by way of eminence, civilians call the common law. Wharton.

A negative statute is one expressed in negative terms, and so controls the common law that it has no force in opposition to the statute. Bac. Abr. *Statute* (G).

An affirmative statute is one which is enacted in affirmative terms.

Such a statute does not necessarily take away the common law; Co. 2d Inst. 200; if, for example, a statute without negative words declares that when certain requisites shall have been complied with, deeds shall have a certain effect as evidence, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner they might have been before the statute was passed; Jackson v. Bradt, 2 Caines (N. Y.) 169; or a custom; 6 Cl. & F. 41. Nor does such an affirmative

statute repeal a precedent statute if the two can both be given effect; Dwarris, Statute 474. The distinction between negative and affirmative statutes has been considered inaccurate; 13 Q. B. 33.

A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.

Penal statutes are those which command or prohibit a thing under a certain penalty. Bac. Abr. A statute affixing a penalty to an act, though it does not in words prohibit it, thereby makes it illegal; Hallett v. Novion, 14 Johns. (N. Y.) 273; 37 E. L. & E. 475; Skelton v. Bliss, 7 Ind. 77. See INTERPRETATION.

A perpetual statute is one for the continuance of which there is no limited time, although it be not expressly declared to be so.

If a statute which did not itself contain any limitation is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter. Bac. Abr. *Statute* (D).

Private statutes or *acts* are those of which the judges will not take notice without pleading; such as concern only a particular species or person. See 1 Bla. Com. 86. Special or private acts are regarded as "rather exceptions than rules, being those which only operated on particular persons and private concerns" (cited with approval in Wells v. Nickles, 104 U. S. 447, 26 L. Ed. 825, where it was held that where an act amends a general act it is a public act).

Private statutes may be rendered public by being so declared by the legislature; 1 Bla. Com. 85; 4 Co. 76. And see 1 Kent 459. In England private statutes are said not to bind *strangers;* though they should not contain any saving of their rights. A general saving clause used to be inserted in all private bills; but it is settled that, even if such saving clause be omitted, the act will bind none but the parties. But this doctrine does not seem to be applicable to this country.

Public statutes are those of which the courts will take judicial notice without pleading or proof.

They are either general or local,—that is, have operation throughout the state at large, or within a particular locality. It is not easy to say what degree of limitation will render an act local. Thus, it has been held that a public act relating to one county only is not local within the meaning of a constitutional provision which forbids enactments of local bills embracing more than one subject; Conner v. New York, 5 N. Y. 285.

A remedial statute is one made to supply such defects or abridge such superfluities in the common law as may have been discovered. 1 Bla. Com. 86.

These remedial statutes are themselves divided into *enlarging* statutes, by which the common law is made more comprehensive and extended than it was before, and into *restraining* statutes, by which it is narrowed down to that which is just and proper. The term *remedial statute* is also applied to those acts which give the party injured a remedy; and in some cases such statutes are penal; Esp. Pen. Acts 1.

A temporary statute is one which is limited in its duration at the time of its enactment.

It continues in force until the time of its limitation has expired, unless sooner repealed. A statute which by reason of its nature has only a single and temporary operation—*e. g.* an appropriation bill—is also called a temporary statute.

There is also a distinction in England between *general* and *special* statutes. The former affect the whole community, or large and important sections, the interest of which may be identical with those of the whole body. *Special* statutes relate to private interests, and deal with the affairs of persons, places, classes, etc., which are not of a public character. Wilb. Stat. 218. See Wells v. Nickles, 104 U. S. 447, 26 L. Ed. 825.

Local statute is used by Lord Mansfield as opposed to *personal statute*, which relates to personal transitory contracts; whereas a local statute refers to things in a certain jurisdiction alone; *e. g.* the statute of frauds relates only to things in England; 1 W. Bla. 246.

As to *mandatory* and *directory* statutes, it is said that when the provision of a statute is the essence of the thing required to be done, it is mandatory; Norwegian Street, 81 Pa. 349; otherwise, when it relates to form and manner; and where an act is incident, or after jurisdiction acquired, it is directory merely; Davis v. Smith, 58 N. H. 17.

Expository statutes. Acts passed for the purpose of affecting the construction to be placed upon prior acts. They are often expressed thus: "The true intent and meaning of an act passed . . . be and is hereby declared to be;" "the provisions of the act shall not hereafter extend"; or "are hereby declared and enacted not to apply," and the like. This is a common mode of legislation. "It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate on future cases it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future." Cooley, Const. Lim. 94; such acts are binding upon the courts, although the latter, without such a direction, would have understood the language to have meant something different. They have the same effect upon the construction of former acts, in the absence of intervening rights, as if they had been embodied in the former act at the time

of its passage; Endlich, Interpr. Stat. 365. See Pomeroy's Sedgw. Constr. Stat. Law 214; Sutherl. Stat. Constr. sec. 402; Washington, A. & G. R. Co. v. Martin, 7 D. C. 120; Dequindre v. Williams, 31 Ind. 444; People v. Board of Sup'rs, 16 N. Y. 424.

A statute declaring the meaning of a prior act, etc., will not be construed to be an invasion of the judicial function, but will be treated as a direct enactment controlling the meaning of the prior act; Singer Mfg. Co. v. McCollock, 24 Fed. 667. But it has been held that the legislature cannot pass an act so as to compel the courts in the future to adopt a particular construction of an earlier statute; Com. v. Warwick, 172 Pa. 140, 33 Atl. 373, Mitchell, J., dissenting from the judgment of the court as being "an unprecedented and unwarranted invasion by the judiciary of the legislative authority." But see Titusville Iron Works v. Oil Co., 122 Pa. 627, 15 Atl. 917, 1 L. R. A. 361, and Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep. 153, where the doctrine seems to have been confined to retrospective legislation.

The legislature cannot prevent the courts from putting their own interpretation on an act, at least as to rights which vested before the declaratory act was passed; Virginia Coupon Cases, 25 Fed. 641; Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

See an article in 35 Am. L. Reg. & Rev. 25, by William M. Meigs.

It is a general rule that when the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law; Co. Litt. 235; Co. 2d Inst. 222; and when a power is given by statute, everything necessary for making it effectual is given by implication: *quando lex aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest*; 12 Co. 130.

The provisions of a statute cannot be evaded by any shift or contrivance; 2 B. & C. 655. Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance; 7 Cl. & F. 540.

Reference Bureaus. The mode of enacting laws is regulated by the constitution of the Union and of the several states respectively. The advantage of having a law officer, or board of officers, to revise bills and amendments of bills during their progress through the legislature, has been somewhat discussed. Agencies are established in some of the states for rendering technical assistance to legislators. Reference bureaus connected with state libraries, universities or historical societies have been established in Alabama, Connecticut, Illinois, Iowa, Kansas, Massachusetts, Nebraska, New York, North Dakota, Rhode Island and Virginia. These have been authorized by law in some states and and in others without express authority. Reference and drafting bureaus have been established by statute in California, Indiana, Michigan, Ohio, Pennsylvania, South Dakota, Texas, Vermont and Wisconsin. Bureaus or offices have been created by statute or legislative rule for drafting work only in Connecticut, Massachusetts and New York.

In the Michigan act (1907) the bureau is required to procure and compile, in suitable and convenient form for ready reference and access, information as to proposed and pending legislation in other states and to investigate the operation and effect of new legislation in other states and countries, so that any legislator or citizen may have the fullest information thereon, and it shall also give such advice and assistance to the members of the legislature as they may require in the preparation of bills, and shall draft bills upon such subjects as they may desire.

See Report of the Committee on Legislative Drafting, Am. Bar Assoc., 1913, p. 622; also Report for 1882; Reports of Engl. Stat. Law Com. 1856–1857; Street, Council of Revision; PARLIAMENTARY COUNSEL.

Enacting legislation. As to formalities required it has been held that a statute which the legislative journals showed was never passed, was valid because signed by the presiding officers of the legislature; Wyatt v. Mfg. Co., 116 N. C. 271, 22 S. E. 120; and that it is not admissible to prove that an act signed by the governor was in fact passed by the legislature and sent to him within two days next preceding the final adjournment of the legislature in violation of the constitution; Western Union Tel. Co. v. Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671

The signing by the speaker of the United States house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses that such bill has passed congress, and when the bill thus attested, receives the approval of the president, and is deposited in the department of state its authentication as a bill that has passed congress is complete and unimpeachable; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. See JOURNALS.

As to whether the president has the power to sign bills after the adjournment of congress, Attorney-General Wirt was of the opinion that he had not, and President Monroe acted on his opinion. President Lincoln signed the act of March 12, 1863, after the adjournment of congress. A house committee subsequently reported that in their opinion the act was not in force, but the house never acted upon their report. The court of claims holds that this act has been recognized by the supreme court, and was therefore valid; see 32 Amer. Law Rev. 211; U. S. v. Weil, 29 Ct. Cl. 549.

Attorney-General Garland advised President Cleveland that he was without authority to sign a bill after adjournment.

In U. S. v. Weil, 29 Ct. Cl. 523, it was held that the president had the power to sign bills after the adjournment of congress. In cases arising under state constitutions, it was held in Fowler v. Peirce, 2 Cal. 165; Hardee v. Gibbs, 50 Miss. 802, that the power to sign a bill ceased with the adjournment, but under the language of the Illinois constitution, a signature after adjournment was held valid; Seven Hickory v. Ellery, 103 U. S. 423, 26 L. Ed. 435. The President can sign a bill during a recess of congress; La Abra Silver Minn. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223 (not decided whether he can do so after final adjournment). See EXECUTIVE POWER.

In People v. Bowen, 21 N. Y. 517, it was held, under a constitutional provision almost identical with that of the constitution of the United States, that a signature after adjournment was valid. And this was followed in State v. Fagan, 22 La. Ann. 545.

Much discussion has arisen on the question whether a statute which appears to be contrary to the laws of God and nature, and to right reason, is void. Earlier dicta in the affirmative (see 8 Co. *118 *a*; 12 Mod. 687) are not now considered to be law; L. R. 6. C. P. 582. See Dwarris, Stat. 482. The question as applicable to this country is treated under CONSTITUTIONAL. It being historically true that the American people are a religious people, as shown by the religious objects expressed by the original grants and charters of the colonies, and the recognition of religion in the most solemn acts of their history, as well as in the constitutions of the states and the nation, the courts, in construing statutes, should not impute to any legislature a purpose of action against religion; Church of the Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

As to statutes which contravene the constitution, see CONSTITUTIONAL.

By the common law, statutes took effect by relation back to the first day of the session at which they were enacted; 4 Term 360. The injustice which this rule often worked led to the statute of 33 Geo. III. c. 13, which declared that, except when otherwise provided, statutes should take effect from the day of obtaining the royal assent, unless otherwise ordered therein. This rule, however, does not obviate the hardship of holding men responsible under a law before its promulgation. By the Code Napoléon, a law takes effect in each department of the empire as many days after its promulgation in that department as there are distances of twenty leagues between the seat of government and the place of promulgation. The general rule in America is, that an act takes effect from the time when the formalities of enactment are actually complete, unless it is ordered otherwise or there is some constitutional or statutory rule on the subject; Cooley, Const. Lim. 187; Matthews v. Zane, 7 Wheat. (U. S.) 164, 5 L. Ed. 425.

The constitutions of many states contain provisions that acts shall not take effect till a certain time after their passage, or after adjournment of the legislature, but such constitutions usually contain also a provision that the legislature may, in a case of emergency, provide that an act shall take effect immediately, and it has become a common practice so to provide even in ordinary acts. But an act which merely provides that "it shall take effect on and after its passage and approval" does not come within such an emergency as to take effect immediately; State v. Exp. Co., 80 Neb. 823, 115 N. W. 619.

Where an act was passed May 16, which declared that it should take effect May 14, it went into effect on its passage; McLaughlin v. Newark, 57 N. J. L. 298, 30 Atl. 543.

The Tariff Act of 1897 took effect at the moment it was approved by the president, which was six minutes past 4 o'clock p. m., Washington time, on July 24, 1897, and goods imported and entered for consumption on that day, but prior to such approval, were dutiable under prior legislation; U. S. v. Iselin, 87 Fed. 194.

An act increasing taxes and annexing penalties, falls within the first article of the constitution prohibiting *ex post facto* laws, and giving effect to statutes only from the time of their receiving the president's signature; Salmon v. Burgess, 1 Hughes, 356, Fed. Cas. No. 12,262. "The law is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 p. m. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions." *Id.* See, also, U. S. v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002, 40 L. Ed. 82, as to the tariff act of 1894.

Local and special legislation. In all but a few states constitutional provisions are found forbidding the passage of local or private or special laws. While these provisions were not unknown at an earlier date, the principle was fully developed in the Illinois constitution of 1870, and has become more fixed as a part of American constitutional law since then. In some states, such prohibited legislation is specified as "local or special," and in some "special or private," and in some "private, local, or special." The act of congress of July 30, 1886, prohibited local and special legislation in the territories. See Binney, Restrict. upon Loc. and Spec. Legisl. 130. The subject-matter of legislation to which this prohibition applies varies in different states. Mr. Binney has grouped them in a general way. See *id.* 132. Among the subject-matters most usually found are: changing names of persons; legitimation and adoption of children; divorce; granting charters; changing laws of descent; providing for the sale or conveyance of real estate of persons under disability; granting the right

of eminent domain; regulating legal procedure; incorporating municipalities; creating offices; or regulating the fees of officers; laying out highways; providing for the management of public schools; taxation. In some states special laws are permitted only when a general law cannot be made applicable.

A general law is defined as "neither for one or more particular persons, nor to operate exclusively in any particular part or parts of the state"; Binney, Restr. etc. 22. Such an act is not necessarily universal and need not be one which operates on all persons or all things; a law which affects a class of persons or things may be a general law; Brooks v. Hyde, 37 Cal. 375; State v. Parsons, 40 N. J. L. 1. A law is to be regarded as such when its provisions apply to all objects of legislation, distinguished alike by quality and attribute which necessitate the enactment as manifest relation. Such laws must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class; Randolph v. Wood, 49 N. J. L. 88, 7 Atl. 286. See GENERAL LAWS.

A special law is one which relates either to particular persons, places, or things, or to persons, places, or things which though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applicable. Binney, Restr. etc. 26.

A local law is one whose operation is confined within territorial limits, other than those of the whole state or any properly constituted class or locality therein.

The features of local and special legislation overlap, and they are not conterminous. The matter to which a local law relates may be either general or special, but in either case the law itself is not in force outside of the locality for which it is passed.

The following are held special acts and invalid: An act for holding primary elections made applicable only to counties casting a certain number of votes at the last election, which makes it applicable only to two counties; Marsh v. Hanly, 111 Cal. 368, 43 Pac. 975; an act, though general in form, regulating the re-location of county seats which was in fact applicable to but a single county; Mode v. Beasley, 143 Ind. 306, 42 N. E. 727; an act for the extension of corporate limits of cities having a certain population which can be applicable only to one city; State v. Des Moines, 96 Ia. 521, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381; an act relating to the collection of taxes, cities of the first, second, and fourth class being excepted, and it not being confined to municipal matters; Van Loon v. Engle, 171 Pa. 157, 33 Atl. 77.

The following are not within the constitutional prohibition: An act amending a city charter granted previously to the adoption of the constitution; Cunningham v. Denver, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212, an act relating to a subject as to which there was already a local law; 96 Ga. 403; one providing a daily pay for jurors although it only applied to a single county in which there was already a special law, it being at the time of the passage of the act the existing rate in the remaining counties; State v. Sullivan, 62 Minn. 283, 64 N. W. 813; an act making it a misdemeanor to work as a barber on Sunday, exempting from its operation New York and Saratoga; People v. Sheriff of Kings County, 13 Misc. Rep. 587, 35 N. Y. Supp. 19; an act providing a different and better system of education for cities of ten thousand or more inhabitants than is enjoyed by the rest of the state; Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944.

A territorial act classifying counties according to the equalized assessed valuation of property and graduating salaries of county officers in reference to population is not a local special law under the act of congress; Harwood v. Wentworth, 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069.

The proviso of a general act that it shall not apply to suits pending at its passage does not render it special; New York & O. L. Co. v. Weidner, 169 Pa. 359, 32 Atl. 557.

An act offering a reward for the first to obtain in each county an artesian well is void; McRae v. Cochise County, 5 Ariz. 26, 44 Pac. 299. At least two individuals, actual or potential, are necessary to constitute a class which may be the subject of an act on the subject concerning which special acts are forbidden; such a class cannot be created by statute, however general, which takes as a class characteristic, to designate the members of a class, peculiarities of a single individual; Groves v. Grant County Court, 42 W. Va. 587, 26 S. E. 460. An act forbidding a sale of stocks of bonds and provisions, cotton, etc., on margin without delivering the property is not a special act; State v. Gritzner, 134 Mo. 512, 36 S. W. 39; but an act prohibiting book-making and pool-selling excepting on a race course is a special act; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; and so is an act permitting a limited divorce instead of an absolute divorce when asked by a person holding conscientious scruples against absolute divorce; Middleton v. Middleton, 54 N. J. Eq. 692, 35 Atl. 1065, 37 Atl. 1106, 36 L. R. A. 221, 55 Am. St. Rep. 602.

When there is a general act for the incorporation of companies with the right of amendment reserved to the state, any amendment thereto must affect all corporations incorporated under the act; Central Trust Co. of New York v. R. Co., 82 Fed. 1; and where it is limited to cities of a certain size whereby it can be applicable only to a certain city, it is special legislation and void; *id.*

Classification. Under modern constitutions which prohibit special legislation, it has been found necessary to permit of the classification of certain subjects of legislation, chiefly in relation to municipalities or what may be termed home rule.

While the classification of municipalities is permitted, it is held that not more than three classes can lawfully be made in cities in Pennsylvania; Appeal of Ayars, 122 Pa. 266, 16 Atl. 356, 2 L. R. A. 577; and that a classification, which is in effect legislation for certain cities to the exclusion of others which are really of the same class, is invalid; Appeal of Scowden, 96 Pa. 422.

A classification act may furnish a precedent for the legislature in future cases, but cannot control its action. The constitutionality of each law which establishes or adopts a classification must be judged of separately, and the mere fact that a classification has constitutionally been employed in one case does not bind the legislature to employ it again, even in a similar case; Calvo v. Westcott, 55 N. J. L. 78, 25 Atl. 269.

Wheeler v. Philadelphia, 77 Pa. 338 (1875), is an early and leading case on classification. It holds that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special; that the necessity for classification is recognized in the constitution by the creation of courts on a basis of population and that classification is incident to legislation and necessary to the promotion of the public welfare; that the question is not whether it is authorized but whether it is expressly prohibited in the constitution. It further holds that, for the purpose of taxation, real estate may be classified; as into timber lands, mineral lands, farm lands, etc., and that the act of 1874, which classifies cities according to their population, is constitutional.

The subject of classification in another connection is treated in EQUAL PROTECTION OF THE LAWS.

In a statute the words "it shall be lawful" are usually only permissive; they confer a faculty or power; but there may be something in the act imposing a duty to exercise such power, in which case the words become obligatory; 5 App. Cas. 222.

See CONSTRUCTION; INTERPRETATION; INITIATIVE; EX POST FACTO LAWS; CONSTITUTIONAL; CONSTITUTION; FOREIGN LAW; PUNCTUATION; PROVISO; OBSOLETE; REPEAL; REVISED STATUTES; STATUTES AT LARGE; RETROSPECTIVE LEGISLATION; PROMULGATION; PROCLAMATION; GENERAL LAWS.

See 3 Binney for a list of British statutes in force in Pennsylvania.

As to the force of English statutes in the American colonies, see Sioussat, 1 Sel. Essays in Anglo-American L. H. 416.

As to the history of ancient English statutes, see Record Commission in 2 Sel. Essays in Anglo-American L. H. 169.

As to the enforcement by state courts of federal statutes, see STATE.

STATUTE MERCHANT. A security entered before the Mayor of London, or some chief warden of a city, in pursuance of 13 Ed. I. stat. 3, c. 1, whereby the lands of the debtor are conveyed to the creditor till out of the rents and profits of them his debt may be satisfied. 2 Bla. Com. 160. It is acknowledged before the court; Ames, Lect. Leg. Hist. 102.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

The statute of frauds "is a weapon of defence, not of offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intentions of the parties." Lord Selborne, C., in L. R. 8 Ch. 351.

STATUTE OF LIMITATIONS. See LIMITATIONS.

STATUTE ROLLS. See ROLLS.

STATUTE STAPLE. The statute of the staple, 27 Ed. III. stat. 2, confined the sale of all commodities to be exported to certain towns in England, called *estaple* or *staple*, where foreigners might resort. It authorized a security for money, commonly called statute staple, to be taken by traders for the benefit of commerce; the mayor of the place is entitled to take recognizance of a debt in proper form, which had the effect to convey the lands of the debtor to the creditor till out of the rents and profits of them he should be satisfied. 2 Bla. Com. 160; 2 Rolle, Abr. 446; Bac. Abr. *Execution* (B. 1); Co. 4th Inst. 238.

The statute staple—the recognizance "in the nature of a statute staple," which afterwards became a usual form of security in the ordinary courts—was introduced in the staple courts. It was a bond of record acknowledged before the mayor of the staple. A seal was required and that was all that was necessary to attest the contract. A number of the most considerable towns in the kingdom were named as statute towns. To these the principle raw commodities of the kingdom were brought for sale and were known as the "staple" wares of England, but the term came to be applied almost exclusively to wool. The system came to an end about 1660. In 1669, a charter was granted to the staplers, as "The Mayor, Constables, and Merchants of the Staple of England." A court of the staple had jurisdiction of civil actions in which staplers were concerned. It was held by the mayor and constables of the staple, who had power to keep the peace and to arrest for trespass, debt, or breach of contract; Brodhurst, The

Staple, in 3 Sel. Essays in Anglo-Amer. L. H. 16 (17 L. Q. R. 56).

STATUTES AT LARGE. Statutes in full or at length as originally enacted, in distinction from abridgments, compilations, and revisions. First used in one of the Elizabethan editions of the statutes; Ilbert, Legislative Methods 21.

A volume of United States Statutes at Large is published for each congress, and is the official publication of the acts of congress. See REVISED STATUTES. If there is any variance between an act of congress, as found in the printed volume of statutes, and the original, as enrolled and deposited with the secretary of state, the latter will prevail; McLaughlin v. Menotti, 105 Cal. 572, 38 Pac. 973, 39 Pac. 207.

STATUTI (Lat.). **In Roman Law.** Those advocates whose names were inscribed in the registers of matriculation, and formed a part of the college of advocates. The number of advocates of this class was limited. They were distinguished from the supernumeraries, from the time of Constantine to Justinian. See Calvinus, Lex.

STATUTORY OBLIGATION. An obligation arising under a statute. See OBLIGATION.

STATUTORY STAPLE. An ancient writ that lay to take the body of a person and seize the lands and goods of one who had forfeited a bond called statute staple. Reg. Orig. 151.

STATUTUM DE MERCATORIBUS. The statute of Acton Burnell (*q. v.*).

STATUTUM HIBERNIÆ DE COHÆREDIBUS. The third public act in the statute book. It appears to be an instruction given by the king to his justices in Ireland, directing them how to proceed in a certain point where they entertained doubt. 1 Reeve, Hist. Eng. L. 259.

STATUTUM SESSIONUM. The Statute Sessions. A meeting in every hundred of constables and householders, by custom, for the ordering of servants, and debating of differences between masters and servants, rating of wages, etc., 5 Eliz. c. 4.

STAY AND TRADE. Within the meaning of an insurance policy, covering a ship during her stay and trade at a place these words were held to mean during her stay there for the purpose of trade; a stay for a purpose unconnected with trade is a deviation. 42 L. J. Ex. 60. See DEVIATION.

STAY LAWS. Acts of the legislature prescribing a stay in certain cases, or a stay of foreclosure of mortgages, or closing the courts for a limited period, or otherwise suspending legal remedies. See STAY OF EXECUTION; MORATORIUM.

STAY OF EXECUTION. In Practice. A term during which no execution can issue on a judgment.

It is either conventional, when the parties agree that no execution shall issue for a certain period, or it is granted by law, usually on condition of entering bail or security for the money.

An execution issued before the expiration of the stay is irregular and will be set aside: and the plaintiff in such case may be liable to an action for damages. What is said above refers to civil cases.

In criminal cases, when a woman is capitally convicted and she is proved to be *enceinte* there shall be a stay of execution till after her delivery. See PREGNANCY; JURY OF WOMEN.

A statute which authorizes stay of execution for an unreasonable and indefinite period, on judgments rendered on pre-existing contracts, is void; Bunn v. Gorgas, 41 Pa. 441; Stevens v. Andrews, 31 Mo. 205; a law permitting a year's stay upon judgments where security is given has been held invalid; Webster v. Rose, 6 Heisk. 93, 19 Am. Rep. 593. See Cooley, Const. Lim., 2d ed. 354, n.

STAYING PROCEEDINGS. The suspension of an action.

Proceedings are stayed absolutely or conditionally.

They are peremptorily stayed when the plaintiff is wholly incapacitated from suing: as, for example, when the plaintiff is not the holder, nor beneficially interested in a bill on which he has brought his action; 2 Cr. & M. 416; 3 Chitty, Pr. 628; or when the plaintiff admits in writing that he has no cause of action; 3 Chitty, Pr. 370, 630; or when an action is brought contrary to good faith; 3 Chitty, Pr. 633.

Proceedings are sometimes stayed until some order of the court shall have been complied with; as, when the plaintiff resides in a foreign country or in another state, or is insolvent, and he has been ruled to give security for costs, the proceedings are stayed until such security shall be given; 3 Chitty, Pr. 633, 635; or until the payment of costs in a former action; 1 Chitty, Bail. 195.

STEALING. This term imports, *ex vi termini*, nearly the same as larceny; but in common parlance it does not always import a felony. People v. Robertson, 3 Wheel. Cr. Cas. (N. Y.) 183.

In slander cases, it seems that the term stealing takes its complexion from the subject-matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject-matter; Dexter v. Taber, 12 Johns. (N. Y.) 239; Wallis v. Mease, 3 Binn. (Pa.) 546. The word steal is held synonymous with theft. Carr v. State, 9 Tex. App. 463. See Young v. State, 12 Tex. App. 614.

STEAMSHIP. A vessel, the principal motive power of which is steam and not sails.

L. R. 7 Q. B. 569. See Western Ins. Co. v. Cropper, 32 Pa. 352, 75 Am. Dec. 561. The owner of a steamboat is not an innkeeper so as to be liable for personal property stolen from a passenger. Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456.

Undertaking to carry a passenger in the steerage of a steamship from one ocean port to another includes the furnishing of such passenger with a berth, unless it was understood beforehand that he was to make the voyage without it; The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572; and see Patterson v. Steamship Co., 140 N. C. 412, 53 S. E. 224, 5 L. R. A. (N. S.) 1012, 111 Am. St. Rep. 848.

See COMMON CARRIER; SLEEPING-CAR; SHIP; VESSEL.

STELLIONATE. **In Civil Law.** A name given generally to all species of frauds committed in making contracts.

This word is said to be derived from the Latin *stellio*, a kind of lizard remarkable for its cunning and the change of its color, because those guilty of frauds used every art and cunning to conceal them. But more particularly it was the crime of a person who fraudulently assigned, sold, or engaged the thing which he had before assigned, sold, or engaged to another, unknown to the person with whom he was dealing. Dig. 47. 20. 3; Code 9. 34. 1; Merlin, *Répert.*; La. Civ. Code, art. 2069; 1 Brown, Civ. Law 426. As a punishment those persons who granted double conveyances were declared infamous and their lives and goods were at the mercy of the king. Ersk. Prin. 441.

STELLIONATUS. A criminal fraud not amounting to any other definite offence. Pollock, Expansion of C. L. 84.

STENOGRAPHER. One who writes in short-hand, by using abbreviations or characters for words.

He does not come within the common-law definition of the word "clerk." In re Appropriations for Deputies, 25 Neb. 662, 41 N. W. 643. Within the meaning of a statute exempting laborers' wages from attachment, he was held a laborer; Cohen v. Aldrich, 5 Ga. App. 256, 62 S. E. 1015. Courts have the power to appoint them; People v. Kelley, 134 Ill. App. 642.

The depositions of witnesses taken in short-hand, and transcribed, will be suppressed, if not read to and signed by the witness, though the witness' subsequent attendance for the purpose could not be procured; In re Cary, 9 Fed. 754; but see *contra*, Brown v. Luehrs, 79 Ill. 576, where it is held that the transcript of evidence taken in short-hand is admissible, where the stenographer testifies that he transcribed the testimony, and that the transcript is correct; that the witnesses were sworn and testified as therein stated. See also Stewart v. Bank, 43 Mich. 257, 5 N. W. 302. Where it is sought to impeach a witness' testimony by proving his testimony at a former trial, the stenographer is not the only witness who may be called, but any one who heard the testimony may be; State v. McDonald, 65 Me. 466; Brice v. Miller, 35 S. C. 537, 15 S. E. 768.

A stenographic report of the testimony of an absent witness, at a former trial, may be admitted if complete and correct; Chicago, St. P., M. & O. R. Co. v. Myers, 80 Fed. 361, 25 C. C. A. 486; or a copy of testimony compared with a stenographic report thereof, by a person who was present at the trial and remembers the testimony as given; Southern R. Co. v. Williams, 113 Ala. 620, 21 South. 328. See MEMORANDUM.

In Pennsylvania, where a stenographer is appointed under the provisions of an act authorizing the appointment of stenographers in the several courts of the commonwealth, the stenographer who actually takes the testimony must certify to the correctness of the transcript which he files, and the trial judge should order the transcript filed and certify to its correctness; Woodward v. Heist, 180 Pa. 161, 36 Atl. 645, 1131.

The charges of a stenographer are not taxable for costs in a suit in equity; Bridges v. Sheldon, 7 Fed. 42; but the agreement of the parties may make them taxable costs, though not so by statute; 1 Bingh. 345. See Phares v. Barber, 61 Ill. 271; Misner v. Darling, 44 Mich. 438, 7 N. W. 77. It is held that the use of stenographers is so general that it must be assumed that when a court appoints an auditor, it by implication authorizes and directs him to make reasonable use of stenographers, and the charges therefor must be classed with the ordinary charges necessarily incurred by the auditor, which together with the auditor's fees are ordinarily taxable against the losing party; Corporation of St. Anthony in New Bedford v. Houlihan, 184 Fed. 252, 106 C. C. A. 394.

Compensation for testimony taken before a referee is the subject of contract, as a stenographer is not then an officer of the court; Coale v. Suckert, 18 Misc. Rep. 76, 41 N. Y. Supp. 583.

An association of stenographers, whose leading object is to control the prices charged by its members, is an illegal combination, and its rules will not be enforced; More v. Bennett, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216.

The dictation of a libellous letter to a confidential stenographer is held to be sufficient publication of the libel; Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414.

STEP-DAUGHTER. The daughter of one's wife by a former husband, or of one's husband by a former wife.

STEP-FATHER. The husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring.

STEP-MOTHER. The wife of one's father by virtue of a marriage subsequent to that

of which the person spoken of is the offspring.

STEP-SON. The son of one's wife by a former husband, or of one's husband by a former wife.

STERE. A French measure of solidity, used in measuring wood. See MEASURE.

STERILITY. Barrenness; incapacity to produce a child. It is curable and incurable; when of the latter kind at the time of the marriage, and arising from impotency, it is a good cause for dissolving a marriage. 1 Foderé, *Méd. Lég.* § 254. See VIABILITY.

STERLING. Current money of Great Britain, but anciently a small coin worth about one penny, and so called, as some suppose, because it was stamped with the figure of a small star, or, as others suppose, because it was first stamped in England in the reign of King John by merchants from Germany called Esterlings. See HANSEATIC LEAGUE. *Pounds sterling* originally signified so many pounds in weight of these coins. Thus we find in Matthew Paris, A. D. 1242, the expression *Accepit a rege pro stipendio tredecim libras esterlingorum.* The secondary or derived sense is a certain value in current money, whether in coins or other currency. Lowndes 14; Watts, Gloss. *Sterling.*

STET PROCESSUS (Lat.). **In Practice.** An order made, upon proper cause shown, that the *process remain stationary.* As, where a defendant having become insolvent would, by moving judgment in the case of nonsuit, compel a plaintiff to proceed, the court will, on an affidavit of the fact of insolvency, award a *stet processus.* See 7 Taunt. 180; 1 Chitty, Bail. 738; 10 Wentw. Pl. 43.

STEVEDORE. A person employed in loading and unloading vessels. Dunlap, Adm. Pract. 98.

The contract of the stevedore with the ship is unquestionably maritime; Imbrovek v. Hamburg-American Steam Packet Co., 190 Fed. 229; but he has no lien; The John Shay, 81 Fed. 216. See 70 L. R. A. 353, note. See LIENS.

STEWARD. Formerly an officer of disputes, namely, a keeper of the courts. Co. Litt. 61. See COURT OF MARSHALSEA.

STEWARD OF A MANOR. An officer who transacts all the legal and other business connected with the estate, and takes care of the court rolls. In royal manors he is appointed by patent. See 10 George IV. c. 40, § 14.

STEWARD OF ALL ENGLAND. In Old English Law. An officer who was invested with various powers; among others, to preside on the trial of peers. See COURT OF THE LORD HIGH STEWARD.

STEWARD OF THE HOUSEHOLD. See MARSHALSEA.

STEWS. Places formerly permitted in England to women of professed lewdness, who for hire would prostitute their bodies to all comers.

These places were so called because the dissolute persons who visited them prepared themselves by bathing,—the word stews being derived from the old French *estuves,* stove, or hot bath. Co. 3d Inst. 205.

STILLICIDIUM (Lat.). **In Civil Law.** The rain-water that falls from the roof or eaves of a house by scattered drops. When it is gathered into a spout, it is called *flumen.* See SERVITUS; Inst. 3. 2. 1; Dig. 8. 2. 2.

STINT. The proportionable part of a man's cattle which he may keep upon the common. The general rule is that the commoner shall not turn more cattle upon the common than are sufficient to manure and stock the land to which his right of common is annexed. There may be such a thing as common without stint or number; but this is seldom granted, and a grantee cannot grant it over. 3 Bla. Com. 239; 1 Ld. Raym. 407.

STIPEND. A provision made for the support of the clergy. Salary; settled pay. In a bequest of £100 for masses for the repose of the testator's soul, at a *stipend* of five shillings each, it was held to mean price and not to involve any attempt to create a perpetuity; 19 L. R. Q. B. 177.

STIPENDIARY ESTATES. Estates granted in return for services, generally of a military kind. 1 Steph. Comm. 174.

STIPENDIARY MAGISTRATES. Paid police magistrates, appointed in London and other cities and large towns of England, with the authority and jurisdiction of justices of the peace. There are sundry acts on the subject.

STIPULATED DAMAGE. See LIQUIDATED DAMAGE.

STIPULATIO (Lat.). **In Roman Law.** A contract made in the following manner: the person to whom the promise was to be made proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. No consideration was required.

STIPULATIO AQUILIANA. In Civil Law. A particular application of the *stipulatio,* which was used to collect together into one verbal contract all the liabilities of every kind and quality of the debtor, with a view to their being released or discharged by an *acceptilatio,* that mode of discharge being applicable only to the verbal contract. Brown.

STIPULATION. A material article in an agreement.

The term appears to have derived its meaning from the use of *stipulatio* above given; though it is applied more correctly and more conformably to its original meaning to denote the insisting upon and requiring any particular engagement. 2 Pothier. Obl., Evans ed. 19.

In Practice. An agreement between counsel respecting business before a court. Anderson, L. Dict.

A case may be reversed on stipulation in the appellate court; Union Mut. Life Ins. Co. v. Waters, 124 U. S. 369, 8 Sup. Ct. 510, 31 L. Ed. 474. A stipulation of counsel does not bind a court to retry a case; Kidd v. McMillan, 21 Ala. 325; nor to continue the argument of a motion; Ford v. Holmes, 61 Ga. 419; but it does bind the court on a question of costs; Dorr v. Steichen, 18 Minn. 26 (Gil. 10).

A stipulation entered into for the purpose of saving time may be repudiated, where the facts subsequently developed show that it was inadvertently signed; but sufficient notice must be given to prevent prejudice to the other party; Carnegie Steel Co. v. Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968.

In Admiralty Practice. A recognizance of certain persons (called in the old law *fide jussores*) in the nature of bail for the appearance of a defendant. 3 Bla. Com. 108.

These stipulations are of three sorts: namely, *judicatum solvi*, by which the party is absolutely bound to pay such sum as may be adjudged by the court; *de judicio sisti*, by which he is bound to appear from time to time during the pendency of the suit, and to abide the sentence; *de ratio*, or *de rato*, by which he engages to ratify the acts of his proctor: this stipulation is not usual in the admiralty courts of the United States.

The securities are taken in the following manner: namely, *cautio fide jussoria*, by sureties; *pignoratitia*, by deposit; *juratoria*, by oath: this security is given when the party is too poor to find sureties, at the discretion of the court; *nuda promissoria*, by bare promise: this security is unknown in the admiralty courts of the United States. Dunl. Adm. Pr. 150.

STIRPES (Lat.). Descents. The root-stem, or stock of a tree. Figuratively, it signifies in law that person from whom a family is descended, and also the kindred or family.

STOCK. In Mercantile Law. The capital of a merchant, tradesman, or other person, including his merchandise, money, and credits. The goods and wares he has for sale and traffic.

In Corporation Law. A right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company. Ang. & A. Corp. § 557.

The capital stock of a corporation is that money or property which is put into a fund by those who, by subscription therefor, become members of the corporate body. Burrall v. R. Co., 75 N. Y. 211. The phrase *capital stock* has been objected to, as the two words have separate meanings, *capital* being the sum subscribed and paid into the company, and *stock* being the thing which the subscriber receives for what he pays in: Dos Passos, St. Brokers 579. See People v. Com'rs of Taxes and Assessments, 23 N. Y. 192. The interest which each person has in the corporation is termed a share, which is the right to participate in the profits of the corporation, and, upon its dissolution, in the division of its assets. See Burrall v. R. Co., 75 N. Y. 211. "Capital stock" has been held to mean the amount contributed by the shareholders, and not the property of the company; State v. Morristown Fire Ass'n, 23 N. J. L. 195.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. Cook, St. & Stockh. § 9. It is to be clearly distinguished from the amount of property possessed by the corporation; *id.*

The property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. Bailey v. Clark, 21 Wall. (U. S.) 284, 22 L. Ed. 651. See definitions in People v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; St. Louis, I. M. & S. Ry. v. Loftin, 30 Ark. 693; Bent v. Hart 10 Mo. App. 146. Capital stock is a different thing from shares of stock; the latter are evidences of ownership; Wilkes Barre Deposit & Sav. Bk. v. Wilkes Barre, 148 Pa. 601, 24 Atl. 111. Stock is commonly used to mean shares of stock, and it has been so held in a tax statute; Lockwood v. Weston, 61 Conn. 211, 23 Atl. 9.

The capital stock of a corporation differs widely in legal import from the aggregate shares into which it is divided by its charter (Farrington v. Tennessee, 95 U. S. 686, 24 L. Ed. 558; People v. Coleman, 126 N. Y. 437, 27 N. E. 818, 12 L. R. A. 762); while the former includes only the fund of money or other property derived by it from the sale or exchange of its shares of stock, the latter represents the totality of the corporate assets and property; Hamor v. Engineering Co., 84 Fed. 396.

A share of stock is a right which its owner has in the management, profits, and ultimate assets of the corporation. Cook, St. & Stockh. § 12. So, also, In re Clementi, 92 N. Y. 592; Van Allen v. Assessors, 3 Wall. (U. S.) 585, 18 L. Ed. 229. It is the right to participate in stockholders' meetings, and in the profits of the business, and to require that the corporate property shall not be diverted from

the original purposes; Forbes v. R. Co., 2 Woods 331, Fed. Cas. No. 4,926.

The number of shares depends upon the statutory regulations, or in their absence the agreement of the parties forming the corporation; Somerset & K. R. Co. v. Cushing, 45 Me. 524. Shares may be arranged in classes, one class being *preferred* to another in the distribution of profits; Kent v. Min. Co., 78 N. Y. 159. Voting may be restricted to a certain class.

The ownership of shares is usually attested by a certificate issued under the corporate seal; and when a new transfer is effected, such certificate is surrendered and cancelled, and a new one is issued to the transferee. A certificate need not be under seal; Coddington v. R. Co., 103 U. S. 409, 26 L. Ed. 400. But a person may be the owner of shares in a corporation without holding such certificate; Field v. Pierce, 102 Mass. 261; see Schaeffer v. Ins. Co., 46 Mo. 248; and, strictly speaking, a company need not issue any certificates or muniments of title, if not required to do so by law or its charter; Agricultural Bk. v. Burr, 24 Me. 256. The presence of a party's name on the stock books of the company is evidence of his ownership of shares; Appeal of Bank of Commerce, 73 Pa. 59. The possession of a corporate certificate of stock, duly issued, is a continuing affirmation of ownership of the stock by the person named therein; First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; which generally creates an estoppel against the company in favor of the holder; Holbrook v. Zinc Co., 57 N. Y. 616; though in England it is said to be merely a solemn affirmation that the specified amount of stock stands on the stock books in the name of the person specified in the certificate; L. R. 7 H. L. 496. Every stockholder is entitled to a certificate of his shares; Cecil Nat. Bank v. Bank, 105 U. S. 217, 26 L. Ed. 1039.

The stock of a national bank is said to be a species of chose in action, or an equitable interest which the shareholder possesses, and which he can enforce against the corporation. See Taggart v. Murray, 53 N. Y. 237. "If a share in a bank is not a chose in action, it is in the nature of a chose in action, and is personal property;" per Shaw, C. J., in Hutchins v. Bank, 12 Metc. (Mass.) 421. Shares are not, strictly speaking, chattels; they bear a greater resemblance to choses in action; or, in other words, they are merely evidence of property; Ang. & A. Corp. § 560. They are now universally considered to be personal property; Ang. & A. Corp. § 557; Moraw. Priv. Corp. 119, 200; though in some earlier cases it was held otherwise. See Cook, St. & Stockh. § 12, n. They are not a debt; Dos Passos, St. Brokers 590. Shares in a corporation are said to be incorporeal personal property; Allen v. Pegram, 16 Ia. 173, per Dillon, J. In Louisiana, stock is property and not a credit; New Orleans Nat. B. Ass'n v. P. S. Wiltz & Co., 10 Fed. 330.

It is settled in England that shares in a joint-stock company are not goods, wares and merchandise within the statute of frauds; 11 A. & E. 205; it has been otherwise decided in Massachusetts; Tisdale v. Harris, 20 Pick. (Mass.) 9, uniformly followed in this country; Cook, St. & Stockh. § 339.

Stock is issued for money, in payment for property or labor, or as a stock dividend. It is established in England that stock may be issued for property, and such was the common law; Thomas v. Mueller, 106 Ill. 43. See Sanger v. Upton, 91 U. S. 60, 23 L. Ed. 220. The subject is usually regulated by statute in this country. Stock can be issued by way of a stock dividend, which "is lawful when an amount of money or property equal in value to the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation." Cook, St. & Stockh. § 536.

It is generally held that stock cannot be issued at a discount, and made full paid; Handley v. Stutz, 139 U. S. 429, 11 Sup. Ct. 530, 35 L. Ed. 227 (see *infra*); [1897] A. C. 299; 38 Ch. Div. 415; 2 De G. F. & J. 295; 11 Manitoba 629; but it has been held that an agreement with the company that the holders should never be called upon to pay any further assessment upon stock is valid as between the parties; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968. See Lorillard v. Clyde, 86 N. Y. 384; L. R. 14 Ch. Div. 394.

Directors issued stock at a discount; its market price went above par. It was held that the issue was unlawful and that the directors were liable, but only for the difference between the price at which they issued it and its par value; [1894] A. C. 654.

Where stock is issued for property which is overvalued, the transaction may be set aside for fraud; Brant v. Ehlen, 59 Md. 1; Coit v. Amalgamating Co., 14 Fed. 12. The corporation, after issuing its stock as full paid cannot complain; Scoville v. Thayer, 105 U. S. 143; unless the entire transaction is such that equity will rescind it for actual fraud. See, as to overvaluing property, 7 Am. & E. Corp. Cas. 652; Elyton Land Co. v. Elevator Co., 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65.

It has been held that a railroad company in need of funds may settle with a contractor by issuing stock to him as full-paid at twenty cents on the dollar, and that creditors of the company could not afterwards collect the difference between that and par; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88. This decision has been much criticised. The same court said subse-

quently, in Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363, that "the trust arising in favor of creditors by subscription to the stock of a corporation cannot be defeated by a stipulated payment of such a subscription nor by any device short of actual payment in good faith." While any settlement might be good between the corporation and the stockholders it is unavailing against creditors. As against creditors, a corporation cannot give away its stock or distribute it among shareholders, without receiving a fair equivalent therefor; Handley v. Stutz, 139 U. S. 417.

A contract by which directors of a street-railway company, acting in the name of a third person, are to construct the road, and divide between them the stock and bonds not required therefor, is fraudulent, and bonds issued pursuant thereto are void; Vanderveer v. R. Co., 82 Fed. 355.

A corporation has no power, in the absence of statutory authority, to increase or diminish its capital stock; Scovill v. Thayer, 105 U. S. 148, 26 L. Ed. 968; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; Grangers' L. & H. Ins. Co. v. Kamper, 73 Ala. 325; Winters v. Armstrong, 37 Fed. 508.

Where a corporation had a reserve fund which was not kept separate, and then sustained a loss which impaired its capital, held, that in reduction of its capital the loss of assets should be ratably apportioned between its reserve and its capital account; [1904] 2 Ch. 208.

As to overissue of shares, see OVERISSUE.

Transfer. A certificate of stock is transferable on the books of the company by the owner in person or by his agent under written authority, which is commonly executed in blank and which may be filled up by the transferee with the name of the agent, Ang. & A. Corp. § 564; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; German Union Bldg. & Sav. F. Ass'n v. Sendmeyer, 50 Pa. 67. A transfer in blank is deemed sufficient in some jurisdictions to pass the legal title to the stock subject to the claims of the company upon the registered stockholders; 2 Ames, B. & N. 784; Cushman v. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Duke v. Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; in other cases such a transfer has been held to give the holder merely an equitable interest; Black v. Zacharie, 3 How. (U. S.) 483, 11 L. Ed. 690; Brown v. Adams, 5 Biss. 181, Fed. Cas. No. 1,986. Prof. Ames is of opinion that the true view is that such a transfer does not pass the legal title, but that it passes the equitable interest, coupled with an irrevocable power of attorney to acquire the legal title; 2 Ames, B. & N. 784. This irrevocable power may, in some cases, by the doctrine of estoppel, be acquired by the delivery of the certificate from one who has no such power himself; Thompson v. Toland, 48 Cal. 99; Stone v. Marye, 14 Nev. 362; Appeal of Pennsylvania R. Co., 86 Pa. 80; McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341. A seal is not necessary; Quiner v. Ins. Co., 10 Mass. 476; though usually employed.

Shares of stock are non-negotiable instruments, but through the doctrine of estoppel, stock certificates, with a power to transfer them, can be dealt in with nearly the same immunity as bills and notes; Dos Passos, Stock Brokers 596; and the same writer is of opinion that the time has come for the court to receive evidence of the general usage of the business world, so as to raise stock certificates to the dignity of negotiable instruments; *id.* 597; but see Aull v. Colket, 2 Wkly. Notes Cas. (Pa.) 322, where evidence of such a usage was rejected; see, also, 38 Pa. 98. Professor Ames says (2 Bills & Notes 784): "Whether the custom of merchants will ever lead the courts to give those instruments (certificates of stock) the quality of negotiability may be an open question; but that they have not done so is clear." See Anderson v. Nicholas, 28 N. Y. 600; 14 Am. L. Reg. N. S. 163, n. In Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172, the court said that certificates, "although neither in form or character negotiable paper, approximate it as nearly as practicable."

Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are frequently sold in open market as negotiable securities are; National S. D., S. & T. Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, holding that where a bank's trusted agent took certain of its stock certificates, authenticated with evidence of title, to a broker, who sold them for full value, in good faith, and paid the proceeds to the bank's agent, the bank could not make any claim against the broker. In Russell v. Tel. Co., 180 Mass. 467, 62 N. E. 751, it is held that where there is a custom among banks and brokers for certificates of stock, with blank transfer, to pass from hand to hand without enquiry, one who entrusts a certificate with blank transfer to a broker, for the purpose of exchanging for a new certificate, is estopped to assert his title against a *bona fide* pledgee to whom the broker had fraudulently pledged the certificate for his own debt; whether the broker's act was larceny was immaterial; in delivering the opinion of the court, Holmes, C. J., cited Knox v. Eden Musée Americain Co., 148 N. Y. 441, 41 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; Appeal of Pennsylvania R. Co., 86 Pa. 80.

In case of the sale of the stock this power of attorney becomes irrevocable; Chew v. Bank, 14 Md. 299; but if such a power of attorney is forged or is made by a person not competent to make it, the corporation is liable for allowing the transfer; Chew v. Bank, 14

Md. 299. See Appeal of Pennsylvania R. Co., 86 Pa. 80; Pratt v. Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37. A company may refuse to allow a transfer until satisfied of the party's right to make it; L. R. 9 Eq. 181; Bayard v. Bank, 52 Pa. 232; Magwood v. Bank, 5 S. C. 379.

A company is bound to require the surrender of the old certificate before allowing a transfer, and may refuse to act till it is surrendered; National Bk. v. R. Co., 21 Ohio St. 221; where a certificate cannot be found the company may refuse a new one or to make a transfer without proper indemnity, unless it be a clear case of loss; Galveston City Co. v. Sibley, 56 Tex. 269.

In a joint stock corporation, each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, to introduce others in his stead; Morgan v. Struthers, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132.

On a wrongful refusal to transfer stock the party may apply for a *mandamus* to make the transfer, or sue in equity for a decree of transfer, or for damages if a transfer is impossible, or bring an action at law for damages.

It is said that the rules for the protection of *bona fide* purchasers are based on estoppel, which extends not only as against previous owners, but against the corporation itself. It is said that the doctrine is being extended and that it may in time render certificates of stock more negotiable than negotiable instruments themselves; Cook, St. & Stockh. § 416; but it is also held that, as a certificate of stock is not negotiable either in form or character, whoever takes it, does so subject to its equities and burdens like every non-negotiable paper; and though ignorant of such equities and burdens, his ignorance does not enable him to hold it discharged therefrom; Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960.

One who surrendered a share certificate bearing a forged transfer, and obtained in exchange a new certificate, must not only return the new certificate, but also pay damages to the company, although he bought the old certificate from his transferor and received the new one from the company in ignorance of the forgery; Boston & A. R. Co. v. Richardson, 135 Mass. 473. This liability of the innocent purchaser was based upon his implied representation or warranty of title, the court finding an analogy between the presentment of the certificate to the company for the purpose of substituting the purchaser in the place of the former registered shareholder and the transfer of a certificate to a third person by way of sale. See an article on "Forged Transfers of Stock" in Ames, Lectures on Legal History 393.

In Fry v. Smellie, [1912] 3 K. B. 282, A. C., shares with a transfer signed in blank were handed to an agent to use as collateral to borrow a certain sum; the agent borrowed a less sum; held, that the lender could hold the shares until payment of his loan. Vaughan Williams, L. J., distinguished France v. Clark, 22 Ch. D. 830, on the ground that there the party misusing the shares was merely a pledgee of the owner, and not, as in the case at bar, an agent with limited authority, as to which it was the duty of the owner to give notice to any one from whom the agent might borrow on the shares. He rested his decision, not on estoppel, but on the rule that, where one of two innocent persons must suffer, he who enables the fraud must bear the loss. This ruling was said to be in accord with the New York rule, and 15 App. Cas. 267 was cited to that effect. In 64 L. J. R. 473, a broker who received shares with a transfer in blank, with instructions to sell them, pledged them for his own debt; held, that the pledgee took no title.

A business corporation cannot make it a condition of transferring stock that the holder shall first have offered it to the directors, and shall have paid all his indebtedness to the corporation; Brinkerhoff-Farris T. & S. Co. v. Lumber Co., 118 Mo. 447, 24 S. W. 129. See note in 27 L. R. A. 272.

The unregistered pledgee of stock has priority over a subsequent attaching creditor; Tombler v. Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896; the same rule obtains in New York, Pennsylvania, New Jersey, South Carolina, Kentucky, Louisiana, Minnesota, and most other states except Connecticut; and in the federal courts, see Cook, St. & Stockh. § 487; Scott v. Bank, 15 Fed. 494; but see Williams v. Bank, 5 Blatchf. 59, Fed. Cas. No. 17,727.

Stock certificates may be attached in a state other than the home state of the company; Merritt v. Steel-Barge Co., 79 Fed. 228, 24 C. C. A. 530. See GARNISHMENT.

The Uniform Stock Transfer Act has been passed in Louisiana, Ohio, Maryland, Pennsylvania, Massachussetts, Michigan, New York, and Wisconsin.

Sec. 1. The title to a certificate and the shares represented by it can be transferred only by the delivery of the certificate, endorsed thereon in blank or to a specified person, by the person appearing by the certificate to be the owner of the shares, or by a separate document containing a written assignment or power of attorney to sell, assign or transfer, signed by such person. The assignment or power of attorney may be either in blank or to a specified person. This provision applies although the charter or regulations or by-laws of the corporation and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation, or registered by a registrar or transferred by a transfer agent.

Sec. 4. The title of a transferee under a power of attorney not written upon the cer-

tificate, and of any person claiming under such transferee, shall cease if at any time prior to the surrender of the certificate, another person, for value and in good faith and without notice of the prior transfer, shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

Sec. 5. The delivery of a certificate in order to transfer title in accordance with the provisions of Sec. 1, is effectual except as provided in Sec. 7, though made by one having no right to possession and no authority from the owner of the certificate or from the person purporting to transfer the title.

Sec. 6. The endorsement of a certificate by the person appearing thereby to be the owner of the shares is effectual (except as provided in Sec. 7), though the endorser or transferor was induced by fraud, duress or mistake to make the endorsement or delivery, or has revoked the delivery of the certificate or authority given by the endorsement and delivery of the certificate, or has died or has become legally incapacitated after the endorsement whether before or after the delivery of the certificate, or has received no consideration.

Sec. 7. If the indorsement or delivery of a certificate—(a.) Was procured by fraud or duress, or (b.) Was made under such mistake as to make the indorsement or delivery inequitable, or if the delivery of a certificate was made—(c.) Without authority from the owner, or (d.) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless: 1. The certificate has been transferred to a purchaser for value, in good faith, without notice of any facts making the transfer wrongful, or, 2. The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights. Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate, or to rescind the transfer thereof, and, pending litigation, may enjoin the further transfer of the certificate or impound it.

Sec. 8. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

Sec. 11. Any person who for value transfers a certificate, unless a contrary intention appears, warrants that the certificate is genuine; that he has a legal right to transfer it; and that he has no knowledge of any fact which would impair its validity.

Sec. 13. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until the certificate is actually seized or surrendered to the corporation which issued it or its transfer be enjoined.

Sec. 14. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise, in attaching such certificate as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Sec. 15. There shall be no lien in favor of a corporation upon the shares represented by a certificate or any restriction upon their transfer by virtue of any by-law, or otherwise, unless the right is stated upon the certificate.

Preferred stock entitles the holder to a priority in the dividends or earnings, over common stock. *Guaranteed* stock is the same thing; Taft v. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

A corporation may issue preferred stock, in the absence of any prohibition; Continental Trust Co. v. R. Co., 86 Fed. 930; [1897] 1 Ch. 361; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Kent v. Min. Co., 78 N. Y. 159; provision therefor is often contained in the by-laws. If there is no provision in the charter or the law, unanimous consent of stockholders is required; Lind. Comp. 396; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156. After a company has been organized, and all or a part of the stock issued, preferred stock cannot be issued against the objection of minority holders of common stock; 4 De G., J. & S. 672; Kent v. Min. Co., 78 N. Y. 159; Cook, St. & Stockh. § 268; its issue will be enjoined in such case; 32 L. J. Ch. 711. But see 2 De G. & S., where an injunction was refused at the suit of five dissenting stockholders, the court declining, however, to declare the issue legal. An objecting stockholder must seek relief promptly; Kent v. Min. Co., 78 N. Y. 159; Taylor v. R. Co., 13 Fed. 152. Legislative power to issue preferred stock may be granted subsequently to the organization of the corporation; Covington v. Bridge Co., 10 Bush (Ky.) 69; Rutland & B. R. Co. v. Thrall, 35 Vt. 536. The terms or provision under which preferred stock is issued are matters of contract, to be gathered from the charter, by-laws, votes of stockholders, or directors, etc.; Bailey v. R. Co., 17 Wall. (U. S.) 96, 21 L. Ed. 611; Gordon's Ex'rs v. R. Co., 78 Va. 501, L. R. 20 Eq. 556; Rogers v. Land Co., 134 N. Y. 197, 32 N. E. 27.

There is no condition implied in a memorandum of association of a company that all shareholders are to be on an equality and a company whose memorandum and

original articles do not authorize the issue of preference shares, can alter its articles so as to do so; [1897] 1 Ch. 361.

The holder of preferred stock is not a creditor of the corporation; St. John v. R. Co., 22 Wall. (U. S.) 136, 22 L. Ed. 743; Doe v. Transp. Co., 78 Fed. 64; Belfast & M. L. R. Co. v. Belfast, 77 Me. 445, 1 Atl. 362; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; 61 L. J. 621; creditors have a priority over preferred stockholders; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769; Chaffee v. R. Co., 55 Vt. 110. It seems to have been held that a mortgage to secure preferred stock is valid. See Gordon's Ex'rs v. R. Co., 78 Va. 501; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

Preferred stockholders are entitled to dividends only from net earnings; Lockhart v. Van Alstyne, 31 Mich. 76; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769; Moraw. Pr. Corp. 457; an engagement to pay dividends when not earned, or out of capital, is void; L. R. 22 Ch. D. 349; Pittsburg & C. R. Co. v. Allegheny County, 63 Pa. 136; though they may be paid out of gross earnings, if the statute so directs; Gordon's Ex'rs v. R. Co., 78 Va. 501. A general guarantee of dividends by a railroad company means only when earned; Miller v. Ratterman, *supra*.

But dividends may be paid though the company have a floating debt; Hazeltine v. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330; but see Chaffee v. R. Co., 55 Vt. 110. Profits of a year can be divided although there was a debit balance in the years before; [1901] 2 Ch. 184. The directors may ordinarily exercise a reasonable discretion as to declaring dividends, even though there be net earnings applicable thereto; New York, L. E. & W. R. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; but if they act oppressively, equity will interfere; Hazeltine v. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330.

A railroad company having a large deficiency issued preferred stock to raise money to pay its floating debt; it was held that it could pay dividends on such stock out of net earnings since its issue; Cotting v. R. Co., 54 Conn. 156, 5 Atl. 851.

Undeclared dividends (arrears of net earnings) pass with the transfer of preferred stock to the transferee; Cook, St. & Stockh. § 275; Manning v. Min. Co., 24 Hun (N. Y.) 360.

In the absence of anything to the contrary, preferred stock shares equally with common, upon a dissolution of the corporation; L. R. 5 Eq. 510; otherwise, if provided by the charter, a statute, or by the contract; L. R. 20 Eq. 59; that the holder has priority as to dividends but not as to assets, unless expressly provided, was held in Jones v. R. R., 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650.

Preferred stock is ordinarily understood to mean such as is entitled to preference in dividends; Scott v. R. Co., 93 Md. 475, 49 Atl. 327.

If there is no contract to the contrary, the weight of authority clearly favors the preferred stockholder's right to share with common stock in profits after the latter have received a dividend equal to the stipulated preferred dividend. It made no difference that for years the preferred had had only 5 per cent. and the entire residue of the profits had gone to the common stock; Sternbergh v. Brock, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877.

Where there is a provision for cumulative dividends on preferred stock and a redemption clause, the stock can be redeemed only on payment of all arrears and of par of the stock; Sterling v. H. F. Watson Co., 241 Pa. 105, 88 Atl. 297.

Where the memorandum of association provided that preference shares should receive "out of the net profits of each year" a dividend of 10 per cent., it was held that they were not entitled to cumulative dividends; [1896] 2 Ch. 203.

Where preferred stockholders are entitled to "dividends of 8 per cent. per annum and to be preferred as to capital as well as dividends," they have no further interest in accumulated surplus earnings; Niles v. Mfg. Co., 196 Fed. 994.

In the absence of anything to the contrary, dividends will be taken to be cumulative; Westchester & P. R. Co. v. Jackson, 77 Pa. 321; Boardman v. R. Co., 84 N. Y. 157; L. R. 3 Eq. 356.

Profits for the year mean the surplus receipts after paying expenses and restoring the capital to the position it was at the beginning of the fiscal year; L. R. 16 Ch. 344. Net earnings are what are left after paying current expenses and interest on debts and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769.

Ordinarily the directors will not be justified in accumulating a reserve fund to liquidate a funded debt when it matures, to the exclusion of all right of preferred stockholders to their dividends; Hazeltine v. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330.

Preferred stock may be issued without the right to vote; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496.

Where preferred stock, entitled to a cumulative dividend, was bequeathed in trust to pay the income to a person for life, and no dividends had been declared during the period of the life tenancy, it was held that the life tenant's executor was not entitled to have the shares retained so as to have the arrears paid out of future preferential dividends; [1913] 2 Ch. 697. Dividends do not "accrue" until they are declared; see Allen v. Armstrong,

58 App. Div. 427, 68 N. Y. Supp. 1079. But if directors refuse to perform their legal duty to the preferred stock, equity will compel them to do so; Hazeltine v. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330.

The face value of preferred stock is in the nature of a debt and the interest thereon becomes a debt as soon as there are profits with which to pay it; Storrow v. Mfg Ass'n, 87 Fed. 612, 31 C. C. A. 139. Courts will not permit a corporation to assess preferred stockholders by refusing to pay dividends when net profits and the character of the business permit; *id.* A general guarantee of dividends is only in the event that they are earned; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496. Certificates of indebtedness to preferred stockholders, obligating payment of fixed dividends, earned or not, are illegal; National Salt Co. v. Ingraham, 122 Fed. 40, 58 C. C. A. 356. Preferred stock is in the nature of a debt and the interest becomes a debt as soon as there are profits; Storrow v. Mfg. Ass'n, 87 Fed. 612, 31 C. C. A. 139. If profits clearly warrant a dividend the court will compel it; *id.*

As to a peculiar issue of deferred stock, see 39 Leg. Int. 98 (S. C. Pa.). The term is sometimes used in contra-distinction to preferred stock to indicate stock which receives a dividend only after the payment of a dividend on preferred stock.

"*Special* stock" is issued by corporations in Massachusetts. It is limited to two-fifths of the actual capital; it is subject to redemption at a fixed time; the holder is entitled to a half-yearly dividend, as upon a debt; the holders are not liable for the debts of the company, and the general stockholders are liable for all the debts until the special stock is redeemed. See Cook, St. & Stockh. §§ 13, 276.

Interest bearing stock has been recognized by the courts. The contract to pay interest is lawful only when interest is to be paid out of net earnings; Miller v. R. Co., 40 Pa. 237, 80 Am. Dec. 570; Barnard v. R. Co., 89 Mass. (7 Allen) 512; and in this view is merely a species of preferred stock.

At common law, a corporation cannot purchase shares of its own capital stock; 9 Ch. App. 54; but such a purchase is held legal and allowable; Douglas v. Daily News Co., 160 Ill. App. 506; West v. Grocery Co., 109 Ia. 488, 80 N. W. 555; Schaun v. Brandt, 116 Md. 560, 82 Atl. 551; Lindsay v. Co-operative Ass'n, 186 Mass. 371, 71 N. E. 797; Cole v. Realty Co., 169 Mich. 347, 135 N. W. 329; U. S. Steel Corp. v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; Richards v. Ernst Wiener Co., 207 N. Y. 59, 100 N. E. 592; Blalock v. Mfg. Co., 110 N. C. 99, 14 S. E. 501; Sweeney v. Underwriters Co., 29 S. D. 576, 137 N. W. 379; San Antonio Hardware Co. v. Sanger (Tex.) 151 S. W. 1104; Rogers v. Sav. Ass'n, 30 Utah, 188, 83 Pac. 754. National banks are prohibited from purchasing shares of their own stock; U. S. R. S. § 5201. When a corporation buys shares of its own stock, the capital stock is not reduced by that amount, nor is the stock merged; Ralston v. Bank, 112 Cal. 208, 44 Pac. 476. So long as the corporation retains the ownership, the stock is lifeless, without rights or powers, but at any time the corporation may resuscitate it by selling and transferring it to the purchaser, and it may be sold at its market value, and need not be held for its par value, as is necessary in an original issue of stock; Belknap v. Adams, 49 La. Ann. 1350, 22 South. 382. As a general rule a corporation has no implied power to purchase shares of the capital stock of another corporation. A railroad company unless expressly authorized so to do, cannot purchase shares of stock in another railroad company; Central R. Co. v. Collins, 40 Ga. 582.

See DIVIDENDS; VOTING TRUST; OVER-ISSUE; STOCKHOLDER; CORPORATIONS; FOUNDERS' SHARES; PARTNERS.

English Law. In reference to the investment of money, the term "stock" implies those sums of money contributed towards raising a fund whereby certain objects, as of trade and commerce, may be effected. It is also employed to denote the moneys advanced to government, which constitute a part of the national debt, whereupon a certain amount of interest is payable. Since the introduction of the system of borrowing upon interminable annuities, the meaning of the word "stock" has become gradually changed; and, instead of signifying the security upon which loans are advanced, it has for a long time signified the principal of the loans themselves. In this latter sense we speak of the sale, purchase, and transfer of stock; Moz. & W. See Cavanaugh, Money Securities.

Stock, in England, signifies a number of paid-up shares, so united that the owner may subdivide it and transfer it in large or small quantities, irrespective of the number and par value of the shares; Cook, St. & Stockh. § 12. Stock can only exist in the paid-up state; L. R. 7 H. L. 717.

Debenture stock "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being part of one large loan." Lindl. Companies 195. It has no connection with *stock* as commonly used in this country. See Simonson, Deb. & Deb. St.

Descents. A metaphorical expression which designates in the genealogy of a family the person from whom others are descended: those persons who have so descended are called branches. See 1 Roper, Leg. 103; 2 Belt. Suppl. Ves. 307; BRANCH; DESCENT; LINE; STIRPES.

Farm Stock. See FENCES; RUNNING AT LARGE.

STOCK ASSOCIATION. A joint stock company (*q. v.*).

STOCK-BROKER. Relation of stock-broker and customer is that of principal and agent, not that of debtor and creditor; In re James Carothers & Co., 182 Fed. 501.

After the purchase of stock on margin by a stock-broker for a customer, the relation between them is that of pledgor and pledgee; Learock v. Paxson, 208 Pa. 602, 57 Atl. 1097; the title vests in the customer, subject to the payment of advances and commissions, he being a pledgee; Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770. Where the broker, in such cases, rehypothecates the stock for his own purpose, it is a conversion; Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. Supp. 42; see Talty v. Trust Co., 93 U. S. 321, 23 L. Ed. 886; German Sav. Bk. v. Renshaw, 78 Md. 475, 28 Atl. 281; Cook, Corp. § 471.

See STOCK EXCHANGE.

STOCK CERTIFICATE. See STOCK.

STOCK EXCHANGE. A building or room in which stock-brokers meet to transact their business of purchasing or selling stocks.

A voluntary association (usually unincorporated) of persons who for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their business. See Dos Passos, St. Brok. 14; Biddle, St. Brok. 40, 43; Leech v. Harris, 2 Brewst. (Pa.) 571; White v. Brownell, 2 Daly (N. Y.) 329. It is usually not a corporation, and in such case it is not a partnership. In the absence of a statute its real estate is held by all the members in the same way as partnership real estate. At common law, all the members had to be joined in a suit; Dicey, Parties, 2d Am. ed. 148, 266; East Haddam Cent. B. Church v. Ecclesiastical Soc., 44 Conn. 259; though actions have been sustained against the exchange as a body; Leech v. Harris, 2 Brewst. (Pa.) 571; Appeal of Moxey, 9 Wkly. Notes Cas. (Pa.) 441.

The members may make such reasonable regulations for the government of the body as they may think best; see People v. Medical Soc., 24 Barb. (N. Y.) 570; such rules bind the members assenting to them; Corn Exch. Ins. Co. v. Babcock, 4 Abb. Pr. (N. S.) 162; but their personal assent must appear; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; it may be inferred from circumstances, as from their admissions and acting as members; L. R. 5 Eq. 63; Palmyra v. Morton, 25 Mo. 593; and a member is bound by a by-law passed during his membership, whether he votes for it or not; MacDowell v. Ackley, 8 Wkly. Notes Cas. (Pa.) 464. It is said that the courts will prevent the interference with a member's rights in an unincorporated association where the latter is acting under a by-law which is unreasonable or contrary to public policy: Dos Passos, St. Brok. 36; White v. Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162; State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; but see People v. Board of Trade, 80 Ill. 134.

Stock Exchange, Seat in. Members of a stock exchange are entitled to what is known as a seat. Seats are held subject to the rules of the exchange. They are a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability, which are characteristic of other species of property; Dos Passos, St. Brok. 87; Biddle, St. Brok. 50. There has been much controversy as to whether a seat can be reached by an execution.

It has been said: "1. In the disposition of a seat or the proceeds thereof, the members of the exchange will be preferred to outside creditors. 2. The seat is not the subject of seizure and sale on attachment and execution. 3. The proceeds of the seat, in the hands of the exchange, are capable of being reached after members' claims have been satisfied, to the same extent and in the same manner as any other money or property of a debtor. 4. A person owning a seat in the exchange can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the exchange, and devote the proceeds to the satisfaction of his judgment debts." Dos Passos, St. Brok. 96. See 20 Alb. L. J. 414; Habenicht v. Lissak, 78 Cal. 351, 20 Pac. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63. In Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915, it was held that a seat in a stock exchange is property, and passes to assignees in bankruptcy subject to the rules of the stock board. See Powell v. Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Belton v. Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495; Weaver v. Fisher, 110 Ill. 146.

A seat on the stock exchange is property and can be pledged; Nashua Sav. Bk. v. Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430. It is property, though incumbered with conditions when purchased; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264. But it is held in Pennsylvania that a seat on the exchange was not property subject to execution in any form; Pancoast v. Gowen, 93 Pa. 66; at least, not until the owner's debts due members of the board are paid; Pancoast v. Houston, 5 Wkly. Notes Cas. (Pa.) 36; that it is personal and cannot be transferred without the approval of the board; Shoemaker v. Produce Exchange, 15 Phila. (Pa.) 103.

Stock exchange rules usually provide that seats are liable first to pay the members' debts to a fellow-member, or a firm of which the latter is a member; and also for arbitration committees to settle differences between members; Cochran v. Adams, 180 Pa. 289, 36 Atl. 854.

In the absence of any specific provision therefor, the expulsion of a member of the St. Louis stock exchange for fraud can not be considered as forfeiting to the exchange his property rights in his seat, and the proceeds, after paying any claims of the exchange or its members belong to the expelled member; In re Gaylord, 111 Fed. 717.

A regular register of all the transactions is kept by an officer of the association, and questions arising between the members are generally decided by an arbitration committee. The official record of sales is the best evidence of the price of any stock on any particular day. The stocks dealt in at the sessions of the board are those which are placed on the list by a regular vote of the association; and when it is proposed to add a stock to the list, a committee is appointed to examine into the matter, and the board is generally guided by the report of such committee.

A Missouri statute made it unlawful to keep in the state any office, store or other place for buying and selling stocks or commodities on margin or otherwise when not actually paid for or delivered at the time of the sale, without making a record of the transaction, and a memorandum stamped with a stamp issued by the state for the purpose. The act was held constitutional; Brodnax v. Missouri, 219 U. S. 287, 31 Sup. Ct. 238, 55 L. Ed. 219.

Where the tribunal provided by a board of trade for disciplining members expels a member in accordance with its own rules, the merits of the judgment thus rendered will not be inquired into collaterally; Nelson v. Board of Trade, 58 Ill. App. 399. The only question for the court to determine in proceedings to compel a stock exchange to reinstate an expelled member is as to the regularity of the proceedings; People v. Produce Exchange, 149 N. Y. 401, 44 N. E. 84.

See "Stock Exchange from Within," by W. C. Van Antwerp. As to methods on the London Stock Exchange, see Quarterly Rev. July, 1912. See Brodhurst, Law & Pr. of Stock Exchange (London); MARGIN; FUTURES.

STOCK-JOBBER. A dealer in stock; one who buys and sells stock on his own account on speculation.

STOCK NOTES. This term has no technical meaning and may as well apply to a note given on the sale of stock which the bank had purchased or taken in the payment of doubtful debts as to a note given on account of an original subscription to stock. Dunlap v. Smith, 12 Ill. 402.

STOCK ORDER. The order in chancery to prevent drawing out a fund in court to the prejudice of an assignee or lienholder.

STOCK YARDS. The business of stock yards is not of itself interstate commerce, within the meaning of the Sherman Act; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290. But in U. S. v. Stock Yard Co., 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226, it was held that a stock yard was subject to the Act to Regulate Commerce and must conform to its requirements as to filing tariffs and desist from unlawful discriminations. That act, as amended, extends to all terminal facilities. The fact that a particular stock yard extends over the boundary line between two states does not make the business interstate commerce; Cotting v. Stock Yards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

Live stock shipped from various states to the yards of a stock yards association in another state by the solicitation and procurement of the members thereof, to be there sold or to be reshipped to other states if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the state; Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290.

A stock yards company maintaining tracks connecting with the tracks of railroad companies, and which by its own locomotives and servants transports cars containing interstate shipments to and from the tracks of the railroad companies, is held to be a common carrier engaged in interstate commerce, though it collects compensation only from the railroad companies and is paid under a contract between it and them; Union Stock Yards Co. of Omaha v. U. S., 169 Fed. 404, 94 C. C. A. 626.

The business of stock yards is of such a public nature as to justify a state legislature in imposing rules and regulations for its government; Cotting v. Stock Yards, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

Where, in an action against a stock yards company to recover for overcharges on live stock, the answer fails to show that the statutory rates will not be a reasonable return on the money invested in the property devoted to such use, they are not so palpably unreasonable and unjust as applied to the defendant stock yards company as to amount to a taking of property without just compensation; Ratcliff v. Stock Yards Co., 74 Kan. 1, 86 Pac. 150, 6 L. R. A. (N. S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016.

On an issue as to whether railroad stock yards are a nuisance, evidence that there is no other reasonably convenient and practicable location is admissible; Dolan v. R. Co., 118 Wis. 362, 95 N. W. 385.

STOCKHOLDER. One who has property interests in the assets of a corporation and who is entitled to take part in its control and receive its dividends. Beal v. Bank, 67 Fed. 816, 15 C. C. A. 128. The word includes all members having a direct financial interest

in the business of the corporation with power to participate in the profits and in the conduct of its affairs, though they hold no shares ; Kimball v. Davis, 52 Mo. App. 194. The government may be a stockholder, and when it assumes this relation, it divests itself to that extent of its sovereign character; the same is true of a state; Field, Corp. § 52; and of a municipal corporation, if it has legislative power; *id.*

One person can hold all the capital stock; Rhawn v. Furnace Co., 201 Pa. 637, 51 Atl. 360. Stockholders are not trustees for each other, and one may vote on any measure, though he has an interest adverse to the company; Blinn v. Gillett, 208 Ill. 473, 70 N. E. 704, 100 Am. St. Rep. 234; Windmuller v. Distributing Co., 115 Fed. 748.

They are conclusively presumed to be citizens of the state which created the corporation; Thomas v. Board, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160. This presumption does not preclude them from asserting their actual citizenship to sustain the jurisdiction of a federal court in a suit brought by them as stockholders; Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606.

At common law the members of a corporation are not liable for the debts of a corporation; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 575, 19 L. Ed. 1029; French v. Teschemaker, 24 Cal. 540; Thomp. Liab. of Stockh. § 4; nor liable on their subscriptions, it is said, until the full capital stock is subscribed; Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130. After shares are legally full paid, no further payments can be required; Gray v. Coffin, 63 Mass. (9 Cush.) 192; French v. Teschemaker, 24 Cal. 540; unless provided by statute, as is done to a certain extent in some states. The holders of full-paid stock in an insolvent national bank are liable to creditors for a further assessment to the extent of the par value of the stock. There is also legislation that shareholders shall be personally liable to all wage-earners. By subscribing to stock in a foreign corporation, the subscriber subjects himself to the law of the foreign country in respect to the powers and obligations of such corporation; Nashua Sav. Bk. v. Agency Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782.

The legislature cannot, after the purchase of stock, impose any additional liability unless it has reserved the power to alter the charter. Statutes have been passed in many states by which stockholders are liable under certain circumstances. The statutes are too various to be treated here. They may be liable in equity when they have assets of the corporation which they ought not to retain. So they may be liable when they have subscribed to the capital stock of the corporation which they have not paid in. The capital stock in such cases is said to be a trust fund for the benefit of creditors; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220. The cases in which this doctrine has most frequently been applied have arisen out of suits brought to compel stockholders to pay the amounts unpaid upon their stock subscriptions.

The original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay, and a contract between him and the corporation or its agent limiting his liability is void as to creditors or the assignee in bankruptcy of the corporation. Representations made to the stockholder by an agent of the corporation as to the non-assessability of stock beyond a certain per cent. of its par value, constitute no defence to an action against the stockholder to enforce payment of the amount subscribed. The legal effect of the word "non-assessable" in the certificate is at most a stipulation against further assessments after the face value of the stock is paid; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203. The transferee of stock, when the transfer was duly registered, is liable in the same way upon an implied promise; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384. So where the holder of shares had procured a transfer to his name, he was held liable for unpaid instalments, though he held the stock only as collateral security for debts due him by the transferror of the stock; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818. Where certificates of stock had on their face a condition that the residue of eighty per cent. unpaid to the stock was to be paid on the call of the directors, when ordered by a vote of a majority of the stockholders, it was held that the absence of a call was no defence to an action for the residue by an assignee of the corporation in bankruptcy; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801. Agreements of members among themselves that stock shall be considered as "fully paid" are invalid; L. R. 15 Eq. 407. A corporation may, however, take in payment of its shares any property which it may lawfully purchase; Thomps. Liab. of Stockh. § 134; Moraw. Priv. Corp. 425; and stock issued therefor as full paid will be so considered; Foreman v. Bigelow, 4 Cliff. 508, Fed. Cas. No. 4,934.

A call by the proper authorities is ordinarily held to be necessary to fix the liability of a stockholder for unpaid instalments; Grosse Isle Hotel Co. v. I'Anson's Ex'rs, 43 N. J. L. 442; Spangler v. R. Co., 21 Ill. 276; L. R. 1 Ch. App. 535; but it is held that a suit may be brought without a call; Phœnix Warehousing Co. v. Badger, 67 N. Y. 300; and when a receiver has been appointed the call is made by a decree of the court; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

The United States courts formerly looked upon the capital stock as a trust fund for the benefit of corporate creditors; Sawyer v. Hoag, 17 Wall. (U. S.) 610, 620, 21 L. Ed. 731. In Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, it was said, quoting from

Sawyer v. Hoag, that the capital stock of a corporation is a trust fund only *sub modo*. In Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, the expression "trust fund" was qualified by a statement that it had not been intended "to convey the idea that there was any direct and express trust attached to the property." In Gottlieb v. Miller, 154 Ill. 44, 39 N. E. 992, it was called a *quasi*-trust fund, and Pomeroy [Eq. Jur. 1046] says that such assets do not in any true sense constitute a trust and are called so only through analogy or metaphor.

In an article in 34 Am. L. Reg. 448 [1895], George Wharton Pepper strongly objects to the expression "trust fund" and considers that the trust theory is untenable. He quotes Mr. Justice Bradley in Graham v. R. Co., 102 U. S. 148, 26 L. Ed. 106, where he says that the conception is at war with notions which we derive from English law with regard to the nature of corporate bodies.

The same writer is of the opinion that the expression "trust fund" is one which is applied by American courts to the judicial recognition of the demand of the commercial world, which is in substance that the liability of a stockholder shall be unlimited up to the par value of his shares and he shall not be entitled to any legal principle which would entitle him to advantage against corporate creditors.

The trust fund doctrine as to the assets of an insolvent corporation appears to have been first announced by Judge Story in Wood v. Dummer, 3 Mas. 308, Fed. Cas. No. 17,944. The more recent decisions eliminate any trust feature from the capital stock; McDonald v. Williams, 174 U. S. 397, 401, 19 Sup. Ct. 743, 43 L. Ed. 1022; Milliken v. Caniso, 205 N. Y. 559, 98 N. E. 493. It was repudiated in Henderson v. Trust Co., 143 Ind. 561, 40 N. E. 516; O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31, but Judge Thompson considers it "the only doctrine worthy of respect"; 5 Thomp. Corp. § 5115.

A Kansas statute gives a creditor of a corporation certain remedies against a stockholder, and gives such stockholders certain rights against other stockholders. Among other rights of the creditor was that of suing an individual stockholder wherever he could be found to an amount equal to the amount of stock owned by him. Where such an action was brought in Illinois, it was held that the courts of that state could not take jurisdiction of a question arising as to the respective relations of creditors and stockholders of a corporation of another state, where a special remedy is provided by statute, before there is a determination by the courts of such state of the just proportion of the corporate indebtedness to be borne by solvent stockholders of such corporation; Tuttle v. Bank, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; and in New York, in a similar action, it was said the purpose of the Kansas law cannot be carried out except by a proceeding in equity for an accounting to which all stockholders are parties; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; that a remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created, could not be enforced in the New York courts; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

In Pennsylvania the questions were considered whether the courts of that state would enforce the statutory liability under the laws of Kansas, and, if so, whether against separate stockholders or only in the form established by Pennsylvania practice in similar cases; Cushing v. Perot, 175 Pa. 66, 34 Atl. 447, 34 L. R. A. 737, 52 Am. St. Rep. 835, but the case was decided on other grounds. In the supreme court of the United States the liability imposed on the stockholders under this statute was held contractual in its nature, though statutory in its origin, and that an action could be maintained in any court of competent jurisdiction; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, and to the same effect; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Hancock Nat. Bk. v. Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; Howell v. A. Manglesdorf & Co., 33 Kan. 194, 5 Pac. 759.

A holder of stock in trust is subject to assessment; Davis v. Baptist Soc., 44 Conn. 582, Fed. Cas. No. 3,633; L. R. 9 Eq. 175, 363 (but the *cestui que trust* is not; *id.*; even if he is a trustee of the corporation itself; U. S. Trust Co. v. Ins. Co., 18 N. Y. 226; Allibone v. Hager, 46 Pa. 48. As to national bank stock, see NATIONAL BANKS. It is held that a *cestui que trust* is bound to indemnify his trustee; L. R. 18 Eq. 16.

The remedy against stockholders may be in some states by garnishment under the judgment against the company; but more commonly it is by bill in equity and a receiver. It is held that the remedy of a creditor against a stockholder is in equity alone; Smith v. Huckabee, 53 Ala. 191; Terry v. Little, 101 U. S. 216, 25 L. Ed. 864. In equity the court decrees a call and the receiver collects the amount. The court may decree payment in full, leaving the stockholders to seek contribution among themselves; Cook, St. & Stockh. § 211.

In an action to enforce the payment of an assessment on unpaid stock, on behalf of creditors, a stockholder cannot set off a claim against the corporation; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; L. R. 1 Ch. 528; Thebus v. Smiley,

110 Ill. 316; otherwise, if the corporation itself sues; L. R. 19 Eq. 449. In New York there is a right of set-off at law against a corporation creditor, but not in equity; Christensen v. Colby, 43 Hun (N. Y.) 362.

A subscriber cannot set up against an action for calls that the corporation was not lawfully organized, if he is a director and was one of the original incorporators; United Growers Co. v. Eisner, 22 App. Div. 1, 47 N. Y. Supp. 906.

The better opinion is said to be that the statute of limitation begins to run only when a call has been made and payment thereunder is due; Cook, St. & Stockh. § 195; or from the order of court making the assessment; Glenn v. Marbury, 145 U. S. 507, 12 Sup. Ct. 914, 36 L. Ed. 790. It is held to run from the date of an assignment for creditors by the company; Franklin Sav. Bk. v. Bridges (Pa.) 8 Atl. 611; and in Great Western Tel. Co. v. Purdy, 83 Ia. 430, 50 N. W. 45, when the subscription is made; so also Williams v. Meyer, 41 Hun (N. Y.) 545; though where a creditor sues it does not run till he secures judgment; Christensen v. Quintard, 36 Hun (N. Y.) 334.

Statutes in various states provide for a forfeiture of stock for non-payment of subscriptions, and a sale. This right does not exist without a statute; nor can it be created by a mere by-law; but it may be by the consent of the stockholder if expressed on the face of his certificate; Cook, St. & Stockh. § 122; the remedy by forfeiture, when given, is in addition to the ordinary common-law remedies; *id.* § 124.

See Thomp. Liab. of Stockh.; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 88; 15 Am. L. Reg. N. S. 648.

In order to constitute one a shareholder, it is not necessary that a certificate should have been issued to him; Beckett v. Houston, 32 Ind. 393; Schaeffer v. Ins. Co., 46 Mo. 248.

The right to vote on his stock is a property right, in which he will be protected as against the doubtful claim of another to such stock; Lucas v. Milliken, 139 Fed. 816; Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

Where a director is required to be the holder of a certain number of shares as a qualification, he is presumed, on winding up, to have been the holder of that number of shares; [1892] 2 Ch. 158.

It is said that a stockholder may deal with his company at arm's length as a stranger might; Russell v. Gas Co., 184 Pa. 102, 39 Atl. 21. See PREFERENCE.

The rights of a stockholder are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts. For the invasion of these rights by the officers of a company, a stockholder may sue at law or in equity, according to the nature of the case. All remedies for injury to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice, the interests of the corporation, a stockholder may, for such breaches of trust and conspiracy, call the guilty parties to an account in a court of equity; Forbes v. R. Co., 2 Woods 323, Fed. Cas. No. 4,926, per Bradley, J.

Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and others for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation, either actually or virtually refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrongdoing directors, officers, and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party, usually as a co-defendant. The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because his rights have been directly violated or because the action is his, or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually, or as the representative of the class, may commence the suit and may prosecute it to judgment; but in every other respect, the action is the ordinary one brought by the corporation. It is maintained directly for the benefit of the corporation and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably necessary party, not simply on the general principles of equity pleading, in order that it may be found by the decree; but in order that the relief, when granted, may be awarded to it, as a party to the record by the decree; 3 Pom. Eq. Jur. § 1095. It is said this view completely answers the objections which are sometimes raised in suits of this class that the plaintiff has no interest in the subject matter of the controversy nor in the relief. In fact the plaintiff has no direct interest; the defendant corporation, alone, has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice; Slat-

tery v. Transp. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245; Estate of Seiter v. Mowe, 182 Ill. 351, 55 N. E. 526; Grant v. Mountain Co., 93 Tenn. 700, 28 S. W. 90, 27 L. R. A. 98; Graham v. Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L. R. A. (N. S.) 729.

In Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401, the right of a stockholder to bring a suit was said to be founded on a right of action existing in the corporation itself as the appropriate plaintiff and must be based upon some injurious action or threatened action upon the part of the corporation or the stockholders, destructive of the corporation or the rights of stockholders. A stockholder cannot sue except on a refusal to sue on the part of the corporation. This was said to be the leading case on the subject; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, which followed Dodge v. Woolsey, and at the same term of the court rule 94 of the supreme court equity rules was promulgated, embodying substantially the language of the opinion of the court in Hawes v. Oakland. It provides that every bill brought by a stockholder against a corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer upon courts of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the directors and, if necessary, of the shareholders, and the cause of his failure to secure such action.

See, also, Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 500, 27 L. Ed. 300; Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815, where it is held that the corporation is a necessary party.

The complaining stockholder is entitled to his costs from the corporation; 2 Spell. Pr. Corp. 643.

A single stockholder can enjoin the use of the funds of the corporation in a project not authorized by charter or certificate when he became a shareholder; Stevens v. R. Co., 29 Vt. 545; this is protection to minority shareholders, but it at times becomes inconvenient, hence it is generally provided by statute or in the articles of incorporation that a change in the specified objects can be made by a certain number.

A stockholder has the right to prevent the sale or lease of all the corporate assets, when the corporation is in financial difficulty, for he has the right that the enterprise shall not be unnecessarily abandoned just as much as enlarged; Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105; but where the corporation is in an embarrassed financial condition, then the directors may lease or sell the assets if the same is done properly and ratified by the majority shareholders; Bartholomew v. Rubber Co., 69 Conn. 521, 38 Atl. 45, 61 Am. St. Rep. 57.

The court will not inquire into the stockholder's motive for bringing his bill against the corporation unless the same is admitted to be bad; L. R. 2 Ch. App. 459; but the suit must be brought on his own behalf and not as suing for some one else; Forrest v. Manchester Ry. Co., 4 De G., F. & J. 125; but it is held, where a share of stock is in the hands of a bona fide purchaser, he shall not be subject to any personal exception that was binding on his transferror; Parsons v. Joseph, 92 Ala. 403, 8 South. 788.

Where a corporation issues stock at an over-valuation for property to promoters who were the only existing shareholders, the subsequent shareholders, buying such stock, cannot sue through the corporation such promoters, since a corporation should not be allowed to disregard its assent previously given, and hence there is no wrong done to the corporation; Old Dominion Copper M. & S. Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *contra;* Old Dominion Copper Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479.

Six distinct classes of creditors' bills against stockholders: 1. He may have subscribed for stock to be paid for in money, and by the terms of his subscription no call has to be made to render him liable, or the call has already been made; Hadden v. Spader, 20 Johns. (N. Y.) 554. (2) Under the same contract of subscription, a call has to be made before the stockholder will be liable to pay; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885. (3) The corporation has agreed that the stock issued to the stockholder for money, at less than par, shall be considered as fully paid; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; or the corporation has issued its stock as fully paid for property conveyed to it in lieu of money; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725. (4) The corporation has issued its stock as fully paid for property conveyed to it in lieu of money, (a) such property being grossly over-valued by the corporation, or (b) being materially over-valued, but the corporation acting in good faith, and in the exercise of its best judgment, or (c) the difference between the valuation assigned and the true value being immaterial. This class of cases sometimes involves statutory and constitutional provisions against "watered" stock, giving rise to further distinctions; Hastings Malting Co. v. Brewing Co., 65 Minn. 28, 67, 8 N. W. 652; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Van Cleve v. Berkey, 143 Mo. 109,

44 S. W. 743, 42 L. R. A. 593; American Tube & Iron Co. v. Gas Co., 165 Pa. 489, 30 Atl. 940. (5) Where the corporation has conveyed the assets representing its capital to stockholders or others in fraud of creditors; Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. (6) The corporation having been dissolved, the directors or trustees in liquidation have had the duties of trustees imposed on them by statute; Jacobs v. Sugar Co., 130 Fed. 589; Wilkinson v. Bertock, 111 Ga. 187, 36 S. E. 623.

Corporate creditor's suit to enforce payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and an execution returned unsatisfied; Terry v. Anderson, 95 U. S. 628, 636, 24 L. Ed. 365; Wetherbee v. Baker, 35 N. J. Eq. 501; Cutright v. Stanford, 81 Ill. 240; Albright v. R. Co., 8 N. M. 422, 46 Pac. 448. The remedy against the corporation need not first be exhausted, where the corporation is bankrupt, notoriously insolvent, or has been formally dissolved; Fourth Nat. Bk. v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; Firestone T. & R. Co. v. Agueir, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150; May v. Charlouis, 195 N. Y. 607, 89 N. E. 1105; Latimer v. Bank, 102 Iowa, 162, 71 N. W. 225.

Where a charter in one state authorized a corporation to do business in another state, it may become liable to the laws of the latter state making stockholders liable for the corporate debts, although contrary to the charter exempting them therefrom; Thomas v. Matthiessen, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. Ed. —.

It has been held that if a corporation has power to reduce its capital stock, it may do so by purchasing a portion of its own shares; State v. Smith, 48 Vt. 266; City Bank of Columbus v. Bruce, 17 N. Y. 507; *contra*, Currier v. State Co., 56 N. H. 262; but it is held to be *ultra vires* for a corporation to dispose of any part of its property other than its surplus or net profits, in the purchase of shares of its own stock; Hamor v. Engineering Co., 84 Fed. 393. A corporation cannot buy its own stock if the rights of creditors are thereby prejudiced; Clapp v. Peterson, 104 Ill. 26; but apart from the rights of creditors, it is held in some states that such a transaction is lawful; Blalock v. Mfg. Co., 110 N. C. 99, 14 S. E. 501; First Nat. Bk. v. Flour Mills Co., 39 Fed. 89; Chicago, P. & S. W. R. Co. v. Marseilles, 84 Ill. 145. Accepting its own stock in payment of land sold by it is not necessarily invalid; Thompson v. Moxey, 47 N. J. Eq. 538, 20 Atl. 854; where the company is perfectly solvent; Fraser v. Ritchie, 8 Ill. App. 554. In England it is held that a corporation cannot purchase its own shares; 12 App. Cas. 409; and a stockholder may enjoin such purchase; L. R. 4 Ch. Div. 327.

A shareholder has a common law right, for proper purposes and under reasonable regulations as to time and place, to inspect the books of a corporation of which he is a member; it should not be granted for speculative or improper purposes; and it should not be denied when asked for legitimate purposes. A state court has authority to enforce the right; Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433 (a national bank). The right rests upon the proposition that those in charge are merely the agents of the stockholders; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707. The common law right of a stockholder to inspect the books of his corporation is not an absolute one, but one depending upon his motive in seeking the inspection; Varney v. Baker, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. A distinction is made between the right to inspect the books in general and the by-laws; In re Coats, 75 App. Div. 567, 78 N. Y. Supp. 429, where it was said that an application to examine the by-laws rested upon a different footing than an application for an inspection of the books and papers in general; that the by-laws constituted a part of the contract between the stockholder and the corporation and were binding upon both. A distinction has also been made between the right of a director to inspect the books of a corporation and the right of a stockholder to do so; People v. Paper Bag Co., 103 App. Div. 208, 92 N. Y. Supp. 1084. A corporation cannot deprive its stockholder of the right to inspect its books for the protection of his interests by offering to purchase his stock at a price fixed by it; Kuhbach v. Cut Glass Co., 220 Pa. 427, 69 Atl. 981, 20 L. R. A. (N. S.) 185; nor by offering to furnish him abstracts of them or to permit an inspection by an expert to be selected by it and him; *id.*; that the stockholder is also a stockholder in a rival company is not sufficient to deprive him of the right to examine its books; *id.*

The right to inspect the general books of a corporation is said to be a common law right the enforcement of which is discretionary with the court; Woodworth v. Bank, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581. The right to inspect stock or transfer books is a statutory right the enforcement of which in a case within the terms of the statute is mandatory; People v. Bank, 105 App. Div. 409, 94 N. Y. Supp. 173; People v. Mines Co., 122 App. Div. 617, 107 N. Y. Supp. 188.

Where there was nothing in the record to show that the purpose for which an inspection was sought was unlawful or ulterior, and the stockholder in his written demand swore that his purpose was not inimicable to the corporation, in the absence of some substantial evidence on the question, the court said it would not be justified in ignoring the mandatory direction of the statute; Althouse

v. Giroux, 56 Misc. Rep. 509, 107 N. Y. Supp. 191.

The right given by statute may be exercised by an agent or attorney of the stockholder; Clawson v. Clayton, 33 Utah 266, 93 Pac. 729; he may not, in the exercise of his right to have assistance, unduly interfere with the ordinary affairs of the company. Varney v. Baker, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. His right to inspection carries with it the right to make such extracts from the books as he requires; People v. Bank, 105 App. Div. 409, 94 N. Y. Supp. 173. He is not entitled to exercise the statutory right until he has had the transfer of stock to him entered upon the books of the company; Butterfly-Terrible G. Min. Co. v. Brind, 41 Colo. 29, 91 Pac. 1101; a stockholder's common law right of inspection is not affected by a statute conferring upon him a limited right; State v. Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112.

A stockholder is not entitled to inspect the books of his corporation in order to ascertain whether a certain person against whom he has a claim by virtue of legal proceedings in a different state owns or has recently transferred shares of stock in the company; State v. Biscuit Co., 69 N. J. L. 198, 54 Atl. 241.

That the stockholder is a member of a company engaged in a competing business is not a ground for refusing his right to inspect the books; Hodder v. Hogg Co., 223 Pa. 196, 72 Atl. 553; because the stockholder is a competitor of the company, or an officer in a competing company, is not sufficient to raise the presumption that the purpose of the inspection is an improper one; Cobb v. Lagarde, 129 Ala. 488, 30 South. 326. The desire to ascertain the value of the stock of the company and whether its business was being conducted according to law was held to be a proper purpose; Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433. Statutes in many of the states granting the right are generally held to be declaratory of the common law; Guthrie v. Harkness, *supra.*

The right of access is as applicable in the case of a banking corporation as it is in any other kind of corporation; Tuttle v. Bank, 170 N. Y. 9, 62 N. E. 761. The authorities are fully examined and the right of inspection for proper purposes and at proper times is recognized in In re Steinway, 159 N. Y. 251, 53 N. E. 1103, 45 L. R. A. 461; Com. v. Iron Co., 105 Pa. 111, 51 Am. Rep. 184; to the same effect Deaderick v. Wilson, 67 Tenn. (8 Baxt.) 108; Huylar v. Cattle Co., 40 N. J. Eq. 392, 2 Atl. 274.

In issuing the writ of mandamus, the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned; Guthrie v. Harkness, supra.

A director is entitled to access to all the corporate books; Lawton v. Bedell (N. J.) 71 Atl. 490.

It is said to be customary for banking companies in England to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors; L. R. 28 Ch. D. 620; but the subject appears to be now regulated there by statute; Cook, Corp. § 518.

A bank may be compelled by mandamus to exhibit to the assessing officer a list of its shareholders with their names and residences and the number of shares owned by each; Paul v. McGraw, 3 Wash. 296, 28 Pac. 532; so with an insurance company; Firemens' Ins. Co. v. Baltimore, 23 Md. 296; but it has been held that a statute authorizing a court to appraise decedents' estates for the fixing of an inheritance tax confers no authority upon such court to compel a private corporation in which the decedent held stock to produce its books and papers; State v. Carpenter, 129 Wis. 180, 108 N. W. 641, 8 L. R. A. (N. S.) 788.

See RECORDS; PRODUCTION OF BOOKS.

A stockholder has no right, by the inherent powers of a court of equity, to bring suit to wind up the business of a corporation; Bliven v. Iron Co., 60 How. Pr. (N. Y.) 280.

A suit in equity may be maintained by a creditor of a corporation against a stockholder only in the courts of the state in which the corporation is created, and the corporation is a necessary party defendant; State Nat. Bk. v. Sayward, 86 Fed. 45.

Contracts by individuals for the purchase of all the stock of a private corporation or to control it are valid and not against public policy; Borland v. Prindle, Weeden & Co., 144 Fed. 713; Scruggs v. Cotterill, 67 App. Div. 583, 73 N. Y. Supp. 882; so also where an agreement stipulated that the stock for five years should be held in one block, the vote to be determined by ballot between the owners; Smith v. R. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119. But see VOTING TRUST. So also where a contract for the sale of a majority of the stock was entered into by all the stockholders and contained a provision that the plaintiffs should hold their corporate offices for five years at a specified salary; Kantzler v. Bensinger, 214 Ill. 589, 73 N. E. 874; but a contract by the holders of a controlling interest in a corporation to elect certain stockholders as officers thereof for a certain period at a specified salary was held contrary to public policy and void; Bensinger v. Kantzler, 112 Ill. App. 293; and an agreement for the organization of a corporation, accepting only those who would consent to the employment of a certain person as general agent, was held void; Flaherty v. Cary, 62 App. Div. 116, 70 N. Y. Supp. 951, affirmed 174 N. Y. 550, 67 N. E. 1082; and so were contracts by certain stockholders to elect certain persons to

corporate offices; Bonta v. Gridley, 77 App. Div. 33, 78 N. Y. Supp. 961; Withers v. Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795.

A sale of the corporate property by a single holder of a majority of the stock by the use of a meeting of the directors, and a meeting of the stockholders, in legal form, for its fair value, but for a smaller amount than could have been obtained for it from another, is voidable at the election of the minority stockholders; Wheeler v. Bank Bl'd'g Co., 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917. So is a sale by a stockholder to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the minority stockholders; Pepper v. Addicks, 153 Fed. 383; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Wright v. Min. Co., 40 Cal. 20; Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.

Where new stock is to be issued, the opportunity to subscribe to it must be offered, first, to the old shareholders in proportion to their original holdings; Stokes v. Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738; a by-law of a Colorado corporation limiting the right to vote to stock that has been paid in full is void; Lilylands C. & R. Co. v. Wood (Colo.) 136 Pac. 1026.

The issue of additional stock and its distribution *pro rata* among its stockholders, although without receiving payment therefor, is not in itself injurious to stockholders or creditors; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163.

After the annual meeting of the stockholders of a corporation had been duly organized, some stockholders without justification withdrew to break the quorum. Those remaining elected the defendants to office; such election was held valid; Com. v. Vandegrift, 232 Pa. 53, 81 Atl. 153, 36 L. R. A. (N. S.) 45. For a case where two parties agreed not to sell stock, except to each other, see Havemeyer v. Havemeyer, 45 N. Y. Super. Ct. 464.

STOCKS. In Criminal Law. A machine, commonly made of wood, with holes in it, in which to confine persons accused of or guilty of crime.

It was used either to confine unruly offenders by way of security, or convicted criminals for punishment. This punishment has been generally abandoned in the United States; in England they were used as late as 1872.

STOLEN GOODS. See RECENT POSSESSION OF STOLEN GOODS; RECEIVER OF STOLEN GOODS.

STOP, LOOK, AND LISTEN RULE. See GRADE CROSSING.

STOP ORDER. A direction given by the purchaser to the broker to the effect that, if the stock touches the price named in the order while it is being held, the broker shall sell it at the best price available; Richter v. Poe, 109 Md. 20, 71 Atl. 420, 22 L. R. A. (N. S.) 174.

STOPPAGE IN TRANSITU. A resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them. Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617.

Chancellor Kent has defined the right of stoppage *in transitu* to be that which the vendor has, when he sells goods on credit to another, of resuming the possession of the goods while they are in the possession of a carrier or middleman, in the transit to the consignee or vendee, and before they arrive into his actual possession, or the designation he has appointed for them, on his becoming bankrupt and insolvent; 2 Kent 702.

The right of stoppage *in transitu* is an equitable extension recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. This right is paramount to any lien created by usage or by agreement between the carrier and the consignee, for a general balance of account, but not to the lien of the carrier for freight; Potts v. R. Co., 131 Mass. 457, 41 Am. Rep. 247.

For most purposes, the possession of the carrier is considered to be that of the buyer; but by virtue of this right, which is an extension of the right of lien, the vendor may reclaim the possession before they reach the vendee, in case of the insolvency of the latter; Grout v. Hill, 4 Gray (Mass.) 361; 8 M. & W. 321, which gives a history of the law.

The vendor, or a consignor to whom the vendee is liable for the price; 3 East 93; 6 *id.* 17; Newhall v. Vargas, 13 Me. 103, 29 Am. Dec. 489; or a general or special agent acting for him; 9 M. & W. 518; Bell v. Moss, 5 Whart. (Pa.) 189; see Reynolds v. R. R., 43 N. H. 589; Seymour v. Newton, 105 Mass. 275; may exercise the right.

The goods sold must be unpaid for, either wholly or partially; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; 2 Exch. 702. As to the rule where a note has been given, see 2 M. & W. 375; Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63; Donath v. Broomhead, 7 Pa. 301; where there has been a pre-existing debt; Stanton v. Eager, 16 Pick. (Mass.) 475; Clark v. Mauran, 3 Paige (N. Y.) 373; Summeril v. Elder, 1 Binn. (Pa.) 106; 1 B. & P. 563; where there are mutual credits; 7 Dowl. & R. 126; Stanton v. Eager, 16 Pick. (Mass.) 467; where the vendee gives a draft; Ainis v. Ayres, 62 Hun 376, 16 N. Y. Supp. 905. The vendee must be insolvent; 4 Ad. & E. 332; Farrell & Co. v. R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Kingman & Co. v. Denison, 84 Mich.

612, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. Rep. 711. A seller cannot stop goods in transit simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown; Smith v. Barker, 102 Ala. 679, 15 South. 340.

The vendor can bring suit for the price of the goods after he has caused them to be stopped *in transitu*, and while they are yet in his possession, provided he be ready to deliver them upon payment of the price; 1 Camp. 109; but the right of the vendor after stoppage exceeds a mere lien; for he may resell the goods; 6 Mod. 152.

There need not be a manual seizure: it is sufficient if a claim adverse to the buyer be made during their passage; 2 B. & P. 457; 9 M. & W. 518; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489.

The goods must be in transit; 3 Term 466; Wood v. Yeatman, 15 B. Monr. (Ky.) 270; Stanton v. Eager, 16 Pick. (Mass.) 474; Atkins v. Colby, 20 N. H. 154. Where goods sold are shipped by rail and a transfer company, under a previous general order of the buyer, receives the goods at the depot to convey them to the buyer's place of business, the goods are still in transit and the seller may still exercise his right of stoppage; Scott v. Dry-Goods Co., 48 Mo. App. 521. Goods shipped by a railroad company and delivered to a local transfer company having general orders from the buyers to receive goods on their behalf, and by it taken to the buyers' store, which was closed on account of insolvency, were held subject to stoppage; In re M. Burke & Co., 140 Fed. 971.

In order to preclude the right the goods must have come actually into the hands of the vendee or some person acting for him; 2 M. & W. 632; Conard v. Ins. Co., 1 Pet. (U. S.) 386, 7 L. Ed. 189; Covell v. Hitchcock, 23 Wend. (N. Y.) 611; Sheppard v. Newhall, 54 Fed. 306, 4 C. C. A. 352; or constructively, as, by reaching the place of destination; 9 B. & C. 422; 3 B. & P. 320, 469; Stubbs v. Lund, 7 Mass. 457, 5 Am. Dec. 63; Atkins v. Colby, 20 N. H. 154; Farrell & Co. v. R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; or by coming into an agent's possession; 4 Camp. 181; Stubbs v. Lund, 7 Mass. 453, 5 Am. Dec. 63; or by being deposited for the vendee in a public store or warehouse; Mottram v. Heyer, 5 Denio (N. Y.) 631; Donath v. Broomhead, 7 Pa. 301; 4 Camp. 251; Williams v. Hodges, 113 N. C. 36, 18 S. E. 83; or by delivery of part for the whole; 14 M. & W. 28; Secomb v. Nutt, 14 B. Monr. (Ky.) 324.

The right can be defeated, where there is no special legislation on the subject, only by a transfer of the bill of lading; McElwee v. Lumber Co., 69 Fed. 302, 16 C. C. A. 232, 37 U. S. App. 266; but the assignment, unindorsed, of a bill of lading will not defeat the right, if the goods are still in transit; Sheppard v. Newhall, 54 Fed. 306, 4 C. C. A. 352, 7 U. S. App. 544. The right expires when the goods have been delivered; *id.*

Where goods are in the hands of a carrier, they may be stopped, although the purchaser has handed to the shipping agent the bills of lading received by him from the vendor and received a bill of lading for them, and the purchaser is himself a passenger on the vessel on which they are shipped; L. R. 15 App. Cas. 391.

The delivery of goods at the buyer's store which was at the time in the possession of the sheriff under an attachment, is not a delivery to the consignee; Harris v. Temey, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796. See Jenks v. Fulmer, 160 Pa. 527, 28 Atl. 841.

The right of stoppage *in transitu* is not abrogated by the Bankruptcy Act of 1898, and may be exercised against the receiver or trustee; In re Darlington Co., 163 Fed. 385.

Where there is no contract to the contrary, express or implied, the employment of a carrier by a vendor of goods on credit constitutes all middlemen into whose custody they pass for transportation and delivery, agents of the vendor; and until the complete delivery of the goods, they are deemed *in transitu*; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63. The right cannot be superseded by an attachment at the suit of a general creditor, levied while the goods are *in transitu*; Dickman v. Williams, 50 Miss. 500; Morris v. Shryock, 50 Miss. 590. If the vendor attach the goods while in transit, his right of stoppage will be destroyed; Woodruff v. Noyes, 15 Conn. 335. Where goods are to be delivered a part at a time, and various deliveries are so made, the right to stop the remaining portion is not lost; nor will the fact that the entire lot of goods was transferred on the books of the warehouse affect the right; Buckley v. Furniss, 17 Wend. (N. Y.) 504. The right of stoppage *in transitu* is looked upon with favor by the courts; 2 Eden 77; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

The effect of the exercise of this right is to repossess the parties of the same rights which they had before the vendor resigned his possession of the goods sold; 1 Q. B. 389; 10 B. & C. 99; Jordan v. James, 5 Ohio 98; Rogers v. Thomas, 20 Conn. 53; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

The doctrine is not founded on any contract between the parties nor on any ethical principle, but upon the custom of merchants. It was first adopted in chancery and afterwards by the courts of law; 11 Q. B. D. 356, per Brett and Bowen, L. JJ.

By the Sales Act, the seller may stop goods on the buyer's insolvency. 1. Goods are in transit: (a) From the time of delivery to any carrier or bailee, until the buyer takes delivery of them from such carrier or bailee; (b) if the goods are rejected by the buyer, and the carrier or other bailee continues in

possession of them, even if the seller has refused to receive them back. 2. Goods are no longer in transit: (a) If the buyer obtains delivery of the goods before their arrival at the appointed destination; (b) if, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer; (c) if the carrier or other bailee refuses to deliver the goods to the buyer, or his agent in that behalf. 3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in possession of the master as carrier or as agent of the buyer. 4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

The exercise of the right by the unpaid seller may be: 1. By obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee, in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer. 2. When notice of a stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to directions of, the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver the goods to the seller unless such document is first surrendered for cancellation.

A carrier which is at service and expense in stopping goods in transit, for inspection and reloading for the benefit of the shipper, is entitled to compensation in addition to the additional expense incurred; Southern R. Co. v. Grain Co., 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004.

See Williston, Sales; BILLS OF LADING.

STORE. To keep for safe custody. O'Niel v. Ins. Co., 3 N. Y. 122; Hynds v. Ins. Co., 16 Barb. (N. Y.) 119. A place where goods are sold at a profit. Alcorn v. State, 71 Miss. 464, 15 South. 37.

STORE-HOUSE. A building for the storage of goods, grain, food-stuffs, etc. A livery-stable has been held a store-house. Webb v. Com. (Ky.) 35 S. W. 1038.

STORE ORDERS. In some states the maintaining of general supply stores by companies or individual employers is forbidden.

An act requiring the redemption in cash of store orders is constitutional; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; but it is held that statutes prohibiting the issuance of checks for labor performed redeemable in goods and merchandise interfere with the right of freedom of contract. Such statutes are not within the police power of the state; Jordan v. State, 51 Tex. Cr. R. 531, 103 S. W. 633, 11 L. R. A. (N. S.) 603, 14 Ann. Cas. 616 (which case see for a review of the decisions supporting this view); to the same effect, Leach v. Timber Co., 111 Mo. App. 650, 86 S. W. 579; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354. The legislature may not single out owners and operators of mines and manufactures of every kind, and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863.

A statute prohibiting mining, manufacturing or railroad corporations from paying wages otherwise than in legal tender money was held not to prevent an employé from giving an order on his employer to merchants or others as an assignment of wages to pay his debts; Shaffer v. Min. Co., 55 Md. 74. Giving an employé checks for merchandise in advance of pay day on his own voluntary application does not violate a statute providing that labor shall be paid for in lawful money; Avent Beattyville Coal Co. v. Com., 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273.

It is usurious to discount a store order for goods by paying twenty per cent. less than its face; Osborne v. Fuller, 92 S. C. 338, 75 S. E. 557, 42 L. R. A. (N. S.) 1058.

See LIBERTY OF CONTRACT; POLICE POWER.

STORES. The supplies for the subsistence and accommodation of a ship's crew and passengers. Under the word stores, tackle, apparel, etc., will not pass. 2 Stark. 105.

STOWAGE. In Maritime Law. The proper arrangement in a ship of the different articles of which a cargo consists, so that they may not injure each other by friction, or be damaged by the leakage of the ship.

The master of the ship is bound to attend to the stowage, unless by custom or agreement this business is to be performed by persons employed by the merchant; Abb.

Shipp. 13th ed. 391; Pardessus, *Dr. Com.* n. 721. See ARRAMEUR.

Merchandise and other property must be stored under deck, unless a special agreement or established custom and usage authorizes their carriage on deck. See SEAWORTHY.

STOWAWAY. One who steals his passage. They shall not, as a rule, be examined or permitted to land at ports of the United States, but in rare cases may be, if they do not belong to the excluded class; U. S. v. Williams, 193 Fed. 228.

A stowaway, in England, is liable to a fine not exceeding £20 or imprisonment not exceeding four weeks, with a provision for arrest without warrant and summary trial before any sheriff or justice of the peace.

STRADDLE. See OPTION.

STRAND. The shore or bank of a sea or river. Cowell. That portion of the land lying between ordinary high and low water mark. Stillman v. Burfeind, 21 App. Div. 13, 47 N. Y. Supp. 280.

STRAND INN. See INNS OF COURT.

STRANDING. In Maritime Law. The running of a ship or other vessel on shore; it is either accidental or voluntary.

Accidental stranding takes place where the ship is driven on shore by the winds and waves and remains stationary for some time.

Voluntary stranding takes place where the ship is run on shore either to preserve her from a worse fate or for some fraudulent purpose. Marsh. Ins. b. 1, c. 12, s. 1.

It is of great consequence to define accurately what shall be deemed a stranding; but this is no easy matter. In one case, a ship having run on some wooden piles, four feet under water, erected in Wisbeach river, about nine yards from shore, which were placed there to keep up the banks of the river, and having remained on these piles until they were cut away, was considered by Lord Kenyon to have been stranded; Marsh. Ins. b. 7, s. 3. In another case, a ship arrived in the river Thames, and upon coming up to the pool, which was full of vessels, one brig ran foul of her bow and another vessel of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her. As to this, Lord Kenyon told the jury that, unskilled as he was in nautical affairs, he thought he could safely pronounce to be no stranding; 1 Camp. 131; 3 *id.* 431; 4 Maule & S. 503; 5 B. & Ald. 225; 4 B. & C. 736. See PERILS OF THE SEA.

When a vessel takes the ground in the ordinary course of navigation, from a natural deficiency of water, or from the ebb of the tide, it is not a stranding; 11 C. B. 876; Potter v. Ins. Co., 2 Sumn. 197, Fed. Cas. No. 11,339. But where a ship was fastened at the pier of a dock basin against the advice of the master, and when the tide ebbed, took the ground and fell over on her side, in consequence of which, when the tide rose, she filled with water, it was held to be a stranding; 4 M. & S. 77.

It may be said, in general terms, that in order to constitute a stranding, the ship must be in the course of prosecuting her voyage when the loss occurs; there must be a settling down on the obstructing object; and the vessel must take the ground by reason of extraordinary casualty, and not from one of the ordinary incidents of a voyage. Arn. Ins. §§ 297, 318. And see Strong v. Ins. Co., 31 N. Y. 106, 88 Am. Dec. 242; Lake v. Ins. Co., 13 Ohio 66, 42 Am. Dec. 188.

STRANGER. A person born out of the United States; but in this sense the term alien is more properly applied until he becomes naturalized.

A person who is not privy to an act or contract: example, he who is a *stranger* to the issue shall not take advantage of the verdict; Brooke, Abr. *Record*, pl. 3; Viner, Abr. 1. And see Com. Dig. *Abatement* (H 54); O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. 455.

When a man undertakes to do a thing, and a stranger interrupts him, this is no excuse; Com. Dig. *Condition* (L 14). When a party undertakes that a stranger shall do a certain thing, he becomes liable as soon as the stranger refuses to perform it; Bac. Abr. *Conditions* (Q 4).

STRATAGEM. A deception either by words or actions, in times of war, in order to obtain an advantage over an enemy.

Stratagems, though contrary to morality, have been justified unless they have been accompanied by perfidy, injurious to the rights of humanity, as in the example given by Vattel of an English frigate, which during a war between France and England appeared off Calais and made signals of distress in order to allure some vessel to come to its relief, and seized a shallop and its crew who had generously gone out to render it assistance. Vattel, *Droit des Gens*, liv. 3, c. 9, § 178.

STRATOCRACY. A military government; government by military chiefs.

STRAW BAIL. See BAIL.

STRAW MEN. See MEN OF STRAW.

STRAW SHOES. See MEN OF STRAW.

STREAM. A current of water. A body of water having a continuous flow in one direction. 34 L. R. Sc. 174. The right to a water-course is not a right in the fluid itself, so much as a right in the current of the stream. 2 Bouvier, Inst. n. 1612.

See RIVER; WATER-COURSE; ICE.

STREET. A public thoroughfare or highway in a city or village. It differs from a

country highway; In re Road from Fitzwater St., 4 S. & R. (Pa.) 106. It means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. L. R. 4 Q. B. D. 121. A street is not an easement, but a dedication to the public of the occupation of the surface for passing and repassing; L. R. 3 Ch. 306; 1 Q. B. D. 703. See HIGHWAY.

A practical rule as to vehicles and pedestrians is that the rights of the latter are primary at crossings and secondary between crossings. This rule has been applied by Judge Sulzberger both in civil and criminal cases in the Philadelphia Common Pleas.

A street, besides its use as a highway for travel, may be used for the accommodation of drains, sewers, aqueducts, water, and gas-pipes, lines of telegraph, and for other purposes conducive to the general police, sanitary, and business interests of a city; Milhau v. Sharp, 17 Barb. (N. Y.) 435; Providence Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618. Its use belongs, from side to side and end to end, to the public; State v. Berdetta, 73 Ind. 193, 38 Am. Rep. 117. Unless there be some special restrictions when the same are acquired, streets and squares are for the public use at large as distinguished from the municipality; 2 Dillon, Mun. Cor. 656.

To enable a city lawfully to permit the use of its streets for poles, wires, etc., for telephone purposes, the power to do so must be expressly delegated to it; State v. Trenton, 36 N. J. L. 79; Texarkana v. Tel. Co., 48 Tex. Civ. App. 16, 106 S. W. 915; Logansport R. Co. v. Logansport, 114 Fed. 688; Birmingham & P. M. St. R. Co. v. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Curry v. Dist. of Columbia, 14 App. D. C. 423; Bischof v. Bank, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. (N. S.) 486.

It was held not within the power of a municipal corporation to grant any exclusive privilege in its streets to any corporation so as to deprive itself of the right to revoke the same and grant like privileges to another; Montgomery L. & W. P. Co. v. Power Co., 142 Ala. 464, 38 South. 1026. It is held that a municipal corporation cannot, without legislative authority, grant a franchise to lay gas pipes in its streets; Elizabeth City v. Banks, 150 N. C. 407, 64 S. E. 189, 22 L. R. A. (N. S.) 925; East Tennessee Tel. Co. v. Russellville, 106 Ky. 667, 51 S. W. 308; Russell v. R. Co., 205 Ill. 155, 68 N. E. 727; Morristown, Tenn., v. Tel. Co., 115 Fed. 304, 53 C. C. A. 132; nor can it grant the exclusive privilege of the use of streets for mains, pipes and hydrants for water works; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Illinois T. & S. Bk. v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Washington v. Monroe, 40 Wash. 545, 82 Pac. 888; nor sell a street or park; Turner v. Com'rs, 127 N. C. 153, 37 S. E. 191.

The charter of a city, giving to a city supervision and control of all public highways and public grounds, does not authorize an ordinance for the leasing of space on the streets or sidewalks in front of business houses for use by produce dealers or other merchants; such use of the streets will constitute a nuisance; Chapman v. Lincoln, 84 Neb. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400.

A street may be used by individuals for the lading and unlading of carriages, for the temporary deposit of movables or of materials and scaffoldings for building or repairing, provided such use shall not unreasonably abridge or incommode its primary use for travel; 3 Camp. 230; 4 Ad. & E. 405; Com. v. Passmore, 1 S. & R. (Pa.) 219; Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; Sikes v. Manchester, 59 Ia. 65, 12 N. W. 755; Mathews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248.

A municipal corporation cannot make an ordinance for the lease to produce dealers of space on a sidewalk; Chapman v. Lincoln, 84 Neb. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400; and cannot erect or authorize market buildings; Curry v. Dist. of Columbia, 14 App. D. C. 423; Costello v. State, 108 Ala. 45, 18 South. 820, 35 L. R. A. 303; or a market pound or jail; Lutterloh v. Cedar Keys, 15 Fla. 306; cannot authorize hucksters stands; Schopp v. St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; licensed vendors; In re Fiegle, 36 Misc. Rep. 27, 72 N. Y. Supp. 438; except when the rights of the public at large or of abutting property owners are not materially interrupted; Londonderry Tp. v. Berger, 2 Pears. (Pa.) 230. But it has been held that a municipality may authorize the use of streets for market purposes; Henkel v. Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

The same prohibition has been extended to fruit or lunch stands and booths, if public transit is materially interfered with; People v. Keating, 168 N. Y. 390, 61 N. E. 637; Chicago v. Pooley, 112 Ill. App. 343; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; also to hack stands; Odell v. Bretney, 38 Misc. Rep. 603, 78 N. Y. Supp. 67; Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; and to lunch wagons; Spencer v. Mahon, 75 S. C. 232, 55 S. E. 321; Com. v. Morrison, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 125 Am. St. Rep. 338 (*contra*, where it does not appreciably interfere with traffic; [1908] 1 K. B. 555); and weighing scales; State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009 (*contra*, Spencer v. Andrew, 82 Ia. 14, 47 N. W. 1007, 12 L. R. A. 115); and boxes for waste paper with exclusive advertising privileges; State v. St. Louis, 161 Mo. 371, 61 S. W. 252; People v. Clean Street Co., 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 455, 116 Am. St. Rep. 156.

The municipality is not estopped, though it granted authority; Com. v. Morrison, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194; McCaffrey v. Smith, 41 Hun (N. Y.) 117.

An ordinance making it unlawful to hold public meetings in city streets is constitutional; Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167; so of an ordinance forbidding any public address upon any public property; Com. v. Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389; and of a statute prohibiting unauthorized bodies of men from drilling or parading with arms in cities or towns; Com. v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606; and an ordinance forbidding the beating of drums in the streets of a city without permission of the mayor (here held to cover the Salvation Army); Wilkes-Barre v. Garebed, 9 Kulp (Pa.) 273. A Salvation Army parade was held not to be an unlawful and tumultuous assembly; L. R. 9 Q. B. Div. 308; and in 57 L. T. N. S. 366, it was held that an ordinance prohibiting playing upon a musical instrument upon the street was void and that a Salvation Army was not punishable thereunder. In In re Gribben, 5 Okl. 379, 47 Pac. 1074, it was held that an ordinance prohibiting the making of noise upon the streets by musical instruments was invalid. As to playing organs on the street, see [1897] 1 Q. B. 84.

There is no right to display a red flag in a parade, which is likely to cause a breach of the peace; People v. Burman, 154 Mich. 150, 117 N. W. 589, 25 L. R. A. (N. S.) 251.

One is not a trespasser if he is merely playing on the street; Chicago, M. & St. P. Ry. Co. v. McArthur, 53 Fed. 464, 3 C. C. A. 594, 10 U. S. App. 546. An attempt by a municipal corporation to prohibit loitering on the streets, so far as applied to persons conducting themselves in a peaceable, orderly manner, disturbing no one and committing no overt act, was held an interference with the constitutional right of personal liberty; St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30, 15 L. R. A. (N. S.) 494, 124 Am. St. Rep. 750; *contra*, Taylor v. Sandersville, 118 Ga. 63, 44 S. E. 845. An ordinance providing that whenever three or more persons obstruct a sidewalk, it should be the duty of the officer to request them to move on, and to arrest them upon refusing, was held unconstitutional; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.

An individual has no right to have an auction in a street; Com. v. Milliman, 13 S. & R. (Pa.) 403; or to keep a crowd of carriages standing therein; 3 Camp. 230; or to attract a disorderly crowd of people to witness a caricature in a shop-window; 6 C. & P. 636. It is held that an abutting owner may stop his carriage in front of his property, though it extend in front of the adjoining property, or may have a line of carriages running in front of neighbor's property, provided such use be reasonable and that a neighbor be allowed to drive up to his own door if desired; Jessel, M. R., in 5 Ch. Div. 713.

An encroachment upon a street, the dedication and acceptance of which is established, is nothing more or less than a nuisance, which cannot be aided by lapse of time; Yates v. Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860. In a suit by abutting owners to enjoin obstruction, no other parties defendant are necessary than the alleged trespasser; Hart v. Buckner, 54 Fed. 925, 5 C. C. A. 1.

A city is not responsible for every unauthorized act resulting in injury to travellers on a street; Joliet v. Seward, 86 Ill. 402, 29 Am. Rep. 35. So of coasting on a street; Altvater v. Baltimore, 31 Md. 462; Dudley v. Flemingsburg, 115 Ky. 5, 72 S. W. 327, 60 L. R. A. 575, 103 Am. St. Rep. 253, 1 Ann. Cas. 958; horse racing; McCarthy v. Munising, 136 Mich. 622, 99 N. W. 865; riding a bicycle on the sidewalk; Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; animals running at large; Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787 (otherwise where it had become a common nuisance and source of danger; Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479); firing explosives in a street; Campbell's Adm'x v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656; firing a cannon; Robison v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; rioting on the streets, unless there is a statutory provision to the contrary; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229. But where a city, without authority, permitted a fair to be held in one of its streets, it was held liable to one who was injured in leaving such fair show while passing on an unsafe platform in the street giving access thereto; Van Cleef v. Chicago, 240 Ill. 318, 88 N. E. 815, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275. See, generally, a note to 23 L. R. A. (N. S.) 636.

The owners of lands adjoining a street are not in some states entitled to compensation for damages occasioned by a change of grade or other lawful alteration of the street; 2 B. & A. 403; Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Seaman v. Washington, 172 Pa. 467, 481, 33 Atl. 756; Smith v. Washington, 20 How. (U. S.) 135, 15 L. Ed. 858; Broadwell v. Kansas, 75 Mo. 213, 42 Am. Rep. 406; Mattingly v. Plymouth, 100 Ind. 545; unless such damages result from a want of due skill and care or an abuse of authority; 5 B. & Ald. 837; Conrad v. Ithaca, 16 N. Y. 158. See EMINENT DOMAIN.

A city which in the repair of the streets places an obstruction in them must give appropriate warning of the same; Baltimore v Maryland, 166 Fed. 641, 92 C. C. A. 335; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Alexander v. Big Rapids, 76 Mich. 282, 42 N. W. 1071. If danger can be averted only by special precautions, such as placing guards or

lighting the streets, it is bound to take these precautions; Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562; Streeter v. Marshalltown, 123 Ia. 449, 99 N. W. 114; Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442. It must take proper precautions to prevent the removal of the lights or barriers, or ascertain the fact and replace them speedily if they are removed; Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622.

The municipal authorities must remove dirt, rubbish and ashes from the street; Connor v. Manchester, 73 N. H. 233, 60 Atl. 436. A city may not allow a street to be used as a storage place for vehicles; Radichel v. Kendall, 121 Wis. 560, 99 N. W. 348; a gravel heater left standing unused for a week in the gutter of a street may be found to be a defect in the highway for which the city is liable to a traveller who is injured thereby; Griffin v. Boston, 182 Mass. 409, 65 N. E. 811; or a road scraper; Whitney v. Ticonderoga, 127 N. Y. 40, 27 N. E. 403; or a tool chest habitually in the highway, placed there by a contractor engaged in repairing sewers under a contract with the city; Warden v. City of N. Y., 123 App. Div. 733, 108 N. Y. Supp. 305.

A tunnel or subway for electric cars is held not to be an additional servitude and will give the owner no right to compensation; Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577; in the proper sense a highway is primarily for travel, and a strong presumption arises that any use of the land for this purpose is within the scope of the proper use, even though its form may be entirely new. This presumption, however, may be rebutted by proof that the new mode of travel is necessarily very burdensome or prejudicial to the land owner; see 17 Harv. L. Rev. 409. Under the statutes of California a telephone corporation operating interstate and local lines in a city of the fifth class obtained rights to maintain its main lines in the streets, but not its local posts and wires, except subject to the regulations of the city; Pomona v. Tel. Co., 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.

Under the statutes of several of the states, assessments are levied upon the owners of lots specially benefited by opening, widening, or improving streets, to defray the expense thereof; and such assessments have been adjudged to be a constitutional exercise of the taxing power; People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; In re Extension of Hancock Street, 18 Pa. 26; Nichols v. Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Alexander v. Baltimore, 5 Gill (Md.) 383, 46 Am. Dec. 630; In re Dorrance-Street, 4 R. I. 230. See Dill. Mun. Corp.

See ASSESSMENT; RAILROAD; HIGHWAY; POLES; WIRES; NUISANCE; SIDEWALK.

STREET RAILWAY. See RAILROADS.

STREPITUS. Estrepement. Spelman.

STRICT CONSTRUCTION. See CONSTRUCTION; INTERPRETATION.

STRICT SETTLEMENT. In England, a settlement to the use of the settlor for life, and after his death to the use that his widow may receive a rent charge (or jointure), subject to these life interests, to trustees for a long term of years in trust to raise by mortgage on the term a sum of money for the portions for his younger children, and subject thereto to the use of his first and other sons successively and the heirs male of their bodies, with the ultimate remainder in default of issue to the settlor in fee simple.

STRICTISSIMI JURIS (Lat. the most strict right or law). In general, when a person receives an advantage, as the grant of a license, he is bound to conform strictly to the exercise of the rights given him by it, and in case of a dispute it will be strictly construed. See Washburn v. Gould, 3 Stor. C. C. 159, Fed. Cas. No. 17,214.

STRICTUM JUS (Lat.). Mere law, in contradistinction to equity.

STRIKE. A combined effort by workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time. Where this is peaceably effected without positive breach of contract, it is not unlawful; Irving v. Dist. Council, 180 Fed. 896; but it sometimes amounts to conspiracy. Most of the decisions bear upon questions arising more or less *indirectly* from the strike.

The word "strike" is used to describe various kinds of conduct quite distinct from each other; 20 H. L. R. 254. A sympathetic strike is one wherein the strikers have no demands or grievances of their own, but strike for the purpose of indirectly aiding other employés or organizations; 1 Eddy. Comb. Sec. 520. They have not been directly held illegal, and are considered justifiable, though only to be resorted to in extreme cases; Mitchell, Org. Labor 304.

It is no answer to a suit against a common carrier for failure to deliver goods with reasonable promptness, that a strike among their employés prevented; Blackstock v. R. Co., 20 N. Y. 48, 75 Am. Dec. 372; Galena & C. U. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574. But otherwise if the employés are discharged and afterwards interfere unlawfully with the business of the road; Cooley, Torts 640, n. Where a railroad company receives freight for shipment, it is not liable for delay in its delivery which is caused by a strike of its employés, accompanied by violence and intimidation of such a character as cannot be overcome by the company or controlled by the civil authorities when called upon; Haas v. R. Co., 81 Ga. 792, 7 S. E. 629; International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Pittsburgh,

Ft. W. & C. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422.

In L. R. 6 Eq. 555, the president and secretary of a trades-union, and a printer employed by them, were restrained by injunction from posting placards and publishing advertisements, urging workmen to keep away from plaintiff's factory, where a strike against the reduction of wages was in progress; but in L. R. 10 Ch. 142, this case was overruled.

An attempt has been made to derive some of the authority for the use of an injunction in such cases to an extent not before recognized in the settled principles of equity jurisprudence from the English Judicature Act of 1873 as a consequence of the union of law and equity procedure. In 20 Ch. Div. 501, it is said that "the courts have interpreted this act as giving them power to restrain one man from persuading another to break his contract with a third person, when the object of such persuasion is the malicious injury to the third person."

Where a trades-union ordered a strike and posted pickets to persuade workmen from entering the employ of the plaintiff, such conduct was held to come within the terms of the act prescribing a penalty against every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority . . . watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." [1896] 1 Ch. 811.

The circuit court of the United States has jurisdiction to restrain the unlawful acts of persons engaged in a strike where they interfere with the operations of interstate commerce or with the transmission of the mails, and may enforce its injunction by proceedings in contempt which are not open to review on *habeas corpus* in the supreme court or any other court; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

A display of force by strikers against laborers who wish to work, such as surrounding them in large numbers, applying opprobrious epithets to them, and urging them in a hostile manner not to go to work, though no force be actually used, is as much intimidation as violence itself. Such conduct will be restrained by injunction, and the actors will be liable in damages to the employer of the laborers. Where new men employed to take the place of strikers are on their way to work, their time cannot be lawfully taken up and their progress interfered with by the strikers on any pretence or under any claim of right to argue or persuade them to break their contracts. Where a bill has been filed against strikers for an injunction and for damages for injuries caused by their illegal conduct, the plaintiff has a right to proceed with the case after the strike is over, for the purpose of recovering damages, and it is improper for a judge to express from the bench an opinion that the case should have been dropped; O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702.

Strikes of laborers to raise wages or lockouts by employers are lawful; 10 Cox, Cr. Ca. 592; Aluminum Castings Co. v. Local No. 84, 197 Fed. 221; Irving v. Dist. Council, 180 Fed. 896. Strikers who seek a legitimate end may not be enjoined from pursuing that end in a legitimate way merely because they may have overstepped the line and trespassed on the rights of their adversary, but a decree fixing a barrier at such line and subjecting them to punishment and damages for having crossed it is as far as the court can go; Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315. Workmen may seek, take or follow the advice of officers of their union as to the advisability of a strike; Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541; a union may order a strike; Aluminum Castings Co. v. Local No. 84, 197 Fed. 223; workmen may peaceably persuade their fellow-workmen to leave their employer's service in order to compel an advance in wages; Rogers v. Evarts, 17 N. Y. Supp. 264.

An injunction against strikers should not prohibit either persuasion or picketing as such, but, when carried beyond their legitimate limits, they become duress or intimidation and as such may be enjoined; Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; but the action of leaders of a strike, conducted primarily for the purpose of compelling recognition of a labor organization, in paying money to non-union employés of a complainant to induce them to leave its service, was held not within the limits of lawful persuasion and was enjoined; Tunstall v. Coal Co., 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453. The limits of lawful persuasion, when exercised by employés striking in order to better the conditions of their employment, are wider than when there is no complaint by employés, but the strike is directed by officials of an extended labor organization for the primary purpose of compelling its recognition; Tunstall v. Coal Co., 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453.

A combination of persons not themselves employés, to procure the latter to strike to the injury of the employer's business, was held to be a criminal conspiracy giving also the right to an injunction and damages; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Thomas v. R. Co., 62 Fed. 803; but the tendency in the American courts is not to treat such combinations as unlawful conspiracies; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414;

Johnston Harvester Co. v. Meinhardt, 60 How. Pr. (N. Y.) 168; where the evidence included facts showing intimidation, it is a criminal conspiracy; Newman v. Com. (Pa.) 34 Pitts. L. J. 313; and an injunction will be granted; Wick China Co. v. Brown, 164 Pa. 449, 30 Atl. 261.

Striking workmen may not coerce third persons not directly concerned in the strike into refusing to buy or use the products of their late employer, any more than he may lawfully coerce third persons into refusing them shelter or food, but the only means of injuring each other which are lawful in such a contest are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it; Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; Irving v. Joint District Council, 180 Fed. 899; Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695.

It is unlawful for striking workmen by any means to induce apprentices under contract to serve the employer for definite terms to break such contract. Such conduct may be enjoined; Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315. Where the service of members of a trade union was neither special, extraordinary or unique in the sense that it could not otherwise be supplied, and that its loss would cause irreparable injury, an injunction could not be granted to restrain the individual laborers from striking; A. R. Barnes & Co. v. Berry, 156 Fed. 72.

A manufacturing company whose skilled workmen are on strike has the right to seek the aid of other manufacturers to make or complete its products, and the strikers have the reciprocal right to seek the aid of their fellow workmen in the employ of such other manufacturers to prevent that end. They may lawfully combine and co-operate for that purpose; Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; the employers may lawfully combine to resist the combination of employés; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686.

A person not one of the parties enjoined by a strike injunction, while not strictly chargeable with breach of the injunction, in the same sense as the parties, is bound with other members of the public to observe its restrictions when known. He must not aid or abet its violation by others, nor set the known command of the court at defiance by interference or obstruction; and if he does so the court's power to punish is absolute; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295.

After the railroad strike at Chicago in 1894, a commission consisting of the two members appointed by the President and the commissioner of labor was authorized to examine the causes of the controversies and differences between railroad companies and other common carriers engaged in interstate transportation and their employés, the conditions accompanying them and the best means for adjusting them. As the result of the report of the commission on November 14, 1894, various bills were introduced in congress between January, 1895, and June 1, 1898, on which date an act was finally passed providing for investigation of the causes of such differences by the chairman of the interstate commerce commission and the commissioner of labor, and for the appointment of a board of arbitration. Section 10 of this act was declared unconstitutional in Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; but was severable from the rest of the act.

This act was repealed by Act July 15, 1913, which applied to common carriers by railroad or partly by railroad and partly by water, between the states or in foreign commerce, including bridges and ferries operated in connection with railroads, but excluding masters of vessels and seamen. It extends to employés, including all persons engaged in train service (but not street railroad service). In case of a controversy as to wages, hours of labor or conditions of employment, either party may apply to the board of mediation and conciliation created by the act, to bring about an amicable adjustment. Failing such adjustment, the board shall endeavor to induce the parties to arbitrate. The controversy is then submitted to a board of six, or, if the parties agree, to a board of three, chosen as follows: In case of a board of three, the employer and employés shall each select one arbitrator and those two shall select a third; if they fail to do so in five days, the third arbitrator is named by the board of mediation. In the case of a board of six, the employer and employés each name two, and those four name two more, or if they fail to name arbitrators, they are appointed by the board.

The award, with the testimony and papers, shall be filed in the United States district court office and shall be final and conclusive unless set aside for error of law apparent on the record. It shall go into effect ten days after filing, unless exceptions are filed for matter of law apparent on the record. An appeal lies within ten days to the circuit court of appeals.

Nothing in the act shall require any employé to render personal service without his consent; no injunction shall issue to compel him to perform any personal labor or service against his will. Receivers in federal courts, in control of the business of employers, may be heard before the arbitrators. Receivers may not reduce wages without the authority of the court, after twenty days' notice to the employés.

See BOYCOTT; COMBINATION; CONSPIRACY; INJUNCTION; LABOR UNION; MALICE; RESTRAINT OF TRADE.

STRIKING A DOCKET. In English Practice. Entering the creditor's affidavit and bond in bankruptcy. 1 Deac. Bank. 106.

STRIKING A JURY. In English Practice. Where, for nicety of the matter in dispute, or other cause, a special jury is necessary, upon motion and rule granted thereon, the sheriff is to attend the prothonotary or proper officer with the book of freeholders, and to take indifferently forty-eight of the principal freeholders, when the attorneys on each side, being present, are to strike off twelve respectively, and the remaining twenty-four are returned. 3 Bla. Com. 357. Essentially the same practice prevails in New York, Pennsylvania, and other states; Tr. & H. Pr. § 636. See JURY; Graham, Pr. 277. In some of the states a *special* or *struck* jury is granted as of course upon the application of either party; but more generally it must appear to the court that a fair trial cannot be otherwise had, or that the intricacy and importance of the case require it. One of the parties being a citizen of color, the judge cannot properly direct a special jury to be impanelled, one-half of whom are of African descent; Nashville v. Sheperd, 3 Baxt. (Tenn.) 373; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667. The statutory method of striking is held to be mandatory; Gallagher v. State, 26 Wis. 423; Long v. Spencer, 78 Pa. 303. See Abb. N. Y. Dig. tit. Trial §§ 196–208; Thomp. & Merr. Jur. § 14.

STRIKING OFF THE ROLL. Removing the name of a solicitor from the rolls of the court and thereby disentitling him to practise. See DISBAR.

STRIP. The act of spoiling or unlawfully taking away anything from the land, by the tenant for life or years, or by one holding an estate in the land less than the entire fee. Pub. St. Mass. [1882] 1295.

STRUCK. In Pleading. A word essential in an indictment for murder, when the death arises from any wounding, beating, or bruising. 1 Bulstr. 184; 5 Co. 122; Cro. Jac. 655; White v. Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

STRUCK JURY. See STRIKING A JURY.

STRUCK OFF. A term applied to a case which the court, having no jurisdiction over, and not being able to give judgment, order to be taken off the record. This is done by an entry to that effect.

As to the meaning of the words as used at an auction sale, see KNOCKED DOWN.

STRUCTURE. That which is built or constructed; an edifice or building of any kind. Poles connected by wires for the transmission of electricity; Forbes v. Electric Co., 19 Ore. 61, 23 Pac. 670, 20 Am. St. Rep. 793: a mine or pit; Helm v. Chapman, 66 Cal. 291, 5 Pac. 352; a railroad track; Lee v. Barkhampsted, 46 Conn. 213; see Giant-Powder Co. v. R. Co., 42 Fed. 470, 8 L. R. A. 700 (*contra*, Rutherfoord v. R. Co., 35 Ohio St. 559); are structures. Swings or seats are not; Lothian v. Wood, 55 Cal. 159. See MECHANICS' LIEN.

STRUMPET. A harlot, or courtesan. Jacob, Law Dict.

STUDENTS. That one is a student in a university does not entitle him to vote where the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified; Wickham v. Coyner, 30 Ohio C. C. 765; Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706. The mere fact of taking a room at a seminary for the sole purpose of studying does not constitute one a voter in the district in which the seminary is located; In re Goodman, 146 N. Y. 284, 40 N. E. 769; In re Garvey, 147 N. Y. 117, 41 N. E. 439; though he is in a Roman Catholic seminary studying for the priesthood, and has renounced all other homes, and, on admission to the priesthood, will continue in the seminary until assigned elsewhere by ecclesiastical superiors; In re Barry, 164 N. Y. 18, 58 N. E. 12, 52 L. R. A. 831; *contra*, In re Garvey, 147 N. Y. 117, 41 N. E. 439. The facts that the student is supported by his parents and spends his vacations with them are strong, but not necessarily conclusive, circumstances to prove that he has not changed his residence; Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97.

Students may become voters of the place where the college is located, if they are self-supporting and have given up their former residence and intend to remain in the county after their studies are over; In re Lower Oxford Contested Election, 2 Pa. Co. Ct. 323.

See CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES; DOMICIL; COLLEGE.

STUFF GOWN. The professional robe worn by barristers of the outer bar; viz. those who are not queen's counsel. Brown. See BARRISTER; SILK GOWN.

STULTIFY (Lat. *stultus*, stupid). To make one out mentally incapacitated for the performance of an act.

It has been laid down by old authorities; Littleton § 405; 4 Co. 123; Cro. Eliz. 398; that no man should be allowed to stultify himself, *i. e.* plead disability through mental unsoundness. This maxim was soon doubted as law; 1 Hagg. Eccl. 414; 2 Bla. Com. 292; and has been completely overturned; 2 Kent 451.

STUMPAGE. The sum agreed to be paid to an owner of land for trees standing upon his land, the purchaser being permitted to enter upon the land and to cut down and re-

move the trees; in other words it is the price paid for a license to cut. Blood v. Drummond, 67 Me. 478.

STUPRUM (Lat.). **In Roman Law.** The criminal sexual intercourse which took place between a man and a single woman, maid, or widow, who had before lived honestly. Inst. 4. 18. 4; Dig. 48. 5. 6; 50. 16. 101.

STURGEON. See ROYAL FISH.

SUABLE. Capable of being, or liable to be, sued. A suable cause of action is the matured cause of action.

SUB-AGENT. A person appointed by an agent to perform some duty, or the whole of the business relating to his agency.

SUB CONDITIONEM. Upon condition.

SUB-CONTRACT. A contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service. 9 M. & W. 710; Hilliard v. Richardson, 3 Gray (Mass.) 362, 63 Am. Dec. 743. See INDEPENDENT CONTRACTOR.

SUB-CONTRACTOR. One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. Phill. Mech. Liens § 44; Lester v. Houston, 101 N. C. 611, 8 S. E. 366.

SUB DISJUNCTIONE. In the alternative. Fleta.

SUB JUDICE (Lat.). Under or before a judge or court; under judicial consideration; undetermined. 12 East 409.

SUB-LEASE. A lease by a tenant to another person of a part of the premises held by him; an under-lease. See LEASE.

SUB MODO (Lat.). Under a qualification. A legacy may be given *sub modo*, that is, subject to a condition or qualification.

SUB NOMINE (Lat.). In the name of.

SUB PEDE SIGILI (*Lat.*). Under the foot of the seal; under seal. This expression is used when it is required that a record should be certified under the seal of the court.

SUB POTESTATE (Lat.). Under, or subject to, the power of another: as, a wife is under the power of her husband; a child is subject to that of his father; a slave to that of his master.

SUB SALVO ET SECURO CONDUCTO (Lat.). Under safe and secure conduct. 1 Stra. 430.

SUB SILENTIO (Lat.). Under silence; without any notice being taken. Sometimes passing a thing *sub silentio* is evidence of consent. See SILENCE.

SUB SPE RECONCILIATIONIS (Lat.). Under hope of reconcilement. 2 Kent 127.

SUB SUO PERICULO (Lat.). At his own risk.

SUB-TENANT. An under-tenant.

SUBALTERN. An officer who exercises his authority under the superintendence and control of a superior.

SUBDITUS. A vassal; a dependent; one under the power of another. Spelman.

SUBDIVIDE. To divide a part of a thing which has already been divided. For example, when a person dies leaving children, and grandchildren, the children of one of his own who is dead, his property is divided into as many shares as he had children, including the deceased, and the share of the deceased is subdivided into as many shares as he had children.

SUBINFEUDATION. The act of an inferior lord by which he carved out a part of an estate which he held of a superior, and granted it to an inferior tenant to be held of himself.

It was an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation. This was forbidden by the statute of Quia Emptores, 18 Ed. I.; 2 Bla. Com. 91; 3 Kent 406. See Cadw. Gr. Rents § 7; Chal. R. P. 18; QUIA EMPTORES; FEUDAL LAW; TENURE.

SUBJECT. An individual member of a nation, who is subject to the laws. This term is used in contradistinction to *citizen*, which is applied to the same individual when considering his political rights.

In monarchical governments, by subject is meant one who owes permanent allegiance to the monarch.

Subject is a wider term than citizen; there are members of the state who, by reason of natural or conventional disability, do not enjoy full political rights. To a certain extent, alien residents within a state may be deemed subjects. See Pollock, First Book of Jurispr. 57.

See ALLEGIANCE; CITIZENSHIP; NATURALIZATION.

SUBJECT-MATTER. The cause; the object; the thing in dispute.

It is a fatal objection to the jurisdiction of the court when it has not cognizance of the subject-matter of the action: as, if a cause exclusively of admiralty jurisdiction were brought in a court of common law, or a criminal proceeding in a court having jurisdiction of civil cases only; 10 Co. 68, 76; Com. v. Johnson, 8 Mass. 87. In such case, neither a plea to the jurisdiction nor any other plea would be required to oust the court of jurisdiction. The cause would be dismissed by the court.

SUBJECT TO INSURANCE. A provision in a charter-party, that the freight should be payable, subject to insurance, does not make the insurance by the ship-owner a condition precedent to his right to recover the freight, but means that the insurance premium is to

be deducted from the freight. 27 L. J. Ex. 392.

SUBJECTION (Lat. *sub*, under, *jacio*, to put, throw). The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private* subjection is subjection to the authority of private persons. *Public* subjection is subjection to the authority of public persons.

SUBMARINE TELEGRAPHS. See TELEGRAPH.

SUBMISSION (Lat. *submissio*,—*sub*, under, *mittere*, to put,—a putting under). Used of persons or things. A putting one's person or property under the control of another. Brouver v. Cotheal, 10 Barb. (N. Y.) 218. A yielding to authority. A citizen is bound to submit to the laws, a child to his parents, a guardian to his ward. A victor may enforce the submission of his enemy.

Every consent involves a submission, but it does not follow that a mere submission involves a consent. 9 C. & P. 722.

In Maritime Law. Submission on the part of the vanquished, and complete possession on the part of the victor, transfer property as between belligerents; The Alexander, 1 Gall. 532, Fed. Cas. No. 164.

In Practice. An agreement between parties, having a dispute, to submit their differences to voluntary arbitration. See ARBITRATION AND AWARD.

SUBMISSION BOND. The bond by which the parties agree to submit the matter in controversy to arbitration, and to abide by the award of the arbitrator. See ARBITRATION AND AWARD.

SUBNOTATIONS (Lat.). **In Civil Law.** The answers of the prince to questions which had been put to him respecting some obscure or doubtful point of law. See RESCRIPT.

SUBORNATION OF PERJURY. The procuring another to commit legal perjury, who in consequence of the persuasion takes the oath to which he has been incited. Hawk. Pl. Cr. b. 1, c. 69, s. 10.

To complete the offence, the false oath must be actually taken, and no abortive *attempt* to solicit will complete the crime; 2 Show. 1; Com. v. Douglass, 5 Metc. (Mass.) 241.

But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law; 2 East 17; 1 Hawk. Pl. C. 435; 2 Bish. N. Cr. L. § 1197; 26 U. C. Q. B. 297. In fact it has been said: "There appears to have been a period in our law when the unsuccessful solicitation was deemed to constitute, without more, the full subornation of perjury; for as such it and other indictable attempts corruptly to influence a witness are treated of in some of the old books." 2 Bish. N. Cr. L. § 1197. In order to constitute the crime the false swearing procured must be itself perjury; State v. Wymberly, 40 La. Ann. 460, 4 South. 161. As to what constitutes perjury, see that title. An attempt at subornation of perjury may be shown in evidence at the trial of the cause to which the attempt relates against the guilty party. So also concealment of facts or documents such as a will, accounts, etc., which were in the power of the party to produce and which presumably he would produce; McHugh v. McHugh, 186 Pa. 197, 40 Atl. 410, 41 L. R. A. 805, 65 Am. St. Rep. 849; L. R. 5 Q. B. 314, approved Hastings v. Stetson, 130 Mass. 76. See Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29; Snell v. Bray, 56 Wis. 156, 14 N. W. 14.

In the case of an affidavit before the land office on an application to enter land, the affidavit need not have been subscribed; Nurnberger v. U. S., 156 Fed. 721, 84 C. C. A. 377.

For a form of an indictment for an attempt to suborn a person to commit perjury, see 2 Chitty, Cr. Law 480. There must be knowledge that the testimony is false on the part of both, he who solicits and he who is solicited; Coyne v. People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324; U. S. v. Evans, 19 Fed. 912.

An indictment was held sufficient, though the precise persons to be suborned and the time and place of such suborning were not particularized; Williamson v. U. S., 207 U. S. 426, 28 Sup. Ct. 163, 52 L. Ed. 278.

SUBPŒNA (Lat. *sub*, under, *pœna*, penalty). A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is called distinctively a *subpœna ad testificandum*.

On proof of service of a subpœna upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend, as commanded.

Where a witness, duly served, fails to attend, and gives as his excuse that he knows no evidence relative to the issue or that the subpœna was taken out merely for vexatious purposes, the court may order it set aside. This was done in the case of the prime minister and home secretary of Great Britain; 25 T. L. R. 79. Members of the cabinet; People v. Smith, 3 Wheel. Cr. Cas. (N. Y.) 135; and congressmen may be subpœnaed (not while in attendance on or going to or from a session of congress; Respublica v. Duane, 4 Yeates [Pa.] 347), and probably the President of the United States. See U. S. v. Burr, Fed. Cas. No. 14,692. Official duties may be a sufficient excuse for not appearing. See Thompson v. R. Co., 22 N. J. Eq. 111. As a general rule, the court should assume that the executive is acting properly, and that his absence is due to his official duties; Appeal of Hartranft, 85 Pa. 433, 27 Am. Rep. 667. See 22 Harv. Law Rev. 376.

In Chancery Practice. A mandatory writ or process directed to and requiring one or more persons to appear at a time to come and answer the matters charged against him or them. The writ of subpœna was originally a process in the courts of common law, to enforce the attendance of a witness to give evidence; but this writ was used in the court of chancery for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff.

It was invented by John Waltham, bishop of Salisbury, and chancellor to Rich. II., under the authority of the statutes of Westminster II. and 13 Edw. I. c. 34, which enabled him to devise new writs; Cruise, Dig. t. 11, c. 1, § 12. See Vin. Abr. *Subpœna*; 1 Swanst. 209; Spence, Eq. Jur.

A Latin form of a subpœna is given in 1 Holdsw. Hist. E. L. 433.

SUBPŒNA AD TESTIFICANDUM. See SUBPŒNA.

SUBPŒNA DUCES TECUM. A writ or process of the same kind as the *subpœna ad testificandum*, but with a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue. 2 Bla. Com. 382.

This is the only method in most cases, of obtaining the production of a document in the hands of a person not a party to the action. The use of such processes seems to be, as suggested by Lord Ellenborough, C. J., "essential to the very existence and constitution of a court of common law"; 9 East 483, where he states that such writs cannot be traced earlier than the time of Charles II.

In the 16th century the practice of proving by witnesses the facts stated in the pleadings was growing. 3 Holdsw. Hist. E. L. 489. By the middle of the 17th century the witnesses and the jury were regarded as so distinct that, if a party desired to have a juror testify, he was examined in open court. 1 *id.* 160. A statute in 1563 allowed process to compel the attendance of witnesses in chancery; *id.* 161.

In Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, the opinion of Bayley, B., in 2 Cr. & M. 477 (a fully considered case), was quoted: "The origin of the *subpœna duces tecum* does not distinctly appear. It has been said that it was not introduced or known in practice till the reign of Charles II. . . . But there must have been some process similar to the *subpœna duces tecum* to compel the production of documents, not only before that time, but even before the statute of the 5th of Elizabeth. Prior to that statute there must have been a power in the crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence and the production of documents material to the cause, though in the possession of a stranger. . . . Whether he could require to be sworn not *ad testificandum*, but true answer to make to such questions as the court should demand of him, touching the possession or custody of the document, is not now the question. Perhaps he might; but we are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness in the cause, when it may often happen that he is a mere depository and knows nothing of the documents of which he has the custody."

The opinion proceeded:

"Where the documents of a corporation are sought, the practice has been to subpœna the officer who has them in his custody. But there would seem to be no reason why the *subpœna duces tecum* should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice." It was held that the *ad testificandum* clause is not essential to a *subpœna duces tecum;* the person producing the papers need not be sworn; they may be proved by others.

It can only be used to compel the production of books, papers, accounts, and the like which are comprehended under the term documentary evidence, and not to bring in court such things as stove patterns, for example: In re Shephard, 3 Fed. 12; Johnson Steel Street-Rail Co. v. Steel Co., 48 Fed. 191.

The writ may issue to a party to the action where he is competent as a witness notwithstanding a statute providing for an order for production to enable an inspection by the adverse party; Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226; *contra*, Trotter v. Latson, 7 How. Pr. (N. Y.) 261; Murray v. Elston, 23 N. J. Eq. 212.

The writ is compulsory and must be obeyed by the party to whom it is addressed; 4 Dowl. 273; U. S. v. Hunter, 15 Fed. 712; and it is a question for the court whether there is any valid reason why the paper shall not be produced and upon what conditions; *id.*; 2 Jones & Sp. 28; Chaplain v. Briscoe, 5 Sm. & M. (Miss.) 198. That the papers are private is not of itself ground for refusal; In re Dunn, 9 Mo. App. 261; Burnham v. Morrissey, 14 Gray (Mass.) 240, 74 Am. Dec. 676. He must bring them into court for its inspection, though he need not permit them to be given in evidence, if this

would prejudice his rights; Bull v. Loveland, 10 Pick. (Mass.) 9.

"No witness, however, who is not a party to a suit, can be compelled to produce his title-deeds to any property, or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture; 2 Taunt. 115; Byass v. Sullivan, 21 How. Pr. (N. Y.) 50; but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action (3 Q. B. D. 618), or because he has a lien upon it." Steph. Dig. Ev. art. 118.

This is stated as the English rule, but in this country it is said that the weight of authority confines the excuse for not producing the document to the exposure to penalty or forfeiture or criminal prosecution; Bull v. Loveland, 10 Pick. (Mass.) 9.

A custodian of public documents will not be required to bring them into court under a *subpœna duces tecum* where official copies can be had; Delaney v. Philadelphia, 1 Yeates (Pa.) 403; or where their production would result in injury to the public; Gray v. Pentland, 2 S. & R. (Pa.) 23; 7 Dowl. 693. Papers which are confidential communications are protected as oral statements of the same character would be, as, for example, papers of a client in the hands of his attorney; Durkee v. Leland, 4 Vt. 612; 9 M. & W. 609. "Although a paper should be in the legal custody of one man, yet if a *subpœna duces tecum* is served on another who has the means to produce it, he is bound to do so;" 1 Campb. 17.

Telegrams are not privileged, and the officers of a telegraph company must produce them under a *subpœna duces tecum* without respect to rules of the company to the contrary; U. S. v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484; U. S. v. Hunter, 15 Fed. 712; Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; notwithstanding statutes forbidding the disclosure of such messages; Ex parte Brown, 72 Mo. 83. Corporations generally may be required to produce their books and papers which are essential to the rights of litigants; L. R. 9 C. P. 27; Wertheim v. Trust Co., 15 Fed. 718. See *id.*, 15 Fed. 718.

A subpœna is ordinarily granted as of course; the applicant drafts his own form and he purchases it at his peril. The court may refuse to allow an excessive number of witnesses to be summoned; Butler v. State, 97 Ind. 378. A witness who denies its regularity should move before the return day; but where it was not served in time, he may appear then and move to set it aside. A second subpœna cannot issue after the first has been served and while it remains unreturned. The writ cannot be turned into a writ of replevin and used to impair the rights of the witness; Elting v. U. S., 27 Ct. Cl. 158. The federal practice is regulated by R. S. § 869.

If a person causes a subpœna to issue against another ostensibly to secure his attendance as a witness in a case, but in reality to compel him to pay a claim, it is an abuse of legal process; Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207.

A court will, in a proper case, set aside a *subpœna duces tecum* became it is too broad; Hoppe v. W. R. Ostrander & Co., 183 Fed. 786.

A witness is guilty of contempt who, expecting to be subpœnaed, but before issue, concealed himself; Aaron v. State, 62 So. 419. A defendant who attempted to persuade one wanted as a witness to avoid service of the subpœna is guilty of a misdemeanor; [1913] Vict. L. R. 380.

See DISCOVERY; PRODUCTION OF DOCUMENTS; SEARCHES AND SEIZURES.

SUBREPTIO (Lat.). **In Civil Law.** Obtaining gifts of escheat, etc., from the king by concealing the truth. Bell, Dict.; Calv. Lex. *Subripere.*

SUBREPTION. In French Law. The fraud committed to obtain a pardon, title, or grant, by alleging facts contrary to truth.

SUBROGATION. The substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor, and which makes the right, the mortgage, or the security which the creditor has pass to the person who is subrogated to him,—that is to say, who enters into his right. Domat, Civ. Law, pt. i. l. iii. t. i. § vi.

It is the substitution of another person in place of the creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to a debt due him. It is independent of any mere contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter; Johnson v. Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83.

It is a legal fiction by force of which an obligation extinguished by payment made by a third party is considered as continuing to subsist for the benefit of this third person, who makes but one and the same person with the creditor in the view of the law.

Subrogation gives to the substitute all the rights of the party for whom he is substituted; Ohio L. Ins. & T. Co. v. Winn, 4 Md. Ch. 253. Among the earlier civil-law writers, the term seems to have been used synonymously with *substitution;* or, rather, *substitution* included subrogation as well as its present limited signification. See Domat,

Civ. Law, *passim;* Pothier. Obl. *passim.* The term *substitution* is now almost altogether confined to the law of devises and chancery practice. See SUBSTITUTION.

The word subrogation is originally found only in the civil law, and has been adopted, with the doctrine itself, thence into equity; but in the law as distinguished from equity it hardly appears as a term, except perhaps where, as in Pennsylvania, equity is administered through the forms of law. The doctrine of marshalling assets is plainly derived from the Roman law of subrogation or substitution; and although the word is, or, rather has been, used sparingly in the common law, many of the doctrines of subrogation are familar to the courts of common law.

It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide that he is entitled to be subrogated or substituted as to the equities and securities to the place of the creditor, as against the debtor and his co-sureties; Story, Eq. Jur. § 493; Dennis v. Rider, 2 McLean, 451, Fed. Cas. No. 3,797; Williams v. Washington, 16 N. C. 137.

Conventional subrogation results, as its name indicates, from the agreement of the parties, and can take effect only by agreement. This agreement is, of course, with the party to be subrogated, and may be either by the debtor or creditor. La. Civ. Code 1249.

"The doctrine of subrogation is derived from the civil law (Springer's Adm'rs v. Springer, 43 Pa. 518). In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed than in England (Furnold v. Bank, 44 Mo. 338). It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form *(Id.),* and is independent of any contractual relations between the parties to be affected by it (Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365). It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter (Harnsberger v. Yancey, 33 Gratt. (Va.) 527. See Johnson v. Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83)." Sheld. Subr. § 1; Har. Subr. 1, 22.

Subrogation does not take place until the payment of the whole debt; Columbia Finance & Trust Co. v. Ry. Co., 60 Fed. 791, 9 C. C. A. 264, 22 U. S. App. 54.

A principle which lies at the bottom of the doctrine is that the person seeking it must have paid the debt under grave necessity to save himself a loss. The right is never accorded to a volunteer; Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Sheld. Subr. § 240; Shinn v. Budd, 14 N. J. Eq. 234; Hoover v. Epler, 52 Pa. 522; Gadsden v. Brown, Speer's Eq. (S. C.) 37, 41, in which is a statement of the doctrine by Johnson, Ch., of which Miller, J., said in Ætna Life Ins. Co. v. Middleport, 124 U. S. 549, 8 Sup. Ct. 625, 31 L. Ed. 537: "This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere."

But under the Louisiana code the payment of a mortgage debt by an ordinary creditor subrogates him to the rights of the mortgagee; Hall v. Hawley, 49 La. Ann. 1046, 22 South. 205; so also of a grantee of the premises who has paid the mortgage in good faith relying on representations that there were no junior liens; Johnson v. Tootle, 14 Utah 482, 47 Pac. 1033; but a mortgagee, who, for his own convenience, with knowledge of the facts, accepts several mortgages in discharge of the original one, is not entitled to subrogation; Seleroe v. Homan, 50 Neb. 601, 70 N. W. 244.

Where a bank lent money to a contractor to be used in carrying out his contract and some of it was used by him for paying laborers and material men, the bank was not entitled to subrogation to the claims of the latter; Lawrence v. U. S., 71 Fed. 228. As to subrogation to rights of labor, etc., claims, see McClung v. R. Co. (Tenn.) 42 S. W. 53; RECEIVER.

Persons are not entitled to the right of subrogation where such alleged right arises from tortious conduct of their own. A person who invokes the doctrine of subrogation must come into court with clean hands; German Bk. of Memphis v. U. S., 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564.

Legal subrogation takes place to its full extent—

First, for the benefit of one who being himself a creditor pays the claim of another who has a preference over him by reason of his liens and securities. For in this case, it is said, it is to be presumed that he pays for the purpose of securing his own debt; and this distinguishes his case from that of a mere stranger. Domat, Civ. Law. And so, at common law, if a junior mortgagor pays off the prior mortgage, he is entitled to demand an assignment thereof; Appeal of Mosier, 56 Pa. 76, 93 Am. Dec. 783; Miller v. Whittier, 36 Me. 577.

Second, for the benefit of the purchaser of an immovable, who uses the price which he paid in paying the creditors to whom the inheritance was mortgaged.

Third, for the benefit of him who, being held with others or for others for the payment of the debt, has an interest in discharging it.

Subrogation takes place for the benefit of co-promisors or co-guarantors, as between themselves, and for the benefit of sureties against their principals. But between co-

guarantors and co-promisors subrogation benefits him who pays the debt only to the extent of enabling him to recover from each separately his portion of the debt. As against his co-sureties, the surety increasing the value of their joint security is entitled to subrogation only to the amount actually paid; Tarr v. Ravenscroft, 12 Gratt. (Va.) 642. Any arrangement by one co-surety with the principal enures to the benefit of all the co-sureties; Tyus v. De Jarnette, 26 Ala. 280; Taylor v. Morrison, 26 Ala. 728, 62 Am. Dec. 747.

If one tenant in common pays a mortgage or other incumbrance upon the property, he may be subrogated to such lien to secure contribution from his co-tenants. A person who has lent money to a debtor for the purpose of discharging a debt may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. After such an agreement with the debtor, he is not a stranger in relation to the debt, but he may in equity be entitled to the benefit of the security which he has satisfied with the expectation of receiving a new mortgage or lien upon the land for the money paid; Haverford L. & B. Ass'n v. Fire Ass'n, 180 Pa. 522, 37 Atl. 179, 57 Am. St. Rep. 657.

When a mortgage is taken upon land with the understanding that it shall be a first lien thereon, and that the money lent is to be applied by the mortgagee to the payment of a prior lien, and it is so applied, the mortgagee is subrogated to the rights of the prior incumbrancer when it is equitable to do so, although there was an antecedent second mortgage of which the subsequent mortgagee had no actual knowledge or notice; Traders' Bk. v. Myers, 3 Kan. App. 636, 44 Pac. 292.

Most of the cases of subrogation so called in the common law arise from transactions of principals and sureties. Courts of equity have held sureties entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt; Story, Eq. Jur. § 499.

"A surety who completes a contract with the United States on the contractor's default is subrogated to the rights which the United States might assert against a fund created by the retention of 10 per cent. of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, and is superior to any equitable lien asserted by a bank for moneys advanced to the contractor without the surety's knowledge before he began to complete the work." Moses v. U. S., 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119.

Where the creditor's right to subrogation depends on the existence in the surety of the rights to which subrogation is sought, after the surety has parted with the thing given him for his protection, the creditor can have no subrogation; Cunningham v. R. Co., 156 U. S. 400, 15 Sup. Ct. 361, 39 L. Ed. 471.

It is a settled rule that in all cases where a party only secondarily liable on an obligation is compelled to discharge it, he has a right in a court of equity to stand in the place of the creditor, and be subrogated to all his rights against the party previously liable; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Barker v. Parker, 4 Pick. (Mass.) 505; Union Bank of Md. v. Edwards, 1 Gill & J. (Md.) 346. This is clearly the case where the surety takes an assignment of the security; Norton v. Soule, 2 Me. (2 Greenl.) 341.

If a surety on a debt secured by mortgage pays the debt, he is entitled to the mortgage as security; 2 Sim. 155. In all cases, the payment must have been made by a party liable, and not by a mere volunteer; Sandford v. McLean, 3 Paige Ch. (N. Y.) 117, 23 Am. Dec. 773; Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; but it will be applied whenever the person claiming its benefits has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights or save his own property; McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335; Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537. The creditor must have had his claim fully satisfied; Union Bank of Md. v. Edwards, 1 Gill & J. (Md.) 347; and the surety claiming subrogation must have paid it; Kyner v. Kyner, 6 Watts (Pa.) 221; La Grange v. Merrill, 3 Barb. Ch. (N. Y.) 625; Bonham v. Galloway, 13 Ill. 68; and is subrogated, where he has paid to redeem a security, only to the amount he has paid, whatever be the value of the security; Hill v. Manser, 11 Gratt. (Va.) 522. But giving a note is payment within this rule; Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102. One who advances money to the mortgage creditor of his debtor, in the payment of interest accumulations on the mortgage debt, becomes legally subrogated, *pro tanto* to the mortgage creditor's right; Hobgood v. Schuler, 44 La. Ann. 537, 10 South. 812. When a mortgagor fails to protect junior incumbrancers against a prior lien when it is his duty to do so, they may pay it and be subrogated to the rights of the holder thereto; Memphis & L. R. R. v. Dow, 120 U. S. 287,

7 Sup. Ct. 482, 30 L. Ed. 595. The surety after paying the debt is entitled to enforce every security which the creditor has against the principal; Penn v. Ingles, 82 Va. 65.

When a surety pays the money to the creditor, to preserve the security for the benefit of the surety so paying, it must be assigned to a trustee, and in no other way can it be kept alive; Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227.

Judgment obtained against the principal and surety does not destroy the relation as between themselves; Pettee v. Flewellen, 2 Ga. 239; La Farge v. Herter, 11 Barb. (N. Y.) 159. If a judgment is recovered against a debtor and surety separately for the same amount, the surety can enforce the judgment against his principal when assigned to him after he had paid the amount of the judgment; Clason v. Morris, 10 Johns. (N. Y.) 524.

A surety in a judgment to obtain a stay of execution is not entitled to be substituted on paying the judgment, as against subsequent creditors; Appeal of Armstrong, 5 W. & S. (Pa.) 352. Nor can the surety be subrogated, although he has paid a judgment, if he has sued his principal and failed to recover; Fink v. Mahaffy, 8 Watts (Pa.) 384.

If a judgment is recovered and the sureties pay, they are entitled to be subrogated; Pott v. Nathans, 1 W. & S. (Pa.) 155, 37 Am. Dec. 456; McDougald v. Dougherty, 14 Ga. 674; Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431; even where a mortgage had been given them, but which turned out to be invalid; Miller v. Pendleton, 4 Hen. & M. (Va.) 436. This seems to be contradicted in Carr's Adm'r v. Glasscock's Adm'r, 3 Gratt. (Va.) 343.

Entry of satisfaction on a judgment does not destroy subrogation, if the entry was not made at the instance of the surety; Baily v. Brownfield, 20 Pa. 41.

Where the surety has become liable on the contract of his principal, when the principal fails to perform the contract, the surety may pay and be subrogated; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; thus, where the surety was held on a bond which he was obliged to pay; Fox v. Alexander, 36 N. C. 340; McDaniels v. Mfg. Co., 22 Vt. 274; and this even where the bond was given to the U. S. to pay duties on goods belonging to a third person; Enders v. Brune, 4 Rand. (Va.) 438. And where the bond was given for the payment of the price of land, he was allowed to sell the land; Franklin Ins. Co. v. Drake, 2 B. Monr. (Ky.) 50. But it is said the mere payment does not *ipso facto* subrogate him; Rittenhouse v. Levering, 6 W. & S. (Pa.) 190. The surety on a bond of a county auditor is entitled to proceed by subrogation, after it has paid the county the loss occasioned by the auditor; National Surety Co. v. Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421.

If the surety be also a debtor, there will be no substitution, unless expressly made; Appeal of Erb, 2 Pen. & W. (Pa.) 296; and the person who claims a right of subrogation must have superior equities to those opposing him; Harrisburg Bank v. German, 3 Pa. 300.

Sureties of a surety, and his assignee, are entitled to all the rights of the surety, and to be substituted to his place as to all remedies against the principal or his estate; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398; McDaniels v. Mfg. Co., 22 Vt. 274.

A surety cannot compel the creditor to exhaust his security before coming on the surety; 37 N. J. L. J. 370.

The debt of the acceptor of a bill is not extinguished by the payment of the bill by the indorser or drawer; for the same rights will remain against him, in their favor, which the holder had himself, unless he is a mere accommodation acceptor; Story, Bills § 422. See a limitation in Per Lee v. Onderdonk, 19 Barb. (N. Y.) 562. But if payment is made by an indorser who had not received due notice, it is at his own risk, and he can ordinarily have no recourse over to third persons; Chitty, Bills, c. 9; Har. Subr. 174.

An accommodation acceptor is not entitled on payment to a security given to an accommodation indorser: Gomez v. Lazarus, 16 N. C. 205.

An accommodation indorser who is obliged to pay the note is subrogated to the collateral securities; Toler v. Cushman, 12 La. Ann. 733. This subrogation operates in the civil law for the benefit of a holder by intervention (*i. e.* who pays for the honor of the drawer).

Payment of a note by an indorser actually bound, produces the legal effect of subrogating him to the rights of the last holder; Seixas v. Gonsoulin, 40 La. Ann. 351, 4 South. 453. One paying the note of another by mistake is not entitled to be subrogated to the rights of the payee; Charnock v. Jones, 22 S. D. 132, 115 N. W. 1072, 16 L. R. A. (N. S.) 233.

This species of subrogation (by indorsement) is to be distinguished from that which a surety on a note has when he is compelled to pay. Such surety is entitled to the benefit of all the securities which the holder has; Barnes v. Morris, 39 N. C. 22; Hill v. Voorhies, 22 Pa. 68; Perley v. Langley, 7 N. H. 236.

In the civil law, an agent who buys goods for his principal with his own money is so far subrogated to the principal's rights that if he fails the agent may sell his goods as if they were his own; Cour de Cass. Nov. 14, 1810.

An insurer of real property is subrogated to the rights of the insured against third parties who are responsible for the loss at common law; 2 B. & C. 254; Hart v. R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Connecticut Fire Ins. Co. v. R. Co., 73 N. Y. 399, 29 Am. Rep. 171; Rockingham Mutual Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618; Connecticut Mut. Life Ins. Co. v. R. Co., 25 Conn. 265, 65 Am. Dec. 571. And it is well settled in some states that the mortgagee cannot, after payment of his debt by the underwriter, enforce his claim against the mortgagor, but that the underwriter is subrogated to the rights of the mortgagee; Smith v. Ins. Co., 17 Pa. 253, 55 Am. Dec. 546; Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618. So in Canada; 1 Low. Can. 222. The contrary view, however, has been consistently maintained in Massachusetts; King v. Fire Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683.

But an insurance company is not subrogated to the rights of a mortgagee who has paid the premiums himself, so as to demand an assignment of the mortgage before paying his claim when the buildings were burned; Foster v. Fire Ins. Co., 2 Gray (Mass.) 216; 8 Hare 216.

The insurer, upon paying to the assured the amount of the loss, total or partial, of the goods insured, becomes, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss is primarily upon the carrier, while the liability of the insurer is only secondary; Wager v. Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013.

Ordinarily as between the insurer, claiming subrogation, and the insured, the amount of the recovery against the person whose tort caused the loss represents the entire loss suffered by the insured; Stoughton v. Gas Co., 165 Pa. 428, 30 Atl. 1001.

Under a statute directing, through its standard form of insurance policy, the subrogation of the insurer to the rights of the insured against the party primarily responsible for the loss, such subrogation is a legal right, which must prevail unless a stronger equity be shown against it; and, where the insured recovers a judgment against such party, the insurer is subrogated to his rights therein; Stoughton v. Gas Co., 35 Wkly. Notes Cas. 519.

"An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty in the partnership name to recover the amount of the loss from the carrier." The Queen, 78 Fed. 155.

An insurer upon paying a loss to the assured can take nothing by subrogation but the rights of the assured, and if the assured has no right of action, none passes to the insurer; St. Louis, I. M. & S. R. Co. v. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; Wager v. Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013.

The doctrine of subrogation does not apply to life insurance; Connecticut Mut. L. Ins. Co. v. R. Co., 25 Conn. 265, 65 Am. Dec. 571. But see, Ætna Ins. Co. v. R. Co., 3 Dill. 1, Fed. Cas. No. 96. An accident insurance company does not become subrogated to the rights of the policy holder against one who negligently causes injury, unless there is a provision to that effect in the policy; Gatzweiler v. Light Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633.

If one lends money to an insane person to purchase real estate, he cannot be subrogated to the rights of his debtor against the vendor, so as to compel the latter to return the purchase money to him; Murphree v. Clisby, 168 Ala. 339, 52 South. 907, 29 L. R. A. (N. S.) 933; and so where one advances money to pay an encumbrance on a minor's property, where he takes as security a deed of trust executed with the sanction of the probate court, but which proves to be without legal justification, he cannot be subrogated to the benefit of the old encumbrance after it has been cancelled on the record; Capen v. Garrison, 193 Mo. 335, 92 S. W. 368, 5 L. R. A. (N. S.) 838. But in Hughes v. Thomas, 131 Wis. 315, 111 N. W. 474, 11 L. R. A. (N. S.) 744, 11 Ann. Cas. 673, it was held that where money is advanced to an executor to pay a mortgage the payor expecting to receive security on the fee, whereas the security bound only the life estate, he was entitled to subrogation to the rights of the mortgagee. The mere payment of the debt at the instance of the debtor does not entitle the payor to subrogation to the lien of the creditor; In re Coleman, 136 Fed. 820, 69 C. C. A. 496.

An original stockholder compelled to pay calls on stock after its assignment, is entitled to be subrogated to the rights of the corporation against the delinquent assignee only upon clear proof of acceptance of the transfer by the latter; Tripp v. Appleman, 35 Fed. 19.

In the civil law, whoever paid privileged debts, such, for example, as the funeral expenses, had by subrogation the prior claim: *Eorum ratio prior est creditorum quorum pecunia ad creditoris privilegios pervenit.* Dig. *de reb. anc. jud. pos.* l. 24, § 3.

So, if during the community of goods aris-

ing from the relation of husband and wife, an annuity which was due from one of them only was redeemed by the money belonging to both, the other was subrogated *pleno jure* as to that part of the claim; Pothier, Obl. pt. 3, c. 1, art. 6, § 2.

In the civil law, the consignee of goods who pays freight is said to be subrogated to the rights of the carrier and forwarder; Cour de Cass., 7th Dec. 1826. The common law does not recognize this right as a subrogation. But see LIEN.

In marshalling assets, where a mortgagee has a lien on two funds, if he satisfy himself out of one which is mortgaged to a junior mortgagee so as to extinguish the fund, the junior mortgagee is subrogated to the other fund; Hunt v. Townsend, 4 Sandf. Ch. (N. Y.) 510.

The right of subrogation is a personal right, but may be assigned; Harrisburg Bk. v. German, 3 Pa. 300; and the creditors of the surety may claim the benefit of the right; Neff v. Miller, 8 Pa. 347; Bibb v. Martin, 14 Smedes & M. (Miss.) 87. As to which of two parties liable for the debt shall be subrogated, see Bellows v. Allen, 23 Vt. 169.

Where one is subrogated to a mortgage, it is not necessary that it be assigned to him; Walker v. King, 45 Vt. 525; though such assignment would only strengthen his position; Davis v. Pierce, 10 Minn. 376 (Gil. 302). The right of subrogation to a prior incumbrance is sometimes enforced by a court of equity by compelling the holder of it to assign it to the party entitled to subrogation; Johnson v. Zink, 51 N. Y. 333; Appeal of Lyon, 61 Pa. 16.

One who is liable to contribute to the payment of a prior lien on property on which he holds security, who is obliged to pay the whole of such claim to protect his own interest, may be subrogated thereto for the purpose of compelling contribution from the other persons liable for a part thereof; Tarbell v. Durant, 61 Vt. 516, 17 Atl. 44.

The weight of authority denies subrogation when the sole object of a suit in equity is to avoid the statute of limitations; Burrus v. Cook, 215 Mo. 496, 114 S. W. 1065.

The creditor need not be made a party to a bill to obtain subrogation; M'Nairy v. Eastland, 10 Yerg. (Tenn.) 310.

See LIEN; MARSHALLING ASSETS.

SUBSCRIBE. To write underneath. Wild Cat Branch v. Ball, 45 Ind. 213. To affix a signature. In re Strong's Will, 16 N. Y. Supp. 104. It may sometimes be construed to mean to give consent to or to attest. 24 L. J. Q. B. 171.

SUBSCRIBING WITNESS. One who subscribes his name to a writing in order to be able at a future time to prove its due execution. An attesting witness.

In order to make a good subscribing witness, it is requisite that he should sign his name to the instrument himself, at the time of its execution, and at the request or with the assent of the party; Hollenback v. Fleming, 6 Hill (N. Y.) 303; 11 M. & W. 168; Mullen v. McKelvy, 5 Watts (Pa.) 399.

The practice is, if the subscribing witness cannot be produced, to prove his signature, and that proves the signature of the maker of the instrument.

If the subscribing witness is out of the jurisdiction, and no person can be found within the jurisdiction who can prove his handwriting, the handwriting of the obligor may be proved.

Quære whether, if the handwriting of the witness is proved, that of the obligor ought not to be also; Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368.

Wigmore, Code of Evidence, states the rule that the attesting witnesses to a document must first be called as being applicable only where attesting witnesses to a document are required by law. The attesting witnesses must first be called, or it must be shown that their testimony is unavailable—the witnesses being dead, or outside the jurisdiction, or cannot be found, etc. It may be shown that the document is more than thirty years old, raising a presumption that the witnesses are dead. The rule does not apply, because of an estoppel or some other rule of positive law, or because of a rule of pleading or a judicial admission, or if the opponent claims under the same instrument, but not because it was merely produced by the opponent.

SUBSCRIPTIO. That kind of imperial constitution which was granted in answer to the prayer of a petitioner who was present. Calvinus.

SUBSCRIPTION (Lat. *sub*, under, *scribo*, to write). The placing a signature at the bottom of a written or printed engagement; or it is the attestation of a witness by so writing his name; but it has been holden that the attestation of an illiterate witness by making his mark is a sufficient subscription. 2 Ves. Sen. 454; 3 P. Wms. 253.

The act by which a person makes an agreement over his signature in writing, to furnish a sum of money for a particular purpose; as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like.

One who subscribes, agreeably to the statute and by-laws of a chartered company, acquires a right to his shares, which is a sufficient consideration to make the subscription obligatory on him; but otherwise where the organization was not yet effected; McCarty v. R. Co., 87 Pa. 332; Boyd v. R. Co., 90 Pa. 169. A subscription for the payment of certain sums of money to a contemplated corporation, to be formed for a purpose for which the subscribers were to derive benefits, may be enforced by the corporation when formed; and no formal acceptance of the subscription

or notice of such acceptance is necessary to make it binding; Richelieu Hotel Co. v. Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234.

A subscription of a certain sum towards paying off a church debt made long after the debt was contracted and the church built, is without consideration and cannot be enforced; First Cong. Church v. Gillis, 17 Pa. Co. Ct. R. 614. A mere subscription for a charitable object cannot be enforced; Twenty-Third St. Bapt. Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; Cottage St. M. E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Pratt v. Trustees, 93 Ill. 475, 34 Am. Rep. 187; University of Des Moines v. Livingston, 57 Ia. 307, 10 N. W. 738, 42 Am. Rep. 42. A gratuitous subscription to promote the object for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something or incurred or assumed some liability or obligation; it is not sufficient that others were led to subscribe by the subscription sought to be enforced; Cottage Street Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Twenty-Third St. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; University of Des Moines v. Livingston, 57 Ia. 307, 10 N. W. 738, 42 Am. Rep. 42. The consideration which supports the promise of a subscriber to an enterprise is expenditure by the promisee on the faith of the subscription and not advantage to be gained by the promisor; Kinsley v. Military Encampment Co., 41 Ill. App. 259; McCabe v. O'Connor, 69 Ia. 134, 28 N. W. 573. See Johnson v. University, 41 Ohio St. 527. Until liability has been incurred or acts have been done on the strength of the subscription, it may be withdrawn, and it is revoked by the insanity or death of the subscriber; Beach v. Church, 96 Ill. 177; Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449.

It has been held that a subscription, to be binding, should be a promise to some particular person or committee; and there should be an agreement on the part of such person or committee to do something on their part: as, to provide materials or erect a building; Phillips Limerick Academy v. Davis, 11 Mass. 114, 6 Am. Dec. 162; Troy Conference Academy v. Nelson, 24 Vt. 189; Hamilton College v. Stewart, 1 N. Y. 581.

If advances were fairly authorized, and have been made on the strength of the subscriptions, it will be deemed sufficient to make them obligatory; Farmington Academy v. Allen, 14 Mass. 172, 7 Am. Dec. 201; Warren v. Stearns, 19 Pick. (Mass.) 73; Robertson v. March, 4 Ill. (3 Scam.) 198; University of Vermont v. Buell, 2 Vt. 48; they form a consideration for each other; Edinboro Academy v. Robinson, 37 Pa. 210, 78 Am. Dec. 421.

The subscriptions to a common object are not usually *mutual* or really *concurrent*, and can only be held binding on grounds of public policy. See George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Trustees of Church in Hanson v. Stetson, 5 Pick. (Mass.) 506; Com'rs Canal Fund v. Perry, 5 Ohio 58.

A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration; San Joaquin Land & Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Rutenbeck v. Hohn, 143 Ia. 13, 121 N. W. 698, 136 Am. St. Rep. 731. An express promise to pay is not necessary in an English corporation, the statutes providing that the subscription shall be a debt due from the subscriber; Nashua Savings Bank v. Anglo-American Land Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. The signing of the subscription paper is an implied promise to pay the subscription; Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179; Planters' & Merchants' Ind. Packet Co. v. Webb, 144 Ala. 666, 39 So. 562; Carnahan v. Campbell, 158 Ind. 226, 63 N. E. 384; Merrimac Min. Co. v. Levy, 54 Pa. 227, 93 Am. Dec. 697; even though the subscription was before incorporation; Richelieu Hotel Co. v. Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Athol M. H. Co. v. Carey, 116 Mass. 471; Peninsular R. Co. v. Duncan, 28 Mich. 130; Edinboro Academy v. Robinson, 37 Pa. 210, 78 Am. Dec. 421. The corporation may bring an action at law for damages against a subscriber to a preliminary subscription list who refuses to take and pay for the stock; Quick v. Lemon, 105 Ill. 578; Rhey v. Plank-Road Co., 27 Pa. 261; Mt. Sterling Coal Road Co. v. Little, 14 Bush (Ky.) 429. A corporation may defeat a subscriber's action for stock by proving that it never accepted his subscription; Badger Paper Co. v. Rose, 95 Wis. 145, 70 N. W. 302, 37 L. R. A. 162; Starrett v. Ins. Co., 65 Me. 374. But no formal acceptance by the corporation is necessary in order to enforce a subscription; Cozart v. Herndon, 114 N. C. 252, 19 S. E. 158; Da Ponte v. Breton, 121 La. 454, 46 South. 571; Louisiana Purchase Expo. Co. v. Emerson, 163 Mo. App. 465, 143 S. W. 843.

A subscriber for stock in a corporation cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers; Steely v. Imp. Co., 55 Tex. Civ. App. 463, 119 S. W. 319; Shelby Co. R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435; except before incorporation; Muncy Engine Co. v. Green, 143 Pa. 269, 13 Atl. 747. A subscription for stock cannot be enforced unless the subscriber expressly promised to pay, or the charter expressly obligated him to do so; White Mountains R. Co. v. Eastman, 34 N. H. 124; Mechanics' F. & M. Co. v. Hall, 121 Mass. 272; *contra*, Windsor E. L. Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. Rep. 838.

See CONTRACT.

SUBSCRIPTION LIST. The subscription list of a newspaper is an incident to the newspaper, and passes with the sale of the printing materials; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109.

SUBSELLIA. Lower seats or benches occupied by the *judices* and by inferior magistrates when they sat in judgment, as distinguished from the *tribunal* of the prætor. Calvinus.

SUBSEQUENT ACTION. A second action commenced after the issue of a writ, but before judgment obtained in a first action, is held to be a subsequent action. 51 L. J. Q. B. 279.

SUBSEQUENT CONDITION. See CONDITION.

SUBSIDY. In English Law. An aid, tax, or tribute granted by parliament to the king for the urgent occasions of the kingdom, to be levied on every subject of ability, according to the value of his lands or goods. Jacob, Law Dict.

In International Law. The assistance given in money by one nation to another to enable it the better to carry on a war, when such nation does not join directly in the war. Vattel, liv. 3, § 82. See NEUTRALITY; SUBVENTION.

Aid given by the government to some commercial enterprise, as to a steamship line.

The appropriations of money by the act of 1895, to be paid to certain manufacturers and producers of sugar who had complied with the provisions of the act of 1890, were held to be within the power of congress to make; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

An intention to surrender the right to demand the carriage of mails over subsidized railroads at reasonable rates, assumed in construing a statute of the United States, is opposed to the established policy of congress; Wis. C. R. Co. v. U. S., 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399.

SUBSOIL. The word includes, *prima facie*, all that is below the actual surface, down to the centre of the earth. 17 L. J. C. P. 162. It is a wider term than mines, quarries, or minerals. 2 L. R. Ir. 339.

SUBSTANCE. That which is essential: it is used in opposition to form.

It is a general rule that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient; 2 Stra. 699; 1 Phil. Ev. 161.

SUBSTANTIAL DAMAGES. Damages, assessed by the verdict of a jury, which are worth having, as opposed to nominal damages (*q. v.*).

SUBSTANTIVE. Dependent upon itself. State v. Ricker, 29 Me. 89.

The positive law of duties and rights is commonly called Substantive Law; procedure, considered in its relation to substantive law, is called Adjective Law. Pollock, First Book of Jurispr. 79. The distinction between Substantive Law & Practice is modern; *id.* 250.

SUBSTITUTE. One placed under another to transact business for him. In letters of attorney, power is generally given to the attorney to nominate and appoint a substitute. Without such power, the authority given to one person cannot, in general, be delegated to another, because it is a personal trust and confidence, and is not, therefore, transmissible. The authority is given to him to exercise his judgment and discretion, and it cannot be said that the trust and confidence reposed in him shall be exercised at the discretion of another; 2 Ves. 645. But an authority may be delegated to another when the attorney has express power to do so; T. Jones 110. See Story, Ag. § 13.

SUBSTITUTED EXECUTOR. One appointed to act in the place of another executor, upon the happening of a certain event.

SUBSTITUTED SERVICE. Service of process upon another than the person upon whom it should be made, where the latter is impossible. Hunt, Eq. pt. i. ch. 2, § 1; Lush. Pr. 867. But an order must be obtained from the court to allow of substituted service, the application for which must be supported by affidavit; Moz. & W. It is usually applied to cases where property is within the jurisdiction (*q. v.*) of the court and process of some sort or notice of the proceeding is required to be given out of the jurisdiction; and so in divorce proceedings where service on the respondent outside of the jurisdiction is necessary or permitted by the rules. See SERVICE.

SUBSTITUTIO HÆREDIS. See HÆRES.

SUBSTITUTION. In Civil Law. The putting of one person in the place of another, so that he may, in default of ability in the former, or after him, have the benefit of a devise or legacy. Direct substitution is merely the institution of a second legatee in case the first should be either incapable or unwilling to accept the legacy. *Fidei commissary substitution* is that which takes place when the person substituted is not to receive the legacy after the first legatee, and, consequently, must receive the thing bequeathed from the hands of the latter. Merlin, *Répert.* See SUBROGATION.

SUBTERRANEAN WATERS. Subterranean streams, as distinguished from subterranean percolations, are governed by the same rules, and give rise to the same rights and obligations, as flowing surface streams; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec.

721; 2 H. & N. 186. The owner of the land under which a stream flows can, therefore, maintain an action for the diversion of it, if such diversion took place under the same circumstances as would have enabled him to recover, if the stream had been wholly above ground: Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Haldeman v. Bruckhart, 45 Pa. 518, 84 Am. Dec. 511; 5 H. & N. 982; Cole Silver Min. Co. v. Water Co., 1 Sawy. 470, Fed. Cas. No. 2,989. But in order to bring subterranean streams within the rules governing surface streams, their existence and their course must be, to some extent, known or notorious; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Haldeman v. Bruckhart, 45 Pa. 518, 84 Am. Dec. 511; it must be proved that there was a well defined and discerned stream, and not merely a percolation; Williams v. Ladew, 161 Pa. 283, 29 Atl. 54, 41 Am. St. Rep. 891. Where there is nothing to show that the waters of a spring are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299. As these percolations spread themselves in every direction through the earth, it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land; the law does not therefore forbid their disturbance; Craig v. Shippensburg Borough, 7 Pa. Super. Ct. 526.

The question has arisen how far one has the right to gather in his well or reservoir water which otherwise would have percolated through the soil of his property. It is suggested by Judge Cooley as a satisfactory principle that it may lawfully be done for the actual use of the proprietor inasmuch as the waters belong to no one until they are collected and they may be appropriated by the one who collects and puts them to use; but one will not be permitted to dig a hole to injure his neighbor; 14 Alb. L. J. 63. He considers it impracticable to apply to subterranean waters percolating through the soil the same rules which are used to regulate the rights of the proprietor in a running stream. "Such a rule," he adds, "would raise questions of unreasonable use and cause difficulties both of evidence and application that would make the right of such waters more troublesome than valuable." *Id.* This question was considered in Acton v. Blundell, 12 M. & W. 324, by Tindal, C. J., who drew a distinction between such cases and those which concerned surface streams, and held the defendant liable in damage for drawing off a supply of water from a well used to run a mill, by a coal-pit three quarters of a mile from the well. This case was afterwards referred to as making for the first time a distinction between underground and surface waters; 7 Exch. 282, 300; it is recognized as settling the rule in England, and is followed in many of the American courts; 7 H. L. Cas. 349; 12 Q. B. 753; Frazier v. Brown, 12 Ohio St. 310; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Clark v. Conroe's Estate, 38 Vt. 473; Brown v. Illius, 25 Conn. 593. See Ang. Waters, § 114, where the cases are collected.

It is held that subterranean waters flowing in known, definite channels, are subject to the same rule as surface waters; Williams v. Ladew, 161 Pa. 283, 29 Atl. 54, 41 Am. St. Rep. 891; 17 L. R. Ir. 459; otherwise they may be drained; 7 H. L. Cas. 349; Delhi v. Youmans, 50 Barb. (N. Y.) 316; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419 (though done with malice; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; [1895] A. C. 557; but see Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276); but not, it is held, if the supply of water in surface streams on the land of adjoining owners is thereby diminished; L. R. 6 Ch. 483.

Where the owner of land sinks a well solely for the purpose of draining his neighbor's spring, statutes in thirteen states provide that he must make compensation for his malevolent act. In two other states the opposite has been decided. Ames, Lectures on Leg. Hist. 449.

The only classification of subterranean waters made by the common law is based on the method of transmission through the ground, and is that they belong to one of only two classes, namely: 1. Underground currents of water flowing in known and defined channels or water courses. 2. Water passing through the ground beneath the surface in channels which are undefined and unknown. The rights to the waters of the first class are governed by the rules of law governing surface streams; while the waters of the second class are treated as mere percolations, and, therefore, as belonging to the owner of the soil wherein they are found; 7 H. L. Cas. 349. The first of these subterranean water courses have all the characteristics of surface water courses; that is, they have beds, banks forming a channel, and a current of water. Under the arid region doctrine of appropriation, the tendency has been more and more to treat the waters flowing or percolating beneath the surface the same, to a great extent, as surface streams, except as to what is now known as diffused percolations, i. e. those waters which, so far as known, do not contribute to the flow of any definite stream or body of surface or subterranean waters, and as to these there still remains a distinction, in that they are considered as a part of the very soil itself and belong to the realty in which they are found. Diffused percolations being but a component part of the ground where they are found, it follows that they are not subject to ownership separate and distinct from the soil itself. And from their very nature they cannot be treated as are the

waters of defined and known streams, either surface or subterranean. It therefore follows that there can be no riparian rights to these waters; Willow Creek Irr. v. Michaelson, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; Howard v. Perrin, 200 U. S. 71, 26 Sup. Ct. 195, 50 L. Ed. 374.

Those subterranean waters whose channels are known and defined are subdivided into known independent subterranean water courses, and known dependent subterranean water courses. The former are those which, independent of the influence of any surface streams, flow underneath the surface of the land in well defined and known channels, the courses of which can be distinctly traced; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 South. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. Where an independent underground stream has once become defined and known as such, the same principles of law of the jurisdiction where the same is found governs it as governs the surface streams. Therefore, if the laws of that particular jurisdiction recognize only the common law of riparian rights, only such rights attach to these streams, and in favor of the riparian owners thereon; Willis v. Perry, 92 Ia. 297, 60 N. W. 727, 26 L. R. A. 124. In those states where the common law of riparian rights has been abolished, and the law recognizes only the rights which can be acquired by the arid region doctrine of appropriation, such is the law governing the rights which can be acquired to the waters of these streams. And, in those states which have the dual laws governing waters within their respective jurisdictions of both the common law of riparian rights and the arid region doctrine of appropriation, the same rules govern the rights to the known independent subterranean water courses and the waters flowing therein as govern surface streams; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497. See IRRIGATION.

The second class are the known, defined, subterranean water courses. These waters are dependent for their supply upon the surface streams, or are the underflow, sub-surface flow, sub-flow, or undercurrent, as they are at times called, of surface streams. These waters may be defined as those which slowly find their way through the soil, sand, and gravel constituting the beds of streams, or the lands under and adjacent to the surface streams, and are themselves a part of the surface streams. The underflow of surface streams, being portions of them, are governed by the same rules as the surface streams themselves; L. R. 6 Ch. 483; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Vineland Irr. Dist. v. Irr. Co., 126 Cal. 486, 48 Pac. 1057, 46 L. R. A. 820; Platte Valley Irr. Co. v. Mill. Co., 25 Colo. 77, 53 Pac. 334; Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719.

The rule that there are correlative rights in percolating water which would prevent one person who could gain access to it from exhausting it to the injury of others having an equal access to it was adopted in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

The right to take subterranean water for use at a distance cannot be determined by the relative area or value of the local lands and those to which it is to be taken; Newport v. Water Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; in Cohen v. Water Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A. (N. S.) 752, it was held that percolating water might be taken for use on land other than that on which it was found, if it could be done without injury to adjoining owners or prior appropriators.

See IRRIGATION; RIPARIAN RIGHTS; PERCOLATING WATERS; WATERS; WATER-COURSES.

As between two corporations pumping water from their respective premises for sale, one cannot complain of the diversion of percolating water by the other; Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

The plaintiff cannot recover damages because the defendant, while draining its land, withdrew water from the subterranean soil of the plaintiff's adjoining land which caused a consolidation of the earth and a settlement of the surface; N. Y., etc., Filtration Co. v. Jones, 39 Wash. L. R. 718 (D. C. Ct. App.).

SUBTRACTION (Lat. *sub*, away, *traho*, to draw). The act of withholding or detaining anything unlawfully.

The principal descriptions of this offence are: (1) Subtraction of suit, and service, consisting of a withdrawal of fealty, suit of court, rent, or customary services, from the lord or landlord; 2 B. & C. 827. (2) Of tithes. (3) Of conjugal rights. (4) Of legacies, which is the withholding of legacies by an executor. (5) Of church rates, a familiar class of cases in England, consisting in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church. Brown, Dict.

SUBTRACTION OF CONJUGAL RIGHTS. See RESTITUTION OF CONJUGAL RIGHTS.

SUBVENTION. A subsidy; a grant, usually from the government. See SUBSIDY.

SUCCESSION. In Louisiana. The right and transmission of the rights and obligations of the deceased to his heirs. The estate, rights, and charges which a person leaves after his death, whether the property exceed the charges or the charges exceed the property, or whether he has left only charges

without property. The succession not only includes the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also of the new charges to which it becomes subject. That right by which the heir can take possession of the estate of the deceased, such as it may be.

Irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament.

Legal succession is that which is established in favor of the nearest relations of the deceased.

Testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. See HEIR; DESCENT; Pothier, *des Successions;* Toullier, l. 3, tit. 1.

In Common Law. The mode by which one set of persons, members of a corporation aggregate, acquire the rights of another set which preceded them. This term in strictness is to be applied only to such corporations. 2 Bla. Com. 430.

SUCCESSION DUTY. A duty payable, in England, upon succession to property.

An excise or duty upon the right of a person to receive property by devise or inheritance from another under the regulations of the state. State v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653.

A tax placed on the gratuitous disposition of property which passes on the death of any person by means of a transfer (called either a disposition or a devolution) from one person, called the predecessor, to another person, called the successor. Property chargeable with this tax is called a succession. Knowlton v. Moore, 178 U. S. 48, 20 Sup. Ct. 747, 44 L. Ed. 969.

SUCCESSOR. One who follows or comes into the place of another.

This term is applied more particularly to a sole corporation, or to any corporation. The word heir is more correctly applicable to a common person who takes an estate by descent. Alger v. Fay, 12 Pick. (Mass.) 322; Co. Litt. 8 *b*.

"No doubt, for a long time, only the word 'heirs' was used in charters of incorporation, and then 'heirs and successors,' and finally 'successors' alone became recognized as more appropriate. . . . The change from 'heirs' to 'successors' was gradual and marked by alternations in their use, and sometimes by the use of both." A. M. Eaton in 1902 Amer. Bar Asso. Rep. 321.

It seems probable that in a limitation to a corporation sole, unless the word "successors" be used, the donee obtains only an estate for life. But this is really equivalent to saying that he takes the estate in his personal capacity, burdened, it may be, with a trust in behalf of his office. A limitation to a corporation aggregate, though without words of inheritance, will confer a fee simple.

Where electrotype plates belonged to two firms and "their heirs and successors," and they passed to one of the firms, and thence to one of its members, who sold them to a third firm, the latter was held not a "successor." Meyer v. Estes, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283.

A person who has been appointed or elected to some office after another person.

SUCCINCT. Brief, compressed, terse; hence, compressed in narrow shape; concise. Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

SUDDER. In Hindu Law. The chief seat of government.

SUE. To commence or to continue legal proceedings for the recovery of a right. See U. S. v. Moore, 11 Fed. 251; ACTION; SUIT.

SUED OUT. A summons is not sued out till it passes from the clerk to a proper officer with a *bona fide* intention to have it served. West v. Engel, 101 Ala. 509, 14 South. 333.

SUERTE. In Spanish Law. A small lot of ground. McMullen v. Hodge, 5 Tex. 83.

SUFFER. To approve; to consent to; to permit and not to hinder. Selleck v. Selleck, 19 Conn. 505; Gregory v. U. S., 17 Blatchf. 330, Fed. Cas. No. 5,803. See PERMIT.

SUFFERANCE. Consent given one from a failure to object; negative permission; toleration; allowance.

SUFFERANCE, TENANT AT. A tenant who has come rightfully into possession of lands by permission of the owner and continues to occupy the same after the period for which he is entitled to hold by such permission. 1 Washb. R. P. 392; 2 Bla. Com. 150; Co. Litt. 57 *b;* Coomler v. Hefner, 86 Ind. 108.

It may arise where a tenant wrongfully holds over after the expiration of his term, differing from tenancy at will where possession is by permission; 4 Kent 113; Edwards v. Hale, 9 Allen (Mass.) 462. It can hardly be called an estate; 3 Holdsw. Hist. E. L. 107. It is not a tenancy, but merely permissive occupation, determinable at any moment, and inalienable by the occupier; Jenks, Modern Land Law 77.

It is of infrequent occurrence, but is recognized as so far an estate that the landlord must enter before he can bring ejectment against the tenant; 3 Term 292; 1 M. & G. 644. If the tenant has personally left the house, the landlord may break in the doors; 1 Bingh. 58; Dorrell v. Johnson, 17 Pick. (Mass.) 263; and the modern rule seems to be that the landlord may use force to regain possession, subject only to indictment if any

injury is committed against the public peace; 14 M. & W. 437; 1 W. & S. 90; Ives v. Ives, 13 Johns. (N. Y.) 235; Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272.

SUFFERANCE WHARVES. Such as may be appointed by the commissioners for the purpose of customs, under the British act of 1876.

SUFFICIENTLY. In a statute requiring the carrier sufficiently to water and feed live stock in transit the word is not too indefinite to carry a penalty. Gulf, C. & S. F. R. Co. v. Gray (Tex.) 24 S. W. 837.

SUFFRAGAN (L. Lat. *suffraganeus*). A titular bishop ordained to assist the bishop of the diocese in his spiritual functions, or to supply his place. By 26 Hen. VIII, every bishop could present two names to the king, who appointed one of them a bishop suffragan of the same see. Jacob, L. D. So called because by his suffrage ecclesiastical causes were to be judged. T. L.

A diocesan bishop in his relation to his metropolitan; an assistant bishop. Encycl. Br.

A suffragan has charge of a definite portion of a large diocese. A coadjutor is appointed as an assistant and successor of an old and infirm bishop. Oxford Dict.

SUFFRAGE. Vote; the act of voting.

Participation in the suffrage is not of right, but is granted by the state on a consideration of what is most for the interest of the state; Cooley, Const., 2d ed. 752; Spencer v. Board of Registration, 8 D. C. 169, 29 Am. Rep. 582; U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459. The grant of suffrage makes it a legal right until it is recalled, and it is protected by the law as property is. The states establish rules of suffrage except as shown below. Suffrage is never a necessary accompaniment of state citizenship, and the great majority of citizens are always excluded from it. On the other hand, suffrage is sometimes given to those who are not citizens; as has been done by no less than twelve of the states, in admitting persons to vote, who, being aliens, have merely declared their intentions to become citizens.

The right of voting in England, Ireland and Scotland has been confined to men from the earliest times down to the present day. The usage is inveterate; [1909] A. C. 160. The subject was also discussed in L. R. 4 C. P. 374. In Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627, it was held that the right of suffrage was not, at the adoption of the constitution, co-extensive with citizenship of the states, and therefore a state constitution which confined the right of voting to "*male* citizens of the United States" was no violation of the United States constitution.

The following states, by their constitutions or by constitutional amendments, have adopted woman suffrage: Wyoming, 1869; Colorado, 1893; Utah, 1896; Idaho, 1896; Washington, 1910; California, 1911; Oregon, 1912; Arizona, 1912; Kansas, 1912; Illinois (partially), 1913; and Alaska, 1913. Limited rights have been conferred in other states.

It has been said that the constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States when they possess it at all, under state laws. But the fifteenth amendment confers upon them a new exemption: From discrimination in elections on account of race, color, or previous condition of servitude; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. See Cooley, Const., 2d ed. 14; Hare, Am. Const. L. 524; ELECTION; VOTER; CIVIL RIGHTS; WOMAN.

SUGAR BOUNTY. See SUBSIDY.

SUGGESTIO FALSI (Lat.). A statement of a falsehood. This amounts to a fraud whenever the party making it was bound to disclose the truth.

The following is an example of a case where chancery will interfere and set aside a contract as fraudulent, on account of the *suggestio falsi:* A purchaser applied to the seller to purchase a lot of wild land, and represented to him it was worth nothing, except for a sheep pasture, when he knew there was a valuable mine on the lot, of which the seller was ignorant. The sale was set aside; Livingston v. Iron Co., 2 Paige, Ch. (N. Y.) 390. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUPPRESSIO VERI.

SUGGESTION. Information. It is applied to those cases where, during the pendency of a suit, some matter of fact occurs which puts a stop to the suit in its existing form, such as death or insolvency of a party; the counsel of the other party announces the fact in court or enters it upon the record: the fact is usually admitted, if true, and the court issues the proper order thereupon. See 2 Sell. Pr. 191.

SUGGESTIVE INTERROGATION. A phrase which has been used by some writers to signify the same thing as *leading question.* 2 Bentham, Ev. b. 3, c. 3. It is used in the French law.

SUI GENERIS. Of its own kind or class.

SUI HÆREDES. *In Civil Law.* One's own heirs; proper heirs. Inst. 2, 19, 2.

SUI JURIS (Lat. of his own right). Possessing all the rights to which a freeman is entitled; not being under the power of another, as a slave, a minor, and the like.

To make a valid contract, a person must, in general, be *sui juris.* Every one of full age is presumed to be *sui juris.* Story, Ag. 10.

SUICIDE (Lat. *suus*, himself, *cædere*, to kill). Self-destruction.

This was once regarded by the common law as exclusively a felonious act; of late, however, it has been often treated as the result of insanity, to be followed by all the legal consequences of that disease, so far as it is practicable. That suicide may be committed by a person in the full enjoyment of his reason, there can be no doubt; nor can there be any doubt that it is often the result of unquestionable insanity. Between the two kinds of suicide here indicated, the medical jurist is obliged to discriminate, and in performing this duty the facts on the subject should be carefully considered.

The instinct of self-preservation is not so strong as to prevent men entirely from being tired of life and seeking their own destruction. They may have exhausted all their sources of enjoyment, their plans of business or of honor may have been frustrated, poverty or dishonor may be staring them in the face, the difficulties before them may seem utterly insurmountable, and, for some reason like these, they calmly and deliberately resolve to avoid the evil by ending their lives. The act may be unwise and presumptious, but there is in it no element of disease. On the other hand, it is well known that suicidal desires are a very common trait of insanity, —that a large proportion of the insane attempt or meditate self-destruction. It may be prompted by a particular delusion, or by a sense of irresistible necessity. It may be manifested in the shape of a well-considered, persistent intention to seize upon the first opportunity to terminate life, or of a blind, automatic impulse acting without much regard to means or circumstances. As the disease gives way and reason is restored, this propensity disappears, and the love of life returns.

Besides these two forms of the suicidal propensity, there are other phases which cannot be referred with any degree of certainty to either of them. Persons, for instance, in the enjoyment of everything calculated to make life happy, and exhibiting no sign of mental disease, deliberately end their days. Another class, on approaching a precipice or a body of water, are seized with a desire, which may be irresistible, to take the fatal plunge. Many are the cases of children who, after some mild reproof, or slight contradiction, or trivial disappointment, have gone at once to some retired place and taken their lives. Now, we are as little prepared to refer all such cases to mental disease as we are to free voluntary choice. Every case, therefore, must be judged by the circumstances accompanying it, always allowing the benefit of the doubt to be given to the side of humanity and justice.

By the common law, suicide was treated as a crime, and the person forfeited all chattels real or personal, and various other property; 4 Bla. Com. 190. This result could be avoided by establishing the insanity of the party; and in England courts have favored this course whenever the legal effect of suicide would operate as a punishment. On the other hand, where the rights and interests of other parties are involved, the question of insanity is more closely scrutinized; and ample proof is required of the party on whom the burden of proof lies.

To be guilty of this offence, the deceased must have had the will and intention of committing it, or else he committed no crime; but he also has been so considered who occasions his own death whilst maliciously attempting to kill another; Hawk. Pl. Cr. b. 1, c. 27, s. 4. As he is beyond the reach of human laws, he cannot be punished. The English law, indeed, attempted to inflict a punishment by a barbarous burial of his body, and by forfeiting his property to the king; Hawk. Pl. Cr. c. 9; 4 Bla. Com. 189; but forfeiture in this species of felony, as in other kinds, has been wholly abolished by the Felony Act of 1870, 33 & 34 Vict. c. 23; 4 Steph. Com. 62; one who kills another at his request incurs the same guilt as if not requested; 8 C. & P. 418; in Massachusetts, an attempt to commit suicide is not punishable, but one who, in attempting it, kills another, commits an indictable homicide; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; one who counsels a suicide which is committed in his presence is guilty as principal; 8 C. & P. 418; State v. Ludwig, 70 Mo. 412; Com. v. Bowen, 13 Mass. 359, 7 Am. Dec. 154; Russ. & R. 523.

But in Sanders v. State, 54 Tex. Cr. R. 101, 112 S. W. 68, 22 L. R. A. (N. S.) 243, it was held that one is not guilty of murder in inducing another to take poison which results in the latter's death, if the latter knew the character of the poison and took it voluntarily for the purpose of committing suicide, which is not unlawful unless made so by statute. As to the effect of repentance and withdrawal from a suicide pact and the effort to dissuade the other person from it, see State v. Webb, 216 Mo. 378, 115 S. W. 998, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518, where it was held that in such case it is not necessary that the deceased should have abandoned his purpose and led the accused in good faith to believe that he had done so.

A note in 17 Harv. L. R. 566, suggests that the fact that no punishment by way of forfeiture of goods or the like could be administered under our law for suicide had given rise to the belief that it was not a crime even within jurisdictions in which the common law prevails. The inconsistencies of some American decisions are noted and the conclusion reached that it is no less criminal in this country than in England, but that the policy of the law is different, no punishment being prescribed for the suicide, because impracticable, but the aiding

or abetting being usually punishable as a crime.

Evidence of an intention to commit suicide is material in a murder case, where the deceased was found dead under circumstances not inconsistent with the theory of suicide; Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

See FELO DE SE; SELF-DESTRUCTION; INSURANCE.

In regard to wills made just before committing suicide, the prevalent doctrine is that the act of self-destruction may not necessarily imply insanity, and that if the will is a rational act, rationally done, the sanity of the testator is established; Brooks v. Barrett, 7 Pick. (Mass.) 94; 1 Hagg. Eccl. 109; 2 Eccl. 415; Succession of Bey, 46 La. Ann. 773, 15 South. 297, 24 L. R. A. 577.

It has been held that when the owner of a deposit receipt gives it to another, the gift to take effect at the death of the donor, under such circumstances that the jury find it to have been done in contemplation of suicide, it is not a good *donatio mortis causa;* [1896] 2 I. R. 204.

It is held in England, in regard to life insurance, that in every case of intentional suicide, whatever may have been the mental condition, the policy becomes void; [1905] 1 K. B. 31; 5 Mann. & G. 639. In 1 F. & F. 22, the court charged the jury the question was, did the assured know he was throwing himself out of the window. If he did, no recovery could be had under the policy. Otherwise, if he did not. Such appears to be the rule in Ohio, Maryland, and Massachusetts; Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414; Cooper v. Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; and, it is said, in Germany, Holland, and France; 6 Ins. L. J. 719; May, Ins. § 312.

When the question then came before the United States supreme court in Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236, it held that the assured must have acted under the control of such reasoning faculties as to be able to understand the moral character, general nature and consequences of his act, and this doctrine was frequently reaffirmed in that court and followed in state courts; Connecticut Mut. L. Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; Blackstone v. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; New Home L. Ass'n v. Hagler, 29 Ill. App. 437; Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 689; Newton v. Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335. Where the insurance is for the benefit of a third person, suicide is never a defense unless expressly made so by the contract; Fitch v. Ins. Co., 59 N. Y. 573, 17 Am. Rep. 372; Kerr v. Ben. Ass'n, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; unless the policy is fraudulently taken out for the purpose of providing for the family and creditors of the insured; Smith v. Ben. Soc., 51 Hun (N. Y.) 575, 4 N. Y. Supp. 521. The trend of the decisions as stated led to an effort by the life insurance companies to evade them by making the exception "suicide, sane or insane," and this was held to prevent a recovery; Bigelow v. Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Pierce v. Ins. Co., 34 Wis. 389; Streeter v. Acc. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882; Scarth v. Mut. L. Soc., 75 Ia. 346, 39 N. W. 658; Adkins v. Ins. Co., 70 Mo. 27, 35 Am. Rep. 410; and the same has been held with reference to a provision in a policy against suicide, "felonious or otherwise, sane or insane;" Scarth v. Mut. L. Soc., 75 Ia. 346, 39 N. W. 658; by his "own act or intention, whether sane or insane;" Adkins v. Ins. Co., 70 Mo. 27, 35 Am. Rep. 410; or "die by his own hand, sane or insane;" Streeter v. Acc. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882; or "shall die by his own hand or act, sane or insane;" De Gogorza v. Ins. Co., 65 N. Y. 233; but death by the suicide of the insured, although insane, is not "death by his own hand," whereby the policy is to be void in that event; Mutual Life Ins. Co. of New York v. Leubrie, 71 Fed. 843, 18 C. C. A. 332, 38 U. S. App. 37; and the provision in a policy that if the insured shall "die by his own hand while insane," the insurer shall pay the amount of the premiums and interest, applies only in case the self-destruction is intentional; but where the insured killed himself while incapable of knowing the effect of his act, the whole amount of the policy can be recovered; Mutual Ben. L. Ins. Co. v. Daviess' Ex'r, 87 Ky. 541, 9 S. W. 812; or if death is accidental; Keels v. Life Ass'n, 29 Fed. 198.

The words "felonious or otherwise," used in a policy, are held equivalent to "sane or insane;" Riley v. Ins. Co., 25 Fed. 315; but not the words, "die by his own hand or act, voluntary or otherwise;" Jacobs v. Ins. Co., 8 D. C. 632; or the words, "under any circumstances die by his own hand;" Schultz v. Ins. Co., 40 Ohio St. 217, 48 Am. Rep. 676.

A Missouri statute, declaring that in all suits upon policies of life insurance it shall be no defense that the insured committed suicide, applies not only to cases where the insured takes his own life voluntarily and in full possession of his mental faculties, but to all cases of self-destruction, whether sane or insane, unless the insured contemplated suicide at the time he made his application for the policy; Knights Templars' & Masons' Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139. That statute was held in a subsequent case to be a legitimate exercise of the power of the state, and stipulations in the policy conflicting with it were void; Whitfield v. Life Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

The full amount of the policy is recoverable under a statute which provides that suicide shall be no defense to an action on

an insurance policy, unless it was contemplated at the time of obtaining the policy that the suicide, whether sane or insane, shall only be entitled to recover the amount of the premiums paid; Knights Templars' & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 1 C. C. A. 561. Where a statute provides that "all companies, after having received three annual premiums, are estopped from defending on any other ground than fraud," . . . the defendant may set up the defence of suicide; Starck v. Ins. Co., 134 Pa. 45, 19 Atl. 703, 7 L. R. A. 576, 19 Am. St. Rep. 674. *Contra*, Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224.

Where the insured, while insane and unable to realize the consequences of his act, and without intending thereby to take his life, cuts his throat, his death comes within the terms in the policy providing that death shall be by "external, violent, and accidental means;" Blackstone v. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

Where one secured a policy of life insurance, and, being financially embarrassed, killed himself in order to secure money for the payment of his debts, the policy was held void, although it was silent as to suicide; Ritter v. Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; but if such a policy is made payable to the wife of the insured, she may recover on it although her husband committed suicide; Morris v. Life Assur. Co., 183 Pa. 563, 39 Atl. 52.

A beneficiary in a mutual benefit certificate, who under the terms of the contract can be changed at any time by the insured, cannot recover if the insured takes his own life while sane, although there is no provision in the certificate against suicide; Davis v. Royal Arcanum, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777. Suicide of a member of a mutual benefit society will not defeat a recovery on his benefit certificate issued in favor of his wife, in the absence of express provision in the contract to that effect, although the beneficiary had not a vested interest which could not be defeated by the member; Grand Legion, Select Knights of America v. Beaty, 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124, 8 Ann. Cas. 160; Parker v. Life Ass'n, 108 Ia. 117, 78 N. W. 826; Supreme Conclave v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528; Robson v. Order of Foresters, 93 Minn. 24, 100 N. W. 381; Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891; even if subsequently a by-law was adopted denying the right to recover in such cases; Feierstein v. Supreme Lodge, 69 App. Div. 53, 74 N. Y. Supp. 558; Sautter v. Supreme Conclave, 72 N. J. L. 325, 62 Atl. 529; or where the by-law was void for lack of authority; Supreme Lodge K. of P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; or where the application contained an anti-suicide clause which was void for lack of authority; Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 21 South. 559, 37 L. R. A. 775, 65 Am. St. Rep. 589.

In many cases suicide while sane is held to be a defense though there was no provision as to the effect of it if the policy was payable to the insured or his personal representatives; Patterson v. Life Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 889; Seiler v. Life Ass'n, 105 Ia. 87, 74 N. W. 911, 43 L. R. A. 537; Hunziker v. Supreme Lodge K. of P., 117 Ky. 418, 78 S. W. 201; Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; where the policy was payable to the estate of the insured, suicide while sane, was no defense unless expressly so provided; Campbell v. Supreme Conclave Heptasophs, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576.

Where suicide was the defence to an action on an insurance policy, it was not error to charge that "the law does not presume murder; it must be proved;" and, if the evidence is equal as between murder and suicide, the jury must find for the defendant; Fidelity & Casualty Co. v. Egbert, 84 Fed. 411, 28 C. C. A. 281; and in an action on such a policy where the evidence is conflicting and quite evenly balanced as to whether death was caused by the intentional or accidental act of the deceased, it will be presumed that death resulted from accident; Ingersoll v. Knights of Golden Rule, 47 Fed. 272. It has been said that the question is not precisely whether a party is insane or not, but whether he understood the physical nature and consequences of his act, and had sufficient will to make the act voluntary; Nimick v. Life Ins. Co., 10 Am. L. Reg. (N. S.) 101, Fed. Cas. No. 10,266. See Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; Wharton, Mental Unsoundness; Phill. Ins.

The burden of showing a suicide rests with the company; Gooding v. Life Ins. Co., 46 Ill. App. 307; Whitlatch v. Fidelity & Casualty Co., 71 Hun (N. Y.) 146, 24 N. Y. Supp. 537; Leman v. Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348. In making the proof necessary to establish the liability of an insurer, the plaintiff is entitled to the presumption that a sane man would not commit suicide, as well as of other rules of law established for the guidance of courts and juries in the investigation and determination of facts; Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148; and while proofs of loss, stating suicide as the cause of death, are admissible, they are not conclusive; Leman v. Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; and, where the defence is fraud, suicide may be shown to be the agency by which the fraud was accomplished, although by the policy suicide was no defence; Smith v. N. B. Society, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

SUIT (L. Lat. *secta;* from Lat. *sequi*, to follow. French, *suite*). An action.

It is more general than "action," which is almost exclusively applied to law, and denotes any legal proceeding of a civil kind brought by one person against another; Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592; Dullard v. Phelan, 83 Ia. 471, 50 N. W. 204. It includes actions at law as well as proceedings in equity; Elk Garden Co. v. Thayer Co., 179 Fed. 556.

Suit is a generic term, of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the recovery of a right. McPike v. McPike, 10 Ill. App. 333.

The word suit in the twenty-fifth section of the Judiciary Act of 1789 applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. An application for a prohibition is, therefore, a suit; Weston v. Charleston, 2 Pet. (U. S.) 449, 7 L. Ed. 481. According to the Code of Practice of Louisiana, art. 96, a suit is a real, personal, or mixed demand made before a competent judge, by which the parties pray to obtain their rights and a decision of their disputes. In that acceptation, the words suit, process, and cause are in that state almost synonymous. See SECTA; Steph. Pl. 427; 3 Bla. Com. 395; 1 Chitty, Pl. 399; Bemis v. Faxon, 4 Mass. 263; Burdick v. Green, 18 Johns. (N. Y.) 14; Kolb's Case, 4 Watts (Pa.) 154; 3 Story, Const. § 1719. In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, information, and a conviction by a magistrate; Hamm, N. P. 270. Suit is applied to proceedings in chancery as well as in law; 1 Sm. Ch. Dec. 26; and is, therefore, more general than *action*, which is almost exclusively applied to matters of law; Didier v. Davison, 10 Paige, Ch. (N. Y.) 516.

The witnesses or followers of the plaintiff. 3 Bla. Com. 295. See SECTA.

Suit of court, an attendance which a tenant owes to his lord's court. Cowell. Every copyholder of a manor, in the absence of special custom, formed one of the copyhold "homage" and was bound to attend the customary court on the usual days, upon pain of fine, distress, and forfeiture. Formerly no administrative or even ministerial act affecting the constitution of the manor could be done elsewhere than in the lord's court. It was the duty of the homage to "present" or take formal notice of any circumstance affecting the manor. Under an act of 1894, a customary court must still be held for recording a consent to a grant of a copyhold tenement out of the waste. Jenks, Modern Land Law 67.

Suit covenant, where one has covenanted to do suit and service in his lord's court.

Suit custom, where service is owed time out of mind.

Suithold, a tenure in consideration of certain services to the superior lord.

The following one in chase; as, fresh suit.

A petition to a king, or a great person, or a court.

SUIT SILVER. A small sum of money paid in lieu of attendance at the court barons. Cowell.

SUITE (French). Those persons who by his authority *follow* or attend an ambassador or other public minister.

In general, the suite of a minister are protected from arrest, and the inviolability of his person is communicated to those who form his suite; Vattel, lib. 4, c. 9, § 120. See Respublica v. De Longchamps, 1 Dall. (U. S.) 111, 1 L. Ed. 59; Baldw. 240; AMBASSADOR.

SUITOR. One who is a party to a suit or action in court. One who is a party to an action. In its ancient sense, suitor meant one who was bound to attend the county court; also one who formed part of the *secta*.

SUITORS' FUND IN CHANCERY. In England. A fund consisting of moneys which, having been paid into the court of chancery, are placed out for the benefit and better security of the suitors, including interest from the same. By stat. 32 & 33 Vict. c. 91, sec. 4, the principal of this fund, amounting to over £3,000,000, was transferred to the commissioners for the reduction of the national debt. Moz. & W.

SUM. The sense in which it is most commonly used is "money"; a quantity of money or currency; any amount indefinitely, a sum of money, a small sum, or a large sum. U. S. v. Van Auken, 96 U. S. 368, 24 L. Ed. 852.

SUMMARY CONVICTION. A phrase applied to proceedings which result in the sentence of an accused person without jury trial. At common law it was applied only in cases of contempt. Such proceedings are now frequently provided for by statute, either for trial by a court without a jury, or a final disposition of criminal cases by the committing magistrate. Such statutes are, in derogation of the right of trial by jury, secured by the state and federal constitutions and therefore must provide a right of appeal to a court having a jury. They usually apply only to lesser offences and to hardened offenders.

Summary proceedings as enumerated by Blackstone comprehend: 1. All trials of offences and frauds contrary to the laws of the excise and other branches of revenue which are to be determined by the commissioners of the respective departments and justices of the peace in the country; such convictions are absolutely necessary for due collection of the public money. 2. Convictions before justices of the peace in order to inflict divers petty, pecuniary mulcts and corporal penalties for such disorderly offences as common

swearing, drunkenness, vagrancy, idleness, etc. 3. Attachments for contempt and the subsequent proceedings thereon. 4 Bla. Com. 280. See SUMMARY PROCEEDING; CONVICTION.

SUMMARY JURISDICTION. The jurisdiction of a court to give a judgment or make an order itself forthwith. See CONTEMPT. For a synopsis of the present law in England, see Encycl. Br.

SUMMARY PROCEEDING. A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. See Jones v. Robbins, 8 Gray (Mass.) 329.

In no case can the party be tried summarily unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempts; for the common law is a stranger to such a mode of trial; 4 Bla. Com. 280. See 2 Kent 73; Taylor v. Porter, 4 Hill (N. Y.) 145, 40 Am. Dec. 274; Jones v. Robbins, 8 Gray (Mass.) 329; Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

The term summary proceedings is applied to proceedings under statute for enabling landlords promptly to dispossess tenants who hold over after default in payment of rent, or after expiration of the term.

SUMMING UP. The act of making a speech before a court and jury, after all the evidence has been heard, in favor of one of the parties in the cause. When the judge delivers his charge to the jury, he usually sums up the evidence in the case. See OPENING AND CLOSING.

SUMMON. In Practice. To notify the defendant that an action has been instituted against him, and he is required to answer to it at a time and place named. This is done by a proper officer either giving the defendant a copy of the summons, or leaving it at his house, or by reading the summons to him. See SERVICE.

SUMMONEAS. In Old Practice. A writ by which a party was summoned to appear in court.

SUMMONERS. Petty officers who cite men to appear in any court.

SUMMONS. The name of a writ commanding the sheriff, or other authorized officer, to notify a party to appear in court to answer a complaint made against him and in the said writ specified, on a day therein mentioned. 3 Bla. Com. 279.

SUMMONS AND ORDER. In English Practice. In this phrase the summons is the application to a common-law judge at chambers in reference to a pending action, and upon it the judge or master makes the order. Moz. & W.

SUMMONS AND SEVERANCE. See SEVERANCE.

SUMMUM JUS (Lat.). Extreme right, strict right. See MAXIMS, *Summum jus*, etc.

SUMPTUARY LAWS. Laws relating to the expenses of the people, and made to restrain excess in apparel, food, furniture, etc.

They originated in the view that luxury is, in some of its degrees, opposed to public policy, and that the state is bound to interfere against it. Montesquieu, *Esprit des Lois*, b. 7, c. 2, 4, and Tacitus, Ann. b. 2, ch. 33, b. 3, ch. 52.

In England, in 1336, it was enacted, 10 Edw. III. c. 3, that inasmuch as many mischiefs had happened to the people of the realm by excessive and costly meats, by which, among other things, many who aspired in this respect beyond their means were impoverished and unable to aid themselves or their liege lord in time of need, all men were forbidden to have served more than two courses at a meal, each of but two sorts of victual, except on the principal feasts of the year, and then only three courses were allowed. 4 Com. 170. Subsequent statutes, 1363, 1463, 1482, regulated the dress, and to some extent the diet, of the people, with careful regard to their rank. The substance of these statutes will be found in Knight's History of Eng. p. 272. They were repealed by 1 Jac. I. c. 25. An act of 30 Car. II. c. 3, which ordered the dead to be buried in woollen shrouds, was not repealed until 53 Geo. III. c. 108.

SUNDAY. The first day of the week.

It commences at twelve o'clock on the night between Saturday and Sunday, and ends in twenty-four hours thereafter; Kilgour v. Miles, 6 Gill & J. (Md.) 268. See Hiller v. English, 4 Strobh. (S. C.) 493 (a very learned case); State v. Green, 37 Mo. 466; Bryant v. Biddeford, 39 Me. 193; Stebbins v. Leowolf, 3 Cush. (Mass.) 137. It is so provided by statute in Minnesota, Connecticut, Massachusetts, South Dakota, Louisiana, Pennsylvania, Wisconsin, Vermont, and Hawaii. In New Mexico and Virginia, it is the time between sunrise of Sunday and midnight of the same day.

The *Sabbath*, the *Lord's day*, and *Sunday*, all mean the same thing; Kilgour v. Miles, 6 Gill & J. (Md.) 268; Gunn v. State, 89 Ga. 341, 15 S. E. 458.

The stat. 5 & 6 Edw. V. c. 3, enacted that Sunday should be strictly observed as a holy day, provided that in case of necessity it should be lawful to labor, ride, fish, or work at any kind of work. The Book of Sports (1618) declared that, after divine service, the people should not be disturbed from any lawful recreation. The stat. 29 Car. II. c. 7, provided that no tradesman, artificer, workman, laborer, or other person whatsoever, should exercise any worldly business, etc., upon the Lord's day, works of necessity and

charity alone excepted. It also forbade the execution of legal process on that day. This has been followed substantially in America, with a tendency to greater strictness. This includes all business, public or private, done in the ordinary calling of the person; 5 B. & C. 406; ordinary calling means that which the ordinary duties of the calling bring into continued action; 7 B. & C. 596; Salter v. Smith, 55 Ga. 245.

The Missouri act relates to Sunday as a day of rest and not to its religious character; State v. R. Co., 239 Mo. 196, 143 S. W. 785. In Dist. of Col. v. Robinson, 36 Wash. L. Rep. 101, it was held that the legislature may impose upon citizens only obligations of a civil and not of a religious nature. The early colonial statute, with its penalties against blasphemy, was considered to be obsolete.

Many statutes except those who observe the seventh day; others do not; and such legislation is constitutional; Soc. for Visitation of Sick v. Com., 52 Pa. 126, 91 Am. Dec. 931; Neuendorff v. Duryea, 69 N. Y. 557, 25 Am. Rep. 235; Com. v. Has, 122 Mass. 40; the fact that one believes the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception; Liberman v. State, 26 Neb. 464, 42 N. W. 419, 18 Am. St. Rep. 791. Connecticut (1907) exempts Seventh Day Sabbatarians from the operation of the Sunday labor act of 1793. The benefit of the act is obtained only by filing a written statement of religious belief in the office of the public prosecutor. In Michigan, an act permits them to perform servile labor on Sunday if they do not disturb persons attending places of worship; and they may keep open their places of business on Sunday, and the latter in Ohio, by act.

Jews are bound to observe the civil regulations for keeping Sunday; Soc. for Visitation of Sick v. Com., 52 Pa. 125, 91 Am. Dec. 931. In New York writs against Jews cannot be made returnable on Saturday; Martin v. Goldstein (Mun. Ct.) 39 N. Y. Supp. 254. In most of the states, Jews are placed in the same class in this respect with Seventh Day Sabbatarians. The Pennsylvania laws do not except Jews and will not permit them to claim exemption on the ground of religious faith from the statutes which prohibit work on Sunday. A municipal ordinance in Louisiana, which permitted Jews to engage in business on Sunday, was held constitutional; Shreveport v. Levy, 26 La. Ann. 671, 21 Am. Rep. 553.

Cases of necessity are determined by the moral fitness of the work; Com. v. Nesbit, 34 Pa. 409. Charity includes everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the comfort and relief of another, and not for one's own pleasure and benefit; Doyle v. R. Co., 118 Mass. 197, 19 Am. Rep. 431. A note given to a lawyer on Sunday for services in bailing a prisoner is a work of charity; Few v. Gunter, 10 Ga. App. 100, 72 S. E. 720.

Necessity may arise out of particular occupations; Philadelphia, W. & B. R. Co. v. Towboat Co., 23 How. (U. S.) 219, 16 L. Ed. 433; U. S. v. Powell, 14 Wall. (U. S.) 494, 20 L. Ed. 726; Hennersdorf v. State, 25 Tex. App. 597, 8 S. W. 926, 8 Am. St. Rep. 448; but not when it is a work of mere convenience or profit; Pate v. Wright, 30 Ind. 476, 95 Am. Dec. 705. Necessity should be construed reasonably; it is a question of moral propriety; State v. R. Co., 239 Mo. 196, 142 S. W. 785.

Shaving a man is not a work of necessity; State v. Wellott, 54 Mo. App. 310; Com. v. Waldman, 140 Pa. 89, 21 Atl. 248, 11 L. R. A. 563; Com. v. Dextra, 143 Mass. 28, 8 N. E. 756. See *infra*. Reaping a field of oats on Sunday in order to prevent the loss thereof is a work of necessity; Johnson v. People, 42 Ill. App. 594; so is repaving a city street in a populous neighborhood; 156 App. Div. 601.

Running street railways on Sunday was held illegal; Sparhawk v. R. Co., 54 Pa. 401; *contra*, Wood v. R. Co., 72 N. Y. 196, 28 Am. Rep. 125; and see Augusta & Summerville R. Co. v. Renz, 55 Ga. 126.

For an employé of a contractor to work on a building on Sunday violates the Sunday law; Lane v. State (Tex.) 150 S. W. 637.

When statutes forbid travelling on Sunday, there can be no recovery for injuries from defective streets; Connolly v. Boston, 117 Mass. 64, 19 Am. Rep. 396; Johnson v. Irasburgh, 47 Vt. 32, 19 Am. Rep. 111; but see Sutton v. Wauwatosa, 29 Wis. 21; unless the party was travelling from motives of necessity or charity; Crosman v. Lynn, 121 Mass. 301; as riding to a funeral or for health; Eaton v. Ins. Co., 89 Me. 570, 36 Atl. 1048; or walking for exercise; O'Connell v. Lewiston, 65 Me. 34, 20 Am. Rep. 673. But in actions for torts against individuals by common carriers, it is no defence that the injury occurred upon Sunday; Mohney v. Cook, 26 Pa. 342, 67 Am. Dec. 419; Schmid v. Humphrey, 48 Ia. 652, 30 Am. Rep. 414; *contra*, Lyons v. Desotelle, 124 Mass. 387. Most of the cases are otherwise; Big. L. C. Torts 711; see Bucher v. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; and the law in Massachusetts was altered in 1877.

Except as to judicial acts, which are void when done on Sunday; 1 W. Bl. 526; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377; Parsons v. Lindsay, 41 Kan. 336, 21 Pac. 227, 3 L. R. A. 658, 13 Am. St. Rep. 290; see DIES NON (but a New York city magistrate may try and sentence one for disorderly conduct; People v. Fox, 150

App. Div. 114, 134 N. Y. Supp. 642); the common law makes no distinction between Sunday and any other day. The English cases decided after the act of Charles II., *supra*, merely avoided contracts made in pursuance of one's ordinary calling; see 1 Cr. & J. 180; Merritt v. Earle, 31 Barb. (N. Y.) 41; 4 M. & W. 270; but in most of the states contracts made on Sunday are invalid; see Hilton v. Houghton, 35 Me. 143; Adams v. Gay, 19 Vt. 358; Kepner v. Keefer, 6 Watts (Pa.) 231, 31 Am. Dec. 460; Hill v. Sherwood, 3 Wis. 343; and if not executed, cannot be enforced; Calhoun v. Phillips, 87 Ga. 482, 13 S. E. 593; Aspell v. Hosbein, 98 Mich. 117, 57 N. W. 27. In New York any business but judicial may be done on Sunday; Batsford v. Every, 44 Barb. (N. Y.) 618.

Generally speaking executory contracts made on Sunday will not be enforced, while executed contracts will not be disturbed; Chestnut v. Harbaugh, 78 Pa. 473; Horton v. Buffinton, 105 Mass. 399; Ellis v. Hammond, 57 Ga. 179; Nibert v. Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; but see Bloom v. Richards, 2 Ohio St. 388; Johnson v. Brown, 13 Kan. 529, as to executory contracts. Delivery on Sunday passes title against the vendor; Moore v. Murdock, 26 Cal. 514; Banks v. Werts, 13 Ind. 203; but see Tucker v. Mowrey, 12 Mich. 378; a church subscription on Sunday is valid in Pennsylvania; 12 Reptr. 665; and Michigan; 21 Alb. L. J. 293. See Catlett v. Trustees, 62 Ind. 365, 30 Am. Rep. 197. A contract of sale made on Sunday is not saved from being a Sunday contract by the fact that the purchase-money was not paid until Monday; Grant v. McGrath, 56 Conn. 333, 15 Atl. 370. A contract dated on Sunday may be shown to be erroneously dated; Stacy v. Kemp, 97 Mass. 166; and it may be shown that a contract bearing a secular date was actually executed on Sunday; Bank v. Mayberry, 48 Me. 198; but not against a *bona fide* holder without notice; Clinton Nat. Bk. v. Graves, 48 Ia. 228. When a contract takes effect on delivery, the date is not material; Prather v. Harlan, 6 Bush (Ky.) 185; Peake v. Conlan, 43 Ia. 297; and a note executed on Sunday but delivered on another day is valid; Goss v. Whitney, 24 Vt. 189; Hilton v. Houghton, 35 Me. 143.

A deed made on Sunday is not within a contract forbidding the making of contracts on Sunday; Wooldridge v. Wooldridge, 69 W. Va. 554, 72 S. E. 654, Ann. Cas. 1913B, 653; where negotiations for a contract were begun on Saturday, continued on Sunday and closed on Monday, the contract was valid; Curtin v. Gas Co., 233 Pa. 397, 82 Atl. 503; where a contract of exchange of land was made on Saturday and put in writing on Sunday, the broker was entitled to his commissions; McCormick v. Hazard, 77 Misc. Rep. 190, 136 N. Y. Supp. 91. The appointment of an agent to sign a contract for the sale of land on Sunday is invalid; Kryzminski v. Callahan, 213 Mass. 207, 100 N. E. 335, 43 L. R. A. (N. S.) 140; otherwise of a release executed on Sunday but the consideration paid on a later day; Ross v. Oliver Bros., 152 Ky. 437, 153 S. W. 756; anything done on Sunday in performance of a valid contract will not be treated as a nullity; Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

Defendant hired an automobile from the plaintiff on a Sunday for the purpose of joy riding, which was in violation of the Sunday law. On a subsequent secular day the defendant promised to pay the plaintiff for the ride, but it was held that the plaintiff could not recover; Jones v. Belle Isle, 13 Ga. App. 437, 79 S. E. 357.

A contract made on Sunday may be ratified; Johnson v. Willis, 7 Gray (Mass.) 164; Sumner v. Jones, 24 Vt. 317; Russell & Co. v. Murdock, 79 Ia. 101, 44 N. W. 237, 18 Am. St. Rep. 348; but see Butler v. Lee, 11 Ala. 885, 46 Am. Dec. 230; but only by an express agreement and not by mere acquiescence; Hill v. Hite, 79 Fed. 826; but it is held that a note made on Sunday cannot be ratified; Moseley v. Bank, 3 Ala. App. 614, 57 South. 91; a will executed on Sunday is valid; Bennett v. Brooks, 9 Allen (Mass.) 118; Rapp v. Reehling, 124 Ind. 36, 23 N. E. 777, 7 L. R. A. 496. A contract for an advertisement in a Sunday paper is invalid; Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; *contra*, Sheffield v. Balmer, 52 Mo. 474, 14 Am. Rep. 430.

A verdict in a homicide case submitted to the jury on Saturday may be received and the jury discharged on Sunday; Ball v. U. S., 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. A verdict received on Sunday is valid; Burrage v. State, 101 Miss. 598, 58 South. 217.

Laws requiring all persons to refrain from their ordinary callings on Sunday have been held not to encroach on the religious liberty of the people; Cooley, Const. Lim., 2d ed. 584, 725; they may be sustained as police regulations; Kurtz v. People, 33 Mich. 279; Frolickstein v. Mobile, 40 Ala. 725; Clinton v. Wilson, 257 Ill. 580, 101 N. E. 192. The legislature may regulate the observance of Sunday; People v. Dunford, 207 N. Y. 17, 100 N. E. 433. Idaho (1907) prohibits horse-racing and opening saloons on Sunday; Colorado only prohibits selling liquors (until six o'clock Monday morning) and carrying on the business of a barber; Georgia forbids running trains on Sunday; in Porto Rico all business must close at twelve o'clock noon on Sunday. California has had no Sunday laws whatever since 1883.

Under an act making it unlawful to open a shop on Sunday, for the sale of goods, etc., a barber cannot be convicted; State v. Krech, 10 Wash. 166, 38 Pac. 1001. A stat-

ute forbidding barbers to carry on their trade on Sunday is constitutional, under the police power; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; notwithstanding the act allows barbers in the cities of New York and Saratoga to work till one o'clock; but in Illinois (Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365), it is held that an act forbidding barbers to work at their trade on Sunday is a taking of property without due process of law; and that it is not a proper exercise of the police power. See, also, Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. But an ordinance regulating the doing of business on Sunday is within the police power of a city; Clinton v. Wilson, 257 Ill. 580, 101 N. E. 192.

Any act forbidding railroad trains to run on Sunday does not constitute a regulation of, and an obstruction to, interstate commerce, and is valid; Norfolk & W. R. R. Co. v. Com., 88 Va. 95, 13 S. E. 340, 13 L. R. A. 107, 29 Am. St. Rep. 705; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; State v. R. Co., 24 W. Va. 783, 49 Am. Rep. 290; but an act forbidding all manner of servile labor on Sundays, etc., is held to be void, so far as it affects interstate traffic; Adams Exp. Co. v. Board, 65 How. Pr. (N. Y.) 72. The running of trains is within the prohibition of a statute which punishes any person who labors in his calling on Sunday, or employs his servants in so doing, except in works of necessity or charity; State v. R. Co., 24 W. Va. 783, 49 Am. Rep. 290; but it has been held that running an excursion train on Sunday is a work of necessity; Louisville & N. R. Co. v. Com. (Ky.) 30 S. W. 878; so is delivery of milk to customers; Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87.

Acts have been passed forbidding baseball playing on Sunday. The cases differ as to their constitutionality. See 56 Alb. L. J. 202; 57 *id.* 258. Baseball does not come within the class of "sports" prohibited on Sunday; Territory v. Davenport, 17 N. M. 214, 124 Pac. 795, 41 L. R. A. (N. S.) 407.

No one is bound to do work in performance of his contract on Sunday, unless the work by its very nature or by express agreement is to be done on that day and can be then done without a breach of law; Cock v. Bunn, 6 Johns. (N. Y.) 326; Barrett v. Allen, 10 Ohio 426. Parties to a contract for program privileges at an opera house, contemplating the giving of Sunday concerts, will not be presumed to have intended violation of the Sunday law in giving such entertainment; Strauss & Co. v. Hammerstein, 152 App. Div. 128, 136 N. Y. Supp. 613. Where an acrobat's contract was for $300 for each week, Sunday would be excluded if performances on that day were unlawful; Keith v. Kellermann, 169 Fed. 196.

Sundays are computed in the time allowed for the performance of an act; 10 M. & W. 331; but if the last day happen to be a Sunday, it is to be excluded, and the act must, in general, be performed on Monday; 3 Chitty, Pr. 110; Street v. U. S., 133 U. S. 299, 10 Sup. Ct. 309, 33 L. Ed. 631; Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. Ed. 72. Notes and bills, when they fall due on Sunday, are payable on Saturday, unless a statute provides otherwise. The indorsement of a note creates a new contract, and is an act within the statute prohibiting secular business on Sunday; Bank v. Kingsley, 84 Me. 111, 24 Atl. 794.

See NEGOTIABLE INSTRUMENTS. See, as to the origin of keeping Sunday as a holiday, Story, Pr. Notes § 220; Story, Bills § 223. See, generally, 17 Am. L. Reg. (N. S.) 285; 3 Rep. Am. Bar Association (1880); 2 Am. L. Rev. 226; 21 Alb. L. J. 424 (Sabbath-breaking); 28 Am. L. Reg. 137, 209, 273; State v. Lorry, 7 Baxt. (Tenn.) 95, 32 Am. Rep. 557; Schmid v. Humphrey, 48 Ia. 652, 30 Am. Rep. 417; McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 122 (legality of labor on Sunday); 3 *id.* 371, n.; Sparhawk v. R. Co., 54 Pa. 401; 3 Cr. L. Mag. 632 (Sabbath-breaking; works of necessity). The Massachusetts law on this subject depends more on its peculiar legislation and customs than any general principles of justice or law; Philadelphia, W. & B. R. Co. v. Steam Towboat Co., 23 How. U. S. 209, 16 L. Ed. 433.

As to execution of legal process on Sunday, see DIES NON.

See HOLIDAY; POLICE POWER; Friedenberg, Sunday Laws.

SUNKEN WRECK. Where part of the frame of a ship was sunk beneath the surface of the sea and partially imbedded in the bottom, as was also a quantity of iron ore that formed a part of the cargo of the ship, it was held to be a sunken wreck within the meaning of the collision clause of a policy of insurance; [1893] Prob. 248.

SUPER ALTUM MARE (Lat.). Upon the high sea. See HIGH SEAS.

SUPER-JURARE. A term anciently used, when a criminal, who tried to excuse himself by his own oath or that of one or two witnesses, was convicted by the oaths of many more witnesses. Moz. & W.

SUPER PRÆROGATIVA REGIS. A writ which formerly lay against the king's tenant's widow for marrying without the royal license. Fitzh. N. B. 174.

SUPER STATUTO. A writ that lay against the king's tenant, holding in chief, who alienated the king's land without his license.

SUPER STATUTO FACTO POUR SENESCHAL ET MARSHAL DE ROY. A writ which lay against a steward or marshal for holding plea in his court, or for trespass or contracts not made or arising within the king's household. Whart.

SUPER STATUTO VERSUS SERVANTES ET LABORATORES. A writ which lay against him who kept any servants who had left the service of another contrary to law.

SUPER VISUM CORPORIS (Lat.). Upon view of the body. When an inquest is held over a body found dead, it must be *super visum corporis*. See CORONER; INQUEST.

SUPERCARGO. In Maritime Law. A person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.

Supercargoes have complete control over the cargo and everything which immediately concerns it, unless their authority is either expressly or impliedly restrained; 12 East 381. Under certain circumstances they are responsible for the cargo; Bridge v. Austin, 4 Mass. 115; see Pawson's Adm'rs v. Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213; but the supercargo has no power to interfere with the government of the ship; 3 Pardessus, n. 646. Not now used.

SUPERFICIARIUS (Lat.). **In Civil Law.** He who has built upon the soil of another, which he has hired for a number of years or forever, yielding a yearly rent. This is not very different from the owner of a lot on ground-rent in Pennsylvania. Dig. 43. 18. 1.

SUPERFICIES (Lat.). **In Civil Law.** Whatever has been erected on the soil.

SUPERFLUOUS LANDS. Lands acquired by a railroad company under its statutory powers and not required for the purpose of the undertaking. See 10 Jur. Rev. 281.

Slips of land above and below a tunnel; 51 L. J. Q. B. 172; land under arches which carry a railway; 48 L. J. Ch. 258; mines under a surface required or which may be required for the undertaking; 46 L. J. Q. B. 509; are not superfluous lands; but the whole of the land beyond the boundary wall of a railway is superfluous, even though that wall be also a retaining wall thicker at the base than at the surface, and though part of such land would be within a line drawn on the surface vertically above the line of the footings of the wall; 52 L. J. Ch. 198.

SUPERFŒTATION. The conception of a second embryo during the gestation of the first, or the conception of a child by a woman already pregnant with another, during the time of such pregnancy.

This, though doubted, seems to be established by numerous cases; 1 Beck, Med. Jur. 193; Cassan, Superfœtation; New York Medical Repository; 1 Briand, *Méd. Lég. prem. partie*, c. 3, art. 4; 1 Foderé, *Méd. Lég.* § 299; Buffon, *Hist. Nat. de l'Homme, Puberté;* Witth. & Beck, Med. Jurispr.

SUPERINDUCTIO (Lat.). **In the Civil Law.** A species of obliteration. Dig. 28. 4. 1. 1.

SUPERINSTITUTION. The institution of one upon another, as where two persons are admitted and are instituted to the same benefice, under adverse titles. Cowell.

SUPERINTENDENT REGISTRAR. An officer who superintends the registration of births, deaths, and marriages in England and Wales. Whart.

SUPERIOR. One who has a right to command; one who holds a superior rank: as, a soldier is bound to obey his superior.

In estates, some are superior to others: an estate entitled to a servitude or easement over another estate is called the superior or dominant, and the other the inferior or servient estate. 1 Bouvier, Inst. n. 1612.

SUPERIOR COURT. A term applied collectively to the three courts of common law at Westminster: namely, the king's bench, the common pleas, the exchequer; and so in Ireland.

It denotes a court of intermediate jurisdiction between the courts of inferior or limited jurisdiction and the courts of last resort.

In American Law. A court of intermediate jurisdiction between the inferior courts and those of last resort. See the several states.

SUPERNUMERARII (Lat.). **In Roman Law.** Those advocates who were not *statuti*, which title see.

The *statuti* were inscribed in the matriculation books, and formed a part of the college of advocates in each jurisdiction. The supernumeraries were not attached to any bar in particular, and could reside where they pleased: they took the place of advocates by title as vacancies occurred in that body.

SUPERONERATIO (L. Lat.). Surcharging a common: *i. e.* putting in beasts of a number or kind other than the right of common allows. It can only be of a common appendant or appurtenant. Bracton 229. Fleta, lib. 4, c. 23, § 4, gives two remedies, novel disseisin and writ of admeasurement, by which latter remedy no damages are recovered till the second offence. Now, distraining, trespass, and case are used as remedies. 3 Sharsw. Bla. Com. 238.

SUPERONERATIONE PASTURA. A writ that formerly lay against him who was impleaded in the county court for the surcharge of a common for his cattle and the cause was removed into one of the superior courts.

SUPERSEDEAS (Lat. that you set aside). **In Practice.** The name of a writ containing a command to stay the proceedings at law.

An auxiliary process designed to supersede the enforcement of the judgment of the court below, brought up by writ of error for review. Williams v. Bruffy, 102 U. S. 249, 26 L. Ed. 135.

Originally it was a writ directed to an officer, commanding him to desist from enforc-

ing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment; Dulin v. Coal Co., 98 Cal. 306, 33 Pac. 123.

It is granted on good cause shown that the party ought not to proceed; Fitzh. N. B. 236. There are some writs which, though they do not bear this name, have the effect to supersede or stay the proceedings: namely, a writ of error when bail is entered operates as a *supersedeas;* and a writ of *certiorari* to remove the proceeding of an inferior into a superior court has, in general, the same effect; 8 Mod. 373; Grubb v. Fox, 6 Binn. (Pa.) 461. But under special circumstances, the *certiorari* has not the effect to stay the proceeding, particularly where summary proceedings, as to obtain possession under the landlord and tenant law, are given by statute; Grubb v. Fox, 6 Binn. (Pa.) 460. See Bacon, Abr.; Com. Dig. Yelv. 6, n.

See APPEAL AND ERROR; UNITED STATES COURTS.

SUPERSTITIOUS USE. **In English Law.** When lands, tenements, rents, goods, or chattels are given, secured, or appointed for and toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere; to have and maintain perpetual obits, lamps, torches, etc., to be used at certain times to help to save the souls of men out of purgatory; in such cases the king, by force of several statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable; Bac. Abr. *Charitable Uses and Mortmain* (D); Duke, Char. Uses 105; 6 Ves. 567; 4 Co. 104.

The doctrine has no recognition in this country; Appeal of Seibert, 18 Wkly. Notes Cas. (Pa.) 276; and a bequest to support a Catholic priest, and perhaps other uses void in England, would not be considered as superstitious uses; Methodist Church v. Remington, 1 Watts (Pa.) 219, 26 Am. Dec. 61; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644. Yet many of the *superstitious uses* of the English law would fail to be considered as charities, and would undoubtedly come under the prohibition against perpetuities. See CHARITIES; CHARITABLE USES; 1 Jarm. Wills, ch. ix. In England there are three classes of persons who have been held obnoxious to the law against superstitious uses: 1. Roman Catholics. 2. Protestant dissenters. 3. Jews. Their various disabilities have been almost wholly removed.

See MASSES.

SUPERVISOR. An overseer; a surveyor.

An officer whose duty it is to take care of the highways.

The chief officer of a town or organized township in the states of Michigan, Illinois, Wisconsin, and Iowa. He has various duties assigned him by the statutes as a town officer, and likewise represents his town in the general assembly, or county board of supervisors. See BOARD OF SUPERVISORS.

SUPERVISORS OF ELECTION. Persons appointed and commissioned by the United States circuit judges to supervise the registration of voters and the holding of elections for representatives in congress under R. S. §§ 2011–2031; repealed by the act of Feb. 8, 1894. As to what was the registration of voters under this act, see REGISTRATION. While this legislation was in force it was held that in case of a question as to what political organization should be recognized by the court in appointing supervisors, the body which was recognized by the last state convention of the party should be considered as its representative organization; subject, however, to modification by change of circumstances; In re Appointment of Supervisors of Election, 9 Fed. 14. The legislation of congress in vesting the appointment of supervisors in the courts was constitutional, and in the exercise of its supervisory power over elections for senators and representatives, new duties may be imposed by congress on the officers of election and new penalties for breach of duty; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715. See ELECTION.

SUPPLEMENTAL. That which is added to a thing to complete it.

SUPPLEMENTAL ANSWER. One filed in chancery for the purpose of correcting, adding to, and explaining an answer already filed. Sm. Ch. Pr. 334. In New York and states having similar practice it is an additional answer to the complaint. It may be to allege a release after issue joined; Guliano v. Whitenack, 3 Misc. 54, 22 N. Y. Supp. 560; or to set up facts excusing nonpayment where the defence of payment was relied on, until the time of trial; Voak v. Inv. Co., 51 Minn. 450, 53 N. W. 708.

SUPPLEMENTAL BILL. **In Equity Practice.** A bill brought as an addition to an original bill to supply some defect in its original frame or structure which cannot be supplied by amendment. See Stafford v. Howlett, 1 Paige Ch. (N. Y.) 200; Walker v. Gilbert, 7 Smedes & M. (Miss.) 456; Cunningham's Adm'r v. Rogers, 14 Ala. 147. It may be brought by a plaintiff or defendant; 2 Ball & B. 140; Baker v. Whiting, 1 Sto. 218, Fed. Cas. No. 786; and as well after, as before, a decree; O'Hara v. Shepherd, 3 Md Ch. Dec. 306; 1 Macn. & G. 405; Story, Eq. Pl. § 338; Secor v. Singleton, 41 Fed. 725; but must be within a reasonable time; Woodruff's Ex'rs v. Brugh, 6 N. J. Eq. 465.

If there has been a change of interest in a pending equity suit, the proper method

to introduce another party or to substitute one party for another, is by a supplemental bill or by an original bill in the nature of a supplemental bill; Ross v. City of Ft. Wayne, 63 Fed. 466, 11 C. C. A. 288, 24 U. S. App. 113.

A supplemental bill in the nature of a bill of review cannot be entertained where no new facts pertinent to the litigation are discussed except such as were known to the complainants at the date of the original decree; City of Omaha v. Redick, 63 Fed. 1, 11 C. C. A. 1, 27 U. S. App. 204.

It may be filed when a necessary party has been omitted; 6 Madd. 369; Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; to introduce a party, who has acquired rights subsequent to the filing of the original bill; Campbell v. Polk Co., 3 Ia. 472; when, after the parties are at issue and witnesses have been examined, some point not already made seems to be necessary, or some additional discovery is found requisite; Stafford v. Howlett, 1 Paige Ch. (N. Y.) 200; when new events referring to and supporting the rights and interests already mentioned have occurred subsequently to the filing of the bill; Story, Eq. Pl. 336; 5 Beav. 253; for the statement only of facts and circumstances material and beneficial to the merits, and not merely matters of evidence; Jenkins v. Eldredge, 3 Sto. 299, Fed. Cas. No. 7,267; when, after a decision has been made on the original bill, it becomes necessary to bring other matter before the court to get the full effect of it; Story, Eq. Pl. § 336; when a material fact, which existed before the filing of the bill, has been omitted, and it can no longer be introduced by way of amendment; Ridgeway v. Toram, 2 Md. Ch. Dec. 303; Mitf. Ch. Pl. 55, 61, 325; but only by special leave of court, when it seeks to change the original structure of the bill and introduce a new and different case; 4 Sim. 76, 628; Dias v. Merle, 4 Paige Ch. (N. Y.) 259. Where, after a final decree, a person who has succeeded to the interest of the complainant in such manner as to entitle him to the full benefit of the decree, finds it necessary to invoke further action to obtain such benefit, he may file a supplemental bill in the original suit; Secor v. Singleton, 41 Fed. 725; but when an executor is substituted as a party in place of his decedent, he need not file a supplemental pleading; Equitable Life Assur. Soc. v. Trimble, 83 Fed. 85, 27 C. C. A. 404. After a decree disposing of the issues, the filing of a new bill by other parties, involving other issues, although connected with the subject-matter of the original litigation, is to be considered a new litigation, although styled a "supplemental bill" and permitted to be filed in the original cause, and the complainant in the original cause is entitled to notice, and will not be bound without it; Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986. And a supplemental bill filed upon leave granted and notice, which makes an essentially different case from that contemplated in the order granting leave to file it, will be ordered to be taken from the files; Stockton v. Tobacco Co., 53 N. J. Eq. 400, 32 Atl. 261.

The bill must be in respect to the same title, in the same person as the original bill; Story, Eq. Pl. 339; and no relief can be had under it upon a cause of action, which did not exist when the original bill was filed; Heffron v. Knickerbocker, 57 Ill. App. 339; Neubert v. Massman, 37 Fla. 91, 19 So. 625. If the original bill shows no title to relief, a supplemental bill cannot be filed based on facts afterwards occurring; but if the original bill is well founded, a supplemental bill may be filed showing a further title to relief; New York S. & T. Co. v. R. Co., 74 Fed. 67; Putney v. Whitmire, 66 Fed. 385. After a decree has been directed for complainant, a stranger will not be permitted to file a supplemental bill based on his purchase of the cause of action, until a decree is actually entered in the original cause; Hazleton Tripod-Boiler Co. v. R. Co., 72 Fed. 325. A bill by a surviving partner, to settle the partnership affairs, is separate, and distinct from a bill to subject real estate of the deceased partner to firm debts, and the statute of limitations cannot be avoided by styling the second suit a supplemental bill; White v. Joyce, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. Ed. 921. When a patent was assigned to a stranger pending a suit for infringement, the assignee cannot obtain the benefit of the suit brought by the assignor, by a supplemental bill, but he may do it by an original bill in the nature of a supplemental bill; Ross v. Ft. Wayne, 58 Fed. 404. In a suit to remove a cloud from a title, where there is a decree establishing such title in the complainant, which carries a right to possession, a supplemental bill may be filed to enforce that right; Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123.

It must state the original bill, and the proceedings thereon; and, when it is occasioned by an event which has occurred subsequently to the original bill, it must state that event and the consequent alteration with regard to the parties. In general, the supplemental bill must pray that all defendants appear and answer the charges it contains; Story, Eq. Pl. § 343. But the supreme court equity rules (Feb. 1, 1913) provide that the statements in the original suit need not be set forth unless the circumstances of the case may require it.

SUPPLEMENTARY PROCEEDINGS. Proceedings supplementary to an execution, directed to the discovery of the debtor's property and its application to the debt for which the execution is issued. They are purely statutory, and the statute limits the power of the courts to existing rights and things *in*

esse at the time of their institution; 18 N. Y. L. J. 1517. The New York statute entitles the judgment creditor to an order of examination "upon proof . . . that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, etc." And where it appears from the examination "that the judgment debtor has, in his possession or under his control, money or other personal property belonging to him," the judge may order such money to be paid over and such other personal property to be delivered up; such proceedings are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him. No property subsequently acquired, no future earnings of any kind, and no earnings for personal services rendered within sixty days preceding such order, if necessary for the use of his family, can be reached; *id.;* Winters v. McCarthy, 2 Abb. N. C. (N. Y.) 357; Potter v. Low, 16 How. Pr. (N. Y.) 549. They do not affect money coming to the debtor, unless it is actually due when the order is obtained; *id.*; Stewart v. Foster, 1 Hilt. (N. Y.) 505; Columbian Institute v. Cregan, 3 N. Y. St. 287; or earnings due after the service of the order; Gerregani v. Wheelwright, 3 Abb. Prac. (N. S. N. Y.) 264; or the salary of a public officer, while in the hands of a disbursing officer in common with other money; Waldman v. O'Donnell, 57 How. Pr. (N. Y.) 215, 217. Proof as to the possession or control by the judgment debtor must be clear; Peters v. Kerr, 22 How. Pr. (N. Y.) 3; and doubts whether the money was earned before or after the order should be resolved in favor of the debtor; Potter v. Low, 16 How. Pr. (N. Y.) 549. If the debtor have a family dependent upon him, he may, if necessary, have sixty days' back earnings exempt; Code Civ. Proc. N. Y. § 2463; and this is held to be a humane provision which should be construed liberally in favor of the debtor; Miller v. Hooper, 19 Hun (N. Y.) 394. But this does not include money received by a saloon-keeper in his business; Prince v. Brett, 21 App. Div. 190, 47 N. Y. Supp. 402.

The return of an execution unsatisfied is sufficient to authorize a resort to supplementary proceedings; Klepsch v. Donald, 18 Wash. 150, 51 Pac. 352.

The appointment of a receiver in such proceedings dissolves a partnership of which the judgment debtor is a member; Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Where the judgment is against a married woman she may be examined as to her separate estate; [1892] 2 Q. B. 626.

The enforcement of orders in such proceedings is by treating the defendant as in contempt, and a debtor is liable thereto for collecting rent; Stevens v. Dewey, 13 App. Div. 312, 43 N. Y. Supp. 130; or drawing out a savings bank deposit held in trust for another; 18 N. Y. L. J. 1520.

An act (1879) which enables the plaintiff to examine the defendant on oath as to his property, fraudulently concealed, is unconstitutional, because no one is obliged to give evidence which may incriminate himself; Horstman v. Kaufman, 97 Pa. 147, 39 Am. Rep. 802. Another act was passed in 1913.

SUPPLETORY OATH. **In Ecclesiastical Law.** An oath given by the judge to the plaintiff or defendant upon half proof, as by one witness, already made. The oath added to the half proof enables the judge to decide. It is discretionary with the judge; 3 Sharsw. Bla. Com. 370.*

SUPPLICATIO (Lat.). **In Civil Law.** A petition for pardon of a first offense; also, a petition for reversal of judgment; also, equivalent to *duplicatio*, which is our rejoinder. Calvinus, Lex.

SUPPLICAVIT (Lat.). **In English Law.** The name of a writ issuing out of the king's bench or chancery for taking sureties of the peace: it is commonly directed to the justices of the peace, when they are averse to acting in the affair in their judicial capacity. 4 Bla. Com. 233.

SUPPLICIUM (Lat.). **In Civil Law.** A corporal punishment ordained by law; the punishment of death: so called because it was customary to accompany the guilty man to the place of execution and there offer *supplications* for him.

SUPPLIES. **In English Law.** Extraordinary grants to the king by parliament to supply the exigencies of the state. Jacob.

Means of provision or relief; stores.

SUPPLY CLAIMS. See MORTGAGE; RECEIVERS.

SUPPORT. The right of support is an easement which one man, either by contract or prescription, enjoys, to rest the joists or timbers of his house upon the wall of an adjoining building owned by another person. 3 Kent 435. See Washb. Easem.

A right to the support of one's land so as to prevent its falling into an excavation made by the owner of adjacent lands.

This support is of two kinds, *lateral* and *subjacent*. Lateral support is the right of land to be supported by the land which lies next to it. Subjacent support is the right of land to be supported by the land which lies under it. See LATERAL SUPPORT; MINES AND MINING.

Support is also generally used to mean articles for the sustenance of the family, as food, etc. Grant v. Dabney, 19 Kan. 389, 27 Am. Rep. 125. See FAMILY.

SUPPRESS. To put a stop to when actually existing. The word does not extend to preventing by suppressing what may lead to a thing. 34 L. J. M. C. 9.

SUPPRESSIO VERI (Lat.). Concealment of truth.

In general, a suppression of the truth when a party is bound to disclose it vitiates a contract. In the contract of insurance, a knowledge of the facts is required to enable the underwriter to calculate the chances and form a due estimate of the risk; and, in this contract perhaps more than any other, the parties are required to represent everything with fairness; 1 W. Bla. 594.

Suppressio veri, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution; 1 Ball & B. 241; Moseley's Adm'rs v. Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; Mechanics' Bk. v. Lynn, 1 Pet. (U. S.) 383, 7 L. Ed. 185; Livingston v. Iron Co., 2 Paige Ch. (N. Y.) 390; 1 Story Eq. Jur., 13th ed. § 204. See CONCEALMENT; MISREPRESENTATION; REPRESENTATION; SUGGESTIO FALSI.

SUPPRESSION OF EVIDENCE. Where evidence in an equity case on letters patent is taken out of order, the court will usually entertain a motion to suppress it, though where no harm can result, it is sometimes allowed to stand till the hearing. If no such motion be made, the testimony will stand; Rob. Pat. § 1128; when the evidence is filed that which is inadmissible will sometimes be stricken out on motion; *id.*; but more commonly it stands over for final hearing. Where, in equity, in a patent case, a witness not named in the answer, testified to prior use, it will be considered at the hearing unless a motion be made to suppress it, even though it was taken under objection; 6 Fish. 452.

SUPRA PROTEST. Under protest. See ACCEPTANCE; ACCEPTOR; BILLS OF EXCHANGE; PROTEST, PAYMENT UNDER.

SUPREMACY. Sovereign dominion, authority, and pre-eminence; the highest state. In the United States the supremacy resides in the people, and is exercised by their constitutional representatives, the president and congress. See SOVEREIGNTY; ACT OF SUPREMACY.

SUPREME. That which is superior to all other things.

SUPREME COURT. A court of superior jurisdiction in many of the states of the United States.

The name is properly applied to the court of last resort, and is so used in most of the states. In nearly all the states there is a supreme court, but in one or two there is a court of appellate jurisdiction from the supreme court.

See SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF ERRORS. An appellate tribunal, and the court of last resort, in the state of Connecticut.

SUPREME COURT OF JUDICATURE. See COURTS OF ENGLAND.

SUPREME COURT OF THE UNITED STATES. In the Appendix of 131 U. S. is given a list of the judges of the Supreme Court of the United States. It is here given, and is brought down to date. The names of the Chief Justices in the following list are in capitals. The first date is the date of commission; the last is the date of death in office (or of resignation or retiring if so noted). See biographical notes on the Federal Judges in 30 Fed. Cas. 1361; Hampton L. Carson's interesting and able work on the Supreme Court.

JOHN JAY, September 26, 1789; resigned June 29, 1795.

John Rutledge, September 26, 1789; declined.

William Cushing, September 27, 1789; died September 13, 1810.

Robert H. Harrison, September 28, 1789; confirmed, but returned his commission to accept chancellorship of Maryland.

James Wilson, September 29, 1789; died August 28, 1798.

John Blair, September 30, 1789; resigned 1796.

James Iredell, February 10, 1790; died October 20, 1799.

Thomas Johnson, August 5, 1791; recommissioned November 7, 1791; resigned March 4, 1793.

William Paterson, March 4, 1793; died September 9, 1806.

JOHN RUTLEDGE, commissioned July 1, 1795, in the recess of Congress; on December 10, 1795, his nomination was sent to the Senate and rejected December 10, 1795.

WILLIAM CUSHING, January 27, 1796; declined.

Samuel Chase, January 27, 1796; died June 19, 1811.

OLIVER ELLSWORTH, March 4, 1796; resigned, from Paris, November, 1800.

Bushrod Washington, September 29, 1798; recommissioned December 20, 1798; died November 26, 1829.

Alfred Moore, December 10, 1799; resigned 1804.

JOHN JAY, December 19, 1800; declined.

JOHN MARSHALL, January 31, 1801; died July 6, 1835.

William Johnson, March 26, 1804; died August 11, 1834.

Brockholst Livingston, November 10, 1806; recommissioned January 16, 1807; died March 18, 1823.

Thomas Todd, March 3, 1807; died February 7, 1826.

Levi Lincoln, January 7, 1811; declined.

John Quincy Adams, February 22, 1811; declined.

Joseph Story, November 18, 1811; died September 10, 1845.

Gabriel Duvall, November 18, 1811; resigned January, 1835.

Smith Thompson, September 1, 1823; recommissioned December 9, 1823; died December 18, 1843.
Robert Trimble, May 9, 1826; died August 25, 1828.
John McLean, March 7, 1829; died April 4, 1861.
Henry Baldwin, January 6, 1830; died April 21, 1844.
James M. Wayne, January 9, 1835; died July 5, 1867.
ROGER B. TANEY, March 15, 1836; died October 12, 1864.
Philip P. Barbour, March 15, 1836; died February 24, 1841.
William Smith, March 8, 1837; declined.
John Catron, March 8, 1837; died May 30, 1865.
John McKinley, April 22, 1837; recommissioned September 25, 1837; died July 19, 1852.
Peter V. Daniel, March 3, 1841; died June 30, 1860.
Samuel Nelson, February 13, 1845; retired November 28, 1872.
Levi Woodbury, September 20, 1845; died September, 4, 1851.
Robert C. Grier, August 4, 1846; retired January 31, 1870.
Benjamin Robbins Curtis, September 22, 1851; recommissioned December 20, 1851; resigned September 5, 1857.
John A. Campbell, March 22, 1853; resigned May 1, 1861.
Nathan Clifford, January 12, 1858; died July 25, 1881.
Noah H. Swayne, January 24, 1862; retired January, 1881.
Samuel F. Miller, July 16, 1862; October 13, 1890.
David Davis, October 17, 1862; recommissioned December 8, 1862; resigned March, 1877.
Stephen J. Field, March 10, 1863; resigned December 1, 1897.
SALMON P. CHASE, December 6, 1864; died May 7, 1873.
Edwin M. Stanton, December 20, 1869; died December 24, 1869, before his commission took effect.
William Strong, February 18, 1870; retired December, 1880.
Joseph P. Bradley, March 21, 1870; died January 22, 1892.
Ward Hunt, December 11, 1872; retired January 7, 1882.
MORRISON R. WAITE, January 21, 1874; died March 23, 1887.
John M. Harlan, November 29, 1877; died October 14, 1911.
William B. Woods, December 21, 1880; died May 14, 1887.
Stanley Mathews, May 12, 1881; died March 22, 1889.
Horace Gray, December 20, 1881; died September 15, 1902.
Samuel Blatchford, March 22, 1882; died July 7, 1893.
Lucius Q. C. Lamar, January 16, 1888; died January 23, 1893.
MELVILLE W. FULLER, July 20, 1888; died July 4, 1910.
David J. Brewer, September 18, 1890; died March 28, 1910.
Henry B. Brown, December 29, 1890; retired May 28, 1906.
George Shiras, Jr., July 22, 1892; retired February 23, 1903.
Howell E. Jackson, February 18, 1893; died August 18, 1895.
Edward D. White, February 19, 1894; appointed Chief Justice December 12, 1910.
Rufus W. Peckham, December 9, 1895; died October 24, 1909.
Joseph McKenna, January 21, 1898.
Oliver Wendell Holmes, Jr., December 8, 1902.
William R. Day, March 2, 1903.
William H. Moody, December 17, 1906; retired November 20, 1910.
Horace H. Lurton, December 20, 1909; died July 12, 1914.
EDWARD D. WHITE, December 12, 1910; took the oath of office December 19, 1910.
Charles E. Hughes, May 2, 1910.
Willis Van Devanter, December 15, 1910.
Joseph R. Lamar, December 15, 1910.
Mahlon Pitney, March 13, 1912.
James C. McReynolds, August 29, 1914.

SUPREME JUDICIAL COURT. An appellate tribunal, and the court of last resort, in the states of Maine, Massachusetts, and New Hampshire. See those titles.

SUPREME POWER. The highest authority in the state. Ruth. Nat. L. b. 2, c. 4, p. 67.

SURCHARGE. To put more cattle upon a common than the herbage will sustain or than the party hath a right to do. 3 Bla. Com. 237. In case of common without stint it could only happen when insufficient herbage was left for the lord's own cattle; 1 Rolle, Abr. 399. The remedy was by distraining the beasts beyond the proper number; an action of trespass which must have been brought by the lord of the manor; an action on the case, or a writ of admeasurement of pasture. 2 Sharsw. Bla. Com. 238, n.

In Equity Practice. To prove the omission of an item from an account which is before the court as complete, which should be inserted to the credit of the party surcharging; Story, Eq. Jur. § 525; 2 Ves. 565; Perkins v. Hart, 11 Wheat. (U. S.) 237, 6 L. Ed. 463. It is opposed to *falsify*, which see. Leave to surcharge and falsify is granted in preference to opening an account, in case of an account stated by the parties or reported by an auditor, where the party obtaining the liberty would be concluded by the account were it not granted. See ACCOUNT; AUDITOR.

SURETY. A person who binds himself for the payment of a sum of money, or for the

performance of something else, for another. See SURETYSHIP.

SURETY COMPANIES. Acts authorizing surety companies to be sole surety, or to act in a fiduciary capacity without other security, are not invalid as granting a special or exclusive privilege; Roane Iron Co. v. Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856; Coleman's Adm'r v. Parrott, 13 S. W. 525, 11 Ky. L. Rep. 947; Gans v. Carter, 77 Md. 1, 25 Atl. 663; so as to acting as guardian; Johnson v. Johnson, 88 Ky. 275, 11 S. W. 5.

A surety company, having a capital stock of $550,000, with undertakings given in various suits amounting to $5,000,000, and on bonds for the fidelity of employees amounting to $12,000,000, where its losses on the latter did not exceed one-eighth of the premiums received and it had full collateral security for the former, was accepted as surety; Rosenwald v. Ins. Co., 9 N. Y. Civ. Pro. Rep. 444; but the same company was held insufficient on substantially the same showing in 9 N. Y. Civ. Proc. R. 444, note.

The premium paid by a libellant in admiralty to a surety company for a bond for costs required by rule of court is taxable as costs; The Bencliff, 158 Fed. 377 (C. C., E. D. of Pa.), reversing the earlier practice. So of a bond given for the release of a libelled vessel; The South Portland, 95 Fed. 295; and of a bond given by the claimant of a libelled vessel, under admiralty rule 53, to respond in damages as claimed in a cross libel; Jacobsen v. Expedition Co., 112 Fed. 73, 50 C. C. A. 121; and an appeal and supersedeas bond; Edison v. Mutoscope Co., 117 Fed. 192; and a supersedeas bond on a writ of error; Jones v. Edward B. Smith Co., 183 Fed. 990; Church v. Wilkeson-Tripp Co., 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059 (under a statute); *contra*, as to an appeal bond, on the ground that there is no authority for taxing such an item; Lee Injector Mfg. Co. v. Injector Co., 109 Fed. 964, 48 C. C. A. 760 (C. C. A., 6th Cir., per Lurton, C. J.); such premium is not taxable in bankruptcy; In re Hoyt, 119 Fed. 987.

A statute permitting a surety company's premium on a trustee's bond to be charged as part of his expenses is constitutional; In re Clark's Estate, 195 Pa. 527, 46 Atl. 127, 48 L. R. A. 587, with full note.

A surety company, which absorbs the assets of another surety company and assumes its liabilities, is liable on a bond executed by its predecessor; Manny v. Surety Co., 103 Mo. App. 716, 78 S. W. 69. A surety company which executed a supersedeas bond under an act of congress is estopped to deny that such act authorized it to execute the bond; Ranney-Alton M. Co. v. Const. Co., 2 Ind. T. 134, 48 S. W. 1028.

The courts generally hold that a paid surety company can be relieved from its obligation of suretyship only where a departure from the contract is shown to be a material variance; Young v. Bonding Co., 228 Pa. 373, 77 Atl. 623; Philadelphia v. Deposit Co., 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085; U. S. v. Guaranty Co., 178 Fed. 721; Justice v. Surety Co., 209 Fed. 105.

See INSURANCE; TRUST COMPANIES; SURETYSHIP.

SURETY OF THE PEACE. See PEACE.

SURETYSHIP. An undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.

It is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. Hope v. Board, 43 La. Ann. 738, 9 South. 754.

The liability of indorsers of notes given by tobacco growers upon advances by warehousemen is held to be that of guarantors, not sureties; Carsey v. Swan, 150 Ky. 473, 150 S. W. 534; so of a person who is not a party to a note which is to become a valid obligation against the maker upon its delivery to the payee, by writing his name upon the back of it; Bates v. Worthington, 163 Ill. App. 75.

The subjects of guaranty and suretyship are however, nearly related, and many of the principles are common to both. See GUARANTY. There must be a principal debtor liable, otherwise the promise becomes an original contract; and, the promise being collateral, the surety must be bound to no greater extent than the principal. Suretyship is one of the contracts included in the statute of frauds; 29 Car. II. c. 3.

The contract must be supported by a consideration, like every other promise. Without that, it is void, apart from the statute of frauds, and whether in writing or not; 4 Taunt. 117; Cobb v. Page, 17 Pa. 469; Bacharach v. McCurrach, 43 Ill. App. 584; Briggs v. Latham, 36 Kan. 205, 13 Pac. 129.

Kent, C. J., divides secondary undertakings into three classes: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. Here there is not, and need not be, any other consideration than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt will not

attach to this subsequent promise. 3. When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds; the last is not; Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317. This classification has been reviewed and affirmed in numerous cases; Mallory v. Gillett, 21 N. Y. 415; Loomis v. Newhall, 15 Pick. (Mass.) 159.

The rule that the statute does not apply to class third has, however, been doubted; and it appears to be admitted that the principle is there inaccurately stated. The true test is the nature of the *promise*, not of the *consideration;* Maule v. Bucknell, 50 Pa. 39; 94 E. C. L. R. 885. But see *infra.*

A simpler division is into two classes. Where the principal obligation exists before the collateral undertaking is made. Where there is no principal obligation prior in time to the collateral undertaking. In the last class the principal obligation may be contemporaneous with or after the collateral undertaking. The first class includes Kent's second and third, the second includes Kent's first, to which must be added cases where the guaranty referring to a present or future principal obligation does not share the consideration thereof, but proceeds on a distinct consideration. Moreover, there are other original undertakings out of the statute of frauds and valid though by parol, besides his third class. These are where the credit is given exclusively to the promisor though the goods or consideration pass to another. Under this division, undertakings of the first class are original: 1. When the principal obligation is thereby abrogated. 2. When without such abrogation the promisor for his own advantage apparent on the bargain undertakes for some new consideration moving to him from the promisee. 3. Where the promise is in consideration of some loss or disadvantage to the promisee. 4. Where the promise is made to the principal debtor on a consideration moving from the debtor to the promisor; Theob. Sur. 37, 49. The cases under these heads will be considered separately.

First, where the principal obligation is pre-existent, there must be a new consideration to support the promise; and where this consideration is the discharge of the principal debtor, the promise is original and not collateral, as the first requisite of a collateral promise is the existence of a principal obligation. This has been held in numerous cases. The discharge may be by agreement, by novation or substitution, by discharge on final process, or by forbearance under certain circumstances; 4 B. & P. 124; Mallory v. Gillett, 21 N. Y. 412; Walker v. Penniman, 8 Gray (Mass.) 233.

But the converse of this proposition, that where the principal obligation remains, the promise is collateral, cannot be sustained, though there have been repeated dicta to that effect; Browne, Stat. Fr. § 193; Jackson v. Rayner, 12 Johns. (N. Y.) 291; denied in Mallory v. Gillett, 21 N. Y. 415; Langdon v. Brumby, 7 Ala. 54; Templeton v. Bascom, 33 Vt. 132.

The main question arising in cases under this head is whether the debtor is discharged; and this is to a great extent a question for the jury. But if in fact the principal debt is discharged by agreement and the new promise is made upon this consideration, then the promise is original, and not collateral; Wood v. Corcoran, 1 Allen (Mass.) 405.

But where there is an existing debt, for which a third party is liable to the promisee, and the promisor undertakes to be responsible for it, still the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability; Eden v. Chaffee, 160 Mass. 225, 35 N. E. 675.

A discharge of the debtor from custody, or surrender of property taken on an execution, is a good discharge of the debt; 11 M. & W. 857; Anderson v. Davis, 9 Vt. 137, 31 Am. Dec. 612; Mallory v. Gillett, 21 N. Y. 415.

Where the transaction amounts to a sale of the principal debt in consideration of the new promise, the debtor is discharged, and the promise is original; 3 B. & C. 855. So where a purchaser of goods transfers them to another, who promises the vendor to pay for them, this is a substitution and an original promise; 5 Taunt. 450; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; Rice v. Carter's Adm'r, 33 N. C. 298; Rowe v. Whittier, 21 Me. 545.

A mere forbearance to press the principal debt is not such a discharge of the debtor as will make the promise original; 1 Sm. L. C. 387; Mallory v. Gillett, 21 N. Y. 412; Jones v. Walker, 13 B. Monr. (Ky.) 356; but where the forbearance is so protracted as to discharge the debtor, it may be questioned whether the promise does not become original; Templeton v. Bascom, 33 Vt. 132.

Second, the promise will be original if made in consideration of some new benefit moving from the promisee to the promisor; Kutzmeyer v. Ennis, 27 N. J. Law, 371; Farley v. Cleveland, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387; Bull. N. P. 281.

Third, the promise is original where the consideration is some loss to the promisee or principal creditor; but it is held in many such cases that the loss must also work some benefit to the promisor; 6 Ad. & E. 564; Mauer v. Washington, 3 Strobh. Eq. (S. C.) 177; Lawrence v. Fox, 20 N. Y. 268. As to merely refraining from giving an execution

to the sheriff, see Russell v. Babcock, 14 Me. 140.

There have been decisions which hold that the mere relinquishment of a lien by the plaintiff takes the case out of the statute; Slingerland v. Morse, 7 Johns. (N. Y.) 464. It would seem that a surrender of a lien merely is not sufficient consideration; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; but it must appear that the surrender is in some way beneficial to the promisor, as when he has an interest in the property released; Prime v. Koehler, 77 N. Y. 91; Conradt v. Sullivan, 45 Ind. 180, 15 Am. Rep. 261; Curtis v. Brown, 5 Cush. (Mass.) 488.

The rule is well settled that when the leading object of a promisor is to induce a promisee to forego some lien, interest, or advantage, and thereby to confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original, and binding contract, although the effect of it may be to assume the debt and discharge the liability of another; 6 Maule & S. 204; Alger v. Scoville, 1 Gray (Mass.) 391. The advantage relinquished by the promisee must directly enure to the benefit of the promisor, so as in effect to make it purchase by the promisor; Curtis v. Brown, 5 Cush. (Mass.) 488; Jackson v. Rayner, 12 Johns. (N. Y.) 291. It is stated in many cases that the promise is original where the consideration moves to the promisor. The true test, however, must be found not in the consideration, but in the nature of the promise. Wherever the new promisor undertakes for his own default; where his promise is virtually to pay his own debt in a peculiar way, or if, by paying the debt, he is really discharging a liability of his own, his promise is original. The only case in which consideration can affect the terms of the promise is where the consideration of the promise is the extinguishment of the original liability; Colt v. Root, 17 Mass. 229; Rollison v. Hope, 18 Tex. 446; Emerson v. Slater, 22 How. (U. S.) 28, 16 L. Ed. 360.

Fourth, the promise is original if made on a consideration moving from the debtor to the promisor; Gold v. Phillips, 10 Johns. (N. Y.) 412; Mason v. Hall, 30 Ala. 599; Alger v. Scoville, 1 Gray (Mass.) 391; Emerson v. Slater, 22 How. (U. S.) 28, 16 L. Ed. 360; Peyson v. Conniff, 32 Neb. 269, 49 N. W. 340.

For the rule in a class of cases quite analogous, see Prather v. Vineyard, 9 Ill. 40; Drakeley v. Deforest, 3 Conn. 272.

Where the guaranty relates to a contemporaneous or future obligation, the promise is original, *(a)* if credit is given exclusively to the promisor, *(b)* if the promise is merely to indemnify.

In the first of these cases the question to whom credit was given must be ultimately for the jury in each case. If there is any primary liability, and the creditor resorts to the principal debtor first, the promise is collateral. Thus, if the promisor says, "Deliver goods to A, and I will pay you," there is no primary obligation on the part of A, and the promise is original; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148. But if he says, "I will see you paid," or, "I promise you that he will pay," the promise would be collateral; 1 H. Bla. 120; Andrews v. Creegan, 7 Fed. 477; Wagner v. Hallack, 3 Colo. 176; Stone v. Walker, 13 Gray (Mass.) 613; Boston v. Farr, 148 Pa. 220, 23 Atl. 901 (where it was left to the jury to decide whether it was an original undertaking).

A promise to indemnify merely against contingent loss from another's default is original; Myers v. Morse, 15 Johns. (N. Y.) 425. A doubt is expressed by Browne, Stat. of Frauds, § 158, whether the fact that mere indemnity is intended, makes the promise original, because in many cases—those where the indemnity is against the default of a third person—there is an implied liability of that person, and the promise is collateral thereto. Now, there are three classes of cases. *First*, it is clear that where the indemnity is against the promisor's default or debt he is already liable without his promise; and to use this as a defence and make the promise collateral thereto would be using the law as a cover to a fraud; Stocking v. Sage, 1 Conn. 519; 6 Bingh. 506; Fenner v. Lewis, 10 Johns. (N. Y.) 42; Weld v. Nichols, 17 Pick. (Mass.) 538. *Second*, so where the only debt against which indemnity is promised is the promisee's, this, being not the debt of another, but of the promisee, is clearly not within the statute, but the promise is original. And even if the execution of such a promise would discharge incidentally some other liability, this fact does not make the promise collateral; 13 M. & W. 561; Alger v. Scoville, 1 Gray (Mass.) 391; Mersereau v. Lewis, 25 Wend. (N. Y.) 243; Soule v. Albee, 31 Vt. 142. *Third*, but where there is a liability implied in another person, and the promise refers to his liability or default, and if executed will discharge such liability or default, the promise would seem on reason to be collateral and binding like a suretyship for future advances—that is, when accepted; Draughan v. Bunting, 31 N. C. 10; 10 Ad. & E. 453; Kingsley v. Balcome, 4 Barb. (N. Y.) 131. But in many cases the rule is broadly stated that a promise to indemnify merely is original; 8 B. & C. 728 (overruled, 10 Ad. & E. 453); Alger v. Scoville, 1 Gray (Mass.) 391; Harrison v. Sawtel, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337 (overruled, Kingsley v. Balcome, 4 Barb. [N. Y.] 131); Holmes v. Knights, 10 N. H. 175; Smith v. Sayward, 5 Me. 504. In other cases the distinction is made to rest on the fact that the engagement is made to the debtor; Aldrich v. Ames, 9 Gray (Mass.) 76; 11 Ad. & E. 438; and in

other cases, on the futurity of the risk or liability; Perley v. Spring, 12 Mass. 297.

The last ground is untenable; future guarantees binding when accepted or acted upon, and those against torts are expressly to the contrary. The first ground is too broad, as shown above; and the second seems to ignore the clear primary liability of the principal debtor.

If a third person makes a direct and unconditional agreement to pay for property of which another is to receive the benefit, the agreement being contemporaneous with the sale of the property, and the intention both of the promisor and the promisee being that the promisor is liable in the first instance for the payment of the purchase price, the agreement is treated as an original agreement and not within the statute of frauds, as where goods were sold to a third person on credit of the promisor; Linam v. Jones, 134 Ala. 570, 33 South. 343; Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143; Cauthron Lumber Co. v. Hall, 76 Ark. 1, 88 S. W. 594; where the landlord of a boarding house instructed the proprietor of a meat market to let his tenant (operating the boarding house) have what meat she wanted and charge it to him; Sears v. Flodstrom, 5 Idaho, 314, 49 Pac. 11; where a contractor promised a grocer to pay for groceries furnished a subcontractor; Lusk v. Throop, 189 Ill. 127, 59 N. E. 529; where instructions were given to furnish to designated persons all the goods they wanted, to charge them directly to the promisor; Temple v. Goldsmith, 118 Mich. 172, 76 N. W. 324; Phelps v. Stone, 172 Mass. 355, 52 N. E. 517; Lessenich v. Pettit, 91 Ia. 609, 60 N. W. 192; where a promisor agreed to pay for property sold to a third party in goods to be furnished by him to the seller; Lindsey v. Heaton, 27 Neb. 662, 43 N. W. 420; Chick v. Coal Co., 78 Mo. App. 234; Mankin v. Jones, 63 W. Va. 373, 60 S. E. 248, 15 L. R. A. (N. S.) 214.

A promise to become surety for any amount of silver up to a stated amount which one might place in the hands of another for manufacture is also held an original promise; Marquand v. Hipper, 12 Wend. (N. Y.) 520; an agreement to repay expenses to be incurred in providing a funeral for the brother of the promisor; McNamee v. McNamee, 9 N. Y. St. R. 720; an agreement by a solicitor to pay the amount required of his client as the condition of a continuance, where the terms were not accepted by his client; Sampson v. Swift, 11 Vt. 315.

Where the surrounding circumstances show that it was the intent of the promisor, in using language of this character, to be bound primarily, he will be held as an original promisor; Davis v. Patrick, 141 U. S. 489, 12 Sup. Ct. 58, 35 L. Ed. 826; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863; Higgins v. Hallock, 60 Hun, 125, 14 N. Y. Supp. 550 affirmed, 138 N. Y. 606, 33 N. E. 1082.

An agreement by an employer of labor that he would see the board of his laborers paid has been held an original promise; Grant v. Wolf, 34 Minn. 32, 24 N. W. 289; Knig v. Lumber Co., 80 Minn. 274, 83 N. W. 170; Marr v. R. Co., 121 Ia. 117, 96 N. W. 716.

It is said that "a mere promise of indemnity which is not collateral to any liability on the part of another, either express or implied, is not within the statute, and such a case illustrates the rule that when there is no principal, the promise need not be in writing. On the other hand, when the promise to indemnify is in fact a promise to pay the debt of another, then clearly such promise is within the statute, and the fact that it is in form a promise to indemnify will make no difference." Brandt, Sur. & Guar. § 59. See 4 B. & S. 414.

When the principal obligation is void, voidable, not enforceable, or unascertained, the promise is original, there being in this case no principal obligation to sustain the promise as collateral; Browne, Stat. Fr. § 156. It may be questionable, however, whether the promise will in such case be original unless the promisor knows the principal liability to be void or voidable; Burge, Surety 6; but this question may be settled by the principle that where credit is given to the principal, notwithstanding his obligation is void or voidable, the promise of the surety is collateral; 4 Bingh. 470; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; but if no such credit is given or implied, the promise is collateral. See Erwin v. Downs, 15 N. Y. 576; Drake v. Flewellen, 33 Ala. 106; Veazie v. Willis, 6 Gray (Mass.) 90. Such would be the guaranty of an infant's promise; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; and this is accordingly so held; Chapin v. Lapham, 20 Pick. (Mass.) 467 (but see Dexter v. Blanchard, 11 Allen (Mass.) 365, *contra*, as to the promise of a father to pay the debt of a minor son); Norton v. Eastman, 4 Me. (Greenl.) 521; though a distinction has been made in the case of a married woman; 4 Bingh. 470; Unangst v. Fitler, 84 Pa. 135; Davis v. Statts, 43 Ind. 103, 13 Am. Rep. 382; but the promise is collateral where the married woman has separate property which she can charge with the payment of her debts, and the credit is given exclusively to her; Connerat v. Goldsmith, 6 Ga. 14.

Where the defendants were sureties on a note given by a minor, who disaffirmed the contract upon attaining his majority, the defendants were not liable on the note; Keokuk County Bank v. Hall, 106 Ia. 540, 76 N. W. 832; but, in Gates v. Tebbetts, 83 Neb. 573, 119 N. W. 1120, 20 L. R. A. (N. S.) 1000, 17 Ann. Cas. 1183, it was held that the general rule is that one who becomes surety for a married woman, minor or other person, incapable of contracting, is not released by a discharge of the principal debtor.

Where the liability is unascertained at the time of the promise, the promise is original; as the liabilities must concur at the time of the undertaking to make a guaranty; Browne, Stat. Fr. § 196; 1 Salk. 27; *contra*, Ambl. 330. Under this head would come a promise to pay damages for a tort, there being no principal liability until judgment; 1 Wils. 305; or where the liability rests upon a future award; Jepherson v. Hunt, 2 Allen (Mass.) 417; and liability upon indefinite executory contracts in general. It is, however, said that the liability may be prospective at the time the promise is made. See Huffcut's Ans. Contr. 72.

The promise is clearly original where the promisor undertakes for his own debt. The rule is, unless the promisor himself or his property is ultimately to be made liable in default of the principal debtor, the statute does not apply; Browne, Stat. Fr. § 177. Thus, an engagement by one who owes the principal debtor to retain the principal debt, so that it may be attached by trustee or garnishee process, is not a collateral promise; Towne v. Grover, 9 Pick. (Mass.) 306; Ellenwood v. Fults, 63 Barb. (N. Y.) 321; Dee v. Downs, 50 Ia. 310.

So an agreement by a purchaser to pay part of the purchase-money to a creditor of the vendor is an agreement to pay his own debt; Lee v. Newman, 55 Miss. 365; Morrison & Co. v. Hogue, 49 Ia. 574; Wilson v. Bevans, 58 Ill. 232; or to pay a debt due a promisee by a third person out of moneys owing by a promisor to such third person; Estabrook v. Gebhart, 32 Ohio 415; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; Wilson v. Bevans, 58 Ill. 233; or for the application of a fund due a promisor by a third party; Justice v. Tallman, 86 Pa. 147. Such an agreement is an original promise.

Under the statute of frauds. At common law, a contract of guaranty or suretyship could be made by parol; but by the statute of frauds, 29 Car. II. c. 3, "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized:" so that under the statute all contracts of guaranty and suretyship must be in writing and signed. The words debt and default in the statute refer to contracts; 2 East 325; and debt includes only pre-existing liability; Perley v. Spring, 12 Mass. 297; miscarriage refers to torts; 2 B. & Ald. 613. Torts are accordingly within the statute, and may be guaranteed against; 2 B. & Ald. 613; Turner v. Hubbell, 2 Day (Conn.) 457, 2 Am. Dec. 115; though this has been doubted in regard to future torts; 1 Wils. 305. Perhaps a guaranty against future torts might be open to objections on the ground of public policy. But the unchallenged contracts of modern indemnity companies would seem to show that such an objection would not prevail.

A guaranty of indemnity to a surety is within the statute of frauds; Waterman v. Resseter, 45 Ill. App. 155.

The doctrine that a future contingent liability on the part of the principal is not within the statute; 1 Salk. 27; Perley v. Spring, 12 Mass. 297; is not tenable; and it is clear, both by analogy and on authority, that such a liability may support a guaranty, although such cases must be confined within very narrow limits, and the mere fact of the contingency is a very strong presumption that the promise is original; Browne, Stat. Fr. § 196; Harrington v. Rich, 6 Vt. 668; Hartley v. Varner, 88 Ill. 561.

Where the promise is made to the debtor, it is not within the statute; Reed, Stat. Fr. 76; Price v. Combs, 12 N. J. L. 188; Mather v. Perry, 2 Den. (N. Y.) 162. "We are of opinion that the statute applies only to promises made to the person to whom another is answerable;" 11 Ad. & E. 446; Alger v. Scoville, 1 Gray (Mass.) 391. The word *another* in the statute must be understood as referring to a third person, and not to a debt due from either of the contracting parties; Preble v. Baldwin, 6 Cush. (Mass.) 552. False and deceitful representations of the credit or solvency of third persons are not within the statute; Browne, Stat. Fr. § 181; 4 Camp. 1.

The English rule required the consideration to be expressed; 5 East 10. It could not be proved by parol; 4 B. & Ald. 595. But by 19 & 20 Vict. no such promise shall be deemed invalid by reason only that the consideration does not appear in writing or by necessary inference from a written instrument: 7 C. B. (N. S.) 361. The rule varies in different states, and in some states is settled by statute. See Brandt, Sur. & Guar. § 82. In some states there are statutes similar to the English statutes. In other states the consideration is required by statutes to be expressed. Of states where statutes are silent, some have accepted and some rejected the English construction of statutes of frauds in Wain v. Walters, 5 East 10, *supra*.

The courts lay hold of any language which implies a consideration; Church v. Brown, 21 N. Y. 315. So where the guaranty and the matter guaranteed are one simultaneous transaction, both will be construed in connection, and the consideration expressed in the latter applied to the support of the former, if these are words of reference in the guaranty; Simons v. Steele, 36 N. H. 73.

Formation of the obligation. In construing the language of the contract to decide whether it constitutes an original promise or

a guaranty, it is difficult to lay down a general rule: the circumstances of particular cases vary widely. See GUARANTY; [1894] 1 Q. B. 288. "One test is if the promisor is totally unconnected with the transaction except by means of his promise to pay the loss, the contract is a guaranty; if he is to derive some benefit from it, his contract is an indemnity." *Id.* The word guaranty or surety may or may not indicate correctly the contract, and the circumstances of the case may make an indorser liable as a guarantor or surety, without any words to indicate the obligation; Ketchell v. Burns, 24 Wend. (N. Y.) 456.

In general, if a promissory note is signed or indorsed when made by a stranger to the note he becomes a joint promisor and liable on the note; Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111; Riley v. Gerrish, 9 Cush. (Mass.) 104; Schneider v. Schiffman, 20 Mo. 571; and this will be true if indorsed after delivery to the payee in pursuance of an agreement made before the delivery; Hawkes v. Phillips, 7 Gray (Mass.) 284; but parol evidence may be introduced to show that he is a surety or guarantor; Fraser v. McConnell, 23 Ga. 368; Eberhart v. Page, 89 Ill. 550. If the third party indorses after delivery to the payee without any previous agreement, he is merely a second indorser; Taylor v. M'Cune, 11 Pa. 466; Hoffman v. Moore, 82 N. C. 313; and he is liable as a maker to an innocent holder; Page v. Lathrop, 20 Mo. 591. But it was held otherwise where the signature was on the face of the note; Sargent v. Robbins, 19 N. H. 572; and the same is held where he signs at inception of the note, in pursuance of a custom, leaving a blank for the payee's signature above his name; Weaver v. Marvel, 12 La. Ann. 517. Such an indorser is held to guaranty that the note shall be collectible when due; Gillespie v. Wheeler, 46 Conn. 410. The time of signing may be shown by parol evidence; Bright v. Carpenter, 9 Ohio 139, 34 Am. Dec. 432.

A payee or subsequent party who executes a guarantee upon a bill or note is not liable as indorser; Davis v. Campbell, 3 Stew. (Ala.) 319; Springer v. Hutchinson, 19 Me. 359; *contra*, Vanzant v. Arnold, 31 Ga. 210; Partridge v. Davis, 20 Vt. 499.

It has been held that a third person indorsing in blank at the making of the note may show his intention by parol; Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179; but not if he describes himself as guarantor, or if the law fixes a precise liability upon indorsements in blank; Seabury v. Hungerford, 2 Hill, (N. Y.) 80. But this has been doubted; 33 E. L. & E. 282. In New York the cases seem to take the broad ground that an indorser in blank, under all circumstances, is an indorser merely, and cannot be made a guarantor or surety; Spies v. Gilmore, 1 N. Y. 324. See Good v. Martin, 95 U. S. 90, 24 L. Ed. 341.

The consideration to support a parol promise to pay the debt of another must be such as would be good relating to the payment of that particular debt or of any other of equal amount; Thomas v. Delphy, 33 Md. 373. It need not necessarily be a consideration distinct from that of the principal contract. An executed or past consideration to the principal is not sufficient; Pratt v. Hedden, 121 Mass. 116; Clopton v. Hall, 51 Miss. 482.

The giving of new credit where a debt already exists has been held a sufficient consideration to support a guaranty of the old and new debt; Loomis v. Newhall, 15 Pick. (Mass.) 159; Hargroves v. Cooke, 15 Ga. 321; but the weight of authority would seem to require that there should be some further consideration; Reed, Stat. Fr. 70; De Wolf v. Rabaud, 1 Pet. (U. S.) 476, 7 L. Ed. 227; Sears v. Brink, 3 Johns. (N. Y.) 211, 3 Am. Dec. 475; Elliott v. Giese, 7 Harr. & J. (Md.) 457. A consideration that will take a case out of the statute of frauds must be such a consideration as will make the collateral debt, agreed to be paid, the debt of the promisor. It must be an original undertaking; Waterman v. Resseter, 45 Ill. App. 155.

Forbearance to sue the debtor is a good consideration, if definite in time; Coffin v. Trustees, 92 Ind. 337; Dahlman v. Hammel, 45 Wis. 466; or even if of considerable time; Cro. Jac. 683; or reasonable time; Board of Directors v. Peterson, 4 Wash. 148, 29 Pac. 995. But there must be an actual forbearance, and the creditor must have had a power of enforcement; 4 East 465. But the fact that it is doubtful whether such a power exists, does not injure the consideration; 5 B. & Ad. 123. Forbearance has been held sufficient consideration even where there was no well-grounded claim; 18 L. J. C. P. 222; Kuns' Ex'r v. Young, 34 Pa. 60; *contra*, Cabot v. Haskins, 3 Pick. (Mass.) 83. A short forbearance, or the deferment of a remedy, as postponement of a trial, or postponement of arrest, may be a good consideration; and perhaps an agreement to defer indefinitely may support a guaranty; Livingston v. Roosevelt, 4 Johns. (N. Y.) 257, 4 Am. Dec. 273; Sage v. Wilcox, 6 Conn. 81. A mere agreement not to push an execution is too vague to be a consideration; McKinney v. Quilter, 4 McCord (S. C.) 409; and a postponement of a remedy must be made by agreement as well as in fact; Mecorney v. Stanley, 8 Cush. (Mass.) 85; Sage v. Wilcox, 6 Conn. 81; 11 C. B. 172.

The contract of suretyship may be entered into absolutely and without conditions, or its formation may be made to depend on certain conditions precedent. But there are some conditions implied in every contract of this kind, however absolute on its face. In the case of bonds, as in other contracts of suretyship, it is essential that there should be a principal, and a bond executed by the surety is not valid until executed by the principal also. One case, 10 Co. 100 *b*, sometimes cited

to the contrary, is not clear to the point. The argument that the surety is bound by his recital under seal fails, especially in all statute bonds, where one important requisite of the statute, that the bond should be executed by the principal, fails; Wood v. Washburn, 2 Pick. (Mass.) 24; 4 Beav. 383.

Where the surety's undertaking is conditional on others joining, and this condition is known to the creditor, he is not ordinarily liable until they do so; 4 B. & Ad. 440; Hunt v. State, 53 Ind. 321; Goff v. Bankston, 35 Miss. 518; Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; *contra*, if the obligee is ignorant of the condition; Millett v. Parker, 2 Metc. (Ky.) 608; Dair v. U. S., 16 Wall. (U. S.) 1, 21 L. Ed. 491; Chase v. Hathorn, 61 Me. 505. So the surety is not bound if the signatures of his cosureties are forged, although he has not made his signature expressly conditional on theirs; 2 Am. L. Reg. 349; but see 8 *id.* N. S. 665. Where a bond to a sheriff; Police Jury v. Haw, 2 La. 41; and an administration bond; State v. Gregory, 119 Ind. 503, 22 N. E. 1; were signed in expectation by the party signing that other sureties would sign, and the bond was delivered without such other signatures, the surety was held liable. If a condition upon which a surety signs be known to the creditor and be not complied with, the surety is not liable; Jones v. Keer, 30 Ga. 93.

Where sureties signed a bond in ignorance of the fact that the principal had not signed, they are not bound; School Dist. No. 80 v. Lapping, 100 Minn. 139, 110 N. W. 849, 12 L. R. A. (N. S.) 1105. A bond executed and delivered to the court clerk, to avoid an injunction, is binding on all the parties notwithstanding a collateral condition by one of the sureties that it was not to be used until an indemnity bond had been given him; Hendry v. Cartwright, 14 N. M. 72, 89 Pac. 309. See 12 L. R. A. (N. S.) 1105, note. Persons who sign a note as sureties on condition that it shall not become binding unless the signature of a third person is secured as cosurety are not liable until such signature is secured; Bank of Benson v. Jones, 147 N. C. 419, 61 S. E. 193, 16 L. R. A. (N. S.) 343.

The acceptance of the contract by the promisee by words or by acts under it is often made a condition precedent to the attaching of the liability of the surety. The general rule is that where a future guaranty is given, absolute and definite in amount, no notice of acceptance is necessary; but if it is contingent and indefinite in amount, notice must be given; Norton v. Eastman, 4 Me. (Greenl.) 521; Stafford v. Low, 16 Johns. (N. Y.) 67; but the promisee has a reasonable time to give such notice; Paige v. Parker, 8 Gray (Mass.) 211.

Where defendant, at plaintiff's request, wrote him a letter guaranteeing payment for any goods which another might purchase, and goods were subsequently purchased, and the defendant's relations with the purchaser were such as should have kept him informed of these transactions, the mere lack of notice of acceptance of the guaranty is no bar to recovery; Drucker v. Heyl-Dia, 52 Misc. 142, 101 N. Y. Supp. 796.

A distinction is to be made between a guaranty and an offer to guaranty. No notice of acceptance is requisite when a guaranty is absolute; Bank of La. v. Coster's Ex'rs, 3 N. Y. 212, 53 Am. Dec. 280; Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 511; but an offer to guaranty must have notice of acceptance; and till accepted it is revocable; 12 C. B. N. S. 784; 6 Dow. H. L. C. 239; Shupe v. Galbraith, 32 Pa. 10; and where acceptance is required, it may be as well implied by acts as by words; as, by receiving the written guaranty from the promisor; Paige v. Parker, 8 Gray (Mass.) 211; or by actual knowledge of the amount of sales under a guaranty of the purchase-money; Noyes v. Nichols, 28 Vt. 160.

The rule requiring notice is said to be based upon "the nature and definition of a contract, which requires the assent of a party to whom a proposal is made, to be signified to the party making it, in order to constitute a binding promise. . . . The rule proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become binding as an obligation until accepted by the party to whom it is made; that, until then, it is inchoate and incomplete and may be withdrawn by the proposer." Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. Ed. 686. When the guaranty is contemporaneous with the principal contract, notice is unnecessary; Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Lemp v. Armengol, 86 Tex. 690, 26 S. W. 941; so, where there has been a precedent request; Hasselman v. Japanese Development Co., 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207; *contra*, Kay v. Allen, 9 Pa. 320. Notice must be given of an offer to guarantee advances to be made by another to a third party, in order to bind the guarantor; 1 M. & S. 557. Knowledge that a guaranty is being acted upon is sufficient in the case of guaranties of existing debts, or of contemporaneous debts; Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. Ed. 686. But in case of guaranties of the repayment of future advances, the cases are in conflict as to whether notice is necessary. That notice is necessary, see Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. Ed. 686; that it is generally unnecessary, see Union Bank of La. v. Coster's Ex'rs, 3 N. Y. 203, 53 Am. Dec. 280; Crittenden v. Fiske, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; that it is necessary where the amount of the proposed advance is uncertain, but unnecessary where

it is certain, see Snyder v. Click, 112 Ind. 293, 13 N. E. 581. See, generally, Huffcut's Ans. Contr. 27. One who, as surety, executes a bond with another, conditioned for the payment of the moneys advanced the other, is not entitled to notice of the acceptance of the bond by the obligee; Hall v. Weaver, 34 Fed. 104.

Where a contract of guaranty is signed by the guarantor without any previous request of the other party, and in his absence and for no other consideration between them, except future advances to be made to the principal debtor, there must be an acceptance of the guaranty by the other party in order to complete the contract; Davis Sewing Machine Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173, 29 L. Ed. 480; Barnes Cycle Co. v. Reed, 84 Fed. 605; Gardner v. Lloyd, 110 Pa. 285, 2 Atl. 562; Coe v. Buehler, 110 Pa. 366, 5 Atl. 20.

Construction and extent of obligation. The liability of a surety cannot exceed, in any event, that of the principal, though it may be less. The same rule does not apply to the remedies, which may be greater against the surety. But, whatever may be the liability imposed upon the surety, it is clear that it cannot be extended by implication beyond the terms of the contract. His obligation is *strictissimi juris*, and cannot be extended beyond the precise terms of the contract; Walsh v. Bailie, 10 Johns. (N. Y.) 180; Coughran v. Bigelow, 9 Utah 260, 34 Pac. 51. Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are never allowed to enlarge, or in any degree to change, their legal obligations; Leggett v. Humphreys, 21 How. (U. S.) 66, 16 L. Ed. 50. And this rule has been repeatedly reaffirmed; McCluskey v. Cromwell, 11 N. Y. 598; Kellogg v. Stockton, 29 Pa. 460; Smith v. U. S., 2 Wall. (U. S.) 235, 17 L. Ed. 788. It is quite true, that in one sense, the contract of a surety is *strictissimi juris*, and it is not to be extended beyond the express terms in which it is expressed. The rule, however, is not a rule of construction of a contract, but a rule of application of the contract after the construction of it has been ascertained.

The obligation of sureties cannot be extended by implication or enlarged construction of the terms of the contract entered into; Crane v. Buckley, 203 U. S. 441, 27 Sup. Ct. 56, 51 L. Ed. 260; but the rule is relaxed in the case of a compensated surety who is regularly engaged in that business; Keefer v. School Dist., 203 Pa. 337, 52 Atl. 245; Atlantic Trust & Deposit Co. v. Laurinburg, 163 Fed. 690, 90 C. C. A. 274.

Where the question is as to the meaning of the language of the contract, there is no difference between the contract of the surety and that of anybody else; Gamble v. Cuneo, 21 App. Div. 413, 47 N. Y. Supp. 548.

The remedies against the surety may be more extensive than those against the principal, and there may be defences open to the principal, but not to the surety,—as, infancy or coverture of the principal,—which must be regarded as a part of the risks of the surety; St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295.

The liability of the surety extends to and includes all securities given to him by the principal debtor, the converse of the rule stated below in the case of collateral security given to the creditor; Paris v. Hulett, 26 Vt. 308. Thus a creditor is entitled in equity to the benefit of all securities given by the principal debtor for the indemnity of his surety; Haven v. Foley, 18 Mo. 136. If the surety receives money from the principal to discharge the debt he holds it as trustee of the creditor; Green v. Dodge, 6 Ohio 80, 25 Am. Dec. 736.

A creditor is bound to use proper care and intelligence in the management and collection of collateral securities; the surety will be released to the extent of the loss occasioned by his negligence; Bank of Philippi v. Kittle, 69 W. Va. 171, 71 S. E. 109, 37 L. R. A. (N. S.) 699, Ann. Cas. 1912D, 113.

A payment made by the principal before the claim is barred by the statute of limitations, keeps the debt alive as to the surety; otherwise, if made after the statute has run; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.

In the common case of bonds given for the faithful discharge of the duties of an office, the bond covers only the particular term of office for which it is given, and it is not necessary that this should be expressly stated; nor will the time be extended by a condition to be bound "during all the time A (the principal) continues," if after the expiration of the time A holds over merely as an acting officer, without a valid appointment; Ward v. Whitney, 3 Sandf. (N. Y.) 403. The circumstances of particular cases may extend the strict rule stated above, as in the case of officers annually appointed. Here, although the bond recites the appointment, if it is conditioned upon his faithful accounting for money received before his appointment, the surety may be held; 9 B. & C. 35; Worcester Bank v. Reed, 9 Mass. 267, 6 Am. Dec. 65. But the intention to extend the time, either by including past or future liabilities, must clearly appear; 4 B. & P. 175. See Anaheim Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048. Generally the recital cannot be enlarged and extended by the condition; Theob. Surety 66. And where the recital sets forth an employment for twelve months, this time is not controlled by a condition, "from time to time annually, and at all times thereafter during the continuance of this employment," although the employment is actually contin-

ued beyond the year; 2 B. & Ald. 431; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1.

So the obligation may cease by a change in the character of the office or employment; 3 Wils. 530; but an alteration in the character of the obligees, by taking in new partners, does not necessarily terminate the obligation; 10 B. & C. 122. But where an essential change takes place, as the death of the obligee, the obligation is terminated, although the business is carried on by the executors; 1 Term 18.

Where one becomes surety for two or either of them, the obligation is terminated by the death of one of the principals; 1 Bingh. 452; but this is where the obligation is essentially personal; and where a bond for costs was given by two as "defendants," the surety was not discharged by the death of one; 5 B. & Ald. 261. A surety for a lessee is not liable for rent after the term, although the lessee holds over; Brewer v. Knapp, 1 Pick. (Mass.) 332.

If the law provides that a public officer shall hold over until a successor is appointed, the sureties on the official bond are liable during such holding over; Thompson v. State, 37 Miss. 518; Amherst Bank v. Root, 2 Metc. (Mass.) 522; *contra*, in the case of officers of corporations; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; but the liability of such surety extends only for such reasonable time as would enable the successor to be appointed; State v. Powell, 40 La. Ann. 241, 4 South. 447. And this provision is not controlled by an alteration of the law extending the term but leaving the provision intact; Com. v. Drewry, 15 Gratt. (Va.) 1. But when the term of an office created by statute or charter is not limited, but merely directory for an annual election, it seems the surety will be liable, though after the year, until his successor is qualified; Sparks v. Bank, 3 Del. Ch. 225.

In bonds, the penalty is the extreme amount of liability of the surety; but various circumstances may reduce the liability below this; Clark v. Bush, 3 Cow. (N. Y.) 151; 6 Term 303. If the engagement of the surety is general, the surety is understood to be obligated to the same extent as his principal, and his liability extends to all the accessories of the principal obligations; Scully v. Hawkins, 14 La. Ann. 183.

A surety's liability will not ordinarily extend beyond the penal sum of the bond, unless he has in some way resisted or obstructed the recovery of the claim; Thomas Laughlin Co. v. Am. Surety Co., 114 Fed. 627, 51 C. C. A. 247.

A surety on a cashier's bond is not liable for money collected by the cashier as an attorney-at-law, and not accounted for to the bank; Dedham Bank v. Chickering, 4 Pick. (Mass.) 314. So also where one was surety, and the bond was conditioned on the accounting by the principal for money received by him in virtue of his office as parish overseer, the surety was held not liable for money borrowed by the principal for parochial purposes; 7 B. & C. 491. But a surety on a collector's bond is liable for his principal's neglect to collect, as well as failure to pay over; 6 C. & P. 106.

As the surety is only liable to the obligations fairly intended at the execution of the bond, he cannot be held for a breach of new duties attached to his principal's office; Dedham Bank v. Chickering, 4 Pick. (Mass.) 314; or if any material change is made in the duties; Boston Hat Manufactory v. Messinger, 2 Pick. (Mass.) 223. A surety on an official bond is said to be liable generally for the faithful performance of duties imposed upon the officer, whether by laws enacted before or after the execution of the bond, where such duties are properly within the scope of the office; Brandt, Sur. & Guar. § 548.

If one guarantees payment for services, and the promisee partly performs the services, but fails of completing them from no fault of his own, the guarantor is liable to the amount of the part-performance; Mellen v. Nickerson, 12 Gray (Mass.) 445.

A bond for faithful performance of duties renders the sureties responsible for ordinary skill and diligence, as well as for integrity; American Bank v. Adams, 12 Pick. (Mass.) 303.

A continuing guaranty up to a certain amount covers a constant liability of that amount; but if the guaranty is not continuing, the liability ceases after the execution of the contract to the amount limited; 3 B. & Ald. 593.

A guaranty may be continuing or may be exhausted by one act. It is said that there is no general rule for determining the question; Brandt, Sur. & Guar. § 156. The general principle may be thus stated: When by the terms of the undertaking, by the recitals in the instrument, or by a reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend; Douglass v. Reynolds, 7 Pet. (U. S.) 113, 8 L. Ed. 626; 3 B. & Ald. 593. Thus, a guaranty for *any* goods to one hundred pounds is continuous; 12 East 227; or for "any debts not exceeding," etc.; 2 Camp. 413; or, "I will undertake to be answerable for *any* tallow not exceeding," etc., but "without the word *any* it might perhaps have been confined to one dealing;" 3 Camp. 220. The words, "I do hereby agree to

guaranty the payment of goods according to the custom of their trading with you, *in the sum of* £200," are held to constitute a continuing guaranty; 6 Bingh. 244; so of the words, "I agree to be responsible for the price of goods purchased at any time, to the amount of," etc.; Bent v. Hartshorn, 1 Metc. (Mass.) 24. The words "answerable for the amount of five sacks of flour" are clearly not continuous; 6 Bingh. 276. The court will look at the surrounding circumstances, in order to determine; L. R. 4 C. P. 595.

The contracts of guaranty and suretyship are not negotiable or assignable, and in general can be taken advantage of only by those who were included as obligees at the formation of the contract; Bleeker v. Hyde, 3 McLean, 279, Fed. Cas. No. 1,537. See GUARANTY. Accordingly, the contract is terminated by the death of one of several obligees; 4 Taunt. 673; or by material change, as incorporation; 3 B. & P. 34. But where a bond is given to trustees in that capacity, their successors can take advantage of it; 12 East 399. The fact that a stranger has acted on a guaranty does not entitle him to the benefits of the contract; Partridge v. Davis, 20 Vt. 499; and this has been held in the case of one of two guarantees who acted on the guaranty; Smith v. Montgomery, 3 Tex. 199. A guaranty is not negotiable, whether made by a payee or subsequent party to a bill or note; McDoal v. Yoemans, 8 Watts (Pa.) 361.

It is held that a guaranty addressed to no one in particular may be acted on by any one; Lowry v. Adams, 22 Vt. 160; but the true rule would seem to be that in such cases a party who had acted on the contract might show, as in other contracts, that he was a party to it within the intention at the making; the mere fact that no obligee is mentioned does not open it to everybody.

In an action against sureties for violation of a bond by the principals, it is not necessary to allege any violation on the part of the sureties; Farley v. Moran, 3 Cal. Unrep. 572, 31 Pac. 158.

The rule of construction applied to ordinary sureties is not applicable to the bonds of fidelity and casualty companies; any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the insured had reasonable ground to expect; Fidelity & Casualty Co. v. Supreme Council, 63 Fed. 48, 11 C. C. A. 96, 22 U. S. App. 439.

Enforcement of the obligation. As the surety cannot be bound to any greater extent than the principal, it follows that the creditor cannot pursue the surety until he has acquired a full right of action against the principal debtor. A surety for the performance of any future or executory contract cannot be called upon until there is an actual breach by the principal. A surety on a promissory note cannot be sued until the note has matured, as there is no debt until that time. All conditions precedent to a right of action against the principal must be complied with. Where money is payable on demand, there must have been a demand and refusal. But it is not necessary that the creditor should have exhausted all the means of obtaining his debt. In some cases it may be requisite to notify the surety of the default of the debtor, or to sue the debtor; but this depends upon the particular conditions and circumstances of each case, and cannot be considered a condition precedent in all cases. Even where the creditor has a fund or other security to resort to, he is not obliged to exhaust this before resorting to the surety; he may elect either remedy, and pursue the surety first. But if the surety pay the debt, he is entitled to claim that the creditor should proceed against such fund or other security for his benefit; Fawcetts v. Kimmey, 33 Ala. 261. And if the creditor having received such collateral security, avail himself of it, he is bound to preserve the original debt; for in equity the surety will be entitled to subrogation; Denny v. Lyon, 38 Pa. 98, 80 Am. Dec. 463. A judgment against the principal may be assigned to the surety upon payment of the debt; Tyler v. Hildreth, 77 Hun (N. Y.) 580, 28 N. Y. Supp. 1042. But an assignment of the debt must be for the whole; the surety cannot pay a part and claim an assignment *pro tanto;* Gannett v. Blodgett, 39 N. H. 150.

In general, it is not requisite that notice of the default of the principal should be given to the surety, especially when the engagement is absolute and for a definite amount; 14 East 514. The guarantor on a note is not entitled to notice as an indorser; Greene v. Thompson, 33 Ia. 293; Simpson's Ex'r v. Bovard, 74 Pa. 351; Sterling v. Stewart, 74 Pa. 445, 15 Am. Rep. 559; Barker v. Scudder, 56 Mo. 272. Laches in giving notice to the surety upon a draft of the default of the principal can only be set up as a defence in an action against the surety, in cases where he has suffered damage thereby, and then only to the extent of that damage; Bank v. Coster's Ex'rs, 3 N. Y. 203, 53 Am. Dec. 280; it is no defence to an action against a surety on a bond that the plaintiff knew of the default of the principal, and delayed for a long time to notify the surety or to prosecute the bond. Morris Canal & B. Co. v. Van Vorst's Adm'x, 21 N. J. L. 100. Mere passive delay in prosecuting a remedy against a principal does not release a surety; Benedict v. Olson, 37 Minn. 431, 35 N. W. 10; Edwards v. Dargan, 30 S. C. 177, 8 S. E. 858; Bank v. Homesley, 99 N. C. 531, 6 S. E. 797; not even if prolonged until the statute of limitations has run; Nelson v. Bank, 69 Fed. 798, 16 C. C. A. 425. Sureties on a supersedeas bond are not entitled to have a suit thereon stayed till attached lands of the

principal are sold and the security exhausted; Davis v. Patrick, 57 Fed. 909, 6 C. C. A. 632.

A judgment against a principal is at least *prima facie* evidence against the surety, though he was not notified of the action; Dexter, Horton & Co. v. Sayward, 66 Fed. 265.

Discharge of obligation. The obligation may be discharged by acts of the principal or by acts of the creditor. Payment, or tender of payment, by the one, and any act which would deprive the creditor of remedies which in case of default would enure to the benefit of the surety, are instances of discharge. In the first place, a payment by the debtor would of course operate to discharge the liability. The only questions which can arise upon this point are, whether the payment is applicable to the payment in question, and as to the amount. Upon the first of these, this contract is governed by the general rule that the debtor can apply his payment to any debt he chooses. The surety has no power to modify or direct the application, but is bound by the election of the principal; 2 Bingh. N. C. 7. If no such election is made by the debtor, the creditor may apply the payment to whichever debt he sees fit; Brewer v. Knapp, 1 Pick. (Mass.) 336. This power, however, only applies to voluntary payments, and not to payments made by process of law; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129. A surety on a promissory note is discharged by its payment, and the note cannot be again put in circulation; Chapman v. Collins, 12 Cush. (Mass.) 163; so, also, extension of time by the holder of a note at the request of one maker without the knowledge of the other who signed as a surety, releases the latter though the holder did not know of the relation between the two makers at the time the note was given; Scott v. Scruggs, 60 Fed. 721, 9 C. C. A. 246, 23 U. S. App. 280.

Where one of two sureties to a contract assented to a change which altered his liability to his prejudice, it was held that the other surety was released but the former was bound for the whole liability; Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366, 17 U. S. App. 442, 463. Whatever will discharge the surety in equity will be a defence at law; People v. Jansen, 7 Johns. (N. Y.) 337, 5 Am. Dec. 275; Boston Hat Manufactory v. Messinger, 2 Pick. (Mass.) 223.

A release of the principal debtor operates as a discharge of the surety; [1893] A. C. 313; though the converse is not true; Bridges v. Phillips, 17 Tex. 128; [1893] App. Cas. 313; Trotter v. Strong, 63 Ill. 272; unless the obligation is such that the liability is joint only, and cannot be severed. But if the creditor, when releasing the principal, reserves his remedies against the surety, the latter is not discharged; L. R. 7 C. P. 9; 4 Ch. App. Cas. 204; and "a creditor who is fully indemnified is not discharged by the release of the principal." Brandt, Sur. & Guar. § 147. The release of one of several sureties is said to release the others only so far as the one released would have been liable for contribution to the co-sureties; Jemison v. Governor of Ala., 47 Ala. 390; but see Starry v. Johnson, 32 Ind. 438. Other cases hold such a release to be a discharge of the co-sureties; Stockton v. Stockton, 40 Ind. 225; Towns v. Riddle, 2 Ala. 694. When the discharge of one surety varies the contract; Mitchell v. Burton, 2 Head. (Tenn.) 613; or increases the risk of the co-sureties, they are released also.

Fraud or alteration avoids a contract of suretyship. Fraud may be by the creditor's misrepresentation or concealment of facts. Unless, however, the contract between the debtor and creditor is unusual, the surety must *ask* for information; 12 Cl. & F. 109; Warren v. Branch, 15 W. Va. 21. The creditor has been held bound to inform a surety of debtor's previous default; Rheem v. Wheel Co., 33 Pa. 358; L. R. 7 Q. B. 666; *contra*, 21 W. R. 439; Roper v. Trustees of Lodge, 91 Ill. 518, 33 Am. Rep. 60; though not of his mere indebtedness; 17 C. B. (N. S.) 482. But to accept a surety relying on the belief that there are no unusual circumstances increasing his risk, knowing that there are such, and neglecting to communicate them, is fraud; Franklin Bank v. Cooper, 36 Me. 179; Hubbard v. Briggs, 31 N. Y. 518. The fraud must be practised on the surety; Evans v. Keeland, 9 Ala. 42. The forgery of the signature of a surety on a constable's bond will release another surety, signing the same upon the representation that such signature is genuine; Cornell v. People, 37 Ill. App. 490.

Sureties for a corporation which has succeeded to the rights of a party who contracted under seal, can not avoid liability on the ground that the original contract was secured by fraudulent representations; Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L. R. A. (N. S.) 600, 127 Am. St. Rep. 898.

Any material alteration in the contract without the assent of the surety, or change in the circumstances, will discharge the surety; even though trivial, or to the advantage of the surety; Prairie State Bank v. U. S., 164 U. S. 238, 17 Sup. Ct. 142, 41 L. Ed. 412; 3 B. & C. 605. Such are the cases where the sureties on a bond for faithful performance are released by a change in the employment or office of the principal; 6 C. B. (N. S.) 550. But it seems that an alteration by the legislature in an official's duties will not discharge surety as long as they are appropriate to his office; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520. If the principal and obligee change the terms of the obligation without the consent of the surety, the

latter is discharged; Miller v. Stewart, 4 Wash. C. C. 26, Fed. Cas. No. 9,591. A change in the amounts of payments to be made under the principal contract releases the surety who had no knowledge of the change and did not consent; Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366.

Any material alteration of the contract guaranteed, without the consent of the surety, discharges him; American Bonding Co. v. Inv. Co., 150 Fed. 17; U. S. v. Freel, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *contra*, Prescott Nat. Bank v. Head, 11 Ariz 213, 90 Pac. 328, 21 Ann. Cas. 990. Where the contract provided that changes may be made in plans and specifications by written agreement of the parties, the surety is not so discharged by modifications agreed upon which are not so extensive as radically to change the contract and substitute a different one; U. S. v. Walsh, 115 Fed. 697, 52 C. C. A. 419. Where the changes are not indorsed upon the contract as provided, the surety will be released; Lonergan v. Trust Co., 101 Tex. 63, 104 S. W. 1061; 106 S. W. 876, 129 Am. St. Rep. 803. In Erfurth v. Stevenson, 71 Ark. 199, 72 S. W. 49, it was held that a material change, consented to by the principal and the builder, discharged the surety.

If the creditor, without the assent of the surety, gives time to the principal, the surety is discharged; 3 Y. & C. 187; 2 B. & P. 61. So where he agrees with the principal to give time to the surety; L. R. 7 Ch. App. 142. But not if without consideration; Kriz v. Pokrok, 46 Ill. App. 418; Gordon v. Bank, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360; nor does the reducing the rate of interest on a debt and allowing it to run along after maturity on payment of interest, without any binding contract for an extension for a definite time; Field v. Brokaw, 148 Ill. 654, 37 N. E. 80. And not where a creditor reserves his rights against the surety; 16 M. & W. 128; 4 H. L. C. 997. The rule applies where a state is a creditor; Braswell v. Gay, 75 N. C. 515.

A surety may file a bill in equity to enjoin the collection of a note where time has been given to the real principal; Grier v. Flitcraft, 57 N. J. Eq. 556, 41 Atl. 425. The surety is usually discharged where an extension is given to the principal debtor; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435; but a mere extension by an attorney who is charged with the collection of a note, will not release the surety thereon, if no security is thereby lost; Hall v. Presnell, 157 N. C. 290, 72 S. E. 985, 39 L. R. A. (N. S.) 62, Ann. Cas. 1913B, 1293; and an administrator has no authority to give time on a note executed by his intestate, so as to release the sureties thereon; Daviess County Bank & T. Co. v. Wright, 129 Ky. 21, 110 S. W. 361, 17 L. R. A. (N. S.) 1122. Where the surety is a joint maker of a note, although known to be a surety to the payee, he is not discharged by the extension of time to the principal debtor; Vanderford v. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; Richards v. Bank, 81 Ohio 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99. A provision for stay of execution in a judgment for overdue rent will not release the lessee's surety if the extension of time is not beyond the time in which execution could have been legally obtained; Bothfeld v. Gordon, 190 Mass. 567, 77 N. E. 639, 5 L. R. A. (N. S.) 764, 112 Am. St. Rep. 341, 5 Ann. Cas. 612.

The contract must be effectual, binding the creditor as well as the debtor; and it is not enough that the creditor merely forbears to press the debtor; Horne v. Bodwell, 5 Gray (Mass.) 457; Kirby v. Studebaker, 15 Ind. 45. See, also, 9 Cl. & F. 45; Forbes v. Sheppard, 98 N. C. 111, 3 S. E. 817; Stuart v. Lancaster, 84 Va. 772, 6 S. E. 139; Uniontown Bank v. Mackey, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485. Mere forbearance or delay of a creditor in enforcing his rights against the principal does not release the surety, who may, if he chooses, pay the debt, and, becoming subrogated to the creditor's rights, control the claim to his own satisfaction; Purdy v. Forstall, 45 La. Ann. 814, 13 South. 95.

Delay short of the limitation period in enforcing payment of a bond will not release the sureties from liability thereon; Clinton County v. Smith, 238 Mo. 118, 141 S. W. 1091, 37 L. R. A. (N. S.) 272.

The receipt of interest on a promissory note, after the note is overdue, is not sufficient to discharge the surety; 6 Gray 319; nor is taking another bond, as collateral security to the original, having a longer time to run; Remsen v. Graves, 41 N. Y. 474.

As a requisite to the binding nature of the agreement, it is necessary that there should be some consideration; Grover v. Hoppock, 26 N. J. L. 191; Freeland v. Compton, 30 Miss. 424; a part payment by the principal is held not to be such a consideration; Roberts v. Stewart, 31 Miss. 664. Prepayment of interest is a good consideration; Dubuisson v. Folkes, 30 Miss. 432; but not an agreement to pay usurious interest, where the whole sum paid can be recovered back; Farrell v. Bean, 10 Md. 227; though it would seem to be otherwise if the contract is executed, and the statutes of usury only provide for a recovery of the excess; Armistead v. Ward, 2 Patt. & H. (Va.) 504.

It has been questioned how far the receipt of interest in advance shows an agreement to extend the time; it may undoubtedly be a good consideration for such an agreement, but does not of itself constitute it. At the most it may be said to be *prima facie* evidence of the agreement; People's Bank v. Pearsons, 30 Vt. 711; 1 Y. & C. 620.

The surety is not discharged if he has given his assent to the extension of the time; Wright v. Storrs, 6 Bosw. (N. Y.) 600. Such assent by one surety does not bind his co-surety; Crosby v. Wyatt, 10 N. H. 318; and subsequent assent given by the surety without new consideration, after he has been discharged by a valid agreement for delay, will not bind him; Merrimack County Bank v. Brown, 12 N. H. 320. He need not show notice to the creditor of his dissent; Riggins' Ex'rs v. Brown, 12 Ga. 271.

Where one surety consents to a change in the original contract and the other does not, the former is bound and the latter is not; Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366.

The burden of showing a surety's consent to an alteration in the contract is on the plaintiff, when set up by him; Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366.

Where an execution against a principal is not levied, or a levy is postponed without the consent of the surety, he is discharged from his liability as surety, unless he has property of the principal in his hands at the time; if he has property in his hands liable for the principal's debts, the creditors of the principal may insist on an application of the property to the payment of their debts; Glass v. Thompson, 9 B. Monr. (Ky.) 235. A creditor must not only fail, but negligently fail, to enforce a lien, in order to exonerate sureties; Mingus v. Daugherty, 87 Ia. 56, 54 N. W. 66, 43 Am. St. Rep. 354. Marriage of the principal and creditor discharges the surety, destroying the right of action; Govan v. Moore, 30 Ark. 667.

If the creditor releases any security which he holds against the debtor, the surety will be discharged; Com. v. Vanderslice, 8 S. & R. (Pa.) 452; Allen v. O'Donald, 23 Fed. 573; Sample v. Cochran, 84 Ind. 594; but if the security only covers a part of the debt, it would seem that the surety will be released only *pro tanto;* Appeal of Neff, 9 W. & S. (Pa.) 36; Guild v. Butler, 127 Mass. 386; so of an execution levied and afterwards relinquished; the surety is discharged to the extent to which he has been injured; Winston v. Yeargin, 50 Ala. 340; but the surety is not discharged unless he is injured by the release of the levy; Iglehart v. State, 2 G. & J. (Md.) 243; Stephens v. Bank, 88 Pa. 157, 32 Am. Rep. 438. Nor will it matter if the security is received after the contract is made; Brandt, Sur. & Guar. § 426; *contra,* 1 Drewry 333. A creditor who has the personal contract of his debtor, with a surety, and has also or takes afterwards property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety he shall lose his claim against the surety to the amount of the property so surrendered, in equity; Springer v. Toothaker, 43 Me. 381, 69 Am. Dec. 66; Hays v. Ward, 4 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 554; or at law; Com. v. Vanderslice, 8 S. & R. (Pa.) 457. The fact that other security, as good as, or better than, that surrendered, was substituted for it, will not preclude the surety from availing himself of the discharge; New-Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Kirkpatrick v. Howk, 80 Ill. 122.

A creditor who has given up a lien on the debtor's property must prove that the surety was not injured thereby; Allen v. O'Donald, 23 Fed. 573. If the relinquishment of the lien materially alters the contract, the surety is wholly discharged; 1 Q. B. Div. 669; when the creditor has, by way of compromise, given up a lien of doubtful validity, and applied the money received, as far as it would go, in payment of the principal debt, the creditor must show that an attempt to realize on the property against which the lien existed would have been successful; Bedwell v. Gephart, 67 Ia. 44, 24 N. W. 585. But a creditor is not under any obligation to take active steps to obtain a lien by execution. Generally, where a creditor has, by negligence, lost security held by him for the debt or undertaking, the surety is discharged. In some cases he has been held to diligence in realizing on such security; in other cases his inaction has been held not to discharge the surety; Brandt, Sur. & Guar. § 440.

But a surety is not discharged by the fact that the creditor has released or compounded with his co-surety; much less if his co-surety has been released by process of law. The only effect of such a release or composition is that the surety is then not liable for the proportion which would properly fall on his co-surety; 6 Ves. 605. This at least is the doctrine in equity; although it may be questioned whether it would apply at law where the obligation is joint; 4 Ad. & E. 675.

But if the obligation is joint and several, a surety is not released from his proportion by such discharge of his co-surety; Klingensmith v. Klingensmith's Ex'r, 31 Pa. 460.

The death of a surety on a bond conditioned for the repayment of advances to the principal does not terminate the liability, and his estate is liable for advances made after his death; Hecht v. Weaver, 34 Fed. 111.

Rights of surety against principal. Until default, the surety has, in general, no rights against the principal, except the passive right to be discharged from the obligation on the conditions stated before. But after default on the part of the principal, and before the surety is called upon to pay, the latter has a remedy against the further continuance of the obligation, and he cannot in all cases compel the creditor to proceed against the debtor; but the English courts of equity allow him to bring a bill against the debtor, re-

quiring the latter to exonerate him; 2 Bro. C. C. 579.

A co-surety has a right in equity to compel the principal debtor to relieve him from liability by paying off the debt; [1909] 2 Ch. 401. A bill *quia timet* by a surety against his principal will not lie until the debt or liability has become due or ascertained, or the risk of loss has become imminent; 22 Ch. D. 561. In L. R. 6 Eq. 410, it was held that a surety, though he had not paid anything, could maintain a bill for payment of the debt and for indemnity.

A surety for a debt which the creditor neglects or refuses to enforce by proper proceedings for that purpose, may, by bill in equity, bring both debtor and creditor before the court, and have a decree to compel the debtor to make payment and discharge the surety; Hannay v. Pell, 3 E. D. Smith (N. Y.) 432; and in courts having full equity powers there can be no doubt of the right of a surety, after a debt has become due, to file a bill to compel the principal debtor to pay, whether the surety has himself been sued or not; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Moore v. Topliff, 107 Ill. 241; Philadelphia & R. R. Co. v. Little, 41 N. J. Eq. 519, 7 Atl. 356. Where there is an accrued debt and the surety's liability is admitted, he has a right to compel the principal to relieve him, by paying off his debt. In sustaining such an action he need not prove that the creditor has refused to sue the principal debtor; 31 L. R. Ir. 181.

The surety, after payment of the debt, may recover the amount so paid of the principal, the process varying according to the practice of different courts; 2 Term 104; Howe v. Ward, 4 Me. (Greenl.) 200; Bonham v. Galloway, 13 Ill. 68. A promise to pay the surety is implied, where there is no express promise; Martin v. Ellerbe's Adm'r, 70 Ala. 326; and assumpsit will lie; 6 M. & W. 153. But before a surety can recover of his principal because of his suretyship, he must have first paid the debt of his principal or some part of it; Minick v. Huff, 41 Neb. 516, 59 N. W. 795. But he may pay the debt before it is due, without the request of the principal, and, after it is due, sue the principal; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545.

And such payment refers back to the original undertaking, and overrides all intermediate equities, as of the assignee of a claim against the surety assigned by the principal before payment; Barney v. Grover, 28 Vt. 391.

The payment must not be voluntary, or made in such a manner as to constitute a purchase: for the surety, by purchasing the claim, would take the title of the creditor, and must claim under that. By an involuntary payment is intended only a payment of a claim against which the surety cannot defend. It is not necessary that a suit should be brought. But a surety who pays money on a claim which is absolutely barred has no remedy against the principal; Randolph's Adm'x v. Randolph, 3 Rand. (Va.) 490.

A surety, having in his hands funds or securities of the principal, may apply them to the discharge of the debt; McKnight v. Bradley, 10 Rich. Eq. (S. C.) 557; but where the fund is held by one of two sureties he must share the benefit of it with his co-surety; Leary v. Cheshire, 56 N. C. 170; Whipple v. Briggs, 28 Vt. 65. But a surety who has security for his liability may sue the principal on his implied promise, unless it was agreed that he should look to the security only; Cornwall v. Gould, 4 Pick. (Mass.) 444. A surety need not account to his co-surety for the simple indebtedness by himself to the principal; Davis v. Toulmin, 77 N. Y. 280.

Payment of a note by a surety by giving a new note is sufficient payment, even if the new note has not been paid when the suit is commenced; Chandler v. Brainard, 14 Pick. (Mass.) 286; Pearson v. Parker, 3 N. H. 366, *contra*, where judgment had been rendered against the surety; Sangston v. Gaither, 3 Md. 47; or by conveyance of land; Brown v. Dutton, 9 Cush. (Mass.) 213.

If the surety pays too much by mistake, he can recover only the correct amount of the principal; 1 Dane, Abr. 197. If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid; Price v. Horton, 4 Tex. Civ. App. 526, 23 S. W. 501; with interest; Bushong v. Taylor, 82 Mo. 660; and costs; Feamster v. Withrow, 12 W. Va. 611.

Extraordinary expenses of the surety, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract; Hayden v. Cabot, 17 Mass. 169; Wynn v. Brooke, 5 Rawle (Pa.) 106. Costs incurred and paid by the surety in litigating in good faith the claim of the creditor can be recovered of the principal; Downer v. Baxter, 30 Vt. 467; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398; but not so if the litigation is in bad faith; Holmes v. Weed, 24 Barb. (N. Y.) 546; Cranmer v. McSwords, 26 W. Va. 412; or where the surety, being indemnified for his liability, incurred expenses in defending a suit contrary to the expressed wishes of the principal, and after being notified by him that there was no defence to such action; Beckley v. Munson, 22 Conn. 299. A surety cannot recover indirect or consequential damages from the principal; Brandt, Sur. & Guar. § 213; or damages for the sacrifice of his property; Vance v. Lancaster, 3 Hayw. (Tenn.) 130, or for his failure in business due to his incurring the liability in question; Hayden v. Cabot, 17 Mass. 169.

Joint sureties who pay the debt of the principal may sue jointly for reimbursement;

Appleton v. Bascom, 3 Metc. (Mass.) 169; Thomas v. Carter, 63 Vt. 609, 22 Atl. 720, 14 L. R. A. 82; and if each surety has paid a moiety of the debt, they have several rights of action against the principal; Peabody v. Chapman, 20 N. H. 418.

Bail. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their rights in person or by an agent. They may pursue him into another state, arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose." Taylor v. Taintor, 16 Wall. (U. S.) 371, 21 L. Ed. 287; In re Von Der Ahe, 85 Fed. 959.

Rights of surety against creditor. It is not quite clear whether a surety can enforce any remedies on the part of the creditor before actual payment by the surety; and, of course, as connected with this, what is the effect of a request by the surety to the creditor to proceed against the debtor, and neglect or refusal to comply by the creditor. The objection to discharging the surety on account of such neglect is the fact that the surety may pay the debt and at once become subrogated to all the rights of the creditor; Mitchell v. Williamson, 6 Md. 210. But where there are courts in the exercise of full equity powers, the surety may insure a prompt prosecution either by discharging the obligation and becoming by substitution entitled to all the remedies possessed by the creditor, or he may by bill coerce the creditor to proceed; King v. Baldwin, 2 Johns. Ch. (N. Y.) 554; In re Babcock, 3 Sto. 393, Fed. Cas. No. 696; though in the latter case he would probably be required to indemnify the creditor against the consequences of risk, delay, and expense; Whitridge v. Durkee's Ex'rs, 2 Md. Ch. 442. The same indemnity would in general be required where a request is made; but it has been held that a simple request to sue the principal debtor, without a tender of expenses, or a stipulation to pay them, or an offer to take the obligation and bring suit, is sufficient to discharge the surety, unless the creditor at the time of the notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be removed; Wetzel v. Sponsler's Ex'rs, 18 Pa. 460. A creditor is not bound to make use of active diligence against a principal debtor on the mere request of a surety; Taylor v. Beck, 13 Ill. 376. There must be an express declaration by the surety that he would otherwise hold himself discharged; Baker v. Kellogg, 29 Ohio St. 663; Fidler v. Hershey, 90 Pa. 363.

There is a line of cases which hold that if the surety, after the principal debt is due, calls upon the creditor to bring suit against the principal who is then solvent, and the creditor fails to do so, and the principal becomes insolvent, the surety is discharged; Brandt, Sur. & Guar. § 239; King v. Baldwin, 17 Johns. (N. Y.) 386, 8 Am. Dec. 415; Cope v. Smith, 8 S. & R. (Pa.) 110, 11 Am. Dec. 582; Martin v. Skehan, 2 Colo. 614. So where the creditor has sufficient mortgage security, and, after request to sue and refusal, the property depreciates in value; Remsen v. Beekman, 25 N. Y. 552. The request to sue must be clear and distinct; Brandt, Sur. & Guar. § 240; and must be made after the debt matures; Hellen v. Crawford, 44 Pa. 105, 84 Am. Dec. 421. That such request must be in writing, see Petty v. Douglass, 76 Mo. 70. The great majority of cases hold that the surety cannot be discharged by a request to the creditor to sue, etc.; Brandt, Sur. & Guar. § 242; Gage v. Bank, 79 Ill. 62; Huff v. Slife, 25 Neb. 448, 41 N. W. 289, 13 Am. St. Rep. 497; Dennis v. Rider, 2 McLean 451, Fed. Cas. No. 3,797.

In Wilds v. Attix, 4 Del. Ch. 258, Bates, Ch., reviews the cases and sustains this view. He points out that the contrary decision in King v. Baldwin, 17 Johns. (N. Y.) 386, 8 Am. Dec. 415, was made by the casting vote of a lay senator, against the opinion of Kent, C. J., and that, while followed in New York, it has not been favorably regarded even there.

The obligation to see that the debt is paid rests upon the surety and not upon the creditor and the latter owes the former no active diligence; Hier v. Harpster, 76 Kan. 1, 90 Pac. 817, 13 L. R. A. (N. S.) 204, 13 Ann. Cas. 919. The failure of the holder of a note to present it against the estate of the principal does not discharge a surety thereon; Jackson v. Benson, 54 Ia. 654, 7 N. W. 97; Bull v. Coe, 77 Cal. 57, 18 Pac. 808, 11 Am. St. Rep. 235; so of bonds; Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Smith v. Smithson, 48 Ark. 261, 3 S. W. 49. The contrary was held in Siebert v. Quesnel, 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441. The surety on a note cannot exonerate himself by notice to the holder to present it against the principal's estate; Hickam v. Hollingsworth, 17 Mo. 475; Jordan v. Bank, 5 Ga. App. 244, 62 S. E. 1024.

The surety who pays the debt of the principal in full is entitled to have every advantage which the creditor has in pursuing the debtor, and for this purpose may have assignment of the debt, or be subrogated either in law or equity; Gannett v. Blodgett, 39 N. H. 150. Whether the remedy will be by subrogation, or whether the suit must be in the name of the creditor, will depend upon the rules of practice in the different states;

Denny v. Lyon, 38 Pa. 98, 80 Am. Dec. 463. The right of subrogation does not depend upon any contract or request by the principal debtor, but rests upon principles of equity; Mathews v. Aikin, 1 N. Y. 595; Lumpkin v. Mills, 4 Ga. 343; and, though originating in courts of equity, is now fully recognized as a legal right; La Farge v. Herter, 11 Barb. (N. Y.) 159. In equity, payment of a debt by a surety does not extinguish it, but operates as an assignment to the surety, with all the creditor's rights; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82. A surety may apply to the court by motion to compel the assignment of a judgment against him and his principal on his offer to pay the judgment; Tyler v. Hildreth, 77 Hun 580, 28 N. Y. Supp. 1042.

A surety of a defaulting government contractor who completes the work may sue to recover a balance due his principal in his own name; Hitchcock v. U. S., 27 Ct. Cls. 185.

Rights of surety against co-surety. The co-sureties are bound to contribute equally to the debt they become liable to pay when their undertaking is joint, or joint and several, not separate and successive; McDonald v. Magruder, 3 Pet. (U. S.) 470, 7 L. Ed. 744; but the creditor may recover the whole amount from one surety; Caldwell v. Roberts, 1 Dana (Ky.) 355. To support the right of contribution, it is not necessary that the sureties should be bound by the same instrument; Young v. Shunk, 30 Minn. 503, 16 N. W. 402; 14 Ves. 160. But where two sureties are bound by separate and distinct agreements for distinct amounts, although for equal portions of the same debt, there is no right of contribution between them; McDonald v. Magruder, 3 Pet. (U. S.) 470. The right of contribution rests only on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden it shall be borne equally between them: Church v. Fire Ins. Co., 66 N. Y. 225; in such cases the law raises an implied promise from the mutual relation of the parties; Warner v. Morrison, 3 Allen (Mass.) 566. If contribution would, as between co-sureties, be inequitable, it will not be awarded; Dennis v. Gillespie, 24 Miss. 581. The right of a surety to seek contribution arises on making payment which discharges the sureties from action; Pass v. Grenada County, 71 Miss. 426, 14 South. 447. Where a surety pays the debt of his principal, he cannot enforce contribution from one who signed simply as his surety; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

It is not necessary that the co-sureties should know of the agreements of each other, as the principle of contribution rests only on the equality of the burden, and not on any privity; 2 B. & P. 270; Appeal of Cottrell, 23 Pa. 294; Owen v. McGehee, 61 Ala. 440; but a volunteer is not entitled to contribution; there must be a contract of suretyship; Appeal of Mosier, 56 Pa. 80, 93 Am. Dec. 783. See 22 Am. L. Reg. 529 (a full article).

A surety may compel contribution for the costs and expenses of defending a suit, if the defence were made under such circumstances as to be regarded as prudent; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; see Bright v. Lennon, 83 N. C. 183; Wagenseller v. Prettyman, 7 Ill. App. 192; this has been held to include attorney fees; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635 (see Acers v. Curtis, 68 Tex. 423, 4 S. W. 551); whether the attorney employed was successful or not; Backus v. Coyne, 45 Mich. 584, 8 N. W. 694. And where the suit is defended at the instance or request of the co-surety, costs would be a subject of contribution, both on equitable grounds and on the implied promise; 1 Mood. & M. 406.

A claim for contribution extends to all securities given to one surety; Ramsey v. Lewis, 30 Barb. (N. Y.) 403. If one of several sureties takes collaterals from the principal, they will enure to the benefit of all; Paulin v. Kaighn, 27 N. J. Law, 503. Where one of several sureties is secured by a mortgage, he is not bound to enforce his mortgage before he pays the debt or has reason to apprehend that he must pay it, unless the mortgagor is wasting the estate; and if the mortgagor be wasting the mortgage property, and the surety secured by the mortgage fails to enforce his rights, he is chargeable, as between himself and his co-sureties, with the fair vendible value of the mortgaged property at a coercive sale; Teeter v. Pierce, 11 B. Monr. (Ky.) 399. The surety in a suit for contribution can recover only the amount which he has actually paid. Any reduction which he has obtained must be regarded as for the benefit of all the co-sureties; Tarr v. Ravenscroft, 12 Gratt. (Va.) 642. And see Lytle's Ex'r v. Pope's Adm'r, 11 B. Monr. (Ky.) 297. But he is not obliged to account for a debt due by him to the principal; Appeal of Leiter, 10 W. N. C. (Pa.) 225.

The right of contribution may be controlled by particular circumstances; thus, where one becomes surety at the request of another, he cannot be called on to contribute by the person at whose request he entered into the security; Cutter v. Emery, 37 N. H. 567.

One of several co-sureties cannot obtain contribution against the others until he has actually paid more than his own share, but he is entitled to a declaration of his right to contribution, and to a prospective order that on paying his own share he shall be indemnified against further liability; [1893] 2 Ch. 514.

The relation between co-sureties may be shown by parol evidence; Barry v. Ransom, 12 N. Y. 462; Harshman v. Armstrong, 43 Ind. 126; Camp v. Simmons, 62 Ga. 73.

A surety who is fully indemnified by his principal cannot recover contribution from his co-surety for money paid by him, but must indemnify himself out of the means placed in his hands; Morrison v. Taylor, 21 Ala. 779, n. A co-surety has the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contribution, as a creditor has on behalf of sureties; 8 J. & Sp. 424. Ordinarily any indemnity, by way of a lien on property, obtained by one surety, after he became such, enures to the benefit of all, and if he lose it by his neglect, it bars contribution. See Brandt, Sur. & Guar. § 271.

The remedy for contribution may be either in equity or at law. The result reached is the same, with one important exception: in the case of the insolvency of one of the sureties. In such cases the law takes no notice of the insolvency, but awards the paying surety his due proportion as if all were solvent. But equity does not regard the insolvent surety, but awards contribution as if he had never existed; Acers v. Curtis, 68 Tex. 423, 4 S. W. 551; Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; 6 B. & C. 689. One surety cannot by injunction arrest the proceedings at law of his co-surety against him for contribution unless he tenders the principal and interest due such co-surety, who has paid the principal, or alleges that he is ready and willing to bring the same into court to be paid to him as a condition of the court's interference; Craig v. Ankeney, 4 Gill (Md.) 225. Where surety has been compelled to pay the debt of his principal, and one of his co-sureties is out of the jurisdiction of the court, and others are within it, the surety who has paid is at liberty to proceed in a suit in equity for contribution against those co-sureties only who are within the jurisdiction, by stating the fact in his bill, and the defendants will be required to make contribution without regard to the share of the absent co-surety; Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680; Jones v. Blanton, 41 N. C. 115, 51 Am. Dec. 415. See, generally, 1 Lead. Cas. Eq. *100. A bill in equity will lie, by one surety against a co-surety, before the principal debt is paid, to compel him to contribute. A surety who consents to the creditor's giving time to the principal loses his right of contribution as against one who does not consent; Brown v. McDonald, 8 Yerg. (Tenn.) 158, 29 Am. Dec. 112. In equity, in proceeding for contribution, it must be shown that the principal is insolvent; Daniel v. Ballard, 2 Dana (Ky.) 296; but not at law; Buckner's Adm'r v. Stewart, 34 Ala. 529; Rankin v. Collins, 50 Ind. 158; *contra*, Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Leak v. Covington, 99 (N. C.) 559, 6 S. E. 241.

The statute of limitations does not run as against a surety claiming contribution until his own liability is ascertained; [1893] 2 Ch. 514. It runs against partial payments on the debt, from the time he pays the creditor more than his proportion of the debt; Bushnell v. Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

Litigants and their sureties are subject to the power of the sovereign to extend the right of review and appeal pending litigation; William W. Bierce v. Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237.

The surety on a bond in judicial proceedings is represented therein by his principal and becomes responsible, to the amount of the penalty, for amendments allowed by the court which do not introduce new causes of action; William U. Bierce v. Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237.

Conflict of laws. The contract of suretyship, like other contracts, is governed by the *lex loci contractus;* but the *locus* is not necessarily the same as that of the principal contract. Thus, the contract made by the indorser of a note is, not to pay the note where it is payable, but that if not paid there he will pay it at the place where the indorsement is made; Hicks v. Brown, 12 Johns. (N. Y.) 142; Prentiss v. Savage, 13 Mass. 20. The *lex loci* applies as well to the interest as to the principal amount. A question has been made in the case of bonds for faithful performance given by public officers; and in these it has been held that the place of performance is to be regarded as the place of making the contract, and sureties are bound as if they made the contract at the seat of the government to which the bonds are given. And under this rule the obligation of all on the bond is governed by the same law, although the principal and sureties may sign in different states: Cox v. U. S., 6 Pet. (U. S.) 172, 8 L. Ed. 359. A letter of guaranty written in the United States and addressed to a person in England must be construed according to the laws of England; Bell v. Bruen, 1 How. (U. S.) 169, 11 L. Ed. 85.

SURFACE WATERS. Waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. Schaefer v. Marthaler, 34 Minn. 489, 26 N. W. 726, 57 Am. Rep. 73. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channel in the soil; and include waters which are diffused over the surface of the ground and are derived from rains and melting snows, occasional outbursts of water which in time of freshet or melting of snows descended from the

mountains and inundate the country, and the moisture of wet, spongy, springy, or boggy ground. See Lessard v. Stram, 62 Wis. 114, 22 N. W. 284, 51 Am. Rep. 715; Macomber v. Godfrey, 108 Mass. 221, 11 Am. Rep. 349; Barkley v. Wilcox, 86 N. Y. 147, 40 Am. Rep. 519.

Waters that over-flow and continue in a general course back into the regular water course from which they started, or into another water course, do not become surface waters. Jefferson v. Hicks, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214.

Where water, whether coming from springs or rains or melting snows, has flowed over lands of the complainant, in a well-defined channel, for a period of time so long that the memory of men runneth not to the contrary, to and upon lands of an adjoining proprietor, the court will, by its mandatory injunction, require such adjoining proprietor to remove any obstruction placed upon his lands to prevent such water from flowing to and over his lands; Schnitzius v. Bailey, 48 N. J. Eq. 409, 22 Atl. 732. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well-defined banks; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Chicago, R. I. & P. Ry. Co. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802.

Overflow from a river in time of high water is surface water; Jean v. Pennsylvania Co., 9 Ind. App. 56, 36 N. E. 159; but the superabundant waters of a river at times of ordinary floods, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in such floods, are not surface waters which a riparian owner may turn off as he will; Cairo, V. & C. R. Co. v. Brevoort, 62 Fed. 129, 25 L. R. A. 527. In agricultural land the natural flow of water from lands of a higher upon those of a lower level cannot be made the subject of an action of damages; but a different rule applies in towns and cities; Bentz v. Armstrong, 8 W. & S. (Pa.) 40, 42 Am. Dec. 265; McMahon v. Thornton, 5 Super. Ct. Pa. 495.

The owner of the dominant estate is not liable for the hastening of the surface water therefrom, although, it results in the wearing of ditches in the servient estate; Pohlman v. R. Co., 131 Ia. 89, 107 N. W. 1025, 6 L. R. A. (N. S.) 146; he may increase the volume and accelerate the flow without incurring liability for damages to owners of lower land; Mason v. Com'rs Fulton Co., 80 Ohio 151, 88 N. E. 401, 24 L. R. A. (N. S.) 903, 131 Am. St. Rep. 689. If the owner of the lower property could in the exercise of ordinary care, protect it, he cannot recover damage for injury by surface waters; L. & N. R. R. Co. v. Moore, 31 Ky. L. Rep. 141, 101 S. W. 934, 10 L. R. A. (N. S.) 579. If the upper proprietor, in the interest of good husbandry and without negligence, collects surface water in a ditch and allows it to flow in the natural course of drainage to the lands of his neighbors, he is not liable therefor; Flesner v. Steinbruck, 89 Neb. 129, 130 N. W. 1040, 34 L. R. A. (N. S.) 1055. The owner of a city property may protect it from surface water flowing from adjacent land, even to the extent of closing a drain which he discovers to be injurious to his land, and he incurs no liability to the owners of adjacent lands by injury caused by the water backing upon them; Levy v. Nash, 87 Ark. 41, 112 S. W. 173, 20 L. R. A. (N. S.) 155. Where a highway was being repaired and culverts were closed through which surface waters naturally drained and surface water thereby accumulated in large quantities upon the property of the dominant estate, the owners thereof are liable for casting it in a body on to the lower land; Martin v. Schwertley, 155 Ia. 347, 136 N. W. 218, 40 L. R. A. (N. S.) 160.

See SUBTERRANEAN WATERS; WATERS.

SURGEON. One who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. One who practises surgery.

This definition is imperfect, it being impossible to define the term surgeon or surgery. The term *surgery*, or *chirurgery*, comes from two Greek words signifying *the hand* and *work*, meaning a manual procedure by means of instruments, or otherwise, in the healing of injuries and the cure of disease. The practice of *medicine*, in contradistinction to the practice of *surgery*, denotes the treatment of disease by the administration of drugs or other sanative substances. There cannot be a complete separation between the practice of medicine and surgery, as they are developed by modern science, and understood by the most learned in the two professions; the principles of both are the same throughout, and no one is qualified to practise either who does not properly understand the fundamental principles of both.

The general principles of law defining the civil responsibilities of physicians and surgeons are the same as those that apply to and govern the conduct of lawyers, shipbuilders, and other classes of men whose employment requires them to transact business demanding special skill and knowledge; Leighton v. Sargent, 27 N. H. 468, 59 Am. Dec. 388; Whart. & Stille, Med. Jur. 750.

See PHYSICIAN.

SURMISE. In Ecclesiastical Law. An allegation in a libel. Phill. Ecc. Law 1445. Formerly where a defendant pleaded a local custom it was necessary for him to surmise, that is to suggest, that such custom should be certified to the court by the mouth of the reporter. Without such a surmise the issue

was to be tried by the country as other issues of fact. 1 Burr. 251.

SURNAME. A name which is added to the Christian name. In modern times these have become family names. They are called surnames, because originally they were written *over the name* in judicial writings and contracts. See NAME.

SURPLUS. That which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the residue. See 18 Ves. 466. It has an appropriate application to personal property or money, but, when used in a will, may include real estate; Byrnes v. Baer, 86 N. Y. 210. See SAVINGS BANKS; RESERVE.

Whether a policy holder in a life insurance company shall participate in the surplus rests in the discretion of the officers as to what amount shall be distributed and when; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682.

A policy which permits participation in surplus earnings is (in the absence of wrongdoing or mistake) entitled only to a distribution according to the method adopted by the company and not to his share of the entire surplus; Greeff v. Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659.

The fact that stockholders claim the surplus of an insurance company, and the officers of the company do not actively deny the claim, gives no ground for a receivership at the suit of a policy holder claiming that the surplus belongs to the policy holders; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682. See PROFITS.

SURPLUSAGE. In Accounts. A greater disbursement than the charges amount to. A balance over. 1 Lew. 219.

In Pleading. Allegations of matter wholly foreign and impertinent to the cause. All matter beyond the circumstances necessary to constitute the action is surplusage; 5 East 275; Allaire v. Ouland, 2 Johns. Cas. (N. Y.) 52; Kottwitz v. Bagby, 16 Tex. 656. Generally, matter of surplusage will be rejected and will not be allowed to vitiate the pleading; Co. Litt. 303 *b*; 2 Saund. 306, n. 14; Thomas v. Roosa, 7 Johns. (N. Y.) 462; Brown v. Manter, 21 N. H. 535, 53 Am. Dec. 223; as new and needless matter stated in an innuendo; Thomas v. Croswell, 7 Johns. (N. Y.) 272, 5 Am. Dec. 269; even if repugnant to what precedes; 10 East 142; but if it shows that the plaintiff has no cause of action, a demurrer will lie; 2 East 451; 2 W. Bla. 842; Wilson v. Codman's Ex'r, 3 Cra. (U. S.) 193, 2 L. Ed. 408. Where the whole of an allegation is immaterial to the plaintiff's right of action, it may be struck out as surplusage; U. S. v. Burnham, 1 Mas. 57, Fed. Cas. No. 14,690. Matter laid under a videlicet, inconsistent with what precedes, may be rejected as surplusage; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; and when the unnecessary matter is so connected with what is material that it cannot be separated, the whole matter may be included in the traverse; Dy. 365; 2 Saund. 206 *a*, n. 21; and the whole must be proved as laid; Adm'rs of Conn v. Ex'rs of Gano, 1 Ohio 483, 13 Am. Dec. 639; Steph. Plead. 422; but an averment, which is surplusage and can be stricken out without injury to the rest, will not vitiate a pleading; Hampshire Manufacturers' Bank v. Billings, 17 Pick. (Mass.) 87.

When words occur in a statute which can be given no effect consistent with the plain meaning of the statute they must be rejected as surplusage; U. S. v. Jackson, 143 Fed. 783, 75 C. C. A. 41.

SURPRISE. In Equity Practice. The act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created, which renders it proper that a court of equity should relieve the party so surprised. 1 Story, Eq. Jur. § 120, n.

The situation in which a party is placed without any default of his own, which will be injurious to his interests. Rawle v. Skipwith, 8 Mart. N. S. (La.) 407.

Jeremy, Eq. Jur. 366, 383, note, seems to think that the word surprise is a technical expression, and nearly synonymous with fraud. It is sometimes used in this sense when it is deemed presumptive of, or approaching to, fraud. 1 Fonbl. Eq. 123; 3 Ch. Cas. 56, 74, 103, 114.

Surprise, as a ground for the granting of a rehearing in equity, must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate and which ordinary foresight could not guard against; Anderson Land & Stock Co. v. McConnell, 171 Fed. 475.

In Law. The general rule is that when a party or his counsel is taken by surprise, in a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial should be granted; Hill, New Tri. 521. Surprise may be good ground for a new trial in criminal as in civil cases; 10 E. L. & E. 105; but in neither case is surprise arising after verdict sufficient to warrant an application to the discretion of the court; 2 Parker 673. Nor will a new trial be granted where the ground of the surprise is evidence which was clearly within the issues presented by the pleadings; Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133; or unless one made application for a postponement of the trial in order that he might repair the injury done him by the unexpected testimony; Overton v. State, 57 Ark. 60, 20 S. W. 590.

It is not ground for a new trial that a defendant was taken by surprise by the court's calling the attention of the jury to a statute relating to its legal obligation, though, had it foreseen such action, it might have had further evidence on the question of fact; Chicago, M. & St. P. R. Co. v. Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

See NEW TRIAL; PLEADING.

SURREBUTTER. In Pleading. The plaintiff's answer to the defendant's rebutter. It is governed by the same rules as the replication. See 6 Com. Dig. 185; 7 *id.* 389.

SURREJOINDER. In Pleading. The plaintiff's answer to the defendant's rejoinder. It is governed in every respect by the same rules as the replication. Steph. Pl. 77; 7 Com. Dig. 389. See PLEADING.

SURRENDER. A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. Co. Litt. 337 *b*. See Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

The deed by which the surrender is made.

A surrender is of a nature directly opposite to a release; for, as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderor, and vests it in the surrenderee, even without the assent of the latter; Shepp. Touchst. 300.

The technical and proper words of this conveyance are, surrender and yield up; but any form of words by which the intention of the parties are sufficiently manifested will operate as a surrender; 1 Term 441; Com. Dig. *Surrender* (A).

The surrender may be express or implied. The latter is when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands; Livingston v. Potts, 16 Johns. (N. Y.) 28; 1 B. & Ald. 50. See Beall v. White, 94 U. S. 389, 24 L. Ed. 173; Martin v. Stearns, 52 Ia. 347, 3 N. W. 92; LANDLORD AND TENANT.

To yield; render up. Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016.

SURRENDER OF A PREFERENCE. The surrender by a preferred creditor, to the assignee in bankruptcy, of all that he has received under such preference, as a necessary step, under the bankrupt law, to obtaining a dividend of the estate. In re Richter's Estate, 1 Dill. 544, Fed. Cas. No. 11,803.

The word "as generally defined may denote either compelled or voluntary action"; Keppel v. Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. In Bankruptcy Act 1898, § 57g, providing that creditors must *surrender* preferences before having claims allowed, "it is unqualified and generic, and hence embraces both meanings;" *id.*

SURRENDER OF CRIMINALS. The act by which the public authorities deliver a person accused of a crime, and who is found in their jurisdiction, to the authorities within whose jurisdiction it is alleged the crime has been committed. In England the crown has the option of either surrendering or refusing to surrender a British subject accused of an extradition offence in a foreign country; [1896] 1 Q. B. 230. See EXTRADITION; FUGITIVE FROM JUSTICE.

SURRENDER TO USES OF WILL. Formerly a copyhold interest would not pass by will unless it had been surrendered to the use of the will. By 55 Geo. III. this is no longer necessary; 1 Steph. Com. 639.

SURRENDEREE. One to whom a surrender has been made.

SURRENDEROR. One who makes a surrender; as, when the tenant gives up the estate and cancels his lease before the expiration of the term. One who yields up a freehold estate for the purpose of conveying it.

SURROGATE (Lat. *surrogatus*, from *subrogare*, or *surrogare*, to substitute). **In English Law.** A deputy or substitute of the chancellor, bishop, ecclesiastical or admiralty judge, appointed by him. He can grant licenses, hold courts, and adjudicate cases, to the same extent and with the same authority as his principal, provided his grant of powers has been coextensive with those possessed by his principal. The office has arisen by usage, but is sanctioned by canon 128, and recognized by statute.

In American Law. A term used in some states to denote the judge to whom jurisdiction of the probate of wills, the grant of administration and of guardianship is confided. In some states he is called surrogate, in others, judge of probate, register, judge of the orphans' court, etc. He is ordinarily a county officer, with a local jurisdiction limited to his county.

SURROGATE'S COURT. In the United States, a state tribunal, with similar jurisdiction to the *court of ordinary, court of probate*, etc., relating to matters of probate, etc. See 2 Kent 409.

SURVEY. The act by which the quantity of a piece of land is ascertained; the paper containing a statement of the courses, distances, and quantity of land is also called a survey.

A survey made by authority of law, and duly returned into the land office, is a matter of record, and of equal dignity with the patent; Steele's Heirs v. Taylor, 3 A. K. Marsh. (Ky.) 226, 13 Am. Dec. 151. See Lunt v. Holland, 14 Mass. 149; Kirby v. Lewis, 39 Fed. 66; Harry v. Graham, 18 N. C. 76, 27 Am. Dec. 226; and is not open to any collateral attack in the courts; Russell v. Land Grant Co., 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971. Where a survey was made in good faith

and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented; U. S. v. Hancock, 133 U. S. 193, 10 Sup. Ct. 264, 33 L. Ed. 601.

In construing maps of official surveys, courts give effect to the meaning expressed by their outlines, as well as by their language; St. Louis v. R. Co., 114 Mo. 13, 21 S. W. 202. The declarations of a dead surveyor, when made on the ground, are competent evidence as to boundaries; so are his field notes, if authenticated otherwise than by his mere declarations; Collins v. Clough, 222 Pa. 472, 71 Atl. 1077, 15 Ann. Cas. 871.

An ancient survey of a manor is admissible evidence of its boundaries: 62 J. P. 661.

By survey is also understood an examination; and in this sense it is constantly employed in insurance and in admiralty law.

SURVEY OF A VESSEL. A public document looked to both by underwriters and owners as affording the means of ascertaining at the time and place the state and condition of the ship and other property at hazard.

SURVEYOR. See DECLARATIONS.

SURVEYOR OF THE PORT. A revenue officer appointed for each of the principal ports of entry, whose duties chiefly concern the importations at his port and the determination of their amount and valuation. U. S. R. S. § 2627.

SURVIVAL OF ACTIONS. See ACTIO PERSONALIS, etc.

SURVIVOR. The longest liver of two or more persons.

There is no presumption of survivorship in the case of those who perish in a common disaster; 8 H. L. C. 183; Young Women's Christian Home v. French, 187 U. S. 401, 23 Sup. Ct. 184, 47 L. Ed. 233. Actual survivorship being unascertainable, descent and distribution take the same course as if the deaths had been simultaneous; *id.*, where a testator gave her property to her only son, but "in the event of my becoming the survivor . . . of my son," then to a charitable home. The mother and the son died in a shipwreck. The will was construed to give the property to the home, on the ground that the intent was that it should take it if the son did not.

The primary meaning of survive is outlive. Where a testator left the residue of his property to trustees in trust to divide it equally between such of the children of A & B "as shall survive me and shall live to attain the age of 21 years on their attaining such an age," it was held that children born during the lifetime of the testator and who were living at his death were alone entitled to share; Knight v. Knight, 14 C. L. R. 86, High Court of Australia 1912.

Under an insurance policy, one who has a *prima facie* right to the proceeds of the policy necessarily wins; 16 Harv. L. R. 369. In some cases it is held if the insured cannot alter the policy, the beneficiary's interest is vested and his representative prevails; if the policy can be altered the representative of the insured wins. U. S. Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641. The real question, it is said, should be whether the condition that the beneficiary should survive the insured is in form precedent or subsequent. If the former, his representative must prove actual survivorship; if the latter, he need not; 16 Harv. L. R. 368, citing Fuller v. Linzee, 135 Mass. 468; Cowman v. Rogers, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550.

See DEATH.

In cases of partnership, the surviving partner is entitled to have all the effects of the partnership, and is bound to pay all the debts owing by the firm; Gow, Partn. 157. He is, however, bound to account for the surplus to the representatives of his deceased partners, agreeably to their respective rights. See PARTNERSHIP.

A surviving trustee is generally vested with all the powers of all the trustees, and the surviving administrator is authorized to act for the estate as if he had been sole administrator.

The right of survivorship among joint-tenants has been abolished, except as to estates held in trust in many states. For the statutes, see Demb. Land Tit. 27. See ESTATES OF JOINT-TENANCY. In Connecticut it never existed; 1 Swift, Dig. 102; Washb. R. P.; nor has it ever been recognized in Ohio, Kansas, Nebraska, or Idaho; Demb. Land Tit. 198. As to survivorship among legatees, see 1 Turn. & R. 413; 3 Russ. 217.

SUS' PER COLL'. In English Law. In the English practice, a calendar is made out of attainted criminals, and the judge signs the calendar with their separate judgments in the margin. In the case of a capital felony it is written opposite the prisoner's name, "let him be hanged by the neck," which, when the proceedings were in Latin, was "*suspendatur per collum*," or, in the abbreviated form, "sus' per coll'." 4 Bla. Com. 403.

SUSPENSE. When a rent, *profit à prendre*, and the like, are, in consequence of the unity of possession of the rent, etc., of the land out of which they issue, not *in esse* for a time, they are said to be in suspense, *tunc dormiunt;* but they may be revived or awakened. Co. Litt. 313 *a*.

SUSPENSION. A temporary stop of a right, of a law, and the like.

In times of war the right of *habeas corpus* may be suspended by lawful authority.

The Stock Exchange and many corporations provide for the suspension as well as

expulsion of members under certain circumstances; State ex rel. v. Milwaukee Chamber of Com., 47 Wis. 670, 3 N. W. 760; Leech v. Harris, 2 Brews. (Pa.) 571.

See EXPULSION; AMOTION; STOCK EXCHANGE.

Suspension of a right in an estate is a partial extinguishment, or an extinguishment for a time. It differs from an extinguishment in this: a suspended right may be revived; one extinguished is absolutely dead; Bac. Abr. *Extinguishment* (A).

The suspension of a statute for a limited time operates so as to prevent its operation for the time; but it has not the effect of a repeal; Brown v. Barry, 3 Dall. (U. S.) 365, 1 L. Ed. 638. For *plea in suspension*, see PLEA; ABATEMENT. Pleas in suspension are not specifically abolished in England by the Judicature Acts, though Ord. xix. rule 13, directs that no plea or defence shall be pleaded in abatement. Moz. & W.

In Ecclesiastical Law. An ecclesiastical censure, by which a spiritual person is either interdicted the exercise of his ecclesiastical function or hindered from receiving the profits of his benefice. It may be partial or total; for a limited time, or forever, when it is called deprivation or amotion. Ayliffe, Parerg. 501.

SUSPENSION OF A RIGHT. The act by which a party is deprived of the exercise of his right for a time.

When a right is suspended by operation of law, the right is revived the moment the bar is removed; but when the right is suspended by the act of the party, it is gone forever. See 1 Rolle, Abr. *Extinguishment* (L, M).

SUSPENSION OF ARMS. An agreement between belligerents, made for a short time or for a particular place, to cease hostilities between them. See ARMISTICE; TRUCE.

SUSPENSION, PLEAS IN. See PLEAS; SUSPENSION.

SUSPENSIVE CONDITION. One which prevents a contract from going into operation until it has been fulfilled.

SUSPENSORY CONDITIONS. Conditions precedent in a contract which merely suspend the operation of a promise till they are fulfilled. They differ from those conditions precedent the non-fulfilment of which works a breach of the contract. Tiff. Sales 153. See New Orleans v. R. Co., 171 U. S. 312, 18 Sup. Ct. 875, 43 L. Ed. 178.

SUSPICION. The act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust, mistrust, doubt. McCalla v. State, 66 Ga. 348.

SUTLER. One whose employment is to sell provisions and liquor to a camp.

By the articles of war no sutler is permitted to sell any kind of liquor or victuals, or to keep his house or shop open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays during divine service or sermon, on penalty of being dismissed all future sutling; all sutlers are subject to orders according to the rules and discipline of war.

SUUS HÆRES. See HÆRES.

SUZERAIN (Norman Fr. *suz*, under, and *re* or *rey*, king). A lord who possesses a fief whence other fiefs issue. A tenant *in capite* or immediately under the king. Note 77 of Butler & Hargrave's notes, Co. Litt. l. 3.

In International Law. The word has no clear or precise signification. It has been extended to the Mussulman world, and to the control of European Powers through their colonies over imperfectly civilized people; 12 L. Quart. Rev. 223; [1896] P. 122.

In modern times suzerainty is used as descriptive of relations, ill-defined and vague, which exist between powerful and dependent states; its very indefiniteness being its recommendation. Encycl. Br.

It is said that suzerainty is title without corresponding power; protectorate is power without corresponding title. Freund, Pol. Sci. Quart. (1899) p. 28.

While protecting and protected states tend to draw nearer, the reverse is true of suzerain and vassal states; a protectorate is generally the preliminary to incorporation; suzerainty, to separation. Encycl. Br.

By the Treaty of Paris (1856) Turkey was recognized as having suzerainty over certain Danubian principalities. The term was used in the Convention of 1881 between the British government and the South African Republic; but it was omitted in the Convention of 1884. Hershey, Int. L. 106. Crete was recognized by the Powers in 1899 as autonomous, under the suzerainty of the Sultan. *Id.*

SWANIMOTE. See COURT OF SWANIMOTE.

SWEAR. To take an oath administered by some officer duly empowered.

One may swear who is not duly sworn; and in such case the oath is not administered, but self-imposed, and the swearer incurs no legal liability thereabout; U. S. v. McConaughy, 33 Fed. 168. See JURY; OATH.

To use such profane language as is forbidden by law. This is generally punished by statutory provisions in the several states. See Gaines v. State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713. See BLASPHEMY.

SWEDEN. A limited monarchy, the constitution resting primarily on the law of June 6, 1809. The king is irresponsible; the executive power is vested in him alone; all his resolutions, however, must be taken in the presence of his cabinet. The cabinet councillors are appointed by him and are responsible to the parliament (Riksdag). They are eleven in number, one being prime minister, two consultative ministers, and the others heads of departments.

They must be of Swedish birth and adherents of the Lutheran confession. The king has the right of initiative in the *Riksdag* and of absolute veto and has in certain administrative and administration matters a special legislative right.

The *Riksdag* consists of two chambers. The members of the first are elected by the representative bodies of the Län and by the municipal councils of some of the rural towns. They are 150 in number and are distributed among the constituencies according to population on a ten years revision. The members of the second chamber number 230, of which 150 are elected from the rural constituencies and 80 from the towns.

The supreme court has a membership of 18 judges and passes sentence in the name of the king, who is nominally the highest judicial authority. There are 119 rural judicial districts, which may be divided into judicial divisions, in each of which is a court consisting of a judge and 12 unpaid assessors elected by the people. Seven form a quorum. If unanimously of a different opinion from the judge, they can outvote him. There are three higher courts between these and the supreme court.

The dissolution of the union between Sweden and Norway was approved by the Riksdag of Sweden on October 19, 1905.

SWEEPSTAKES. The sum of the stakes for which the subscribers agree to pay for each horse nominated. Stone v. Clay, 61 Fed. 889, 10 C. C. A. 147. A free handicap sweepstake is not a stake race; *id.* See HORSE-RACE.

SWINDLER. A cheat; one guilty of defrauding divers persons. 1 Term 748.

Swindling is usually applied to a transaction where the guilty party procures the delivery to him, under a pretended contract, of the personal property of another, with the felonious design of appropriating it to his own use; 2 Russ. Cr. 130; Stevenson v. Hayden, 2 Mass. 406; as where a purchaser tendered a twenty-dollar gold-piece in payment for goods, supposing it was a silver dollar and the seller knowing his mistake returned him change for a dollar, the offence was held to be swindling; Jones v. Methvin, 97 Ga. 449, 25 S. E. 318.

The terms cheat and swindler are not actionable unless spoken of the plaintiff in relation to his business; Odg. Lib. & Sl. 61; Odiorne v. Bacon, 6 Cush. (Mass.) 185; Herr v. Bamberg, 10 How. Pr. (N. Y.) 128. The words "you are living by imposture," spoken of a person with the intention of imputing that he is a swindler, are not actionable *per se;* 8 C. B. 142. See LIBEL.

SWITZERLAND. A republic of Europe. It is a confederation of 22 cantons, which are sovereign states, except so far as they have given up their rights to the federal government. The legislative and executive functions are vested in a federal assembly of two chambers, a state council of forty-four members chosen by the cantons, two for each, and the national council of one hundred and sixty-seven deputies chosen by representation on the basis of population for three years. It meets at Bern. The chief executive authority is deputed to a federal council of seven members chosen by the federal assembly. The president and vice-president of the federal council, who are elected for the term of one year, are the first magistrates of the republic.

The Bundesgericht consists (since 1904) of nineteen full members and nine substitutes elected for six years by the federal assembly; every two years the federal parliament elects the president and vice-president of the federal tribunal; it adjudicates in the last instance all points in dispute between the federal governments and the individual cantons, and is a high court of appeal. It is divided into a civil and criminal court.

SWORN BROTHERS. **In Old English Law.** Persons who, by mutual oaths, covenanted to share in each other's fortunes.

SWORN CLERKS IN CHANCERY. Officers who had charge of records, and performed other duties in connection with the court of chancery. Abolished in 1842.

SYB AND SOM. A Saxon form of greeting, meaning peace and safety. T. L.

SYLLABUS. An abstract; a head note. The brief statement of the point or points decided, prefixed to the printed report of a case. The head note of a reported case is a thing upon which much skill and thought is required to express in clear, concise language the principle of law to be deduced, or the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice. 17 C. B. 459.

Unless the headnote is given special force by statute or rule of court, the opinion is to be looked to for the original and authentic grounds of the decision; Burbank v. Ernst, 232 U. S. 162, 34 Sup. Ct. 299, 58 L. Ed. ——. If made under a statute, the opinion may be examined to ascertain the scope of the decision; Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. ——. It should be used only as a guide to the decision, even if prepared by the court itself; Brief Making, by Lile and others, Cooley's Ed. 116.

The duty of framing the syllabus of its opinions cannot be imposed upon a court except by constitutional provision; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107.

In West Virginia it is the law of the case, whatever may be the reasoning of the opinion of the court; Kuhn v. Coal Co., 215 U. S. 356, 30 Sup. Ct. 140, 54 L. Ed. 228.

A collection. The word, in the sense of a catalogue or list, is used of a collection of

eighty condemned propositions addressed by Pope Pius IX to all the Catholic episcopate, December 8, 1864. It gave rise to the most violent polemics; the Ultramontane party was loud in its praise, while the liberals treated it as a declaration of war by the church on modern society and civilization. Encycl. Br.

See COPYRIGHT; INFRINGEMENT; PARAGRAPH.

SYLVA CÆDUA. In Ecclesiastical Law. Wood of any kind which was kept on purpose to be cut, and which being cut grew again from the stem or root. 4 Reeve, Hist. Eng. L. 90.

SYMBOLIC DELIVERY. The delivery of some thing as a representation or sign of the delivery of some other.

Where an actual delivery of goods cannot be made, a symbolical delivery of some particular thing, as standing for the whole, will vest the property equally with an actual delivery; Gibson v. Stevens, 8 How. (U. S.) 399, 12 L. Ed. 1123; Atwell v. Miller, 6 Md. 10, 61 Am. Dec. 294; Vining v. Gilbreth, 39 Me. 496; Packard v. Dunsmore, 11 Cush. (Mass.) 282.

In 2 Poll. & Maitl. 84, symbolic delivery in the ancient German conveyance is thus described: The essence of the transaction may be that one man shall quit, and another shall take, possession of the land, but this must be done in formal fashion and before witnesses. The number and complexities of the scenes may vary in different times and tribes. All the symbols and ceremonies are not the same in any one age or district. The two men, each with his witnesses, appear upon the land, a knife is produced, a sod of turf is cut, the twig of a tree is broken off, and the turf and twig are handed to the donee, and thus the land passes from hand to hand. The knife may also be delivered and retained by the donee. Perhaps its point would be broken off or its blade twisted, that it may differ from other knives. But, before this, the donor has taken from his hand the war glove which would protect it in battle and the donee assumes it; his hand is vested or invested; it is the *vestita manus* that will fight in defense of this land; with it he grasps the turf and twig. All the talk about investiture and being vested with land goes back, it is said, to this ceremony. Then the donor must solemnly forsake the land. Perhaps he is expected to leap over the encircling hedge; or some renunciatory gesture with his fingers (*curvatis digitis*) is demanded of him. Maybe he will have to pass over to the donee the mysterious rod or *festuca*, which has great contractual efficacy. In time some of these ceremonies could be transacted away from the land. It is not always convenient for the parties to visit the land, particularly when one of them is a dead saint. The reliquary that contains him may be taken to the field, or the field must come to the saint. The turf and twig can be brought with it and placed with the knife upon the shrine. The twig planted in a convent garden or a sod from a churchyard will do, or a knife, without any sod, or a glove, or indeed any small thing that lies handy, for the symbolical significance of those articles is becoming obscure, and the thing deposited is now thought of as a gauge or *wed* (*vadium*), by which the donor can be constrained to deliver possession of the land.

SYMBOLIUM ANIMÆ. See SOUL SCOT.

SYNALLAGMATIC CONTRACT. In Civil Law. A contract by which each of the contracting parties binds himself to the other: such are the contracts of sale, hiring, etc. Pothier, Obl. 9.

SYNDIC. In French Law. The assignee of a bankrupt. So in Louisiana.

One who is chosen to conduct the affairs and attend to the concerns of a body corporate or community. In this sense the word corresponds to director or manager. Rodman Notes to *Code de Com.* p. 351; La. Civ. Code. art. 429; Dalloz, Dict. *Syndic.*

SYNDICATE. A university committee. A combination of persons or firms united for the purpose of enterprises too large for individuals to undertake; or a group of financiers who buy up the shares of a company in order to sell them at a profit by creating a scarcity. Moz. & W.

An association of individuals, formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216. It is said to be, as respects the persons composing it, a partnership. *Id.* But this is rather too broadly expressed. It would seem rather a joint adventure, which see.

See 40 L. R. A. (Md.) 216; PROMOTERS.

SYNDICUS (Gr. *σὺν*, with, *δίκη*, cause). One chosen by a university, municipality, etc., to defend its cause. Calv. Lex. See SYNDIC.

SYNGRAPH (Gr. *σὺν*, with, *γράφω*, to write). A deed, bond, or other instrument of writing, under the hand and seal of all the parties. It was so called because the parties *wrote together.*

Formerly such writings were attested by the subscription and crosses of the witnesses; afterwards, to prevent frauds and concealments, they made deeds of mutual covenant in a script and rescript, or in a *part* and *counterpart*, and in the middle between the two copies they wrote the word *syngraphus* in large letters, which, being cut through the parchment and one being delivered to each party, on being afterwards put together proved their authenticity.

Deeds thus made were denominated *syngraphs* by the canonists, and by the common-lawyers *chirographs.* 2 Bla. Com. 296.

SYNOD. An ecclesiastical assembly, which may be general, national, provincial, or diocesan.

SYNODALES TESTES. See SIDESMEN.

SYSTEMATIZED DELUSION. One based on a false premise, pursued by a logical process of reasoning to an insane conclusion; there being one central delusion around which other aberrations of the mind converge; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405. See INSANITY.

T

T. Every person convicted of felony short of murder, and admitted to benefit of clergy, was at one time marked with this letter upon the brawn of the thumb. Abolished by 7 & 8 Geo. IV. Whart. Dict.

TABELLA (Lat.). In Civil Law. A small table on which votes were often written. Cicero, in Rull. 2. 2. Three tables were given to the judges, one with the letter A for *Absolutio*, one with C for *Condemnatio*, and one with N. L. for *Non Liquet*, not proven. Calvinus, Lex.

TABELLIO. In Roman Law. An officer among the Romans, who reduced to writing, and into proper form, agreements, contracts, wills, and other instruments, and witnessed their execution.

The term tabellio is derived from the Latin *tabula, seu tabella*, which, in this sense, signified those tables or plates covered with wax which were then used instead of paper. 8 Toullier, n. 53.

Tabelliones differed from notaries in many respects: they had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the *tabelliones;* they received the agreements of the parties, which they reduced to short *notes;* and these contracts were not binding until they were written *in extenso*, which was done by the *tabellones*. Jacob, Law Dict. *Tabellion.*

TABLE. A synopsis in which many particulars are brought together in a general view. See LIFE TABLES. As to the Law of the Twelve Tables, see CODE.

TABLE-RENTS. Rents paid to bishops and other ecclesiastics, appropriated to their table or housekeeping. Jacob.

TABLEAU OF DISTRIBUTION. In Louisiana. A list of creditors of an insolvent estate, stating what each is entitled to. Taylor v. Hollander, 4 Mart. N. S. (La.) 535.

TABULA IN NAUFRAGIO (Lat. a plank in a wreck). A figurative term used to denote the power of a third mortgagee, who, having obtained his mortgage without any knowledge of a second mortgage, may acquire the first incumbrance, and squeeze out and have satisfaction before the second. 2 Ves. Ch. 573. "It may be fairly said that the doctrine survives only in the unjust and much-criticised English rule of tacking"; Ames, Lect. Leg. Hist. 269. See TACKING; PURCHASER FOR VALUE WITHOUT NOTICE. The use of the expression is attributed to Sir Matthew Hale; see 2 P. Wms. 491.

TABULÆ. In Civil Law. Contracts and written instruments of all kinds, especially wills. So called because originally written on tablets and with wax. Calvinus.

TAC. A kind of customary payment by a tenant. Blount, Ten. 155.

TAC FREE. Free from payments, etc.; *e. g. "tac free de omnibus propriis porcis suis infra metas de C," i. e.* paying nothing for his hogs running within that limit. Jacob.

TACIT. That which, although not expressed, is understood from the nature of the thing or from the provision of the law; implied.

TACIT LAW. A law which derives its authority from the common consent of the people without any legislative enactment. 1 Bouvier, Inst. 120.

TACKING. In English Law. The union of securities given at different times, so as to prevent any intermediate purchaser's claiming title to redeem or otherwise discharge one lien which is prior, without redeeming or discharging other liens also which are subsequent, to his own title. Jeremy, Eq. Jur. 188; 1 Story, Eq. Jur. § 412.

It is an established doctrine in the English chancery that a *bona fide* purchaser without any notice of a defect in his title at the time of the purchase may lawfully buy any mortgage, or incumbrance, and if he can defend by those at law his adversary shall have no help in equity to set those incumbrances aside, for equity will not disarm such a purchaser. And as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has extended to them, and a mortgagee who has advanced his money without notice of any prior incumbrance may, by getting an assignment of a statute, judgment, or recognizance, protect himself from any incumbrance subsequent to such statute, judgment, or recognizance, though prior to his mortgage; that is, he will be allowed to *tack* or unite his mortgage to such old security, and will by that means be entitled to recover all moneys for which such security was given, together with the money due on his mortgage, before the prior mortgagees are entitled to recover anything; 2 Cruise, Dig. t. 15, c. 5, s. 27; 1 Vern. 188. The source and origin of the English doctrine is the case of Marsh v. Lee, 2 Ventr. 337; 1 Ch. Cas. 162; 1 Wh. & T. L. C. Eq. 611, notes. This case and the doctrine founded upon it has been the subject of severe criticism; Langd. Eq. Pl. 191. Lord Ch. J. Holt is said to have been one of the first to benefit by the right of tacking; see Holt v. Mill, 2 Vern. 279.

Tacking was abolished by sec. 7 of the Vendor and Purchaser Act, Stat. 37 & 38 Vict. c. 78, but that section is repealed by sec. 129 of the Land Title and Transfer Act of 38 & 39 Vict. c. 87; Moz. & W. See 1 Pingr. Mortg. § 477.

In England a mortgagee who holds several distinct mortgages under the same mortgagor,

redeemable, not by express contract, but only by virtue of the equity of redemption, may, within certain limits and against certain persons, consolidate them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all; 6 App. Cas. 698. See Brett's L. Cas. Mod. Eq. 216. It is there termed consolidation of mortgages, and the principle is laid down that the courts lean against any extension of the doctrine; 6 App. Cas. 698, which is cited as the leading case, and as practically overruling L. R. 4 Eq. 537, which was overruled in 14 Ch. D. 699.

The high-water mark of the doctrine is said to be represented by Vint v. Padget, where it was held that if mortgages of different lands to secure different debts are made to, or come into the hands of, the same person, the mortgagee cannot redeem either without redeeming both, or he may enforce the payment of the amount of both debts out of the land covered by either; and this is true though he bought the mortgages with notice of an outstanding second mortgage; 2 De G. & J. 611. This case is said to have been cited but not approved in [1896] App. Cas. 187, affirming [1895] 1 Ch. 51, which affirmed [1894] 2 Ch. 328, where it was held that when the owner of different properties mortgages them to different persons, and the mortgages afterward become united under one title, the holder of the mortgages has a right to refuse to be redeemed as to one without payment of all, not only as against the mortgagor, but also as against a person in whom the equities of redemption of all the properties have been vested by one deed, whether from the mortgagor or mesne assignee, although the assignment is made before the mortgages become united in title.

In American Law. This doctrine is inconsistent with the laws of the several states, which require the recording of mortgages; and does not exist to any extent; Peabody v. Patten, 2 Pick. (Mass.) 517; Brayee v. Bank, 14 Ohio 318; Anderson v. Neff, 11 S. & R. (Pa.) 208; Dyer v. Graves, 37 Vt. 375; Parkist v. Alexander, 1 Johns. ch. (N. Y.) 399; Bisph. Eq. § 159. A rule apparently analogous may, however, be found in those cases where a mortgage is given to secure future advances, and where the mortgagee is allowed to recover sums subsequently advanced, as against a *mesne* mortgage; Bisph. Eq. § 159, where the cases are collected; but the future advances to be protected must be without notice of the intervening incumbrance; *id.;* Shirras v. Caig, 7 Cra. (U. S.) 45, 3 L. Ed. 260; unless the advances are made under a binding agreement; Crane v. Deming, 7 Conn. 387; Appeal of Moroney, 24 Pa. 372; Farnum v. Burnett, 21 N. J. Eq. 87; and the recording of the latter is a sufficient notice; Spader v. Lawler, 17 Ohio 371, 49 Am. Dec. 461; Shirras v. Caig, 7 Cra. (U. S.) 45.

Though, for the reasons stated, the subject of tacking as to mortgages or liens is not a very practical one in this country, the term is used in a number of other connections, as of possessions, disabilities, or items in accounts or other dealings. In these several cases the purpose of the proposed tacking is to avoid the bar of a statute of limitations.

Tacking Successive Possessions. On the issue of adverse possession, the various holdings of the different claimants in the chain of title may be added together; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515; Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494; and so may successive possessions of different tenants in common; Woodruff v. Roysden, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. 905; or that of father-in-law followed by son-in-law; St. Louis v. Keitley, 29 Mo. 593, note. The possessions may be tacked: Of grantor and grantee; Harris v. McGovern, 99 U. S. 161, 25 L. Ed. 317; (but not if the grantor have no color of title; Morrison v. Craven, 120 N. C. 327, 26 S. E. 940); of decedent and his heirs and representatives; Wickes v. Wickes, 98 Md. 307, 56 Atl. 1017; Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249; the possession of the tenant of premises which were occupied under adverse possession and which he afterwards purchased, and that of a tenant who had been in possession prior to and during his occupancy and who attorned to him and paid him rent; Houston v. Finnigan (Tex.) 85 S. W. 470.

To permit of such tacking there must be privity of estate; Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177; they must be connected through the chain of title; Murray v. Pannaci, 67 N. J. Eq. 724, 57 Atl. 1132; Johnston v. Case, 131 N. C. 491, 42 S. E. 957. To constitute continuous adverse possession by tacking that of successive owners, the privity of estate may rest on a conveyance, parol agreement or understanding; Kepley v. Scully, 185 Ill. 52, 57 N. E. 187; by operation of law, by descent, or voluntary or involuntary transfers from one to another; Nelson v. Trigg, 72 Tenn. (4 Lea) 701; but they must be directly connected. Interrupted and discontinuous periods of possession cannot be tacked together, so as to ripen into a title; Clark v. White, 120 Ga. 957, 48 S. E. 357; and where several persons enter upon land in succession, the several possessions cannot be tacked together so as to make a continuity of possession under the law of adverse title, unless there is privity of estate, or the several titles are connected; Low v. Schaffer, 24 Or. 239, 33 Pac. 678. The possession of the assignee of a dower terminates with the death of the dowress and cannot be added to the subsequent possession of her grantee to enable the latter to set up title by adverse possession against the remainderman; Beaty v. Clymer, 32 Tex. Civ. App. 322, 75 S. W. 540. Under a statute providing that no estate in lands other than leases for a year or less

shall be granted except by operation of law or deed in writing, successive possessions may be tacked so as to make up a continuous adverse possession barring recovery without anything more than a parol sale and transfer from one possessor to another; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 N. W. 1027, 82 N. W. 534, 48 L. R. A. 830, 80 Am. St. Rep. 54. As against a mere intruder showing no title, the possession of the ancestor of a plaintiff in ejectment and that of the ancestor's tenants may be tacked together to perfect a title by adverse possession; Beam v. Gardner, 18 Pa. Super. Ct. 245, where plaintiff was purchasing the title of the heirs. The grantee of mortgaged premises may add to the time of limitation in his favor that which had run in favor of his grantors in order to make up the aggregate period required to bar the action to foreclose; Paine v. Dodds, 14 N. D. 189, 103 N. W. 931, 116 Am. St. 674.

Tacking Disabilities. One disability cannot be tacked to another to avoid the operation of the statute of limitations; Davis v. Coblens, 174 U. S. 719, 19 Sup. Ct. 832, 43 L. Ed. 1147: as coverture to infancy; Knippenberg v. Morris, 80 Ind. 540; Eager v. Com., 4 Mass. 182; Franklin v. Cunningham, 187 Mo. 184, 86 S. W. 79; Elcan v. Childress, 40 Tex. Civ. App. 193, 89 S. W. 84; or infancy to coverture; Caperton v. Gregory, 11 Grat. (Va.) 505; Lamberida v. Barnum (Tex.) 90 S. W. 698; or lunacy to infancy; Sharp v. Stephens' Committee, 21 Ky. L. Rep. 687, 52 S. W. 977.

Tacking Items in Accounts for Services or Goods Sold and Delivered. This will not be permitted where such items are separated by a material lapse of time. The accounts must be practically continuous. Where payment is claimed for personal service for two periods separated by a break of some years, the former period, being barred, cannot be tacked on to the latter as items in a mutual account current, and there is no liability unless the proof shows that at the beginning of the second period there was an express contract to pay for past as well as future services; Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023; and where a married woman lived on her own farm, which her husband operated and supported the family, and she bought goods prior to 1888 on open account, and the husband purchased seed in 1894, and in the interval barbed wire, giving notes, which were paid, each of the latter purchases was an independent transaction, which could not be tacked to the old account, so as to take that out of the statute of limitations; Moore v. Blackman, 109 Wis. 528, 85 N. W. 429.

TAIL. See ESTATE TAIL.

TAILAGE. See TALLAGE.

TAILLE (Fr.). The equivalent of the English tallage—the typical direct tax in France of the Middle Ages, as tonlieu was the generic term for an indirect tax. See TALLAGE.

TAINT. A conviction of felony, or, the person so convicted. Cowell. See ATTAINT.

TAKE. A technical expression which signifies to be entitled to: as, a devisee will take under the will.

To seize: as, to take and carry away, either lawfully or unlawfully.

In an indictment for larceny, a charge that defendant did feloniously take implies a trespass; State v. Friend, 47 Minn. 449, 50 N. W. 692. Under a statute making it an offence to take up and use a horse without the consent of the owner, the taking a horse bridled, saddled, and hitched to a tree will not constitute the offence; Cochran v. State, 36 Tex. Cr. R. 115, 35 S. W. 968.

The word may be synonymous with arrest; Com. v. Hall, 9 Gray (Mass.) 267, 69 Am. Dec. 285; but *take* and *steal* were held not to be synonymous; Stone v. Stevens, 12 Conn. 229, 30 Am. Dec. 611. It has been held equivalent to require. King v. Kent's Heirs, 29 Ala. 542. A devisee takes under a will only when the possession and control of the devisor has ceased; Jersey City v. Banking Co., 41 N. J. L. 70.

Poison administered externally (poison ivy) is not a *taking* of poison under a benefit certificate; Dent v. Mail Ass'n, 183 Fed. 840.

To retain money illegally collected at Bremen from an immigrant within the excluded classes was held not a taking in the United States; U. S. v. Nord Deutscher Lloyd, 186 Fed. 391.

As to *taking silk*, see SILK.

In its usual signification the word taken implies a transfer of dominion, possession, or control. *Id.*

To choose: *e. g. ad capiendas assisas*, to choose a jury.

To obtain: *e. g.* to take a verdict in court, to get a verdict.

TAKE UP. An indorser or acceptor is said to take up, or retire, a bill when he discharges his liability upon it. In such a case, the indorser would hold the instrument with all his remedies intact; while the acceptor would extinguish all the remedies on it. One who accepts a lease is also said to take it up.

TAKING. The act of laying hold upon an article, with or without removing the same. See LARCENY; ROBBERY.

It implies a transfer of possession, dominion, or control. A thing is not taken unless such a change of status is effected. In trespass, trover, or replevin the taking is not accomplished until the goods are within the power or control of the defendant. See CONVERSION; TRESPASS; TROVER; REPLEVIN; EMINENT DOMAIN.

TALE. **In English Law.** The ancient name of the declaration or count. 3 Bla. Com. 293.

TALES (Lat. *talis*, such, like). A number of jurors added to a deficient panel sufficient to supply the deficiency. Nesbit v. People, 19 Colo. 441, 36 Pac. 221. See Shields v. Bank, 3 Hun (N. Y.) 477, 479.

A list of such jurymen as were of the tales, kept in the king's bench office in England.

TALES DE CIRCUMSTANTIBUS (Lat. a like number of the bystanders). A sufficient number of jurors selected from the bystanders to supply a deficiency in the panel.

The order of the judge for taking such bystanders as jurors.

Whenever from any cause the panel of jurors is insufficient, the judge may issue the above order, and the officer immediately executes it; see Lee v. Evaul, 1 N. J. L. 283; Fuller v. State, 1 Blackf. (Ind.) 65. See JURY.

TALESMEN. See preceding title.

TALITER PROCESSUM EST. "So it has proceeded;" words formerly used in pleading, by which a defendant, in justifying his conduct by the process of an inferior court, alleged the proceedings in such inferior court. Steph. Pl. 5th ed. p. 369.

TALKING MACHINES. Where records were made by taking a matrix from the commercial records of a manufacturer of talking machines, making copies of them and selling them at about half price, it was held that, aside from any question of infringement of trade mark or imitation of label or deception of the public, the manufacturers of the original records were entitled to an injunction; Fonotipia, Limited, v. Bradley, 171 Fed. 951.

TALLAGE, or TALLIAGE (Fr. *tailler*, to cut). **In English Law.** A term used to denote subsidies, taxes, customs, and, indeed, any imposition whatever by the government for the purpose of raising a revenue. Bacon, Abr. *Smuggling*, etc. (B); Fort. *De Laud.* 26; Madd. Exch. c. 17; Co. 2d Inst. 531.

A tax upon cities, townships and boroughs granted to the king as a part of the royal revenue. 2 Steph. Com. 622.

The king could permit his boroughs to tallage themselves. The great men of London purchased charters exempting them from tallages, and the whole weight of the burden was thrown on the smaller folk. "Not just once, twice, thrice, or four times have the mayor and aldermen set tallages upon us without special command of the king or the assent and consent of the whole community; they have spared the rich and distrained the poor to the disherison of the king and the destruction of his city"; 1 Poll. & Maitl. 647.

It was arbitrarily exacted, without the consent of parliament, until the right was surrendered by Edward I; Taswell-Langmead, Const. Hist. 122.

TALLAGIUM (perhaps from Fr. *taille*, cut off). A term including all taxes. Co. 2d Inst. 532; *Stat. de tal. non concedendo, temp.* Edw. I.; Stow, Annals 445; 1 Sharsw. Bla. Com. 311*. Chaucer has talaigiers for "tax-gatherers."

TALLY (Fr. *tailler;* It. *tagliare*, i. e. *scindere*, to cut off). A stick cut into two parts on each whereof is marked, with notches or otherwise, what is due between debtor and creditor. Hence the tallier of the exchequer is now called the teller. Lex. Constit. 205; Cowell. One party must have one part, and the other the other, and they must match. Tallies in the exchequer were abolished by 23 Geo. III. c. 82, and were ordered to be destroyed in 1834. They were thereupon used in such quantities to heat the stoves in the house of lords that it is supposed they were the cause of the fire which destroyed both houses of parliament.

By the custom of London, sealed tallies were effectual as a deed. Liber Albus 191a. They are admissible by the French and Italian Codes as evidence between traders. It is said that they were negotiable. See Penny Encycl.; Hall, Antiq. of Exch. 118.

TALMUD. A work which embodies the civil and canonical law of the Jewish people.

TAME. Domesticated; reclaimed from a natural state of wildness. See ANIMAL.

TANGIBLE PROPERTY. That which may be felt or touched: it must necessarily be corporeal, but it may be real or personal.

See TAX; SITUS; MOVABLES.

TANISTRY (*a thanis*). **In Irish Law.** A species of tenure founded on immemorial usage, by which lands, etc., descended, *seniori et dignissimo viro sanguinis et cognominis, i. e.* to the oldest and worthiest man of the blood and name. Jacob, Law Dict.

TANTEO. In Spanish Law. Pre-emption. White, N. Recop. b. 2, t. 2, c. 3.

TANTO. In Mexican Law. The right enjoyed by an usufructuary of the property, of buying property at the same price at which the owner offers it to any other person, or is willing to take from another. Civil Code, Mex. art. 992.

TARDE VENIT (Lat.). The name of a return made by the sheriff to a writ, *when it came into his hands too late* to be executed before the return day.

The sheriff is required to show that he has yielded obedience to the writ, or give a good excuse for his omission; and he may say, *quod breve adeo tarde venit quod exequi non potuit.* It is usual to return the writ with an indorsement of *tarde venit.* Com. Dig. *Return* (D 1).

TARIFF. Customs, duties, toll, or tribute payable upon merchandise to the general government; the rate of customs, etc., also bears this name, and the list of articles liable to duties is also called the tariff.

The present tariff act was approved at 9:10 p. m. October 3, 1913, and took effect on

the day following its passage, unless therein otherwise specially provided.

See RECIPROCITY; TAX; PHILIPPINES; STATUTE.

TAVERN. A place of entertainment; a house kept up for the accommodation of strangers. Webster. Originally, a house for the retailing of liquors to be drunk on the spot. Webster. A house licensed to sell liquors in small quantities. In re Schneider, 11 Ore. 288, 8 Pac. 289.

In almost all the states the word has come to mean the same as inn, with no particular reference to the sale of liquors. See 2 Kent 597*, note *a;* Foster v. State, 84 Ala. 451, 4 South. 833. Tavern has been held to include "hotel"; St. Louis v. Siegrist, 46 Mo. 593; *contra,* Bonner v. Welborn, 7 Ga. 296.

For the liability of tavern-keepers, see Story, Bailm. § 7. See Wandell, Inns; Beale, Innkeepers; INNKEEPER.

TAX. A pecuniary burden imposed for the support of the government. U. S. v. R. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597. The enforced proportional contribution of persons and property, levied by the authority of the state for the support of government, and for all public needs. Opinion of the Justices, 58 Me. 591; Cooley, Tax. 1. Burdens or charges imposed by the legislative power of a state upon persons or property, to raise money for public purposes. Perry v. Washburn, 20 Cal. 318. A sum or rate imposed by governmental authority for a public object or purpose. Pettibone v. Smith, 150 Pa. 118, 24 Atl. 693, 17 L. R. A. 423; Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

A pecuniary burden laid upon individuals or property to support the government. New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284. See the opinion by Miller, J., in Citizens S. & L. Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455.

A tax is a demand of sovereignty; a toll is a demand of proprietorship; State Freight Tax Case, 15 Wall. (U. S.) 278, 21 L. Ed. 146. Taxes are not "debts"; Perry v. Washburn, 20 Cal. 318; McKeesport v. Fidler, 147 Pa. 532, 23 Atl. 799; City Council of Charleston v. Phosphate Co., 34 S. C. 541, 13 S. E. 845; do not embrace local assessments; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; New London v. Miller, 60 Conn. 112, 22 Atl. 499; Austin v. Seattle, 2 Wash. 667, 27 Pac. 557; nor are fees required by a statute for filing articles of incorporation a tax; Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721. The word "tax" is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of a charge or burden imposed by the state for the purpose of revenue for its support; New York v. Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.

A tax is not a debt; Camden v. Allen, 26 N. J. L. 398; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; and has none of the incidents of a debt; 21 Harv. L. Rev. 283; technically it is not a debt; Appleton v. Hopkins, 5 Gray (Mass.) 530, per Shaw, C. J. There are cases holding that, in the absence of any other remedy, assumpsit will lie; Baltimore v. Howard, 6 Har. & J. (Md.) 383; but the weight of authority is otherwise; McKeesport v. Fidler, 147 Pa. 532, 23 Atl. 799, following Lane County v. Oregon, 7 Wall. (U. S.) 71, 19 L. Ed. 101; Camden v. Allen, 26 N. J. L. 398. Liability to pay taxes arises from no contractual relation and cannot be enforced by common law proceedings, unless a statute so provides; Schmuck v. Hartman, 222 Pa. 190, 70 Atl. 1091. But in U. S. v. Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204, it was held, in an action to recover the amount of revenue stamps alleged to be due on a conveyance, that an action of debt was maintainable wherever there was due a sum either certain or readily reducible to certainty, distinguishing Lane County v. Oregon, 7 Wall. (U. S.) 71, 19 L. Ed. 101, as holding that the acts making United States notes a legal tender for debts did not apply to state taxes.

Taxes differ from subsidies, in being certain and orderly, and from forced contributions, etc., in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government; Cooley, Tax. 2. No matter how equitable a tax may be, it is void unless legally assessed; Joyner v. School Dist. Number Three, 3 Cush. (Mass.) 567; and, on the other hand, the injustice of a particular tax cannot defeat it when it is demanded under general rules prescribed by the legislature for the general good; Cooley, Tax. 3.

Taxes are classified as *direct,* which includes "those which are assessed upon the property, person, business, income, etc., of those who pay them; and *indirect,* or those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity." Cooley, Tax. 61. The latter includes duties, imposts and excises; Pollock v. Trust Co., 157 U. S. 557, 15 Sup. Ct. 673, 39 L. Ed. 759, where it was said: "Although there have been from time to time intimations that there might be some tax which was not a direct taxation, nor included under the words 'duties, imposts and excises,' such a taxation for more than 100 years of national existence has yet remained undiscovered." Quoted in Thomas v. U. S., 192 U. S. 363, 370, 24 Sup. Ct. 305, 48 L. Ed. 481.

Direct taxes within the meaning of the constitution are only capitation taxes and

taxes on real estate; Springer v. U. S., 102 U. S. 586.

It was held that the income tax law of 1894 was a direct tax and unconstitutional. The first decision left the constitutional question in doubt, the court being equally divided; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759. On re-argument before a full court the decision was by a majority of one only. The points settled by the opinion of the court were, substantially, these: Direct taxes must be apportioned among the several states in accordance with numbers. Taxes on real estate are direct taxes, and taxes on the rent or income of real estate are the same. Taxes on personal property or on the income of personal property are likewise direct taxes. The act of 1894, so far as it falls on the income of real estate and of personal property, is a direct tax on the property and therefore void, because not apportioned according to representation; Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.

See *infra* as to the 16th amendment to the constitution and the Income Tax Act of Oct. 3, 1913.

Excise taxes have been repeatedly sustained by the courts: Thus, on the use of carriages; Hylton v. U. S., 3 Dall. (U. S.) 171, 1 L. Ed. 556; on sales at exchanges or boards of trade; Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786; on the transmission of property from the dead to the living; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; on agreements to sell shares of stock denominated "calls"; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; on tobacco manufactured for consumption (between the beginning of manufacture and consumption); Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; on the sales of shares of stock; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481; on transfers of property intended to take effect in possession or enjoyment at or after the death of the grantor; Keeney v. Comptroller of New York, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139; on sugar refining; Spreckels S. R. Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496; on conducting commercial agencies (unless its effect is to violate a federal statute, such as burdening interstate commerce); U. S. F. & G. Co. v. Kentucky, 231 U. S. 394, 34 Sup. Ct. 122, 58 L. Ed. 283. The internal revenue tax on the sale of liquor is not a tax on property or the profits of the business, but a charge on the business; South Carolina v. U. S., 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. The provision of the constitution that "all duties, imposts and excises shall be uniform throughout the United States" refers purely to geographical uniformity, and is synonymous with the expression "operate generally throughout the United States;" Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. These words were used comprehensively to cover customs and excise duties on importations, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481.

Public Purpose. No tax is valid which is not laid for a public purpose; Citizens' S. & L. Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455, where it was said that there are limitations on the powers of the three branches of the government which grow out of the essential nature of all free governments—implied reservations of individual rights without which the social compact could not exist, and among these is that taxation must be for a public purpose; such are (according to Cooley, Tax. 18) to preserve the public order; to make compensation to public officers, etc.; to erect, etc., public buildings; to pay the expenses of legislation, and of administering the laws, etc.; also, to provide secular instruction; Cooley, Tax., 2d ed. 119-124; Kelly v. Pittsburgh, 104 U. S. 81, 26 L. Ed. 658; but not in a school founded by a charitable bequest, though a majority of the trustees were to be chosen (but from certain religious societies) by the inhabitants of the town; Jenkins v. Andover, 103 Mass. 94. A town may tax itself for the erection of a state educational institution within its limits; Merrick v. Amherst, 12 Allen (Mass.) 500. The support of public charities is a public purpose, and money raised by taxation may be applied to private charitable institutions. Taxation for the purpose of giving or loaning money to private business enterprises is illegal; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39. In some cases, governments have applied public funds to pay equitable claims (upon which no legal right exists), such as for the destruction of private property in war, or for loss incurred in a contract for the construction of a public work; Cooley, Tax. 91. Taxes may be levied for the construction and repair of canals, railroads, highways, roads, etc.; Cooley, Tax. 94; Chicago, B. & Q. R. Co. v. Otoe Co., 16 Wall. (U. S.) 667, 21 L. Ed. 375; Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666, 22 L. Ed. 227; (Miller and Davis, JJ., dissenting in both of these last two cases; see also the opinion, rendered by Miller, J., in Citizens' S. & L. Ass'n v. Topeka, 20 Wall. [U. S.] 655, 22 L. Ed. 455); and the construction of a free bridge in a city; Philadelphia v. Field, 58 Pa. 320; and for the payment of the public debt, if lawfully incurred; and for protection against fire; Kelly v. Pittsburgh, 104 U. S. 81, 26 L. Ed. 658. Taxation to provide municipal gas and water works is lawful; Wells v. Atlanta, 43 Ga. 67; Van Sicklen v. Burlington, 27 Vt. 70; and for the preservation of the public health; Western S. F. Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730;

Cooley, Tax. 101. Municipalities may pay money by way of bounties to those who volunteer as soldiers in time of actual or threatened hostility; Speer v. School Directors, 50 Pa. 150; but not to provide amusements for the people, or to celebrate the declaration of independence, etc.; Hood v. Lynn, 1 Allen (Mass.) 103; Hodges v. Buffalo, 2 Den. (N. Y.) 110; the purchase and support of public parks is lawful; Cooley, Tax. 61, 129, 615.

A manufacturing enterprise in a community is not a public purpose; Citizens' S. & L. Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455 a leading case, in which Miller, J., rendered the opinion of the court, and considered also the subject of railroad aid bonds, as well as what is a public purpose. (See BOND as to railroad aid bonds.)

A legislature can authorize a city or town to tax its inhabitants only for public purposes; Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; Attorney General v. Eau Claire, 37 Wis. 400; Mather v. Ottawa, 114 Ill. 659, 3 N. E. 216.

A statute providing for a special tax on corporations to establish free scholarships in a state university is unconstitutional; State v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653, where the cases as to what is a public purpose are collected. So of loans to aid in rebuilding parts of a city destroyed by fire; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6; a city water plant; loans by cities in aid of private manufacturing enterprises; Citizens' S. & L. Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; aid of private educational enterprises; Curtis's Adm'r v. Whipple, 24 Wis. 350, 1 Am. Rep. 187; Jenkins v. Andover, 103 Mass. 94; though no tuition fee is charged; Mullen v. Juenet, 6 Pa. Super. Ct. 1; a bounty for growing forest trees; Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622; a pension for the blind; Auditor of Lucas County v. State, 75 Ohio St. 114, 78 N. E. 955; so a tax on fire insurance companies premiums (local) for the benefit of disabled firemen; Ætna Fire Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

Public purpose in this connection "has no relation to the urgency of the public mind, or to the extent of the public benefit to follow." People v. Salem, 20 Mich. 452, 4 Am. Rep. 400.

It is an essential rule of taxation that the purpose for which a tax is levied "should be one which in an especial manner pertains to the district within which it is proposed that the contribution shall be collected. . . . A state purpose must be accomplished by a state taxation, a county purpose by a county taxation, etc." Cooley, Tax. 104.

Apportionment, which is a necessary element of taxation, is a matter of legislation; Cooley, Tax. 175. Judge Cooley classifies the taxes as specific, *ad valorem*, and those apportioned by special benefit. He suggests as general principles, that while the districts are discretionary, the basis of apportionment must be applied throughout the district and cannot embrace persons or property outside of it. There may be a diversity in methods of collecton; the tax does not fail because the rule of apportionment cannot in all cases be enforced, and exemptions, though permissible, must not be in the nature of special and invidious discriminations against individuals.

While perfect equality is unattainable, only statutes based upon false and unjust principles or producing gross inequality will justify the interposition of the courts. See Grim v. School Dist., 57 Pa. 433, 98 Am. Dec. 237; Walton v. Riley, 85 Ky. 413, 3 S. W. 605. The 14th amendment of the constitution of the United States was not intended to compel the states to adopt an iron rule of equality or prevent classification; it is enough that there is no discrimination in favor of one as against another of the same class; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

A tax is uniform when it operates with the same effect in all places where the subject of it is found, and is not wanting in such uniformity because the thing is not equally distributed in all parts of the United States; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. Accordingly a different rule of taxation may be prescribed for railroad companies from that for individuals; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

"The whole argument of a right under the federal constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap R. R. Co. v. Pa., 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892." Merchants' Bank v. Pa., 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.

The requirement of uniformity imposed by the constitution on congress in levying excise taxes is not intrinsic, but geographic; Billings v. U. S., 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. —.

"Direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself." Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786.

Double taxation is defined as the require-

ment that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once; Cooley, Tax. 394, citing McNeill v. Hagerty, 51 Ohio St. 255, 37 N. E. 526, 23 L. R. A. 628; Com. v. R. Co., 150 Pa. 234, 24 Atl. 609; Second Ward S. Bk. v. Milwaukee, 94 Wis. 587, 69 N. W. 359. Double taxation does not exist in a legal sense unless the double tax is levied upon the same property within the same jurisdiction; an excise levied upon earnings from operating property is not a double tax because the property itself is taxed; In re Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. ——. Where a testator died domiciled in Illinois and that state taxed the succession to his propefty, it was held that a tax imposed in New York on the transfer of his bank deposit in that state was not invalid; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439, where it was said that the power of two states to tax on different and more or less inconsistent principles leads to some hardship; that it may be regretted also that one and the same state should tax on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole; but that such inconsistencies infringe no rule of constitutional law. So also in Hawley v. Malden, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. ——. Mr. Judson, in his work on Taxation, points out that the only relief lies in interstate comity. See also In re Burr's Estate, 16 Misc. 89, 38 N. Y. Supp. 811, and an article by Simeon E. Baldwin in 14 Yale L. J. 134.

Land subject to a mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation either of the land or of the owner's personal property; Paddell v. New York, 211 U. S. 446, 29 Sup. Ct. 139, 53 L. Ed. 275, 15 Ann. Cas. 187, where it is said that long settled habits of a community play an important part in determining questions of constitutional law, and the fact that a method of taxation was enforced for many years before the adoption of the 14th amendment is a reason for not considering that it was overthrown thereby.

Taxing both the property and stock of a corporation is held to be double taxation; Loftin v. Bank, 85 Ind. 341; People v. Com'rs of Assessments, 69 N. Y. 91; but see Macon v. Bank, 59 Ga. 648, and *infra;* so is taxing a bicycle specially and also as a pleasure vehicle; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. (N. S.) 408, 67 Am. St. Rep. 224.

In assessing a succession tax upon "property within the jurisdiction," a mortgage to a citizen upon real estate of a nonresident should be deducted; McCurdy v. McCurdy, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. (N. S.) 329 14 Ann. Cas. 859; so in Matter of Skinner's Estate, 106 App. Div. 217, 94 N. Y. Supp. 144.

Double taxation is not favored in the law and will not be presumed; State v. R. Co., 215 Mo. 479, 114 S. W. 956; People v. Coleman, 135 N. Y. 231, 31 N. E. 1022; though the legislature may constitutionally impose it; *id.;* the same property cannot be subjected to a double tax, payable either directly or indirectly by the same person; In re Opinion of the Justices, 76 N. H. 588, 79 Atl. 31. But it has been said, on the contrary, that in the absence of any constitutional provision the power to tax is an inherent right of the sovereign and is limited only by its necessities; Alderman v. Wells, 85 S. C. 507, 67 S. E. 781, 21 L. R. A. (N. S.) 864, 21 Ann. Cas. 193.

The assessment of personal property permanently located in a state, but belonging to a foreign corporation, is not double taxation though the shares of stock belonging to a resident have also been taxed; Wilkens Co. v. Baltimore City, 103 Md. 293, 63 Atl. 562, 7 Ann. Cas. 1192; nor is it such when property is held by different titles and both the creditor and the debtor are taxed, the one on his security and the other on his property; Myers v. Richmond, 110 Va. 605, 66 S. E. 826.

The taxation of real property and of the rents thereof as income is not double taxation; In re Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; nor is a tax on gross earnings of a corporation and on its franchises in connection with its tangible property; Lincoln T. Co. v. Lincoln, 84 Neb. 327, 121 N. W. 435; nor a tax on the property of a corporation and an excise tax on its right to do business; Ohio R. & W. R. Co. v. Dittey, 203 Fed. 537; nor a tax on a stockholder and also on corporate real property; Appeal of Bulkeley, 77 Conn. 45, 58 Atl. 8; Illinois N. Bk. v. Kinsella, 201 Ill. 31, 66 N. E. 338; *contra,* as to taxing the property of a corporation and its shares; Dallas County v. Ins. Co., 97 Ark. 254, 133 S. W. 1113; Hunt v. Allen Co., 82 Kan. 824, 109 Pac. 106; East Livermore v. Banking Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. (N. S.) 952, 13 Ann. Cas. 631; Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. Ed. 833; First N. Bk. v. Douglas Co., 124 Wis. 15, 102 N. W. 315, 4 Ann. Cas. 34; Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029.

Where the right of way of a railroad was taxed, it was held that no further tax could be levied in respect thereof; People v. Ferry Co., 257 Ill. 452, 100 N. E. 956.

The assessment of an insurance company on its capital stock, surplus, contingent reserve, gross premiums and tangible property is double taxation; Bankers' L. Ins. Co. v. Lancaster Co., 89 Neb. 469, 131 N. W. 1034. A resident of a state may be taxed on his stock in a foreign corporation, though it pays taxes in its home state; State v. Nelson, 107 Minn. 319, 119 N. W. 1058.

Goods shipped to a state and there other-

wise taxable are not exempt because they had been taxed at the seller's domicil; Spaulding v. Adams Co., 140 Pac. 367.

Double taxation was held to be illegal in the absence of special legislative authority therefor; Lewiston W. & P. Co. v. Asotin Co., 24 Wash. 371, 64 Pac. 544. A tax which would amount to double taxation was held void in Detroit Citizens' St. R. Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; and in People v. Coleman, 135 N. Y. 231, 31 N. E. 1022; the court said it would be "against public policy, the purposes of the laws and natural justice."

Generally, property in order to be subject to taxation must be within the jurisdiction of the taxing power; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732. Presumptively all property within a state is subject to its taxing power; New York v. Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.

The power of taxation is exercised upon the assumption of an equivalent rendered to the tax payer in the protection of his person and property, &c. If the taxing power be not in a position to render those services or to benefit the person or property, and such property be wholly within the taxing power of another state, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and is beyond the power of the legislature; Union Transit Co. v. Kentucky, 199 U. S. 202, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493.

A state cannot tax tangible property permanently outside of the state and having no *situs* within the state; Western U. Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; and it cannot attain the same end by taxing the enhanced value of the capital stock of a corporation which arises from the value of property beyond its jurisdiction. This would be taxing property without due process of law; Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077.

It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation; Union Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493, where it was said that the court knew of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of a foreign state, and that the argument against the taxability of land applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws.

The rule that the power of a state to impose taxes is limited to property within its territory does not apply in the same degree to federal legislation, since the underlying principle on which such rule is based is that taxes are the consideration for protection afforded, and the federal government has power to afford protection to its citizens, though they may be domiciled and the property located in a foreign country; U. S. v. Billings, 190 Fed. 359.

In regard to tangible property the old rule was *mobilia sequuntur personam*. For the purposes of taxation, however, it has been held that personal property may be separated from its owner and taxed, even if it is not his own domicil and he is not a citizen of the state which imposes the tax. The same rule applies to intangible property; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732. Intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicil of the creditor; *id.* In In re Whiting's Estate, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640, it was said that this rule or maxim had been repealed.

There is an obvious distinction between tangible and intangible property in the fact that the latter is held secretly, and there is no method by which its existence or ownership can be ascertained in the state of its *situs*, except, perhaps, in the case of mortgages and shares of stock. So, if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also more particularly in the case of mortgages, in the state where the property is; Tappan v. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Sturges v. Carter, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669. If this occasionally results in double taxation, it more frequently happens that this class of property escapes altogether; Union Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493.

State taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders is not forbidden by the fourteenth amendment, where the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of

such credits are kept in the home office at all times when not needed in the state; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853; affirming 115 La. 698, 39 South. 846, 9 L. R. A. (N. S.) 1240, 116 Am. St. Rep. 179.

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs* that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Western U. Tel. Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100.

In Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732, where neither the person assessed nor the debtor was a resident of, or present in, the taxing state, and wherein no business was done by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation, it was held that the mere presence of evidences of debt could not amount to the presence of property within the state, though such notes had been sent to an agent in Indiana for the express purpose of evading taxation in Ohio. On the ground that the assessment was made upon property which was never within the jurisdiction of Indiana, the tax was held to be a taking without due process of law (Mr. Justice Day dissenting).

It is undoubtedly true that by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his domicil, and, in general, any transfer of chattels good by the law of his own domicil will be good elsewhere. But this rule is a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of property at their decease, agreeably to their wishes, without their being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact which contravenes the law of his domicil; for, if there is, the law of the owner's domicil must yield to the law of the state where the property is in fact situated; Catlin v. Hull, 21 Vt. 152, cited and followed in New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174.

The state of origin remains the *situs* of personal property, though it occasionally is sent to foreign parts; a state may tax its own corporation for all its property in the state during the year, even if every item should be taken into another state for a year and then brought back (here it did not appear that any specific cars or any average of cars were so continuously in another state as to be taxable there); New York v. Miller, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155.

Tangible personal property situate within a state may be taxed there without regard to the residence of the owner; People v. Ogdensburgh, 48 N. Y. 390; Maltby v. R. Co., 52 Pa. 140; and the real estate of a nonresident may be taxed where it is situated; Witherspoon v. Duncan, 4 Wall. (U. S.) 210, 18 L. Ed. 339; Turner v. Burlington, 16 Mass. 208.

It is the general rule to assess personalty to the owner where he has his domicil; Barnes v. Woodbury, 17 Nev. 383, 30 Pac. 1068; and sometimes, wherever it may be located in the state, either to the owner, his agent, or person having charge of it, whether the owner is a resident or not; Shriver v. Pittsburg, 66 Pa. 446; Boardman v. Tompkins Co., 85 N. Y. 359; and this rule is sometimes applicable to choses in action; State v. Howard Co. Court, 69 Mo. 454; see *infra;* vessels are usually assessed at the port where registered; People v. New York County, 58 N. Y. 242; ferryboats, where owned; Mobile v. Baldwin, 57 Ala. 62, 29 Am. Rep. 712; property in a partnership, usually where the business is carried on; Fairbanks v. Kittredge, 24 Vt. 9; and where one carries on a business at a place other than his domicil, it is held to be proper to assess the property to one in charge of the business; Danville B. & T. Co. v. Parks, 88 Ill. 170. Personalty in the hands of a trustee is assessed to him at his domicil; State v. Matthews, 10 Ohio St. 431; but sometimes to the beneficiary, if a resident of the state; Davis v. Macy, 124 Mass. 193; and if the fund is in charge of a court, in the jurisdiction in which it is controlled; State v. Jones, 39 N. J. L. 653. The personalty of a decedent is sometimes assessed to the estate at the place of *situs*, if the decedent was a nonresident, or at his last domicil, if a resident; McGregor's Ex'rs v. Vanpel, 24 Ia. 436; and sometimes to the personal representative at his domicil; State v. Jones, 39 N. J. L. 650; and continues to be so assessed until distributed; Herrick v. Big Rapids, 53 Mich. 554, 19 N. W. 182.

Movables brought into a taxing district after the beginning of the tax year are assessable; and so when brought from one district to another, if not previously, for that

year, assessed in the former district; Hammond L. Co. v. Smart, 129 La. 945, 57 South. 277, 38 L. R. A. (N. S.) 856; *contra*, Wangler Bros. v. Black Hawk Co., 56 Ia. 384, 9 N. W. 314; Johnson v. Lyon, 106 Ill. 64; see note in 38 L. R. A. (N. S.) 856.

The personalty of persons under guardianship is sometimes assessed where the ward has his domicil; West Chester School Dist. v. Darlington, 38 Pa. 157; or to the guardian; Louisville v. Sherley, 80 Ky. 71; and this would probably be the rule if the guardian, living in the state, had possession of the property, and the ward were a non-resident; West Chester School Dist. v. Darlington, 38 Pa. 157.

The state may give stock, held by individuals, any *situs* for the purpose of taxation; American Coal Co. v. Allegany County, 59 Md. 185; and it may provide that the shares of stockholders shall be assessed at the place of corporate business and the tax paid by the corporation for its members; Baltimore v. Ry. Co., 57 Md. 31.

Bank bills and municipal bonds are subject to taxation where found; and so of notes and mortgages; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174.

As to foreign-held bonds, "the power of taxation of a state is limited to persons, property, and business within her jurisdiction; all taxation must relate to one of these subjects." "Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was incorporated, they are property beyond the jurisdiction of the state." Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 300, 21 L. Ed. 179.

Where an act directs a corporation to retain a percentage of interest due on its indebtedness and to pay it to the state, it is a tax on the bondholder; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; an act which directs employers of aliens to retain a certain sum from their daily wages and pay it to the state is a tax on the alien and void; Fraser v. McConway & Co., 82 Fed. 257.

In a line of cases, the supreme court has held that notes, bonds, and mortgages may acquire a *situs* at the place where they are held; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619.

Personal property of a citizen and resident of one state, consisting of mortgages in another state, is taxable in the latter state; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701. Mortgages on land in a state may be taxed by it to the mortgagees in the county where the land lies, though owned by residents of another state and in their possession; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803.

Mortgage notes made and payable in Ohio and secured by a mortgage on Ohio property, the owner whereof resides in New York, are not taxable in Indiana where they are for safe keeping; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732. This case is distinguished in Wheeler v. New York, 233 U. S. 434, 440, 34 Sup. Ct. 607, 58 L. Ed. ——.

A bank deposit of a non-resident is taxable at the *situs* of the bank; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174.

A state may tax property in the form of credits evidenced by notes or obligations held within the state, in the hands there of an agent of a foreign corporation carrying on a permanent business there; State Board of Assessors v. Comptor National D'Escompte de Paris, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232.

Bonds deposited by a foreign insurance company with a state insurance commissioner, may be taxed by the state; Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619.

A tax imposed by a state upon tangible property within its limits, the owner of which is a non-resident, is not a personal charge against the owner, but must be enforced against the property; People v. Chenango Co., 11 N. Y. 563; Dow v. First Parish in Sudbury, 5 Metc. (Mass.) 73; and such personalty cannot be taxed unless it has an actual *situs* within the state so as to be under the protection of its laws; Augusta v. Dunbar, 50 Ga. 387.

The rule or fiction of law that personal property, more especially choses in action, has no *situs* away from the domicil of the owner at which it is deemed to be present, originated, according to Savigny, in Rome, and acquired the designation of *mobilia personam sequuntur*; but its applicability to property was never held to extend beyond Roman territory. Subsequently it became a device of international comity which, it has been declared, was subsequently "adopted from considerations of general convenience and policy and for the benefit of commerce." It was never invented with a view to its being used as a rule to govern and define the application and scope of taxation, nor was it intended to have any other meaning than that, for the purpose of the sale and distribution of property, any act, agreement, or authority which is sufficient in law where the owner resides, shall pass the property in the place where the property is, more especially to facilitate the distribution of decedents' estates by enabling

owners to dispose of their property without embarrassment from their ignorance of the laws of the country where it is; David A. Wells in 52 Pop. Sci. Monthly 356.

In dealing with the intangible interest of a stockholder, there is no question of physical *situs*, and the jurisdiction to tax such interest is not dependent upon the tangible property of the corporation; Hawley v. Malden, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. —.

In estimating, for taxation, the value of a telegraph company's property in a state, it may be regarded as part of a system, and it may be taxed although incorporated by Congress, or engaged in interstate commerce; W. U. Tel. Co. v. Missouri, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116.

A state may tax the average number of cars (refrigerator) used by a railroad within the state, but owned by a foreign corporation, which has no office or place of business within the state, and employed as vehicles of transportation within the state in the interchange of interstate commerce; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; refrigerator cars of a Kentucky corporation, used in Utah, may be taxed in Utah; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708. A foreign corporation (a sleeping car company) may be taxed not only on its tangible property in a state, but on the rights, privileges and franchises; Pullman Co. v. Trapp, 186 Fed. 126, 108 C. C. A. 238.

A tax on the property and business of a railroad operated within the state may be estimated *prima facie* by gross income computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229. In Maine v. R. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, an annual excise tax for the privilege of exercising its franchise was levied upon any one operating a railroad in the state, fixed by percentages varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. The tax was upheld. The estimated gross receipts per mile were said to be made a measure of the value of the property per mile. That the effort of the state was to reach that value and not to fasten on the receipts from transportation, as such, was said to be shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed and this excise, with the local tax, were to be in lieu of all taxes. The local tax was not expected to include the additional value gained by the property's being part of a going concern. The excise was an attempt to reach that additional value. The two taxes together may be fairly called a commutation tax; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031.

The requirement that a sleeping car company, as a condition of its right to do intrastate business, shall, in the form of a fee, pay to the state a specified per cent. of its authorized capital, is a violation of the constitution of the United States, in that such a single fee, based on all the property, interests, and business of the company, in and out of that state, is, in effect, a tax both on the interstate business of that company and on its property outside of that state, and compels the company, in order that it may do local business in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; to the same effect; Ludwig v. Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423.

Rolling stock continuously used in a state acquires a *situs* therein for taxation, and even though it is used exclusively in interstate commerce, it may be subjected in the state to an equal property tax; Pullman's Palace Car Co. v. Twombly, 29 Fed. 658; Union P. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. Ed. 787. It is within the legislative power to establish a *situs* for personal property elsewhere than at the place in which it is found, and rolling stock used continuously in two states may have a *situs* in each, but can be taxed in each only upon a fair proportion of the value; Pullman's Palace Car Co. v. Twombly, 29 Fed. 658. The continuous use in one state necessary for taxation is not prevented by frequent change of cars from one road to another and the fact that the identical cars are not continuously used in one state; *id.* It has also been held that its *situs* for the purpose of taxation is the place where the manager or agent would be taxed in contemplation of law; Dubuque v. R. Co., 39 Ia. 56. Rolling stock is taxable only at the home office of the company; Appeal Tax Court v. R. Co., 50 Md. 274.

The valuation of rolling stock may be apportioned by the court for taxation among the counties through which the road runs, with an assignment to each county of a share proportionate to the length of the road therein; Richmond & D. R. Co. v. Alamance, 84 N. C. 504. Rolling stock held under a car trust company is taxable where the car trust association has its place of business; 24 Am. & Eng. R. Cas. 626.

The Adams Express Company owned four million dollars of tangible assets in different states. By combining with that its contracts, franchises and privileges, it created a corporate property of sixteen million dollars. Its intangible property is therefore twelve million dollars; this must be considered as being distributed wherever its tangible property is located and its work done, and to be proportionally taxable there; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899. Pullman cars employed in Pennsylvania are not exempt from taxation there because, while in use, they may pass across the boundary of the state and return; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

An excise tax on foreign corporations, for the right to do business, of one-fiftieth of one per cent. of the par value of its stock (but not to exceed $2,000), is valid; Keystone Watch Case Co. v. Com., 212 Mass. 50, 98 N. E. 1063.

Vessels, though engaged in interstate commerce and employed in such commerce wholly within the limits of a state, are subject to taxation therein, although they may have been registered or enrolled at a port outside its limits; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100; but in Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205, it was held that the general rule as to vessels plying between states and in the coastwise trade, is that the domicil of the owner is the *situs* of the vessel for taxation, subject to the exception that where such a vessel has acquired an actual *situs* in a state other than the owner's domicil, it may be taxed there; and this was followed in Southern P. Co. v. Kentucky, 222 U. S. 64, 32 Sup. Ct. 13, 56 L. Ed. 96, where Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100, was distinguished, because there the vessels had for years been continuously and exclusively engaged in navigating Virginia waters, which state had thereby acquired jurisdiction. The owner of a vessel cannot arbitrarily select the place in which it shall be taxed; Southern P. Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. Ed. 96.

A *poll* or capitation tax is so called because it is a tax on the poll or person merely, without regard to property or other circumstances; The Head-Money Cases, 18 Fed. 135; Gardner v. Hall, 61 N. C. 21. It is used in some states, as Pennsylvania, to establish a qualification for voting. It was abolished in Massachusetts and in Delaware (by the constitution of 1898) and a registration fee adopted in its stead. It is a direct tax within the meaning of the federal constitution; Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433, 19 L. Ed. 95; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482; and cannot be laid by the United States except in proportion to population; Springer v. U. S., 102 U. S. 587, 26 L. Ed. 253. The domicil of the taxable is the place of the imposition of the poll tax; State v. Ross, 23 N. J. L. 517.

One person cannot have two domicils for the purpose of taxation; Richards v. Dagget, 4 Mass. 534; nor can one be abandoned until another is acquired; Borland v. Boston, 132 Mass. 89, 42 Am. Rep. 424. See DOMICIL.

There may be a tax upon occupations even if it duplicates taxes; Cooley, Tax. 385. They are usually by way of license, as distinguished from a tax upon the business authorized by the license to be carried on; Home Ins. Co. v. Augusta, 50 Ga. 530.

Such taxes have been laid on bankers, auctioneers, lawyers; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; Ould v. Richmond, 23 Grat. (Va.) 464, 14 Am. Rep. 139; clergymen; Miller v. Kirkpatrick, 29 Pa. 226; peddlers, etc. See License Tax Cases, 5 Wall. (U. S.) 462, 18 L. Ed. 497, as to federal license taxes.

A license fee is a charge for the privilege of carrying on a business or occupation and is not the equivalent or in lieu of a property tax; New York v. Tax Com'rs, 199 U. S. 48, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381. A privilege tax may both regulate the business under the police power, and produce revenue, if authorized by the law of the state; Bradley v. Richmond, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. 603. Its reasonableness is within the discrimination of the state; In re Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. ——. A state may classify occupations and impose different taxes upon different occupations; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663. The classification of merchants selling sewing machines at regular places of business and manufacturers selling by traveling salesmen is not unreasonable; such laws will not be set aside as discriminatory if there is any rational basis for the classification; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. ——. So of grading dairies; Birmingham v. Goldstein, 151 Ala. 473, 44 South. 113, 12 L. R. A. (N. S.) 568, 125 Am. St. Rep. 33; but not of discriminating between oil wagons and other wagons; Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035.

While the amount of the license or fee is usually a question for the taxing power, yet the rule is subject to the limitation that the tax should not be a prohibition of any legitimate business; Fiscal Court, Owen Co., etc., v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83; Morton v. Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485. A

license tax of $800 on private bankers is valid; Bradley & Co. v. Richmond, 110 Va. 521, 66 S. E. 872; and one of $100; Seattle v. Barto, 31 Wash. 141, 71 Pac. 735; and one of $200 on pawnbrokers; Van Baalen v. People, 40 Mich. 258; and one of $100 on the privilege of selling cigars; Gundling v. Chicago, 177 U. S. 188, 20 Sup. Ct. 633, 44 L. Ed. 725.

As to licensing physicians, see State v. Matthews, 81 S. C. 414, 62 S. E. 695, 22 L. R. A. (N. S.) 735, 128 Am. St. Rep. 919, 16 Ann. Cas. 182.

The federal *corporation tax act* (August 5, 1909) provided that every corporation for profit and having a capital stock represented by shares and engaged in business in any state should be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation equivalent to one per centum upon the entire net income, over and above five thousand dollars, received by it from all sources, exclusive of amounts received by it as dividends upon stock of other corporation subject to the tax. This act was held valid in Flint v. Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (followed in McCoach v. R. Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842), as being an impost or excise tax on the doing of business, and not a direct tax.

It was also there held that it complies with the provision for uniformity throughout the United States, that franchises of corporations are not governmental agencies of the state, and that the tax is properly measured by the entire income of the companies subject to it, notwithstanding a part of such income may be derived from non-taxable property.

While the legislature cannot by a declaration change the real nature of a tax it imposes, its declaration is entitled to weight in construing the statute and determining what the actual nature of the tax is; *id.* It is an excise tax measured by the corporate income; Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. ——; imposed upon the doing of business and not upon the franchises or property of the corporation; McCoach v. R. Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. The act was repealed by the tariff act of 1913.

A trust formed in a state for the purpose of purchasing, improving, holding and selling lands, which does not have perpetual succession, but ends with lives in being and twenty years thereafter, is not within the provisions of the corporation tax law; Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424. See TRUST ESTATES AS BUSINESS COMPANIES.

The subject matter of a *succession tax* is the devolution of the estate, or the right to become beneficially entitled to the same; Scholey v. Rew, 23 Wall. (U. S.) 349, 23 L. Ed. 99; Northern T. Co. v. Rayner, 263 Ill. 222, 104 N. E. 1114; it is not a property tax: *id.* The taxes upon legacies and distributive shares of personal property which were imposed by the war revenue act of June, 1898 were imposed on the transmission or receipt of such inheritances and legacies, and not upon the right of the state to regulate the devolution of property upon death: Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, where this tax was held to be a duty or excise, as distinguished from a direct tax.

It was imposed on the particular legacies or distributive shares, and not on the whole personal estate. The rate of the tax was determined by the classifications of legatees and was progressively increased according to the amount of the legacies or shares; *id.* The opinion contains a historical review of the subject.

The cases upholding the constitutionality of such taxes are said to be based upon two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law and not a natural right—a privilege; and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of state constitutions requiring uniformity and equality of taxation; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; Strode v. Com., 52 Pa. 181; Schoolfield's Ex'r v. Lynchburg, 78 Va. 366; State v. Dalrymple, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372; State v. Hamlin, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569; State v. Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; In re Wilmerding's Estate, 117 Cal. 281, 49 Pac. 181; Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; Gelsthorpe v. Furnell, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

Such acts may discriminate between collateral and lineal relatives; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; and may tax undistributed estates of persons who died before the enactment; Cahen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215; and a sliding scale is valid; Knowlton v. Moore, 178 U. S. 109, 20 Sup. Ct. 747, 44 L. Ed. 969. But an act taxing only estates over $20,000 was held unequal and void; State v. Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218. See an article in 34 Amer. L. Reg. (N. S.) 179, by Luther E. Hewitt.

A state may impose a graduated tax on transfers of personal property by an instrument taking effect on the grantor's death, without violating the equal protection clause; Keeney v. New York, 222 U. S. 525, 32 Sup.

Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139; an Illinois testator's deposit in a New York bank and his credits there may be subjected by New York to an inheritance tax; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439. Inheritance taxes on tangible chattels, both at the domicil of the owner and at their *situs*, are constitutional; Callahan v. Woodbridge, 171 Mass. 595.

A New Hampshire testator bequeathed stock in a corporation incorporated in Massachusetts and other states; it was held that the value of this stock, for the purpose of a succession tax to be paid in Massachusetts, is limited to the value of the franchise and property in Massachusetts which it specifically represents; Kingsbury v. Chapin, 196 Mass. 533, 82 N. E. 700, 13 Ann. Cas. 738.

The New York inheritance tax act, imposing a transfer tax upon property within the state belonging to non-residents at the time of death, is valid as to promissory notes, the makers of which are non-residents of the state; Wheeler v. New York, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. Ed. —.

In Iowa it was held that a herd of cattle within the state of Missouri, belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease; Weaver's Estate v. State, 110 Ia. 328, 81 N. W. 603.

Where a testator died domiciled in Illinois, leaving property consisting in part of a debt due him in New York and in part of a net sum held on deposit account by a trust company of that state, it was held that, although the whole succession had been taxed in Illinois, the New York tax on the transfer was also valid, and that the fact that two states, dealing each with its own law of succession, both of which have to be invoked by the party claiming rights, have taxed the right which they respectively confer, gives no ground for complaint on constitutional grounds; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439.

When land in another state is directed by will to be sold, it is not thereby subjected to succession tax of that other state; In re Shoenberger's Estate, 221 Pa. 112, 70 Atl. 579, 19 L. R. A. (N. S.) 291, 128 Am. St. Rep. 737.

A provision in a will for the care of testator's grave is not subject to collateral inheritance tax; Morrow v. Durant, 140 Ia. 437, 118 N. W. 781, 23 L. R. A. (N. S.) 474, 17 Ann. Cas. 850. But where the gift was to a cemetery company to be used for that purpose, it was held subject to the tax; In re Fay's Estate, 62 Misc. 154, 116 N. Y. Supp. 423; Long's Estate, 22 Pa. Super. Ct. 370. See note to 23 L. R. A. (N. S.) 474.

A state inheritance tax may be levied on the exercise of a power of appointment as though the estate belonged to the person exercising the power, and, although the power was created prior to the act, it does not deprive the appointee of his property without due process of law; Chanler v. Kelsey, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882.

A state can lay an inheritance tax or transfer tax on United States bonds; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998; Succession of Levy, 115 La. 377, 39 South. 37, 8 L. R. A. (N. S.) 1180, 5 Ann. Cas. 871. A state may tax its own bonds or those of its municipalities, and this does not impair the obligation of the contract; Orr v. Gilman, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196; though issued tax free; Com. v. Herman, 16 W. N. C. (Pa.) 210.

A state inheritance tax imposed upon a legacy to the United States is not invalid as an attempt to tax the property of the United States, since it is imposed upon the legacy before it reaches the hands of the government; U. S. v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287. So also In re Harriot's Estate, 145 N. Y. 543, 40 N. E. 246. The United States may levy an inheritance tax on a bequest to a city or state; Snyder v. Bettman, 190 U. S. 249, 23 Sup. Ct. 803, 47 L. Ed. 1035.

On the death of a non-resident intestate, his estate immediately passes to his next of kin, and the right of the state to inheritance tax vests at once; In re Ramsdill's Estate, 190 N. Y. 492, 83 N. E. 584, 18 L. R. A. (N. S.) 946; but on the death of a testator it is otherwise; see 21 Harv. L. Rev. 435.

No inheritance tax can be collected when a legatee renounces; In re Stone's Estate, 132 Ia. 136, 109 N. W. 455, 10 Ann. Cas. 1033; *contra*, In re Frank's Estate, 9 Pa. Co. Ct. 662.

For the inheritance tax laws of all the states, see Bancroft, Inheritance Taxes (1911).

The *war revenue* (1898) *stamp duty* imposed on sales of corporate stock is in the category of duties, imposts and excises, and is not a direct tax; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481.

The New York State tax of two cents a share on *transfers of stock* made within the state does not violate the equal protection clause of the 14th amendment; nor does it deprive non-resident owners of stock transferring, in New York, shares of non-resident corporations, of their property without due process of law; nor does it interfere with interstate commerce; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

Income Tax. The 16th amendment of the federal constitution, 1913, gave the power to levy a tax on incomes from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration. The act of congress of October 3, 1913, imposes a tax of one per cent. per annum upon the entire net income, in excess of $3,000 in case of unmarried persons and of $4,000 in the case of married persons, arising from all sources in the preceding calendar year. The tax is assessed on every citizen having such income, wheth-

er residing at home or abroad, and on every person residing in the United States, though not a citizen thereof. The act imposes a like tax upon the net income from all property owned, and every business, etc., carried on in the United States by persons residing elsewhere. In addition to this tax, which is called in the act "the normal income tax," there is also imposed upon the net income of every individual an additional income tax, called in the act "the additional income tax," of one per cent. per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, two per cent. per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, three per cent. per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, four per cent. per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, five per cent. per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,000, and six per cent. per annum upon the amount by which the total net income exceeds $500,000.

The provisions of the act for the ascertainment and assessment of these taxes are too elaborate to permit even a brief statement of them in this place.

Income in the federal constitution and income tax act is used in its common or ordinary meaning, and not in its technical or economic sense; Van Dyke v. Milwaukee, 146 N. W. 812.

Where a tax is within the legitimate authority of the federal government, it may be measured in part by the income from property not in itself taxable. A distinction exists between an attempt to tax property beyond the reach of the taxing power and to measure a legitimate tax by income derived in part at least from the use of such property; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

It has been held in Indiana that *life insurance policies* are not taxable, as there is no statute regulating it, or any manner of assessing for valuing such policies; State Board of Tax Com'rs v. Holliday, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826.

The proceeds of a life policy issued by a New York corporation to a resident of New Jersey, who always kept it in the latter state, is not subject to a New York inheritance tax on "property within the state;" it appeared that at the death of the insured the company had sufficient assets in New Jersey to pay the policy; In re Gordon's Estate, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. (N. S.) 1089. It is said that the difficulty of imposing general property taxes on life insurance policies does not apply to inheritance taxes; 20 Harv. L. Rev. 423, citing In re Knoedler's Estate, 140 N. Y. 377, 35 N. E. 601.

Patent rights are not taxable; Com. v. Petty, 96 Ky. 452, 29 S. W. 291, 29 L. R. A. 786; Com. v. Mfg. Co., 151 Pa. 265, 24 Atl. 1107, 1111; nor *trade-marks;* Com. v. Warehouse Co., 132 Ky. 521, 116 S. W. 766, 21 L. R. A. (N. S.) 30, 136 Am. St. Rep. 186, 18 Ann. Cas. 1156; nor *the good will* of a newspaper; Hart v. Smith, 159 Ind. 182, 64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280.

A state may not tax *agencies of the federal government;* Farmers' Bank v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. —— (bonds issued by a municipality of a territory of the United States); or the property of a bank in which United States bonds are included; Home Sav. Bk. v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901; Farmers' Bank v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. ——; or the obligations of the United States; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998; or United States revenue stamps; Palfrey v. Boston, 101 Mass. 329, 3 Am. Rep. 364; or the salary of a federal officer; Dobbins v. Erie Co., 16 Pet. (U. S.) 435, 10 L. Ed. 1022; or the Bank of the United States; McCulloch v. Md., 4 Wheat. (U. S.) 316, 4 L. Ed. 579; but stock in a national bank may be taxed to the owner; note 3 L. R. A. (N. S.) 584; or its real estate, but not both; Frederick Co. v. Bank, 48 Md. 117. The Bank of the United States is not a private corporation, but a public one created for national purposes, and therefore beyond the taxing power of a state; Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; so is land of the United States; Van Brocklin v. Tennessee, 117 U. S. 155, 6 Sup. Ct. 670, 29 L. Ed. 845; and also where it has sold real estate reserving the legal title till all payments are made and conditions performed; Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 Atl. 1130, 11 Ann. Cas. 388. (But it is otherwise where all the conditions precedent to a sale thereof have been perfected, but the legal title remains in the United States; McDaniel v. Traylor, 196 U. S. 423, 25 Sup. Ct. 369, 49 L. Ed. 533); so of public lands located under a warrant, but the equitable title has not passed; Sargent v. Herrick, 221 U. S. 404, 31 Sup. Ct. 574, 55 L. Ed. 787. A state cannot tax the franchises of a telegraph company received from the United States to use military and post roads; Western U. Tel. Co. v. Wright, 185 Fed. 250, 107 C. C. A. 356; but see Western U. Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226; so also the operations of the Union Pacific Railroad, which was chartered by congress; but its property may be taxed; Union P. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. Ed. 787. The states have no power to tax franchises conferred by congress without its permission; California v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150. They may tax liquor in a United States bonded warehouse; Thompson v. Kentucky, 209 U. S. 340, 28 Sup. Ct. 533, 52 L. Ed. 822.

Permanent improvements on lands allotted to Indians in severalty cannot be taxed by a

state as personal property; U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; proceeds of the sale of allotted lands by Indian heirs of allottees are exempt; U. S. v. Thurston Co., 143 Fed. 287, 74 C. C. A. 425.

A state may not impose a tax which is in any way a burden on *interstate commerce;* and a tax on telegraphic messages sent out of the state is unconstitutional; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; see Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; so is a state tax on freight transported from state to state; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 232, 21 L. Ed. 146; but a state may impose a privilege tax upon corporations engaged in interstate commerce for carrying on that part of their business which is wholly within the taxing state. This rule does not permit the taxing of Pullman cars running through a state, but those operated wholly within a state may be taxed; Allen v. Car Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134.

A state may tax personal property employed in interstate or foreign commerce, like other personal property within its jurisdiction; Pullman's P. C. Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; followed in Old Dominion S. S. Co. v. Virginia, 198 U. S. 305, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100. A state may tax property (here of an unincorporated express company) within a state, although used in interstate commerce, and may measure its value by the gross receipts and impose a tax on such value, if the same is in lieu of all taxes upon the property; U. S. Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459. A statute taxing a telegraph company upon its property within the state, at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting the value of its real estate and machinery subject to local taxation within the state, is constitutional; Western U. Tel. Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49.

While interstate commerce cannot itself be taxed, the receipts of property or capital employed therein may be taken as the measure of a lawful state tax, and where a foreign corporation carries on a purely local business, the state may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. ——, distinguishing Western U. Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and Southern Ry. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247.

An ordinance imposing an annual license fee on poles and wires of telegraph, telephone and electric light companies is not obnoxious to the commerce clause; Western U. Tel. Co. v. New Hope, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240.

While a state may not directly tax imported goods or the right to sell them, or impose license fees on importers for the privilege of selling, so long as the goods remain in the original packages and are unincorporated into the general property, yet when mingled with the other property in the state, such goods are subject to the taxing power of the state; New York v. Wells, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370; Norfolk & W. Ry. Co. v. Sims, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; American S. & W. Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538.

Where a foreign manufacturer has a permanent place of business in this country for the sale of imported articles, although the bulk of the proceeds may be sent abroad, such proceeds as cash in bank and notes receivable, retained here and used in the business, become capital invested in business in the state and are subject to state taxation; New York v. Wells, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370.

Grain was shipped from Western to Eastern points under through bills of lading which allowed warehousing in Chicago for inspection and testing; Illinois taxed the grain in warehouse as personal property and such tax was held constitutional; Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615.

Where an assessment was made upon the capital stock of a Pennsylvania corporation, and a part of such stock was represented by certain coal, mined in Pennsylvania, but stored in New York and there awaiting sale, it was held that, however temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania and could not be taxed there, even though it was conceded that a tax on the corporate stock is a tax on the assets of the corporation issuing such stock; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077.

A tax on the seller is a tax on the goods; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663. A state cannot impose a privilege tax on the agent of a packing house as to goods shipped to him from another state merely to distribute to purchasers from his principal; but it can on his domestic business; nor is it void because it is laid on the agent, so that it cannot be apportioned between the two periods of business; *id.*

No state can compel an individual or corporation to pay for the privilege of engaging in interstate commerce; this does not prevent a state from imposing ordinary property

taxes upon property having a *situs* within its territory and so employed, and the franchise of a corporation so employed is, as a part of its property, subject to state taxation, providing, at least, that it was not derived from the United States. Telegraph companies engaged in interstate commerce are subject to police supervision, and the municipality may, in addition to ordinary property taxation, subject such corporations to reasonable charges for the expenses thereof. Reasonableness will depend on all the circumstances of the case; Atlantic & P. Tel. Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995.

There is a presumption that the state legislature intended to tax only that which it had the power to tax, and a state license tax, if void in part, may be sustained so far as it relates to business intrastate; Singer Sewing Machine Co. v. Alabama, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. ——.

A railroad bridge across a navigable river forming the boundary line between two states is not, by reason of being an instrument of interstate commerce, exempt from taxation by either state upon the part within its boundaries; Pittsburgh, C., C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; so of a bridge over the Ohio river; Henderson B. Co. v. Henderson, 173 U. S. 620, 19 Sup. Ct. 553, 43 L. Ed. 823.

The federal constitution provides that no state shall, without consent of congress, (1) lay any imposts or duties on exports or imports, except what may be necessary for executing its inspection laws. See Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; (2) lay any duties of tonnage. Under this clause a tax on vessels at a certain sum per ton is forbidden; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417.

The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state constitutions and state laws; New Orleans C. & L. R. Co. v. New Orleans, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121.

The United States cannot tax the salary of a state officer; Collector v. Day, 11 Wall. 113, 20 L. Ed. 122; or the income of a municipal corporation; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; or bonds issued by a state, or by one of its municipal bodies under its authority, and held by private corporations; Mercantile Bank v. New York, 121 U. S. 138, 162, 7 Sup. Ct. 826, 30 L. Ed. 895; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998; or impose a stamp tax upon a bond which a state required as a prerequisite to the right to sell liquor; Ambrosini v. U. S., 187 U. S. 1, 23 Sup. Ct. 1, 47 L. Ed. 49. But when South Carolina went into the liquor business, it did so as a private undertaking and was subject to the internal revenue tax thereon; South Carolina v. U. S., 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737 (White, Peckham and McKenna, JJ., dissenting).

For a letter from Taney, C. J., to Secretary Chase protesting against a tax on the salaries of judges, see 157 U. S. 701.

As to *exemptions* from taxation: In the absence of any constitutional provision, the right to make exemptions is included in the right to apportion taxes; City of Indianapolis v. Sturdevant, 24 Ind. 391; the federal constitution does not prohibit them; New York v. Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.

A contract of exemption from taxation must be clear and unambiguous; City of St. Louis v. Ry. Co., 210 U. S. 266, 28 Sup. Ct. 630, 52 L. Ed. 1054; exemption is never presumed; New York v. Tax Com'rs, 199 U. S. 41, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381; exemption acts, if doubtful, are construed in favor of the public; Spokane Valley L. & W. Co. v. Kootenai Co., 199 Fed. 481; Commonwealth's Appeal, 127 Pa. 435, 17 Atl. 1094; being in derogation of common right; Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174, 10 Sup. Ct. 68, 33 L. Ed. 302. The rule that they must be strictly construed against the exemption applies not only to the extent of the legislative grant, but also to the power of the legislature to make it. Berryman v. Board of Trustees, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225. Exemptions are not favored by the courts; People v. Commissioners, 76 N. Y. 64; property exempted from taxation must be of a public nature and for a public purpose. Where the general use is of a public nature the right to exemption is not impaired by the fact that part of the property is used for producing revenue, as in the case of a public library, and statutory exemption is not impaired by the fact that part of a library building is a theatre or hall occasionally let to outside parties; People v. Sayles, 23 Misc. 1, 50 N. Y. Supp. 8.

The legislature of a state may grant to a corporation a perpetual exemption from taxation; Herrick v. Randolph, 13 Vt. 525; Landon v. Litchfield, 11 Conn. 251; O'Donnell v. Bailey, 24 Miss. 386; but privileges which may exempt a corporation from the burdens common to individuals do not necessarily flow from their charter, but must be expressed in it or they do not exist; Marshall, C. J., in Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939.

A state may bind itself by a contract, *based upon a consideration*, to refrain from exercising the right of taxation in a particular case; Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. Ed. 189; Humphrey v. Pegues, 16 Wall. (U. S.) 244, 21 L. Ed. 326; Atwater v. Woodbridge, 6 Conn. 223, 16 Am. Dec. 46, note. Immunity from taxation is not in itself transferable. It must be consid-

ered as a personal privilege not extending beyond the immediate grantee, unless otherwise expressly declared; Pickard v. R. Co., 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051.

A charter of a railway conferring all the powers and privileges conferred by act on another company does not include a right to exemption belonging to such other company; Wright v. Banking Co., 216 U. S. 420, 30 Sup. Ct. 242, 54 L. Ed. 544. A right of exemption belonging to a railroad company does not survive a foreclosure sale at which the state bought in the property; Great Northern R. Co. v. Minnesota, 216 U. S. 206, 30 Sup. Ct. 344, 54 L. Ed. 446.

A distinction between an exemption contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprises, is well settled; the latter is a mere announcement of a policy of the state, and not a contract with a company coming under its provisions; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229.

Where the exemption is by contract with the state (as in the Dartmouth College Case, 4 Wheat. [U. S.] 518, 4 L. Ed. 629), it is beyond the power of the state to abrogate. To make such a contract there must be a consideration. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients may have incurred expense upon the faith of such offers; Grand Lodge F. & A. M. v. New Orleans, 166 U. S. 143, 17 Sup. Ct. 523, 41 L. Ed. 951. Thus in Welch v. Cook, 97 U. S. 541, an act exempted from general taxation for ten years property that might be employed in the District of Columbia for manufacturing purposes; it was held to be merely a bounty and liable at any time to be withdrawn. So the perpetual exemption in Christ Church v. Philadelphia Co., 24 How. (U. S.) 300, 16 L. Ed. 602, was held revocable at the pleasure of the sovereign. The same test as to what constitutes public purposes should be applied in exempting property from taxation as in levying taxes; 18 Harv. L. Rev. 386.

The exemption of corporate capital does not necessarily include the exemption of shareholders on their stock; New Orleans v. Bank, 167 U. S. 404, 17 Sup. Ct. 905, 42 L. Ed. 202. A grant of a franchise subject to paying a license fee does not, of itself, exempt the property itself from taxation; New York v. Tax Com'rs, 199 U. S. 48, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381; and the imposition of an occupation tax does not exclude the right to tax a vehicle used therein; Newport v. Fitzer, 131 Ky. 544, 115 S. W. 742, 21 L. R. A. (N. S.) 279. An exemption, when contrary to the constitution of a state, cannot be obtained in the guise of a contract; Forshaw v. Laynan, 182 Fed. 193, 104 C. C. A. 559.

The state may exempt property from taxation for state purposes that is subject to taxation for municipal purposes; Covington Gas Light Co. v. Covington, 92 Ky. 312, 17 S. W. 808. It has full power to exempt any class of property as it may deem best, according to its views of public policy; Wilkens Co. v. Baltimore, 103 Md. 293, 63 Atl. 562, 7 Ann. Cas. 1192; as stock and securities of building associations; National L. & I. Co. v. Detroit, 136 Mich. 451, 99 N. W. 380.

The legislature may exempt property from taxation in whole, or for all except specified levies on any class of property, unless prohibited by constitutional provisions, so long as it affords to all property equal protection of the laws and makes no unequal or unfair discrimination in taxing different kinds or classes of property; but all property of the same kind and in the same condition, used for the same purposes and afforded equal protection of the law, must be submitted to the same taxation; Pryor v. Bryan, 11 Okl. 357, 66 Pac. 348, affirmed Foster v. Pryor, 189 U. S. 325, 23 Sup. Ct. 549, 47 L. Ed. 835.

The power of exemption seems to imply the power of discrimination, and in tax, as in other matters, classification is within the legislative power, and it may be even to a greater extent. The state is not bound to rigid equality by the equal protection clause of the constitution; classification simply must not be exercised in clear and hostile discrimination between particular classes and persons; Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. Ed. 1206.

Generally public property is exempt from taxation, and this extends to assessments for public improvements; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; so of crown lands, [1902] 2 K. B. 73. Public schools generally are exempt, both from taxation and local assessments; Pittsburg v. Subdistrict School, 204 Pa. 635, 54 Atl. 463, 61 L. R. A. 183; Witter v. School Dist., 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33. But they are not exempt from assessments; Chicago v. Chicago, 207 Ill. 37, 69 N. E. 580.

Lands belonging to a state are exempt; State v. Stevenson, 6 Idaho 367, 55 Pac. 886; but a leasehold interest in lands belonging to a state may be taxed; Carrington v. People, 195 Ill. 484, 63 N. E. 163; Sexton v. Coahoma Co., 86 Miss. 380, 38 South. 636; so a wharf and warehouse on tide lands held under contract of purchase from the state are taxable; Gray's Harbor Co. v. Chehalis County, 23 Wash. 369, 63 Pac. 233.

Public parks are exempt; Herman v. Omaha, 75 Neb. 489, 106 N. W. 593; and city halls and court houses; 1 Cooley, Tax. 263; a building and a stock of liquors, owned by a municipal corporation and operated by it as a dispensary are public property and exempt from taxation; Walden v. Whigham,

120 Ga. 646, 48 S. E. 159; property of a county held for a public use is exempt; Camden Co. v. Collins, 60 N. J. L. 367, 37 Atl. 623, affirmed Collins v. Camden Co., 61 N. J. L. 695, 43 Atl. 1097. The property of a city used in connection with its fire department, and also public parks of the city, are exempt from taxation by the state; City of Owensboro v. Com., 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202; in the absence of statute, municipal water works and lighting plants are exempt; West Hartford v. Water Com'rs, 44 Conn. 360; Board of County Com'rs v. Wellington, 66 Kan. 590, 72 Pac. 216, 60 L. R. A. 850; Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

Property purchased by a municipal corporation for public purposes is not subject to taxation for state purposes; Gachet v. New Orleans, 52 La. Ann. 813, 27 South. 348; Somerville v. Waltham, 170 Mass. 160, 48 N. E. 1092.

Buildings erected on leased premises by a lessee holding under a lease from a town for a fixed term, which requires the lessee to expend a large sum during the first year within the town, "either in the construction of railroads or improvements" on the premises, and stipulates that in default of the payment of rent the town may re-enter and occupy all the improvements thereon, are part of the real estate, and are not assessable against the lessee; In re Long Beach Land Co., 101 App. Div. 159, 91 N. Y. Supp. 503; that the buildings were erected for the lessee's business does not change the rule, nor make them the lessee's property; *id.*

Dispensaries operated by county or municipal authorities are not exempt from taxation; Sheffield v. Dispensary in Blakely, 111 Ga. 1, 36 S. E. 302; wharf property of a city is not; Commonwealth v. Louisville (Ky.) 47 S. W. 865; or property held by a city as trustee; St. Louis v. Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561. Where the owner of land held it in trust for a city for park purposes, and prior to the acceptance and improvement thereof received the rents from its use as a ball ground, he was properly charged with state and county taxes thereon; Elliott v. Louisville, 123 Ky. 278, 90 S. W. 990.

Where land is necessary for the franchises of a *public corporation*, it will not be locally taxed unless the legislative intent is perfectly clear; Philadelphia v. Traction Co., 208 Pa. 159, 57 Atl. 354.

The act of congress of July, 1870, provides for the issue of United States bonds and that they and the interest thereon shall be exempt from taxation. This exemption covers bonds and every incident thereto, including premiums above par which such bonds command in the market; R. I. Hospital Trust Co. v. Armington, 21 R. I. 33, 41 Atl. 570.

Government bonds are not subject to taxation, although the money or property obtained by a pledge of such bonds is not exempt; Hooper v. State, 141 Ala. 111, 37 South. 662; by act of August 13, 1894, United States legal tender notes and coin may be taxed by a state; this includes United States notes commonly called greenbacks, United States treasury notes, and gold and silver certificates; Howard Sav. Inst. v. Newark, 63 N. J. L. 547, 44 Atl. 654.

A state may authorize a town to exempt manufacturing establishments, their necessary machinery and buildings, and capital and personal property invested therein; Colton v. Montpelier, 71 Vt. 413, 45 Atl. 1039.

A railroad right of way is exempt, it paying a tax on gross earnings in return for exemption; Patterson v. Chicago, R. I. & P. R. Co., 99 Minn. 454, 109 N. W. 993; so in Boston v. R. Co., 170 Mass. 95, 49 N. E. 95.

The exemption of charitable and other institutions extends to a common school; Watson v. Cowles, 61 Neb. 216, 85 N. W. 35; a medical college; Omaha Medical College v. Rush, 22 Neb. 449, 35 N. W. 222; a school for boys; Englewood School v. Chamberlain, 55 N. J. L. 292, 26 Atl. 913; a private military school; Montclair Academy v. Bowden, 64 N. J. L. 214, 47 Atl. 490; a private school for girls; 12 Can. S. C. 384; a private school; Cassiano v. Ursuline Academy, 64 Tex. 673; a Catholic school teaching higher and lower branches; People v. St. Francis Academy, 233 Ill. 26, 84 N. E. 55.

Charging tuition at schools does not usually preclude exemption; Nashville v. Ward, 16 Lea (Tenn.) 27; Linton v. Cobb Institute, 117 Ga. 678, 45 S. E. 53; see notes in 21 L. R. A. (N. S.) 164, 171; nor does using a school for a residence; Cassiano v. Ursuline Academy, 64 Tex. 673; Yale University v. New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490 (Yale University, where buildings were leased as dormitories). Where the property of colleges is exempt if "occupied by them or their officers for the purposes for which they were incorporated," a building used for a student's dining hall, the president's house, and certain houses leased to professors (Harvard University) are exempt; Harvard College v. Cambridge Assessors, 175 Mass. 145, 55 N. E. 814, 48 L. R. A. 547. Under the same statute, houses leased to professors (Williams College) were held not exempt; Williams College v. Williamstown Assessors, 167 Mass. 505, 46 N. E. 394. In the later of these two cases the houses were used for professorial duties and the statute was more liberally construed. Where a university's land and buildings were exempt, this does not exempt their lessees, who have erected buildings thereon; Jetton v. University of the South, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. A church and its auxiliary charitable societies, in one of which beneficiaries were required to pay for ad-

mission and turn over their property to it, are charitable organizations; Carter v. Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733, and note.

The residence of a clergyman is not exempt as a "building for religious worship," because it contains one room set apart as a religious chapel; St. Joseph's Church v. Providence Assessors, 12 R. I. 19, 34 Am. Rep. 597.

A missionary society of a particular denomination is exempt; Maine B. M. Convention v. Portland, 65 Me. 92; so is a home for widows and orphans of members of a secret society; Widows' & Orphans' Home of O. F. v. Commonwealth, 126 Ky. 386, 103 S. W. 354, 16 L. R. A. (N. S.) 829; so is an orphan asylum, though with restrictions as to religious worship and instruction; Burd Orphan Asylum v. School Dist., 90 Pa. 21; so is a corporation formed exclusively for the study of Hebrew literature, religion and language; Hebrew F. S. Ass'n v. New York, 4 Hun (N. Y.) 446; so a school for the instruction of girls in useful and ornamental branches of learning and in the moral and religious principles of the Roman Catholic Church; Warde v. Manchester, 56 N. H. 508, 22 Am. Rep. 504. Hospitals are exempt; Hennepin Co. v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298; though some of the patients therein pay for their treatment; Philadelphia v. Hospital, 154 Pa. 9, 25 Atl. 1076.

Libraries are exempt; Cleveland Library Ass'n v. Pelton, 36 Ohio St. 253; the American Geographical Society was held a library; People v. Assessments Com'rs, 11 Hun (N. Y.) 506; so was an institution whose membership was limited to a stated number of shareholders; 1 El. & El. 88, but, *contra*, Delaware County Institute v. Delaware County, 94 Pa. 163; Providence Athenæum v. Tripp, 9 R. I. 559.

Fraternal orders are often recognized as charities; State v. Several Parcels of Land, 79 Neb. 643, 113 N. W. 248; Hibernian B. Soc. v. Kelly, 28 Or. 173, 42 Pac. 3, 30 L. R. A. 167, 52 Am. St. Rep. 769; *contra*, Bangor v. Rising Virtue Lodge No. 10, 73 Me. 428, 40 Am. Rep. 369; and where only purely public charities are exempt, fraternal orders which confine their benefactions to their own members are taxable; Philadelphia v. Masonic Home, 160 Pa. 572, 28 Atl. 954, 23 L. R. A. 545, 40 Am. St. Rep. 736; Morning Star Lodge, No. 26, I. O. O. F. v. Hayslip, 23 Ohio St. 144; so are mutual benefit or mutual insurance societies; Young Men's Soc. v. Fall River, 160 Mass. 409, 36 N. E. 57; Supreme Lodge M. A. F. O. v. Effingham Co., 223 Ill. 54, 79 N. E. 23, 7 Ann. Cas. 38. If part of a building is rented for business uses, that part is taxable, even though the profits are devoted to charity; Indianapolis v. Grand Master, 25 Ind. 518; Massenburg v. Grand Lodge F. & A. M., 81 Ga. 212, 7 S. E. 636.

A club house owned by a fraternal order, open only to members, but maintaining in one part of the building a restaurant, the proceeds of which were devoted to charitable work among the members and the public, was held exempt; Salt Lake Lodge No. 85, B. P. O. E., v. Groesbeck, 40 Utah 1, 120 Pac. 192.

A fraternal benefit association is not exempt; Royal Highlanders v. State, 77 Neb. 18, 108 N. W. 183, 7 L. R. A. (N. S.) 380; nor is a club house belonging to such an order, used to entertain, amuse and provide refreshments for its members; Elks' Green Bay Lodge v. Green Bay, 122 Wis. 452, 100 N. W. 837, 106 Am. St. Rep. 984.

The Young Men's Christian Association is not entitled to the benefits of exemption; Y. M. C. A. v. New York, 113 N. Y. 187, 21 N. E. 86; *contra*, Com. v. Y. M. C. A., 116 Ky. 711, 76 S. W. 522, 105 Am. St. Rep. 234; Young Men's Christian Ass'n v. Donohugh, 13 Phila. 12 (but not as to property leased by it for purposes of revenue; *id.*). A Young Women's Christian Association property was held exempt; Philadelphia v. Women's Christian Ass'n, 125 Pa. 572, 17 Atl. 475. A theosophical society was held not exempt as a literary, scientific or benevolent organization; New England Theosophical Corp. v. Board of Assessors, 172 Mass. 60, 51 N. E. 456, 42 L. R. A. 281; so as to a society for the promotion of temperance; Young Men's P. T. & B. S. v. Fall River, 160 Mass. 409, 36 N. E. 57. A building and loan association is not a benevolent institution, so as to exempt it; State v. McGrath, 95 Mo. 193, 8 S. W. 425.

The right to exemption as a purely public charity depends upon the public nature of the charity, and not upon whether the institution which administers it is a public or private organization; Humphries v. Little Sisters of the Poor, 29 Ohio St. 201. A corporation without capital stock, the income of which is not divided among its members, organized to provide a home for working girls at moderate cost, is exempt; Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675.

As to whether property claimed to be exempt is actually employed for the purpose for which the exemption was granted, see note in 16 L. R. A. (N. S.) 829.

A building is not exempt if the charity itself uses it for profit; American S. S. Union v. Philadelphia, 161 Pa. 307, 29 Atl. 26, 23 L. R. A. 695; Sisters of Peace v. Westervelt, 64 N. J. L. 510, 45 Atl. 788; but the fact that some income is derived from the use of the property does not render it taxable, if the use be a mere incident of the charitable purpose for which it is maintained; House of Refuge v. Smith, 140 Pa. 387, 21 Atl. 353; Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675.

A local auxiliary of a foreign missionary society, employing nearly all of its funds outside the state, is not exempt; Carter v.

Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733, and note. The exemption in a succession tax of religious, etc., organizations does not apply to those located outside of the state; Carter v. Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733, and note.

Generally, exemption to schools on their vacant lands does not extend to such assessments when the improvement is beneficial to their property; State v. Macalester College, 87 Minn. 165, 91 N. W. 484; Boston Asylum v. Street Com'rs of Boston, 180 Mass. 485, 62 N. E. 961. So of a cemetery company; Philadelphia v. Burial Ground Society of Philadelphia, 178 Pa. 533, 36 Atl. 172, 36 L. R. A. 263; and the property of a county; Edwards & W. Const. Co. v. Jasper Co., 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301; but it is held that the exemption does extend to assessments; Dist. of Columbia v. Sisters of Visitation of Washington, 15 App. D. C. 300; Cooper Hospital v. Camden, 68 N. J. L. 208, 52 Atl. 210.

The omission of the legislature for one year, or for a series of years, to tax certain classes of property, does not destroy the power of the state to tax them when it sees fit; New York v. State Board of Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.

Where a charter provides that all earnings above a specified rate of dividends shall go to the territory of Hawaii, this is not *taxation* and does not exempt from other taxes; Honolulu R. T. & L. Co. v. Wilder, 211 U. S. 137, 29 Sup. Ct. 44, 53 L. Ed. 121.

A tax may be levied upon the owner of mineral rights in lands while the surface is taxed to the owner of the fee; Downman v. Texas, 231 U. S. 353, 34 Sup. Ct. 62, 58 L. Ed. —.

Lands in a harbor under water, but forming part of the limits of a municipality, are taxable; Leary v. Jersey City, 189 Fed. 419.

The right to lay taxes cannot be delegated by the legislature to any other department of the government; St. Louis v. Clemens, 52 Mo. 133; Hydes v. Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; except that municipal corporations may be authorized to levy local taxes; Cooley, Tax. 62; St. Louis v. Laughlin, 49 Mo. 559; St. Louis v. Bank, 49 Mo. 574; Appeal of Butler, 73 Pa. 448.

The state may undoubtedly require the payment of taxes *in kind*, that is, in products, or in gold or silver bullion, etc.; Cooley, Tax. 12. See Perry v. Washburn, 20 Cal. 318; Lane Co. v. Oregon, 7 Wall. (U. S.) 71, 19 L. Ed. 101.

The constitutional guaranty which declares that no person shall be deprived of property, etc., except by the judgment of his peers or the law of the land does not necessarily apply to the collection of taxes; Harper v. Elberton, 23 Ga. 566; Cooley, Tax. 37; Miller, Const. 105; taxes have been said to be recoverable, not only without a jury, but without a judge; Harris v. Wood, 6 T. B. Monr. (Ky.) 641. Though differing from procedure in courts of justice, the general system of procedure for the levy and collection of taxes established in this country is due process of law; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658.

"It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Allen v. Georgia, 166 U. S. 138, 17 Sup. Ct. 525, 41 L. Ed. 949; Orr v. Gilman, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196." Gallup v. Schmidt, 183 U. S. 300, 22 Sup. Ct. 162, 46 L. Ed. 207.

The power to tax is vested entirely in the legislative department. No matter how oppressive taxation may be, the judiciary cannot interfere on that account; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482; Daily v. Swope, 47 Miss. 367.

The courts are without authority to avoid an act of congress lawfully exerting the taxing power, though it might appear to be exercised unwisely or oppressively, nor can they inquire into the levying of a tax within its constitutional power; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. Equity can only correct abuses in assessing taxes by invidious assessments when injury has been done; Tacoma R. & P. Co. v. Pierce Co., 193 Fed. 90.

In order to invoke the powers of a court of equity to restrain the collection of illegal taxes, the case must be brought within the well recognized foundations of equitable jurisdiction, and the mere error or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxation, will not justify such interposition; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Arkansas B. & L. Ass'n v. Madden, 175 U. S. 269, 20 Sup. Ct. 119, 44 L. Ed. 159; and it must clearly appear not only that the tax is illegal, but that the property owner has no adequate remedy at law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction; Pittsburgh, C., C. & St. L. R. Co. v. Board of Pub. Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354. An apparent exception to this rule has been said to have been established by certain cases, but this exception is only recognized when there is a state statute authorizing an injunction or when inequality of valuation is

the result of a statute designed to discriminate injuriously against any particular class of persons or species of property; German Nat. Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469, where the cases are analyzed.

Equity will restrain the collection of taxes illegally imposed, but there must be some equitable ground for relief besides the illegality of the tax; Allen v. Car Co., 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303. Such ground may be liability to irreparable injury or to vexatious litigation; Union Pac. R. Co. v. Cheyenne, 113 U. S. 525, 5 Sup. Ct. 601, 28 L. Ed. 1098. Where there is a statutory remedy, it is exclusive; but if the statute leaves open to judicial inquiry all jurisdictional questions, the decision of an administrative board does not preclude a resort to judicial remedies; Ogden City v. Armstrong, 168 U. S. 239, 18 Sup. Ct. 98, 42 L. Ed. 444. If a remedy is provided, as by a board of equalization, redress there must first be sought; Altschul v. Gittings, 86 Fed. 200.

Equity will not stop an assessing officer from performing his statutory duty for fear he may perform it wrongfully, until an assessment has actually been made; First Nat. Bank v. Albright, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. Ed. 614.

See, as to a remedy in equity, a note in 16 L. R. A. (N. S.) 685.

Taxes become a lien on property only by statute; Linn v. O'Neil, 55 N. J. L. 58, 25 Atl. 273; Heine v. Levee Com'rs, 19 Wall. (U. S.) 659, 22 L. Ed. 223.

A state may tax property for previous years, where it has escaped taxation; Jackson Lumber Co. v. McCrimmon, 164 Fed. 759; an act for the assessment and collection of back taxes for several years on property that had escaped taxation was upheld in Gallup v. Schmidt, 183 U. S. 300, 22 Sup. Ct. 162, 46 L. Ed. 207, following the decision in the state court.

Recovery Back of Taxes. It was held in Elliott v. Swartwout, 10 Pet. (U. S.) 156, 9 L. Ed. 373: Under the law as it stood at that time, congress having made no special provision, where a collector charged excessive duties and the party paying them, in order to get possession of the goods, accompanied the payment by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and a notice not to pay it over to the treasury, an action could be maintained against the collector for the excessive charge.

Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payor that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them; Erskine v. Van Arsdale, 15 Wall. (U. S.) 75, 21 L. Ed. 63, a case of internal revenue taxes.

The last two cases were cited and followed in Pacific Steam Whaling Co. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253.

Where a state officer receives money for a tax paid under duress with notice of its illegality, he has no right to it and the name of the state does not protect him from suit; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

The grounds of protest need not be set out; Whitford, Bartlett & Co. v. Clarke, 80 Atl. 257; there must be a distinct and definite protest against paying the particular tax, on the ground of its illegality. The form may not be material; Rogers v. Greenbush, 58 Me. 390, 4 Am. Rep. 292; it is enough if the tax collector was notified in writing that the taxes claimed were illegal and void, and that suit would be brought to recover back the amount paid; Shoup v. Willis, 2 Idaho (Hasb.) 120, 6 Pac. 124. The grounds need not be set out in an action to recover back internal revenue taxes; Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781; Herold v. Kahn, 159 Fed. 608, 86 C. C. A. 598. In respect of custom duties, more formality is required. See a note in 36 L. R. A. (N. S.) 476, where the cases are collected.

The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary; when paid under protest or with notice of suit, a recovery may, on occasion, be had, although, generally speaking, even protest or notice will not avail if the payment be made voluntarily, with full knowledge, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, over person or property, from which there is no means of immediate relief than payment; Chesebrough v. United States, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432 (purchase of war revenue stamps for a deed without protest or notice).

Neither a statute imposing a tax, nor the execution issued, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods. Or, if there is, the citizen may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. For instance, an act requiring that if a franchise tax is not paid by a given date a penalty of 25 per cent. shall be incurred and the license of the corporation cancelled and the right to sue be lost. Payment to avoid such consequences is not voluntary, but compulsory, and the money may be recovered back; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510, following Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

See PROTEST.

The state rule excludes interest on overdue taxes unless the statute so provides; the United States rule allows interest unless forbidden by statute; Billings v. United States, 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. —, citing Cooley, Taxation 17, and Rochester v. Bloss, 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. (N. S.) 694, 7 Ann. Cas. 15, as to the state rule, and U. S. v. R. Co., 106 U. S. 327, 1 Sup. Ct. 223, 27 L. Ed. 151, and U. S. v. R. Co., 154 Fed. 519, as to the federal rule. Interest accrues on a tonnage tax on foreign-built yachts; U. S. v. Bennett, 232 U. S. 299, 34 Sup. Ct. 433, 58 L. Ed. —. See TONNAGE.

The bankrupt act prefers taxes due to any state and not only those due to the state in which the proceedings are; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284; and this covers all taxes, including yearly license fees of corporations organized under a state law for the privilege of doing business; *id.;* but this does not apply to the liability of an employer to the state under a state workmen's compensation act; In re Farrell, 211 Fed. 212.

The fact that a tax statute acts retroactively does not cause it to be unconstitutional; Billings v. U. S., 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. —.

Federal courts may issue a mandamus against counties or municipal corporations, to compel the levy of a tax to pay their judgments; Deuel County v. Bank, 86 Fed. 264, 30 C. C. A. 30.

The collection of taxes by distraint is one of the most ancient methods known to the law; Scottish U. & N. Ins. Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619; and government bonds may be distrained upon for that purpose; *id.*

See LICENSE; CONSTITUTIONALITY; POLICE POWER; PROPERTY.

TAX DEED. An instrument whereby the officer of the law undertakes to convey the title of the rightful proprietor to the purchaser at a tax sale, or sale of the land for nonpayment of taxes.

This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government or deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, every condition essential in its character, then the deed becomes conclusive evidence of the title in the grantee, according to its extent and purport. See Blackw. Tax Titles 430.

The legislature may make a tax deed *prima facie* evidence of title in the purchaser, but cannot make it conclusive evidence of his title to the land; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410.

TAX LEVY. The total sum to be raised by a tax. Also the bill, enactment, or measure of legislation by which an annual or general tax is imposed.

TAX LIEN. A statutory lien in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land, or for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

TAX SALE. A sale of lands for the nonpayment of taxes assessed thereon.

The power of sale does not attach until every prerequisite of the law has been complied with; Minor v. Natchez, 4 Smedes & M. (Miss.) 602, 43 Am. Dec. 488.

There must be a substantial compliance with the law authorizing the sale; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410.

There are important details connected with the auction itself and the duties of the officer intrusted with the conducting thereof. The sale must be a *public*, and not a *private*, one. The sale must take place at the precise time and place fixed by the law or notice. A tax sale is vitiated by a failure to give the notice required by law of the place where the sale will occur; Henderson v. White, 69 Tex. 103, 5 S. W. 374.

The sale must be made to the highest bidder. This is the rule in Pennsylvania; but in most of the states the highest bidder is he who will pay the taxes, interest, and costs due upon the tract offered for sale for the least quantity of it. The sale must be for cash and must be according to the parcels and descriptions contained in the list and the other proceedings.

When a tract of land is assessed against tenants in common, and one of them pays the tax on his share, the interest of the other may be sold to satisfy the residue of the assessment.

Where several parcels of land belonging to the same person are separately assessed, each parcel is liable for its own specific tax and no more.

A tax sale is void if any portion of the tax for which it was made was illegal; Tillotson v. Webber, 96 Mich. 144, 55 N. W. 837; Graham v. Mortgage Co., 33 Fla. 356, 14 South. 796. See Culbertson v. Witbeck Co., 127 U. S. 326, 8 Sup. Ct. 1136, 32 L. Ed. 134; TAX DEED.

TAX TITLE. The title by which one holds land which he purchased at a tax sale.

It is not a derivative title. If valid, it is a breaking up of all other titles, and is an-

tagonistic to all other claims to the land; Willcuts v. Rollins, 85 Ia. 247, 52 N. W. 199; but in Pennsylvania, by statute, tax sales do not always cut out existing liens.

The owner of land can acquire a tax title by purchasing it at a tax sale; Griffin v. Turner, 75 Ia 250, 39 N. W. 294.

TAXABLE. That may be taxed.

TAXATION. The process of taxing or imposing a tax. Webster, Dict.

In Practice. Adjustment. Fixing the amount; *e. g.* taxation of costs. 3 Chitty, Gen. Pr. 602.

See TAX.

TAXATION OF COSTS. Fixing the amount of costs to which a party is entitled.

It is a rule that the jury must assess the damages and costs separately, so that it may appear to the court that the costs were not considered in the damages; and when the jury give costs in an amount insufficient to answer the costs of the suit, the plaintiff may pray that the officer may tax the costs, and such taxation is inserted in the judgment. This is said to be done *ex assensu* of the plaintiff, because at his prayer. Bac. Abr. *Costs* (K).

The costs are taxed in the first instance by the prothonotary or clerk of the court. See Jackson v. Huntley, 2 Wend. (N. Y.) 244; Winslow v. Hathaway, 1 Pick. (Mass.) 211. A bill of costs, having been once submitted to such an officer for taxation, cannot be withdrawn from him and referred to another; Hall v. Sherwood, 2 Wend. (N. Y.) 252. See COSTS.

TAXING OFFICER. An officer in each house of parliament, whose duty it is to tax the costs incurred by the promoters or opponents of private bills. May, Parl. Pr. 843.

TEACHER. See SCHOOLS.

TEAM. Two or more horses, oxen, or other beasts harnessed together for drawing; Inman v. C., M. & St. P. R. Co., 60 Ia. 462, 15 N. W. 286; with the vehicle to which they are customarily attached; Dains v. Prosser, 32 Barb. (N. Y.) 291; Wilcox v. Hawley, 31 N. Y. 655, in reference to an exemption law. It may mean a vehicle with animals drawing it and used for loads instead of persons. Hotchkiss v. Hoy, 41 Conn. 577. A horse driven with other horses unharnessed; Elliott v. Lisbon, 57 N. H. 29; and a single horse; Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 568; are held teams.

TEAM WORK. Work done by a team as a substantial part of a man's business. Hickok v. Thayer, 49 Vt. 375. It has been held to extend to other than agricultural work, as hauling coals; 9 Q. B. D. 636, overruling 8 Q. B. D. 1. A covenant to provide team work does not oblige a lessee to find the instruments necessary for its performance; *id.*

TEAMSTER. One who drives horses in a wagon for the purpose of carrying goods for hire. Elder v. Williams, 16 Nev. 416; Brusie v. Griffith, 34 Cal. 306, 91 Am. Dec. 695. He is liable as a common carrier. Story, Bailm. § 496. A teamster is a laborer; McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272. See CARRIER.

TECHNICAL. That which properly belongs to an art.

In the construction of contracts it is a general rule that technical words are to be taken according to their approved and known use in the trade in which the contract is entered into or to which it relates, unless they have manifestly been understood in another sense by the parties; 2 B. & P. 164. See CONSTRUCTION.

TEDING-PENNY. A small tax to the sheriff from each tithing toward the charge of keeping courts, etc. Cowell.

TEIND COURT. In Scotch Law. A court which has jurisdiction of matters relating to *teinds* or tithes.

TELEGRAPH AND TELEPHONE. *Method of Operation and General Characteristics.* In the United States all telegraph lines are operated by companies, either under the authority of general laws, or by express charter; Scott & J. Telgr. § 3. The telegraph is an instrument of commerce; Western U. Tel. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; and telegraphic communication between states is interstate commerce; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; Postal Tel.-Cable Co. v. Mobile, 179 Fed. 955; and so is communication by telegraph or telephone between points in different states; Sunset Tel. & Tel. Co. v. Eureka, 172 Fed. 755.

Telegraph companies are *quasi*-public agencies, and their rights, duties, and obligations are matters arising under the general law. Questions arising in connection with them are not controlled in the federal courts by state decisions; Postal Tel. Cable Co. v. Baltimore, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399. An indictment of a telegraph operator in Connecticut who transmitted a message to New Jersey directing a bet on a horse-race, was upheld under a statute prohibiting betting on horse races, and the statute was held not to be in violation of the commerce clause in the constitution; State v. Harbourne, 70 Conn. 484, 40 Atl. 179, 40 L. R. A. 607, 66 Am. St. Rep. 126. Exclusive franchises may be granted, but will not be implied; Charles River Bridge v. Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773. By a federal statute, companies are authorized to construct their lines upon any public road or highway, and across navigable streams, but so as not to interfere with their public use or navigation; Dickey v. Tel. Co., 46 Me. 483. The telegraph is a public use authorizing the exercise of a right of eminent domain; State v. Commercial News Co., 43 N. J. L. 381; Chesapeake & P. Tel. Co. v. Tel. Co., 66 Md. 399, 410, 7 Atl. 809, 59 Am. Rep. 167; State

v. Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Cumberland Tel. & Tel. Co. v. R. Co., 42 Fed. 273, 12 L. R. A. 544.

Telephone Companies Usually Embraced in Telegraph Legislation. In law the owners and operators of telephones are in much the same position as telegraph companies. There appears to be no distinction between telephonic and telegraphic communication.

It is generally held that where, by statute, rights, duties or obligations are imposed upon telegraph companies, no others being mentioned, telephone companies are also embraced unless there is some special reason why they should be excluded. An extreme illustration of this is to be found in the fact that where telegraph companies are authorized by statute to exercise the right of eminent domain, the power is also held to be given to telephone companies; San Antonio & A. P. R. Co. v. Tel. Co., 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884; Duke v. Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; and the same is true of the authority to occupy highways; People's Tel. & Tel. Co. v. Turnpike Rd., 199 Pa. 411, 49 Atl. 284; N. W. Tel. Exch. Co. v. Ry. Co., 76 Minn. 334, 79 N. W. 315, where it was said that "in these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." The relation between the two systems of communication was considered in England in connection with the control of the telegraph by the postmaster-general. The question was whether the telephonic transmission of intelligence was an infringement of the telegraphic monopoly granted to the postmaster-general. It was concluded by Stephen, J., that notwithstanding the claim of novelty for the telephonic transmitter and receiver the whole apparatus taken together constituted a wire used for the purpose of telegraphic communication; Atty. Gen. v. Edison T. Co., L. R. 6 Q. B. Div. 244. Where a telephone company had been organized under a general act for the incorporation of telegraph lines, it was held to be a valid corporation and as such subject to a municipal tax; Wis. Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828. Telephone companies have also been classed with telegraph companies to determine the jurisdiction of justices of the peace; Franklin v. Tel. Co., 69 Ia. 97, 28 N. W. 461; and also to decide as to the place and manner of the assessment of their property; Iowa U. Tel. Co. v. Board of Equalization, 67 Ia. 250, 25 N. W. 155. In Richmond v. Tel. Co., 174 U. S. 761, 773, 19 Sup. Ct. 778, 43 L. Ed. 1162, the court (interpreting the postal telegraph act) refused to follow these cases.

Not Common Carriers but Exercise a Public Employment. It may be considered as settled by a preponderance of the cases that they are not common carriers so far as to be held as insurers of correct transmission of messages. Whether they were such was the only material point in the discussion, since they are held by practically all the courts both federal and state, to all the other obligations of common carriers and those who exercise a public employment, such as to serve all comers impartially and without discrimination and to transact their business with due care.

In Primrose v. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, it was said: "Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. . . . But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities;" citing Southern Exp. Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. Ed. 556; Western U. Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; and in a later case, where the question was not involved, the court, speaking through the same judge, Gray, J., said by way of illustration: "Although a telegraph company is not a common carrier, yet its relation with senders of messages over its lines is of a commercial nature, and contracts that the company shall not be liable for the negligence of its servants, are affected in some degree by similar conditions;" Hartford F. Ins. Co. v. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84, where the above cases are cited with approval.

Both telegraph and telephone companies are subject to the rules governing common carriers to the extent that they are bound to furnish equal facilities to all persons or corporations belonging to the classes which they seek to serve; Delaware & A. Tel. & Tel. Co. v. State, 50 Fed. 677, 2 C. C. A. 1, 3 U. S. App. 30, affirming 47 Fed. 633; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; and to serve the public without partiality; Cent. U. T. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; Western U. Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; and, subject to reasonable regulations, to receive and promptly transmit and deliver all messages; Cogdell v. Tel. Co., 135 N. C. 431, 47 S. E. 490; and being engaged in a *quasi* public employment, they may not refuse to receive messages for the transmission of which payment has been tendered; Vermilye v. Cable Co., 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472.

The rule as laid down by the supreme court is that which is generally followed; Gillis v. Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611, and note; Western U. Tel. Co. v. Reynolds Bros., 77

Va. 173, 46 Am. Rep. 715. But courts have been emphatic, as a rule, in the opinion that these companies were "not common carriers"; Western U. Tel. Co. v. Carew, 15 Mich. 525 (Christiancy, Cooley and Campbell, JJ., concurring in the opinion); and they are not charged with the absolute liability of a common carrier; Leonard v. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446. In Breese v. Tel. Co., 45 Barb. (N. Y.) 274, it was said that attempts to subject telegraph and telephone companies to the same rules and liabilities will "sooner or later have to be abandoned, as clumsy and undiscriminating efforts . . . to assimilate things which have no natural relation or affinity whatsoever, and at best but a loose or mere fanciful resemblance." That such company "is not a common carrier, but a bailee performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make, for its government," was the view taken in Birney v. Tel. Co., 18 Md. 341, 81 Am. Dec. 607; and in another case it was said that such companies were not common carriers, "but, on the contrary, the true nature and character of their liability would seem to be that of bailees for hire"; Western U. Tel. Co. v. Fontaine, 58 Ga. 433. They are not insurers; Smith v. Tel. Co., 83 Ky. 104, 7 Ky. L. Rep. 22, 4 Am. St. Rep. 126; Fowler v. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Ellis v. Tel. Co., 13 Allen (Mass.) 226; De Rutte v. Tel. Co., 1 Daly (N. Y.) 547; New York & W. P. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338. There was an early tendency to hold these companies to all the liabilities of common carriers; Parks v. Tel. Co., 13 Cal. 422, 73 Am. Dec. 589; MacAndrew v. Elec. T. Co., 17 C. B. 3; Western U. Tel. Co. v. Meek, 49 Ind. 53. The California case is said to be the only one in which the rule was laid down positively where the point was necessary to be decided; Jones, Tel. & Tel. Cos. 27, note 3. There is a later case in which telegraph and telephone companies were held *quasi* common carriers of news, but bound only to service without discrimination, which is the rule generally agreed upon; State v. Tel. Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870. It is also true that it has been said in later cases that "a telephone company doing a general telephone business is a common carrier of news"; State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; and that "telephone companies are, to a limited extent, and yet in a strict sense, common carriers of intelligence and news, and are bound to afford equal facilities to all in like situations"; Huffman v. Tel. Co., 143 Ia. 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1000. See 15 Harv. L. Rev. 309.

The phrase "common carrier of news" is also used in one federal case, but the decision is not that it is such, but only that such companies are often described as such. The case decides only that it "is engaged in a *quasi* public service, affected with a public interest, for which it is endowed with some of the sovereign powers of the state, and as such is held to the obligation of an impartial and undiscriminating service to the public upon common-law principles"; Postal Cable Tel. Co. v. Tel. & Tel. Co., 177 Fed. 726. Notwithstanding these sporadic suggestions of the use of the term "common carriers of news" and the like, the law may be considered as settled in accordance with the rules and principles above stated.

In the act of June 18, 1910 (creating the commerce court) section 7 enacts a new section 1 of the act of Feb. 4, 1887 (which created the interstate commerce commission), which added to the subjects of its jurisdiction, which had been enlarged by the act of June 29, 1906, "telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country." It was further provided by the last mentioned act that telegraph and telephone charges shall be reasonable and if unreasonable shall be unlawful, but classification of different kinds of business is permitted; 36 Stat. L. 514–546. Whether this amendment of the statute is considered by the courts to affect any previous decisions does not appear, as it does not seem to have been adverted to in any reported case.

The Obligation of Impartial Service and Due Care. "They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights, both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon." Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 100, 21 Sup. Ct. 561, 45 L. Ed. 765.

Like carriers, these companies are liable for negligence. They are held to a degree of care and skill commensurate with the importance of their duties; Bartlett v. Tel. Co., 62 Me. 209, 16 Am. Rep. 447; the obligation is due and reasonable care in the performance of their duties; Fowler v. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Stewart, Morehead & Co. v. Cable Co., 131 Ga. 31, 61 S. E. 1045, 18 L. R. A. (N. S.) 692, 127 Am. St. Rep. 205; Passmore v. Tel. Co., 78 Pa. 238; Breese v. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; and the necessity for such care is made the greater by the delicacy of the instrument and the skill required to manage it; Western U. Tel. Co. v. Carew, 15 Mich. 525; Tyler v. Tel. Co., 60 Ill. 421, 14

Am. Rep. 38. Ordinary care means the providing of suitable instruments and competent servants; Reed v. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609. The company, by accepting a dispatch, assumes the duty of reasonable care in its transmission, and is liable in tort for the breach of it; Western U. Tel. Co. v. Dubois, 128 Ill. 218, 21 N. E. 4, 15 Am. St. Rep. 109; Frazier v. Tel. Co., 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396. The duty is imposed by law, and proof of incorrect transmission casts the burden upon the company to prove its own due care; Reed v. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *contra*, Ellis v. Tel. Co., 13 Allen (Mass.) 226, where it was held that the duty to the addressee might be limited by contract; but another case holds that the liability imposed by law cannot be restricted by a contract to which the addressee is not a party; New York & W. P. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338.

A telephone company is not required by common law or statute (in Indiana) to construct a new line or maintain an old one: Severin v. Dearborn County, 105 Ind. 264, 4 N. E. 680; or to continue its service in particular places; American Bell Tel. Co. v. Service Co., 36 Fed. 488, 1 L. R. A. 799, when in the exercise of a legitimate business discretion such course is deemed unprofitable or unadvisable.

A telephone company maintaining a line between different cities and towns, with public stations therein, is required to maintain a messenger service to notify persons at a reasonable distance when they are wanted, and is liable for the negligence of its messengers, and a regulation to the contrary is void; Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Telephone companies are bound to furnish telephones to private individuals under ordinary circumstances; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201. See Central D. & P. Tel. Co. v. Com., 114 Pa. 592, 7 Atl. 926.

Under a statute prescribing a penalty, a telegraph company was held liable for refusing to send a message to a railroad superintendent that there was no fire in the station; Western U. Tel. Co. v. Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. (N. S.) 836. It may refuse obscene, blasphemous, slanderous, profane and indecent messages; Western U. Tel. Co. v. Ferguson, 57 Ind. 495; but may not assume to act as a moral censor of a message in decent language, on the mere inference of the operator that it is intended for immoral purposes; *id.*, where the message refused was: "Send me four girls . . . to tend fair." Nor can he act as a censor of language or purpose, but he may refuse a message clearly on its face libellous, profane or obscene; Nye v. Tel. Co., 104 Fed. 628; Peterson v. Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; or if it discloses purpose to subserve either crime or tort; Gray v. Tel. Co., 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259.

A telephone company, refusing to furnish service to a subscriber who has refused to pay for past service, is guilty of discrimination under the Arkansas statute; Southwestern Tel. & Tel. Co. v. Danaher, 102 Ark. 547, 144 S. W. 925. It may make and enforce reasonable rules; *id.*

Telegraph and Telephone Connections. A company may refuse to furnish the facilities to any one who does not pay the proper charges; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; Rushville Co-op. Tel. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; or whose rentals are in arrears; s. c., Irvin v. Telephone Co., 161 Ind. 524, 69 N. E. 258; or one who violates its reasonable regulations; Gardner v. Prov. Tel. Co., 23 R. I. 262, 49 Atl. 1004; as the use of improper language over the line; Pugh v. City of S. Tel. Ass'n., 8 Ohio Dec. 644 (affirmed 13 Wkly. L. Bul. 190), where it was held that the word *damned* is improper language; and this decision is said to be supported by one of Judge Barr of the United States District Court of Kentucky; 27 Albany L. J. 163.

The company is liable in damages for failure or refusal to make connections where the statute prescribes a penalty for failure to supply "telephone connections and facilities . . . without discrimination or partiality"; Cent. U. Tel. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64.

A telephone company must furnish to any person who requests it a separate telephone with proper connections; Cent. U. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114. They must also furnish a directory of the subscribers, with their numbers; State v. Neb. Tel. Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 409. But they are only compelled to furnish their facilities for use in legitimate business, and cannot be compelled by mandamus to furnish them for the purpose of furthering unlawful occupations, as, for example, the carrying on of a bucket shop; Byrant v. W. U. Tel. Co., 17 Fed. 825; Metropolitan G. & S. Exch. v. Chicago Board of Trade, 15 Fed. 847; or a bawdy-house; Godwin v. Tel. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, where it was held that the disability attached, not to the character of the proposed subscriber, but of the business at the house where the telephone was requested, and that a person engaged in an unlawful business might be entitled to have the telephone on other premises.

The rates charged must be uniform under similar conditions; maximum rates are in many states regulated by statutes which are constitutional; Hackett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

A requirement that the subscriber should pay the long distance charge in advance at the central office before getting the connection was held not reasonable under a statute prescribing a penalty for not making telephone connections and facilities . . . without discrimination or partiality; Yancey v. Tel. Co., 81 Ark. 486, 99 S. W. 679, 11 Ann. Cas. 135.

When a message is transmitted over two lines, the first company is liable for delay of an operator employed by both companies; Southwestern Tel. & Tel. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076. Failure to connect a house threatened with fire is not a proximate cause of the loss by fire, so as to make the telephone company liable; Lebanon L. & L. Tel. Co. v. Lumber Co., 131 Ky. 718, 115 S. W. 824, 21 L. R. A. (N. S.) 115, 18 Ann. Cas. 1066.

As to the legal consequence of failure or refusal to make proper connections, see subtitle *Damages, infra.*

The Right of Regulation by Governmental Authority. The general principle that business "affected with a public interest" is subject to state regulation, as settled in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, and note, 15 Am. St. Rep. 460, affirmed in 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; applies to telegraph and telephone companies, the business conducted by them having been repeatedly held to be of that character; Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. Ed. 1144; Central U. Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; State v. Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; St. Louis v. Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278, and note. The power to determine what compensation it may exact is a legislative, not a judicial, function; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; and the power of state control is not lost by reason of the fact that the company's lines extend into another state; Central U. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; but the act must prescribe the rate, as the court cannot do it; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; and the power to regulate is plenary and complete; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201, where such a statute is held constitutional.

Statutes in some states provide that telephone companies shall serve all who apply as subscribers. Prior to the passage of such acts there was much litigation as to whether they could refuse their service under any circumstances. It was held that telephone companies are bound to furnish equal facilities to all telegraph companies; Chesapeake & P. Tel. Co. v. Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; State v. Tel. Co., 23 Fed. 539; Cent. U. Tel. Co. v. Bradbury, *supra;* Bell Tel. Co. v. Com., 2 Sadler 299, 3 Atl. 825; but in American Rapid Tel. Co. v. Tel. Co., 49 Conn. 352, 44 Am. Rep. 237 (which seems to stand alone), the court held otherwise, upon the ground that the telephone company, a local company, was restricted under its license on the patents used by it and must be considered as doing business only within the lines of restriction. The contract between a telephone company and the owner of patented telephone instruments, that in the use of such instruments by the telephone company discriminations should be made against certain telegraph companies, was declared void; State v. Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583, and other cases herein cited. Accordingly it may be considered as settled that the right of regulation is not affected by the fact that the device used by the company is patented, as the right to use the patented article must be exercised in subordination to the police power of the state; and these principles were followed in Delaware & A. Tel. & Tel. Co. v. State, 50 Fed. 677, 2 C. C.A. 1, 3 U. S. App. 30, affirming 47 Fed. 633. This case seems to have settled finally a long contest on this question, which does not appear to have reached the supreme court. The language of the court in the case last cited is quoted by the higher court and construed with approval in Primrose v. Telegraph Co., 154 U. S. 1, 22, 14 Sup. Ct. 1098, 38 L. Ed. 883. The case in 23 Fed. 539, *supra,* was taken up, but the appeal was abandoned and dismissed; Bell Tel. Co. v. Missouri, 127 U. S. 780, 32 L. Ed. 328. That court has, however, applied the same principle in analogous cases; Patterson v. Ky., 97 U. S. 501, 24 L. Ed. 1115; nor can the regulation of a maximum rate be evaded under the excuse of the use of a patented article by dividing the charge into two items, one for rental and the other for the use of instruments; Johnson v. State, 113 Ind. 143, 15 N. E. 215.

The power of regulation, it is now considered by the weight of authority, may be delegated to a municipality; Dill. Mun. Corp. § 245, though it was contended otherwise by some authorities; and within the scope of the delegated power it is as absolute as that of the state would have been if not delegated; Taylor v. Carondelet, 22 Mo. 110; Heland v. Lowell, 3 Allen (Mass.) 408, 81 Am. Dec. 670. See Jones, Tel. & Tel. Cos. § 230. This power may be delegated, but the delegation must be either expressly given or necessarily implied from the powers granted; Domestic Tel. Co. v. Newark, 49 N. J. L. 344, 8 Atl. 128; Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; and it is not implied from power in a city charter to regulate "all other business," though the telegraph companies were mentioned and the telephone had not been invented; St. Louis v. Tel. Co., 96 Mo. 623, 10

S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. A city cannot regulate telephone rates unless the right has been granted to it by the state legislature; Cumberland Tel. & Tel. Co. v. Memphis, 200 Fed. 657, 119 C. C. A. 73; and when it has the power, the rates must be reasonable and not confiscatory; Cumberland Tel. & Tel. Co. v. Memphis, 183 Fed. 875.

The state statutes for the regulation of telephone companies requiring connections and facilities without discrimination or partiality, etc., are merely declaratory of their common law obligation, giving a new remedy and imposing penalties for non-observance; Cumberland T. & T. Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; Postal Cable Teleg. Co. v. Cumberland T. & T. Co., 177 Fed. 726, where it was also held that a telephone company also furnished telegraph service could not authorize discriminating charges for telephone service furnished to a competing telegraph company.

A railroad company cannot grant a telegraph company the exclusive right to establish telegraph lines along its way, such contracts being void as in restraint of trade; Western U. Tel. Co. v. R. Co., 11 Fed. 1.

Under the police power municipal corporations may regulate the manner in which the lines are to be constructed in cities, so as not to interfere with the comfort and safety of the inhabitants; Scott & J. Telegr. § 54. But the power of the municipality is to regulate, not to prohibit; Richmond v. Tel. & Tel. Co., 85 Fed. 19, 28 C. C. A. 659, 42 U. S. App. 686; and in the absence of evidence that a proposed method of laying the wires by a company will impede or endanger the use of the streets by the public, a court of equity will enjoin the town from interfering with the wires; 19 Am. L. Reg. N. S. 325. Unless under the sanction of legislative enactment the erection of telegraph posts or the laying of tubes in any highway is a nuisance at common law; 30 Beav. 287. See POLES; WIRES.

A grant of authority to use the streets, etc., of a city for its telephone plant will not be construed to give an exclusive right or privilege simply from the failure to exclude other corporations from like privileges; City of Plattsmouth v. Tel. Co., 80 Neb. 460, 114 N. W. 588, 127 Am. St. Rep. 779, 14 L. R. A. (N. S.) 654, and note.

The question of permitting poles to be erected or conduits constructed in streets is a matter to be determined exclusively by the municipality, and the courts will not interfere, unless in the case of an unreasonable and flagrant exercise of that power; Auerbach v. Tel. Co., 7 Ohio N. P. 633.

Where a city is given authority to construct a line on a street, it will not be considered a limitation of the police power, and a subsequent order may be made for the removal of the wires or for placing them underground; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454, and note. Such an order for placing wires underground is a legitimate exercise of the police power; Western U. Tel. Co. v. New York, 38 Fed. 552, 3 L. R. A. 449; Richmond v. Tel. Co., 85 Fed. 19, 28 C. C. A. 659.

Power to Make Regulations and What are Reasonable. A company may make reasonble rules relative to its business, and thereby limit its liability.

A rule that the company will not be responsible for the correct transmission of despatches, beyond the amount received therefrom, unless repeated at an additional expense, is reasonable; Becker v. Tel. Co., 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; Primrose v. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; McAndrew v. Elec. Tel. Co., 17 C. B. 3; 17 U. C. Q. B. 470; Western U. Tel. Co. v. Carew, 15 Mich. 525; whether the sender read the contract or not; Passmore v. Tel. Co., 78 Pa. 238; Clement v. Tel. Co., 137 Mass. 463; but such regulations were held void in Tyler & Co. v. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Western U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Ayer v. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Western U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Western U. Tel. Co. v. Crall, 38 Kan. 679, 684, 17 Pac. 309, 5 Am. St. Rep. 795, which cases are cited, but not approved, in Primrose v. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; but no regulations or device will avail to avoid liability in case of negligence or fraud; Candee v. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Wann v. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; nor from injury which the repetition would not have prevented; North P. & P. Co. v. Tel. Co., 70 Ill. App. 275; nor is the company relieved from liability for delay in delivery not referable to any mistake in the tenor of the telegram; Barnes v. Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; nor where the company failed to put the message on its transit; Birney v. Tel. Co., 18 Md. 341, 81 Am. Dec. 607; and failure to transmit and deliver a message correctly is *prima facie* evidence of negligence; Western U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

Such a stipulation in a telegraph blank releasing the company from liability beyond the price charged for non-delivery of unrepeated messages and for delays on connecting lines, is without effect where, upon receiving notice within a few minutes after undertaking to transmit an important message that the lines are down, it failed to notify the sender of that fact; Postal Tel. Cable Co. v. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870 note, 14 Ann. Cas. 369. Where the line is interrupted the company is bound to notify the sender and is liable for damages caused by its failure to

do so; Swan v. Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153, and note in which the earlier cases are collected, while the later ones are in a note in 16 L. R. A. (N. S.) 870.

Stipulations releasing a company from liability unless a message is repeated are invalid, and according to the weight of authority not reasonable, being induced by moral duress; Western U. Tel. Co. v. Chambler, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89. Such stipulations were held good in Wisconsin v. W. U. Tel. Co., 13 Allen (Mass.) 226; and bad as against public policy in Ayer v. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

If a message is incorrectly transmitted, the company is *prima facie* guilty of negligence, and is liable notwithstanding that the printed blank was used containing the stipulation of non-liability for unrepeated messages; Tyler v. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; *id.*, 74 Ill. 168, 24 Am. Rep. 279; Rittenhouse v. Ind. Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; Western U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500. (In the last case and the Ohio case there was no question of condition for repeating—merely error).

The current of authority favors the rule that the usual conditions in the blanks of telegraph companies exempt them only from the consequences of errors arising from causes beyond their control, whether the message be repeated, or unrepeated; Thompson v. Tel. Co., 107 N. C. 449, 12 S. E. 427; Passmore v. Tel. Co., 78 Pa. 238; Sweatland v. Tel. Co., 27 Ia. 433, 1 Am. Rep. 285; Western U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Aiken v. Tel. Co., 5 S. C. 358. See Thompson v. Tel. Co., 107 N. C. 449, 12 S. E. 427. Notice of regulations must be brought home to the sender of the despatch, if they are to be regarded as incorporated in his contract. De Rutte v. Tel. Co., 1 Daly (N. Y.) 547; Id., 30 How. Prac. (N. Y.) 403. His signature to the printed conditions is sufficient evidence of knowledge, and he will not be heard to say that he did not read them; Grinnell v. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Western U. Tel. Co. v. Carew, 15 Mich. 525; See Marr v. Tel. Co., 85 Tenn. 529, 3 S. W. 496; Pegram v. Tel. Co., 97 N. C. 57, 2 S. E. 256; they are part of the contract; cases cited *supra*.

A company may regulate its office hours provided they are reasonable; Carter v. Tel. Co., 141 N. C. 374, 54 S. E. 274; Western U. Tel. Co. v. Ford, 77 Ark. 531, 92 S. W. 528; they may be fixed with reference to the amount of business done, and when that does not justify night delivery it is not required; Western U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366.

It is unreasonable to require claims for damages caused by the company's failure to transmit messages correctly to be made within sixty days after the message was sent; Davis v. Telegraph Co., 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371.

Regulations limiting the liability of companies upon non-compliance with stipulations in the blanks or regulations have been held not to apply to the receiver of the message; New York & W. Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Webbe v. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep 207; but the cases on this point are very conflicting; they are collected in 61 Am. St. Rep. 214, note. The principle on which the cases rest in denying liability to the addressee is that the company owes no duty to the undisclosed principal of the addressee, because injury to him cannot be reasonably anticipated as the consequences of the lack of due care; Western U. Tel. Co v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; unless the message shows upon its face that it related to the business of the employer; Lee v. Tel. Co., 51 Mo. App. 375; Western U. Tel. Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; but where the addressee has an interest in the message, although he is not the primary beneficiary, and the company knows of such interest, it may be held liable to him; McLeod v. Tel. Co., 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

Limitation of Liability for Negligence. Telegraph companies may limit their liability by notice to the sender of the message; Western U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Western U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; De Rutte v. Tel. Co., 30 How. Pr. (N. Y.) 413; 17 C. B. 3. But it is a general rule, upon the weight of authority, that they cannot by contract exempt themselves from losses caused by their own negligence; Willock v. R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674; Eells v. R. Co., 52 Fed. 903; Reed v. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; Camp v. Tel. Co., 1 Metc. (Ky.) 164, 71 Am. Dec. 461, and note with full citation of earlier cases; though it has been held in some cases that they may limit their liability for their negligence or error, except for wilful misconduct or gross negligence; Birkett v. Tel. Co., 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374; Redpath v. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69; but this exemption is limited to such mistakes as are incident to the service and involve slight culpability; Lassiter v. Tel. Co., 89 N. C. 336; Grinnell v. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

Acceptance of Messages. Telegraph companies are bound to receive and transmit messages from other companies, but are not held responsible for their defaults; Baldwin

v. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165. They are not, at common law, bound to receive messages for points not on their own lines; Crosw. Electr. § 445. In many states statutes provide otherwise; see *id.* § 385; but if a company accepts a message for transmission over a connecting line, it is liable to the same extent as over its own lines; Western U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109; De Rutte v. Telegraph Co., 1 Daly (N. Y.) 554; but it is held that its only obligation in such case is to deliver the message correctly to the connecting line; 16 U. C. Q. B. 530.

The company is not liable for receiving a libellous telegram at its office writing it out, having it copied in a letter press and delivering it to the addressee. The publication is solely by the one depositing the message; Western U. Tel. Co. v. Cashman, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693, and note; unless the message indicates upon its face that its object is defamation there is no liability; Nye v. Tel. Co., 104 Fed. 628; Stockman v. Tel. Co., 10 Kan. App. 580, 63 Pac. 658; Peterson v. Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

Telegraph companies are not allowed to show any preference in the transmission of despatches, except as regulated by statute; Western U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; U. S. Tel. Co. v. Tel. Co., 56 Barb. (N. Y.) 46. They may refuse to send obscene messages, but they cannot judge of the good or bad faith of the senders in the use of language not in itself immoral; Western U. Tel. Co. v. Ferguson, 57 Ind. 495. They may refuse to communicate a message which is to furnish the means of carrying on an illegal business; and this, regardless of the motive by which they are actuated in refusing to send the message; Smith v. Tel. Co., 84 Ky. 664, 2 S. W. 483; they need not supply reports to bucket shops; *id.*

When a telegraph company sends a messenger for the express purpose of taking a telegram, he is the agent of the company, and not of the sender, notwithstanding a stipulation to the opposite effect on the blank; Alexander v. Tel. Co., 158 N. C. 473, 74 S. E. 449, 42 L. R. A. (N. S.) 407.

A telegraph company has the right to choose its own agencies for the delivery of its messages, and may refuse to deliver telegrams by telephone and to receive telephone messages to be telegraphed; People v. Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637. But where the company permits its employés to receive, by telephone, messages for transmission, it consents to send a message so received; Texas Tel. & Tel. Co. v. Seiders, 9 Tex. Civ. App. 431, 29 S. W. 258.

Writing a message on the blank of another company is held to be an adoption by the sender of the conditions thereof; Western Union Tel. Co. v. Waxelbaum & Co., 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Clement v. Tel. Co., 137 Mass. 463; when the company accepts a message written on blank paper, the conditions on its blanks do not apply; Pearsall v. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662 (where the fact that plaintiff was a shareholder was held not to charge him with notice); unless the sender is chargeable with knowledge or notice of the conditions; Western Union Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Harris v. Tel. Co., 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70; Beasley v. Tel. Co., 39 Fed. 181; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; but when the company refused to receive a message because the sender refused to use the blank, it was held that the refusal was not permissible under a statute, but that a claim for damages must be presented within a reasonable time, though the company could not prescribe a limitation; Kirby v. Tel. Co., 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621, 624, 46 Am. St. Rep. 765, overruling, on rehearing, Kirby v. Tel. Co., 4 S. D. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. Rep. 765. A telegraph company cannot be compelled to accept messages by telephone, but if it does so it cannot claim the benefit of its printed conditions, and the operator is not the agent of the sender; Western Union Tel. Co. v. Todd, 22 Ind. App. 701, 54 N. E. 446; Carland v. Tel. Co., 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394.

As to contracts for telegrams not written on the company's blanks, whether they are on the blanks of another company, or on blank paper, or given by telephone, or orally, see Western Union Tel. Co. v. Waxelbaum & Co., 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741, where it was held that a message written on the blank of another company is subject to the reasonable conditions set out therein, which are presumed to have been adopted; and see also 56 L. R. A. 741, where the same case is reported with an extended note.

Delivery. The company must use reasonable diligence to deliver messages; merely leaving them at the place of address is not sufficient; Western Union Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. E. 792; and this is equally true if the addressee is absent from his residence or place of business; Pope v. Tel. Co. 9 Ill. App. 283. The leading principle as to delivery is that the message is to be delivered to the person primarily, and not to the place, and if the person cannot be found at the specified place it may be negligence for the company to leave the telegram at the place, without making further efforts to find the person; Crosw. Electr. § 412; Western U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 15 L. R. A. 129, 27 Am. St. Rep. 918; Beas-

ley v. Tel. Co., 39 Fed. 181; especially if the name is in the directory; Western U. Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800. And the message should not be left at the office till called for; Western U. Tel. Co. v. Lindley, 62 Ind. 371. Delivery at a hotel is sufficient. If the addressee lives in the town, a misspelled name is not an excuse for nondelivery; Western U. Tel. Co. v. Gamble (Tex.) 101 S. W. 1166; nor is an abortive attempt to deliver; Western U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894. The company is bound to deliver a message where the true address can be ascertained by reasonable diligence; Klopf v. Tel. Co., 100 Tex. 540, 101 S. W. 1072, 10 L. R. A. (N. S.) 498, 123 Am. St. Rep. 831; if personal delivery cannot be made, it must be delivered to those in charge of the business or to members of the family; Western U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989; see as to the duty of the company to find the person addressed, Western U. Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129, with note.

Where a telegraph operator accepts a telegram for transmission, the fact that there is no office at the place to which it is to be sent does not relieve the company from its liability for failure to transmit and deliver; Western U. Tel. Co. v. Jones, 69 Miss. 658, 13 South. 471, 30 Am. St. Rep. 579. If a telegram is addressed to one person in care of another, the company may deliver it to the latter without being guilty of any negligence, even if it fails to reach the person; Lefler v. Tel. Co., 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; Western U. Tel. Co. v. Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751; though no effort was made to find the addressee; Western U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70.

It has been held that the delivery of a message to a telegraph company for transmission raises an inference that it was received by the addressee; Com. v. Jeffries, 7 Allen (Mass.) 556, 83 Am. Dec. 712.

If there was delay in the delivery of the message, the burden is upon the company to explain it; Harkness v. Tel. Co., 73 Ia. 190, 34 N. W. 811, 5 Am. St. Rep. 672; Julian v. Tel. Co., 98 Ind. 327; and when there was a delay of a week, there is a presumption of negligence, but it may be rebutted, and to do so a preponderance of evidence is not required, since on the whole case the burden of proving negligence is on the plaintiff; Shepard v. Tel. Co., 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796.

A telegraph company was not negligent in not delivering a warning message before the person to whom it was addressed was killed by his pursuers, where it could have delivered the message only by sending out messengers to watch for his arrival; Ross v. Tel. Co., 81 Fed. 676, 26 C. C. A. 564.

The fact that the addressee of a telegram, announcing the death of her brother, cannot attend his funeral without telegraphing the family to postpone the funeral and their compliance with the request, does not deprive her of a right of action against the company for failure to deliver the message; Western U. Tel. Co. v. Caldwell, 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748, with note on contingencies in the possible action of the addressee or some third person as affecting liability. If a message is of such character as reasonably to suggest that mental suffering would result from the failure to deliver, the company is liable for mental suffering resulting from the non-delivery, and where it was customary to deliver messages beyond the delivery limits by telephone, it is competent for the company to enter into an agreement for such delivery; Lyles v. Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534.

Recovery cannot be had for the loss of a sale by delay in delivery of a cipher message unless the company knew its meaning or importance; Postal Tel. Cable Co. v. Cotton Oil Co., 136 Ky. 843, 122 S. W. 852, 125 S. W. 266.

Breach of the contract for prompt delivery of a telegram in another state takes place at the point where the addressee was, and not at the place where the mistake occurred, so that the courts of the former state, in which the action was brought, will apply their own rule as to damages; Western U. Tel. Co. v. Lacer, 122 Ky. 839, 93 S. W. 34, 121 Am. St. Rep. 502, 5 L. R. A. (N. S.) 751, and note on the liability of telegraph companies generally.

Where a telegraph message sent from a place outside of the state is to be delivered in a state, the contract between the sender and the telegraph company is to be performed there, and will be construed in accordance with the laws of the state of delivery; North P. & P. Co. v. Tel. Co., 70 Ill. App. 275.

See MENTAL SUFFERING; MEASURE OF DAMAGES.

Telegrams and Telephone Conversations as Evidence. Messages are instruments of evidence, and are governed by the same rules as other writings; Scott & J. Telegr. § 340; the original message is said to be the best evidence; if this cannot be produced, then a copy should be produced; *id.* § 341; see Saveland v. Green, 40 Wis. 440; Anheuser-Busch Bg. Ass'n v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575. As to which is the original, is said to "depend upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination." Durkee v. R. Co., 29 Vt. 140. See Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Saveland v. Green, 40 Wis. 440.

A telegram as received is only admitted as secondary evidence where the company was the agent of the sender, and there must be proof that the company was duly authorized to send; Cobb v. Lumber Co., 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734; but where the telegraph company was shown to be the agent of the sender, the message delivered was primary evidence against him; Morgan v. People, 59 Ill. 58; Trevor v. Wood et al., 36 N. Y. 307, 93 Am. Dec. 511; if the receiver is the employer, the original message given by the sender to the operator must be produced; Durkee v. R. Co., 29 Vt. 127; in an action for failure to deliver with due diligence, the delivered message is the original; Conyers v. Cable Co., 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; but in an action for failure to transmit the message, the dispatch handed to the operator is the original; Western U. Tel. Co. v. Hopkins, 49 Ind. 223; to prove a hiring by telegraph, the dispatch received is the original; Wilson v. R. Co., 31 Minn. 481, 18 N. W. 291; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88. The rule that a letter following a previous one calling for a reply should prove itself by contents does not apply to telegrams; Howley v. Whipple, 48 N. H. 487.

The signature of a clerk of a telegraph company to a despatch was held to be sufficient, under the statute of frauds, where the original instructions had been signed by the party; Gray, Com. by Tel. 138; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Little v. Dougherty, 11 Colo. 103, 17 Pac. 292; L. R. 5 C. P. 295. See 6 U. C. C. P. 221.

A contract may be made and proved in court by telegraphic despatches; Taylor v. The Robert Campbell, 20 Mo. 254; Leonard v. Tel. Co., 41 N. Y. 544, 1 Am. St. Rep. 446; Rommel v. Wingate, 103 Mass. 327; L. R. 6 Ex. 7; and the same rules apply in determining whether a contract has been made by telegrams as in cases of a contract made by letter; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; 31 U. C. Q. B. 18; Minnesota L. O. Co. v. Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635; 20 Q. B. D. 640. Real estate may be leased or sold by telegram if the despatch was duly signed; Calhoun v. Atchison, 4 Bush (Ky.) 261, 96 Am. Dec. 299. Contracts by telegraph satisfy the statute of frauds in England; Chit. Contr., 13th ed. 15.

Statutes in some states provide that when any notice, information, or intelligence, written or otherwise, is required to be given, it may be given by telegraph, and powers of attorney or other instruments in writing duly proved or acknowledged for record may, with the proper certificate, be sent by telegraph and the telegraph copy recorded; and so of checks, due bills, promissory notes, and bills of exchange. And in such states writs and processes in legal proceedings can be transmitted by telegraph.

Notice of issue of an injunction may be transmitted by telegraph; 13 Ch. D. 110; Morgan v. People, 59 Ill. 58; Cape May & S. L. R. Co. v. Johnson, 35 N. J. Eq. 422.

Conversations over a telephone are admissible, without identification of the voice, the voluntary connection of a person with the telephone system being held to put him in the same category, with respect to communications received, as the result of a connection asked for, as would exist with reference to conversations with an unknown clerk in his place of business; Wolfe v. Ry. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 19 Am. St. Rep. 331; Globe P. Co. v. Stahl, 23 Mo. App. 451; Rock I. & P. R. Co. v. Potter, 36 Ill. App. 590; C. C. Thompson & W. Co. v. Appleby, 5 Kan. App. 680, 48 Pac. 933; but where the nature of the conversation is such as to require identification of the person speaking, in order to make such conversations admissible, the voice of the person speaking must be recognized; J. Obermann Brewing Co. v. Adams, 35 Ill. App. 540; Kimbark v. Equipment Co., 103 Ill. App. 632; Swing v. Walker, 27 Pa. Super. Ct. 366; Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590; or the person identified; Davis v. Walter & Son, 70 Ia. 465, 30 N. W. 804; which may be by hearing or other circumstances; William Deering & Co. v. Shumpik, 67 Minn. 348, 69 N. W. 1088; Shawyer v. Chamberlain, 113 Ia. 742, 84 N. W. 661, 86 Am. St. Rep. 411; and the recognition of the voice is implied from testimony that the witness talked with a person named; Galt v. Woliver, 103 Ill. App. 71; and so when the voice was recognized as that of a person employed in the office, but the name was not known; Missouri P. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; or as that of the declarant, when it is sought to prove a declaration made over the telephone; Stepp v. State, 31 Tex. Cr. Rep. 349, 20 S. W. 753. Where the witness recognized the voice, he was not disqualified from testifying to what he had heard because he was eavesdropping; De Lore v. Smith (Or.) 136 Pac. 13, 49 L. R. A. (N. S.) 555. Delivery of a telegram over the telephone is not sufficiently proved, without identification or recognition of the voice; Planters' C. O. Co. v. Tel. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180, and note. A conversation over the telephone, where the voice was recognized, was admitted in a criminal case, against objection, but upon what ground did not appear; People v. Ward, 3 N. Y. Cr. Rep. 483, 511, note; so also where the accused admitted having called up the witness; Chapman v. Com., 112 S. W. 567, 33 Ky. L. Rep. 965. Where the operator repeated the conversation and was known to be doing it, proof of what she reported the other party to have said was admitted on the ground of agency; Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Oskamp

v. Gadsden, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 440, 37 Am. St. Rep. 428; *contra*, Wilson v. Coleman, 81 Ga. 297, 6 S. E. 693. An acknowledgment of a deed through a telephone by a married woman was held valid; Banning v. Banning, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156; but reading a subpœna on a telephone was not a good service; Ex parte Terrell (Tex.) 95 S. W. 536; and such communication is insufficient to sustain an affidavit for an attachment, in the absence of identification of the person speaking, though it would be sufficient if it appeared that the affiant knew and recognized his voice; Murphy v. Jack, *supra*. A demand for payment of a note over the telephone was held sufficient to hold the endorser, where the maker had answered that he was unable to pay and had not insisted on his statutory right to the exhibition of the instrument; Gilpin v. Savage, 60 Misc. 605, 112 N. Y. Supp. 802. See also 56 Alb. L. J. 233.

Where the endorsee of a promissory note demanded payment by the maker over the telephone, it was held that this was not a sufficient presentment to charge the endorser; Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861, reversing 132 App. Div. 948, 118 N. Y. Supp. 1108, and 60 Misc. 605, 112 N. Y. Supp. 802. It is permitted to prove in evidence a conversation with a person who answers a telephone call after connection has been obtained with the place of business of one of the parties to the suit; Barrett v. Magner, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531.

Disclosure of Messages by Employés. Employés of telegraph companies cannot refuse to answer questions as to messages transmitted by them; and they must, if called upon, produce such messages; 20 L. T. (N. S.) 421; U. S. v. Hunter, 15 Fed. 712; Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117; an operator may be required to testify to the contents of a telegram addressed and delivered to a defendant on trial under indictment; State v. Litchfield, 58 Me. 267; National Bank v. Bank, 7 W. Va. 544. And even when a statute forbids the divulging of the contents of a telegram, it has been held not to apply when the testimony of an operator is required in a court of justice; 2 Pars. Eq. Cas. 274. See Allen, Tel. Cas. 496, n. The power of the court to compel the local manager of a company to search for and produce private telegrams has been enforced by *subpœna duces tecum*, notwithstanding a statute similar to that referred to above; U. S. v. Hunter, 15 Fed. 712; Woods v. Miller, 55 Ia. 168, 7 N. W. 484, 39 Am. Rep. 170. The doctrine of these decisions has been severely criticised, but they have not been overruled; Cooley, Const. Lim., 371; 18 Am. L. Reg. (N. S.) 65. See 5 So. L. Rev. 473.

The Home Secretary of England has the power to order telegrams to be detained and opened for reasons of state or public justice, which power is exercised by express warrant under his signature, by statute.

Actions by and against Telegraph and Telephone Companies. The companies are liable for breach of contract where there is one, or in tort for negligence arising either in the performance or non-performance of their duties to those who deal with them; Brown v. R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Shingleur v. Tel. Co., 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604. It is said that there is no liability in tort to the sender where there is an express contract; Crosw. Electr. § 458; except perhaps in cases where the stipulations on the telegraph blanks are considered rather as regulations of the business than as contracts; *id.* If the sender of the message is the agent of the addressee, either disclosed or undisclosed, the latter may maintain an action against the company, whether the company had knowledge of the fact or not; Crosw. Electr. § 454.

It has been held that the telegraph company is the agent of both parties and is liable to either for negligence; New York & W. P. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; but it is probably more accurate to say that it is not an agent for either, but independent of both, as exercising a *quasi* public function; McPeek v. Tel. Co., 107 Ia. 362, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; Alexander v. Tel. Co., 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; and for a failure to exercise the degree of care and diligence to which they are bounden, they are liable to the injured party; *id.*; Gray v. Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301, note.

In England there is said to be no action for mere negligence, and, the only remedy being on the contract, the courts hold that the receiver, not being a party to it, can claim no rights under it; Dixon v. Reuters' Teleg. Co., 3 C. P. D. 1; Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706. In the first of these cases the suit was by the addressee and in the last one by the sender. In both cases the court held that there was no cause of action and expressly declined to adopt the view of the American courts that there is any analogy between the liabilities of common carriers and of telegraph companies. The latter of the English cases cited was followed in Feaver v. Montreal Tel. Co., 23 U. C. C. P. 150. This case was decided in 1880, but in 1890 and 1892, in two Canadian cases, it was held that a telegraph company is responsible to the addressee in an action of tort for negligence in failing to deliver a message; Bell v. Dominion Tel. Co., 3 Montr. Leg. N. 406; Watzo v. Mont. Tel. Co., 5 Montr. Leg. N. 87; and in the periodical last

cited, at page 87, these cases are the subject of editorial comment as being interesting evidences of concurrence in American and Canadian courts. And in an earlier case, Kinghorn v. Montreal Tel. Co. (1859) 18 D. C. Q. B. 60, while the plaintiff failed on the ground that, even if the telegram had been received, there would have been no complete contract, the suit being in tort, the court said that if the company "had received the message for the purpose alleged . . . he would have a good cause of action against them, such as he has brought—that is in tort for breach of duty," "and if he showed . . . damage from their negligence . . . he would be entitled to recover."

In the United States the right of action of the receiver of a message is conceded; 1 Am. L. Reg. 685; Crosw. Electr. § 462; Pearsall v. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. This right has been based upon the "misfeasance" of the company, upon which the receiver acted to his injury; New York & W. P. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Western U. Tel. Co. v. Fenton, 52 Ind. 1; and the companies have been held equally responsible for their negligence to the addressee as to the sender; Young v. Tel. Co., 107 N. C. 370, 11 S. E. 1144, 9 L. R. A. 669, 22 Am. St. Rep. 883; Wadsworth v. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Webbe v. Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207.

An extended discussion of the liability of the company to the addressee, by Otto H. Draige, in 26 Wkly. L. Bul. 138, which contains a large collection of cases, reaches the conclusion that the addressee has a right of action for all damages not too remote, but resulting directly from the company's negligent act,—a right of action which cannot be impaired by any conditions entered into with the sender.

The American doctrine on which this line of cases rests gives to a third person a right of action on a promise made for his benefit, though he be a stranger both to the promise and the consideration, and it is said that two elements must combine an intent to benefit the third party and there must be an obligation from the promise to the third party; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731. This American rule, in this as in many other cases, was originally based upon early English cases such as Dutton v. Poole, 2 Lev. 210, which have been over-ruled; Tweddle v. Atkinson, 1 De G. & S. 393. See an interesting historical discussion of the English and American rules in Jones, Teleg. & Teleph. Cos. § 467 *et seq.*

Mandamus is a proper remedy to enforce the duties of a company to the public and secure its facilities, and that was the mode of proceeding adopted in the cases where the courts have enforced the obligation to install telephones for all persons and corporations impartially. A mandamus will lie to compel a company to supply facilities, though petitioner has not complied with his previous contract to use respondent's telephone exclusively, the remedy for that being an action for breach of contract; State v. Tel. Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; but it will not lie to compel a telephone company to put a telephone in a bawdyhouse; Godwin v. Tel. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, where the objection was to the character of the house for which the telephone was sought, and not to the character of the plaintiff.

Telephone companies are liable for setting fire to buildings, caused by lightning striking the wires; Griffith v. Tel. & Tel. Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919; but where the best known device for protecting persons against injury by atmospherical electricity has been placed on the telephone, there is no liability for injury to a user of the telephone during a violent thunderstorm; Rocap v. Tel. Co., 230 Pa. 597, 79 Atl. 769, 36 L. R. A. (N. S.) 279.

Where a telegram was erroneously delivered to the wrong person, who undertook a journey because of it, he could not recover, where the person whose illness was announced was a stranger, and the name of the addressee, though similar, was not identical; Bowyer v. Tel. Co., 130 Ia. 324, 106 N. W. 728, 5 L. R. A. (N. S.) 984. The company is not liable for failure to give a proper connection on a call for a physician, and the damages are too remote in the absence of a specific contract; Southwestern Tel. & Tel. Co. v. Solomon, 54 Tex. Civ. App. 306, 117 S. W. 214.

An action cannot be maintained at common law for unreasonable delay in the delivery of a death notice where the only damage is mental suffering; Western U. Tel. Co. v. Sklar, 126 Fed. 295, 61 C. C. A. 281; Alexander v. Tel. Co., 126 Fed. 445; nor under the Virginia statute; *id.*

A company is not liable for failure to transmit a message to which no internal revenue stamp is affixed as required by law; Western U. Tel. Co. v. Young, 138 Ala. 240, 36 South. 374.

With respect to actions by telegraph or telephone companies, it has been held that the remedy of the latter against a subscriber for refusal to pay is to bring suit for the amount due; State v. Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

A telegraph company is liable in damages to a traveler, who during an electric storm, comes in contact with one of its wires, charged with electricity from the atmosphere, and is injured thereby; Southwestern Tel. & Tel. Co. v. Robinson, 50 Fed. 810, 1 C. C. A. 684, 2 U. S. App. 205.

Where the lessees of a tramway discharged

electricity into the ground by uninsulated wires and the current interfered with the instruments of a telephone company, the tramway company was held liable; 68 L. T. 283. But an injunction will not lie at the suit of a telephone company to restrain an electric railway company from permitting the escape of electricity from its wires, where it appears that the former could obviate the trouble by the use of a return wire, and at a less expense than any method the railway company could adopt; Cumberland Tel. & Tel. Co. v. R. Co., 42 Fed. 273, 12 L. R. A. 544.

A telephone company may enjoin the proprietor of a hotel from permitting his boarders to use an instrument in the hotel, for their private business, though they may use it to call for a carriage and such like; 32 Am. L. Rev. 736 (S. C. of D. C.), Chesapeake & Potomac Tel. Co. v. Danenhauer.

Under a statute imposing a penalty for refusing to transmit a message, neither the company nor its operator is guilty of libel for sending a message of which the language was innocent on its face, though in fact intended to state that a school committee had been bribed; Grisham v. Tel. Co., 238 Mo. 480, 142 S. W. 271, 37 L. R. A. (N. S.) 861, Ann. Cas. 1912A, 535.

See, generally, Allen, Telegraph Cases; Jones, Teleg. & Teleph. Cos.; Scott & Jarnagin, Telegraphs; Sherman & Redfield, Negligence; a collection of leading telegraph and telephone cases, with annotations, 35 Am. & Eng. Corp. Cas. 1–94; 26 Wkly. Law Bul. 147; COMMERCE; EVIDENCE; POLES; WIRES.

The rules as to the admissibility of evidence in actions against such companies is the same as in other cases. It must always be responsive to the issue involved; Chicago, B. & Q. R. Co. v. Hoeffner, 44 Ill. App. 137; Kyle v. Buffalo, etc., R. Co., 16 U. C. C. P. 76. In a suit against a company, either in contract or tort, there must be proved in general a delivery of the message to the company, its implied or express contract to transmit it, and its breach of duty thereof; Pearsall v. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. As to what constitutes a delivery, and the consequent duty of the company, see *supra*.

Where there has been proof of delivery and an error or other breach of duty, the burden is on the company to disprove negligence; Bartlett v. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Cowan v. Tel. Co., 122 Ia. 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; where the suit is for an error on a connecting line, the burden is on the defendant to show that such line caused the loss; La Grange v. Tel. Co., 25 La. Ann. 383.

The question whether there was negligence, and what constitutes it, in the particular case, are exclusively for the jury; Colt v. Tel. Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; McPeek v. Tel. Co., 107 Ia. 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205.

Damages. In estimating the measure of damages for the failure to transmit a message properly, the general rules upon the subject of damages *ex contractu* are applied; Gray, Com. by Tel. 80; Squire v. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Kinghorne v. Montreal Tel. Co., 18 U. C. Q. B. 60; Washington & N. O. Tel. Co. v. Hobson, 15 Gratt. (Va.) 122. The damages for negligent transmission of a telegram are said to be usually settled under the general rule of Hadley v. Baxendale, 9 Exch. 341, limiting consequential damages to those within the contemplation of the parties at the date of the contract; 12 H. L. R. 423; but the application of this rule has been refused; Western U. Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; Western U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715; Western U. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682. This raises in most cases the question of notice to the operator as ground for special damages, which may be either actual or constructive; Squire v. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Western U. Tel. Co. v. Valentine, 18 Ill. App. 57; Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; Primrose v. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, where the cases are collected on the reasonableness of the regulation requiring a message to be repeated in order to warrant the recovery of actual damages. A telegraph company is not relieved from liability by the fact that at the time of the delivery of the message relating to sickness and death it was not informed of the relation of the parties; Western U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Western U. Tel. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860.

The company is liable for damages for the incorrect transmission of a message, notwithstanding a provision limiting its liability to the amount paid for transmission, as that amount is paid for correct transmission; Western U. Tel. Co. v. Milton, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; but probably the weight of authority is in favor of the validity of such stipulations, except as against gross negligence, and the cases are collected at large in the note to the last cited case.

Where failure to make a telephone connection is without wilfulness or oppression, actual and not punitive damages may be recovered; Cumberland Tel. & Tel. v. Paine, 94 Miss. 883, 48 South. 229; Cumberland Tel. & Tel. Co. v. Jackson, 95 Miss. 79, 48 South. 614; but merely nominal damages and not special damages growing out of the professional character of the person called, unless it appear that a conversation with him would have prevented the loss; Haber, B. B. Hat Co. v. Tel Co., 118 Ga. 874, 45 S. E. 696;

and the requirement that the subscriber should first pay the long distance charge in advance at the central office is not so oppressive as to warrant exemplary damages; Cumberland Tel. & Tel. Co. v. Baker, 85 Miss. 486, 37 South. 1012.

Where a telegraph company is sued for negligence in transmitting a message, the measure of damages, unless special damages are alleged and proved, is the sum paid for transmission; Cutts v. Tel. Co., 71 Wis. 46, 36 N. W. 627. Speculative damages are not recoverable for error in transmitting a message; Western U. Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719. Unless the despatch shows on its face the importance of the matter to which it relates, or information on this point is communicated to the company's agents, only nominal damages can be recovered for the default of the company; Pope v. Tel. Co., 9 Ill. App. 283; U. S. Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Beaupré v. Tel. Co., 21 Minn. 155; Baldwin v. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; Mackay v. Tel. Co., 16 Nev. 222.

If the sender of a cipher message does not inform the company of the nature of the transaction to which it relates, or what might happen if it were not correctly transmitted, he can recover only the sum paid for sending it, in case of a mistake in its transmission or delivery; Primrose v. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; Candee v. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Mackay v. Tel. Co., 16 Nev. 222; Western U. Tel. Co. v. Wilson, 32 Fla. 527, 14 South. 1, 22 L. R. A. 434, 37 Am. St. Rep. 125; either nominal damages or the cost of sending it, at most; Fergusson v. Tel. Co., 178 Pa. 377, 35 Atl. 979, 35 L. R. A. 554, 56 Am. St. Rep. 770. See also Western U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, as to MEASURE OF DAMAGES. Abbreviations in a telegram may render it unintelligible; but if they represent well-known trade abbreviations which the operator may be presumed to understand, the company will be put on information and become liable for negligence in its transmission; Postal Tel.-Cable Co. v. Lathrop, 33 Ill. App. 400; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; if the abbreviations are understood by the company, it is not a cipher despatch, and the company is liable for negligent alteration in transmission; Pepper v. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. Orders to agents to buy and sell stocks, though briefly expressed, have been held to impart information sufficiently as to their importance; U. S. Tel. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751; Tyler v. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673; *contra*, U. S. Tel. Co. v. Gildersleve, 29 Md. 232. And the company is liable for the losses sustained, the fluctuations in the market being the measure of damages. See Turner v. Tel. Co., 41 Ia. 458, 20 Am. Rep. 605; Bank of New Orleans v. Tel. Co., 27 La. Ann. 49. If the default of the company arises from the dishonesty of some third person, the company will not be held liable for such remote damages; First Nat. Bank v. Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; Lowery v. Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154.

Lines on Post Roads. Any telegraph company organized under the laws of any state is granted the right, under certain restrictions, to construct and operate lines through and over any portion of the public domain, and along any of the military or post roads of the United States, and under or across navigable streams or waters, provided that they do not obstruct their navigation, or interfere with ordinary travel; R. S. § 5263.

A telegraph company acquires no right, under this act, to occupy the public streets of a city without compensation; St. Louis v. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, Id., 149 U. S. 465, and note, 13 Sup. Ct. 990, 37 L. Ed. 810; Postal Tel. Cable Co. v. Baltimore, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399; but the word "highway," in a grant to a telephone company to construct its lines, includes streets and ways of a city; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657, where the questions involved are discussed at large. This act, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commerce and is appropriate legislation to execute the powers of commerce over the postal service; Pensacola Tel. Co. v. Tel. Co., 96 U. S. 1, 24 L. Ed. 708. It applies equally to telephone companies. The privileges granted must be exercised subject to the police power of the state, provided regulations are not oppressive and such as show an intent to control and perhaps defeat the company's existence; Richmond v. Tel. Co., 85 Fed. 19, 28 C. C. A. 659. Since this act a railroad company, operating a post road over which interstate commerce is carried, cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other companies which have accepted the provisions of the said act, the lines of which would not obstruct the business of the first company; U. S. v. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319. Cables laid across navigable streams or waters must not obstruct navigation; Western U. Tel. Co. v. S. S. Co., 59 Fed. 365, 8 C. C. A. 152, 20 U. S. App. 247.

Submarine telegraph lines are subordinate

to navigation and must be so laid and maintained as not to interfere therewith, and the company is liable in damages to vessels injured by them; Western U. Tel. Co. v. S. S. Co., 43 Fed. 85, affirmed 59 Fed. 365, 8 C. C. A. 152; Blanchard v. Tel. Co., 60 N. Y. 510; but in England injury resulting from submarine telegraph lines is held to be a question of negligence; 15 C. B. N. S. 759.

An opinion of the attorney-general given at the request of the secretary of state in January, 1898, holds that, in the absence of legislation, the president may control the landing of foreign submarine cables, either preventing it, if necessary, or permitting it on conditions demanded by the public interest.

TELLER (*tallier*, one who keeps a tally). An officer in a bank or other institution. A person appointed to receive votes. A name given to certain officers in the English exchequer.

The duties of tellers in banks consist of the receiving of all sums of money paid into the bank, and the paying of all sums drawn out. The position ranks next in importance to that of cashier. See CASHIER; OFFICER.

TELLTALES. In railroad practice ropes suspended from a wire across the track warning of a low bridge. West v. R. Co., 179 Fed. 801, 103 C. C. A. 293.

TEMPERANCE. It has no fixed legal meaning as contradistinguished from its usual import. It is habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation; as temperance in eating and drinking; temperance in the indulgence of joy or mirth. Web. Dict. in People v. Dashaway Ass'n, 84 Cal. 123, 24 Pac. 277, 12 L. R. A. 117. See LIQUOR LAWS.

TEMPEST. A violent or furious storm; a current of wind rushing with extreme violence, and usually accompanied with rain or snow. 29 U. C. C. B. 84. See ACT OF GOD; LIGHTNING.

TEMPLE. See INNS OF COURT.

TEMPORAL LORDS. See PEERS; PARLIAMENT.

TEMPORALITIES. Revenues, lands, tenements, and lay fees which bishops have from livery of the king, and in virtue of which they sit in parliament. 1 Rolle, Abr. 881.

TEMPORALITY. The laity.

TEMPORARY. That which is to last for a limited time. Approved in People v. Wright, 70 Ill. 399. See PERMANENT.

TEMPORIS EXCEPTIO (Lat.). **In Civil Law.** A plea of lapse of time in bar of an action, like our statute of limitations.

TEMPUS (Lat.). Time in general. A time limited; a season: *e. g. tempus pessonis*, mast time in the forest.

TEMPUS SEMESTRE. **In Old English Law.** The period of six months or half a year consisting of one hundred and eighty-two days. Cro. Jac. 166.

TEMPUS UTILE (Lat.). **In Civil Law.** A period of time which runs beneficially: *i. e.* feast-days are not included, nor does it run against one absent in a foreign country, or on business of the republic, or detained by stress of weather. But one detained by sickness is not protected from its running; for it runs where there is power to act by an agent as well as where there is power to act personally; and the sick man might have deputed his agent. Calvinus.

TENANCY. The state or condition of a tenant; the estate held by a tenant.

TENANT. (Lat. *tenere*, to hold). One who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. In a popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupations are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant. See LANDLORD AND TENANT; 5 M. & G. 54.

The term is applied generally in connection with the names of the various estates in land to indicate the person entitled to a particular estate, as tenant in common, by the curtesy, in dower, in fee, for life, in severalty, at sufferance, in tail, at will, for years, from year to year, and joint tenants. See the several titles relating to these estates. *Tenant of the demesne* is one who is tenant of a *mesne* lord; Hamm. N. P. 392. *Tenant by the manner* is one who has a less estate than the fee in the land which remains in the deversion. He is so called because in avowries and pleadings it is specially shown in what manner he is tenant in contradistinction to veray tenant, who is called simple tenant. See Hamm. N. P. 393; VERAY. As to *tenant paravail*, see PARAVAIL. See ESTATE; LEASE; NOTICE TO QUIT.

See ESTATE IN COMMON; CURTESY; ESTATE BY THE CURTESY; DOWER; FEE-SIMPLE; FEE-TAIL; ESTATE FOR LIFE; SEVERALTY, ESTATE IN; SUFFERANCE; ESTATE AT WILL; ESTATE FOR YEARS; ESTATE OF JOINT TENANCY; ESTATE PUR AUTRE VIE; ENTIRETY; ELEGIT; STATUTE MERCHANT; STATUTE STAPLE; JOINT TENANTS.

TENANT RIGHT. In leases from the crown, corporations, or the church, it is usual to grant a further term to the old tenants in preference to strangers; and as this expectation is seldom disappointed, such tenants are considered as having an ulterior interest beyond their subsisting term; and this interest is called the *tenant right*. Bacon Abr. *Leases and Terms for Years* (U).

TENANT TO THE PRÆCIPE. See RECOVERY.

TENDER. An offer to deliver something, made in pursuance of some contract or obligation, under such circumstances as to require no further act from the party making it to complete the transfer.

See LEGAL TENDER.

In Contracts. It may be either of money or of specific articles.

Tender of money must be made by some person authorized by the debtor; 2 Maule & S. 86; to the creditor, or to some person properly authorized, and who must have capacity to receive it; 1 Camp. 477; Huston v. Mitchell, 14 S. & R. (Pa.) 307, 16 Am. Dec. 506; McIniffe v. Wheelock, 1 Gray (Mass.) 600 (but necessity will sometimes create exceptions to this rule; thus any one may make a tender for an idiot; 1 Inst. 206 *b*; an uncle, although not appointed guardian, has been permitted to make a tender on behalf of an infant whose father was dead; Brown v. Dysinger, 1 Rawle [Pa.] 408); in lawful coin of the country; 5 Co. 114; Hallowell & A. Bank v. Howard, 13 Mass. 235; Moody v. Mahurin, 4 N. H. 296; or paper money which has been legalized for this purpose; Thorndike v. U. S., 2 Mas. 1, Fed. Cas. No. 13,987; as, U. S. treasury notes or "greenbacks;" Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. Ed. 287; Bank of State v. Burton, 27 Ind. 426; or foreign coin made current by law; 2 Nev. & M. 519; but a tender in bank notes will be good if not objected to on that account; 2 B. & P. 526; Snow v. Perry, 9 Pick. (Mass.) 539; Brown v. Dysinger, 1 Rawle (Pa.) 408. A tender of a ground rent payable in Spanish milled dollars of a specified weight is good, though it does not include nine days interest, amounting to 1¼ cents; Milligan v. Marshall, 38 Pa. Super. Ct. 60.

He who tenders must be ready to pay or have within his reach the means to pay and actually offer to pay; 10 East 101; Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469. The money need not always be brought forward as well as offered, especially if the party to whom the offer is made refuses to receive it; 2 M. & S. 86; Breed v. Hurd, 6 Pick. (Mass.) 356. The person making the tender need not have the money in his possession; 2 C. & P. 77. A refusal to accept a check for the sole reason that it was insufficient in amount, is a waiver of all objection to the form of the tender; Larsen v. Breene, 12 Colo. 480, 21 Pac. 498. A corporation is not bound to tender a certificate before it can maintain an action on a subscription for its stock; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244. The exact amount due must be tendered; Boyden v. Moore, 5 Mass. 365; Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564; Helphrey v. R. Co., 29 Ia. 480; though more may be tendered, if the excess is not to be handed back; 5 Co. 114; 4 B. & Ad. 546; and asking change does not vitiate unless objection is made on that account; 1 Camp. 70; 5 Dowl. & R. 289; see Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; and the offer must be unqualified; 1 M. & W. 310; Wood v. Hitchcock, 20 Wend. (N. Y.) 47; Hunter v. Warner, 1 Wis. 141.

A tender accompanied with conditions which the party has no right to impose is of no avail; Odum v. R. Co., 91 Ala. 488, 10 South. 222. Though a conditional tender is not good, a tender under a protest, reserving the right of the debtor to dispute the amount due, is a good tender, if it does not impose any conditions on the creditor; [1892] 1 Ch. 1. Where a decree directed complainant to pay defendant, or into court, a certain sum, and defendant thereupon to deliver to the complainant, or into court, certain stock, held that the tender of the same with interest coupled with a demand for the surrender of the stock and a settlement of the pending appeal was bad as a conditional tender and did not stop the running of the interest; Beardsley v. Beardsley, 86 Fed. 16, 29 C. C. A. 538. One who makes a tender in order to stop the running of the interest must show that he has kept on hand, so as to be constantly ready and able to pay, the amount of the tender in lawful money at any time the creditor should elect to take it; *id.* See Cheney v. Bilby, 74 Fed. 52, 20 C. C. A. 291.

When a larger sum than is due is tendered, it is not necessary that the debtor pay or keep good the whole amount; for, although the tender of money is supposed to be an admission by the debtor that the entire sum tendered is due and payable, yet it is not *conclusive* evidence to that effect; Abel v. Opel, 24 Ind. 250. But where tender was made after suit brought, and the amount supposed by defendant to be due was paid into court, it was decided that the full amount must be paid over to the plaintiff, notwithstanding a much less sum was found by arbitrators to be due; Berkheimer v. Geise, 82 Pa. 64.

It is said that the amount must be stated in making the offer; Knight v. Abbott, 30 Vt. 577. It must be made at the *time* agreed upon; 1 Saund. 33 *a*, n.; Maynard v. Hunt, 5 Pick. (Mass.) 240; but the offer may be given in evidence in mitigation of damages, if made subsequently, before suit brought; 1 Saund. 33 *a*, n.; statutes have been passed in many of the states, permitting the debtor to make a tender at any time before trial, of the amount he admits to be due, together with all costs accrued up to date of tender, and compelling plaintiff, in case he do not recover more than the sum tendered, to pay all costs subsequently incurred. See The Enos B. Phillips, 53 Fed. 153; McDaniel v. Upton, 45 Ill. App. 151.

In Pennsylvania, by statute of 1705, in case of a tender made before suit, the amount tendered must in the event of a suit be paid into court; Cornell v. Green, 10 S. & R. (Pa.) 14; otherwise, the plea of tender is a nullity. If so paid, tender is a good plea in bar, and if followed up, protects the defendant; Wheeler v. Woodward, 66 Pa. 158. Tender may be made after suit brought by paying the amount tendered into court with the costs up to the time of payment; 1 T. & H. Pr. 744; Stratton v. Graham, 140 N. Y. Supp. 869. At common law the tender of a mortgage debt on the day it falls due and at the appointed place discharges the mortgage; but if made after the maturity of the debt, it must be kept good, in order to have that effect; Crain v. McGoon, 86 Ill. 431, 29 Am. Rep. 37; Smith v. Kelley, 27 Me. 237, 46 Am. Dec. 595; Himmelmann v. Fitzpatrick, 50 Cal. 650, but mere tender is sufficient to discharge the mortgage; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Caruthers v. Humphrey, 12 Mich. 270. Where a chattel mortgage is a mere lien, tender of the amount due at any time before sale under foreclosure discharges the lien; Thomas v. Malting Co., 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945, 15 Ann. Cas. 494; Gould v. Armagost, 46 Neb. 897, 65 N. W. 1064; Barbee v. Scoggins, 121 N. C. 135, 28 S. E. 259.

It must be at a suitable hour of the day, during daylight; Wing v. Davis, 7 Greenl. (Me.) 31; at the *place* agreed upon, or, if no place has been agreed upon, wherever the person authorized to receive payment may be found; 2 M. & W. 223; and, in general, all the conditions of the obligation must be fulfilled. Where a chattel mortgage runs to several mortgagees jointly, to secure a joint debt, a tender to either mortgagee is good; Flanigan v. Seelye, 53 Minn. 23, 55 N. W. 115. The money must have been actually produced and offered, unless the circumstances of the refusal amount to a waiver; 3 C. & P. 342; Bakeman v. Pooler, 15 Wend. (N. Y.) 637; Hunter v. Warner, 1 Wis. 141; or at least be in the debtor's possession ready for delivery; Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469; Appleton v. Donaldson, 3 Pa. 381.

In order to constitute a valid tender there must be actual ability, accompanied by immediate possibility of reaching out and laying hold of the thing to be delivered, and the making of a manual proffer thereof or of placing it in such a position that the person to receive it may lay hold of it if he chooses; Greenwood v. Watson, 171 Fed. 619, 96 C. C. A. 421; Eastern Oregon Land Co. v. Moody, 198 Fed. 7, 119 C. C. A. 135. To support a plea of tender it must be shown that the tender was fairly made, that it was absolute and unconditional, and that it covered the full amount then due; Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A. 475; a plea of tender must state how and to whom it was made, as well as the amount tendered, in order that the court may see that as a matter of law the tender was good; Harding, Whitman Co. v. Knitting Mills, 142 Fed. 228.

An actual tender is dispensed with if the party is ready and willing to pay it, but is prevented by the other's declaring that he will not receive it; Odum v. R. Co., 94 Ala. 488, 10 South. 222. Presence of the debtor with the money ready for delivery is enough if the creditor be absent from the appointed place at the appointed time of payment; Gilmore v. Holt, 4 Pick. (Mass.) 258; or if the tender is refused; Sands v. Lyon, 18 Conn. 18.

A tender may be made in the case of unliquidated damages, but it must be kept good, especially where there is a dispute as to the amount due; Dunbar v. De Boer, 44 Ill. App. 615.

See PAYMENT; ACCORD AND SATISFACTION.

Tender of specific articles must be made to a proper person, by a proper person, at a proper time; 2 Pars. Contr. 158. The *place* of delivery is to be determined by the contract, or, in the absence of specific agreement, by the situation of the parties and circumstances of the case; Bronson v. Gleason, 7 Barb. (N. Y.) 472; for example, at the manufactory or store of the seller on demand; Rice v. Churchill, 2 Den. (N. Y.) 145; at the place where the goods are at the time of sale; Veazy v. Harmony, 7 Greenl. (Me.) 91; Barr v. Myers, 3 W. & S. (Pa.) 295; McMurry v. State, 6 Ala. 326; the seller's place of abode, when the articles are portable, like cattle, and the time fixed; Goodwin v. Holbrook, 4 Wend. (N. Y.) 377; Aldrich v. Albee, 1 Greenl. (Me.) 120, 10 Am. Dec. 45. When the goods are cumbrous, it is presumed that the seller was to appoint a place; Bixby v. Whitney, 5 Greenl. (Me.) 192; Mingus v. Pritchet, 14 N. C. 78; or, if he fails to do so upon request, the buyer may appoint a place, giving notice to the seller, if possible; Lamb v. Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174; Aldrich v. Albee, 1 Greenl. (Me.) 120, 10 Am. Dec. 45. Whether a request is necessary if the seller be without the state, see Bixby v. Whitney, 5 Greenl. (Me.) 192; 2 Greenl. Ev. § 611. The articles must be set apart and distinguished so as to admit of identification by the buyer; Barns v. Graham, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394; Bates v. Bates, Walk. (Miss.) 401, 12 Am. Dec. 572. It must be made during daylight, and the articles must be at the place till the last hour of the day; Sweet v. Harding, 19 Vt. 587; Duckham v. Smith, 5 T. B. Monr. (Ky.) 372; unless waived by the parties.

In Pleading. If made before action brought; Suffolk Bank v. Bank, 5 Pick. (Mass.) 106; Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. 854; tender may be pleaded in ex-

cuse; 2 B. & P. 550; Jones v. Hoar, 5 Pick. (Mass.) 291; it must be on the exact day of performance; 1 Saund. 33 *a*, n.; and if a tender is relied on as a defence, it must be pleaded; Hughes v. Eschback, 7 D. C. 66. It cannot be made to an action for general damages when the amount is not liquidated; 2 Burr. 1120; as, upon a *contract;* 2 B. & P. 234; *covenant* other than for the payment of money; 1 Ld. Raym. 566; *tort;* 2 Stra. 787; or *trespass;* 2 Wils. 115. It may be pleaded, however, to a *quantum meruit;* 1 Stra. 576; accidental or involuntary *trespass;* Slack v. Brown, 13 Wend. (N. Y.) 390; Tracy v. Strong, 2 Conn. 659; Brown v. Neal, 36 Me. 407; *covenant* to pay money; 7 Taunt. 486.

The effect of a tender is to put a stop to accruing damages and interest, and to entitle the defendant to judgment for his costs; 3 Bingh. 290; Carley v. Vance, 17 Mass. 389; Cornell v. Green, 10 S. & R. (Pa.) 14; and it may be of effect to prevent interest accruing, though not a technical tender; Suffolk Bank v. Bank, 5 Pick. (Mass.) 106; but unless kept good by payment into court, it will not defeat a recovery of costs; Ramirez v. S. S. Co., 107 Fed. 530.

It admits the plaintiff's right of action as to the amount tendered; Eddy & Hathaway v. O'Hara, 14 Wend. (N. Y.) 221; Phoenix Ins. Co. of Brooklyn v. Readinger, 28 Neb. 587, 44 N. W. 864; at the date of the suit; Giboney v. Ins. Co., 48 Mo. App. 185; and the plaintiff is entitled to judgment for that amount at least; Brunswick Realty Co. v. Inv. Co. (Utah) 134 Pac. 608; but nothing more, and does not prevent the making of any defence inconsistent with the admissions of the original contract or cause of action, as to any claim beyond that of the sum tendered; Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688. The benefit may be lost by a subsequent demand and refusal of the amount due; 5 B. & Ad. 630; Town v. Trow, 24 Pick. (Mass.) 168; but not by a demand for more than the sum tendered; Thetford v. Hubbard, 22 Vt. 440; or due; 3 Q. B. 915.

See LEGAL TENDER; PAYMENT INTO COURT.

A plea of tender, if defective, should be demurred to, and plaintiff cannot question its sufficiency after accepting the money paid into court under such plea; Gardner v. Black, 98 Ala. 638, 12 South. 813.

TENDER OF AMENDS. See AMENDS.

TENEMENT (from Lat. *teneo*, to hold). Everything of a permanent nature which may be holden.

House, or homestead. Jacob. Rooms let in houses. See APARTMENT; FLAT.

Property held by a tenant. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299.

In its most extensive signification, tenement comprehends everything which may be *holden*, provided it be of a *permanent* nature; and not only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has any frank tenement, and of which he may be seised *ut libero tenemento*, are included under this term; Co. Litt. 6 *a*; 2 Bla. Com. 17; 1 Washb. R. P. 10. In its technical sense it will include an advowson; 3 Atk. 460; 4 Bing. 290; tithes; 1 Stra. 100; 6 Ad. & El. 388; a dignity; 30 Ch. Div. 136; 2 Salk. 509. It includes a wharf; People v. Kelsey, 14 Abb. Pr. (N. Y.) 372. The word *tenements* simply, without other circumstances has never been construed to pass a fee; Wright v. Page, 10 Wheat. (U. S.) 204, 6 L. Ed. 303. See 1 B. & Ad. 161; Com. Dig. *Grant* (E. 2), *Trespass* (A 2).

Maitland (Domesday Book 358) speaks of the use of the "excellent tenement," of the "feeble holding" and the "overworked estate."

TENEMENTAL LAND. Land distributed by a lord among his tenants, as opposed to the demesnes which were occupied by himself and his servants. 2 Bla. Com. 90.

TENENDUM (Lat.). It was used to indicate the lord of whom the land was to be held and the tenure by which it was to be held. Since the statute of *quia emptores*, it was useful only for the latter purpose; 3 Holdsw. Hist. E. L. 194. It is joined to the *habendum* in this manner—to have and to hold. The words "to hold" have now no meaning in our deeds. 2 Bla. Com. 298. See HABENDUM.

TENERI (Lat.). That part of a bond where the obligor declares himself to be held and firmly bound to the obligee, his heirs, executors, administrators, and assigns, is called the *teneri*. Fitch v. Brockmon, 3 Cal. 350.

TENET (Lat. he holds). **In Pleading.** A term used in stating the tenure in an action for waste done during the tenancy.

When the averment is in the *tenet*, the plaintiff on obtaining a verdict will recover the place wasted, namely, that part of the premises in which the waste was exclusively done, if it were done in a part only, together with treble damages. But when the averment is in the *tenuit*, the tenancy being at an end, he will have judgment for his damages only. 2 Greenl. Ev. § 652.

TENNESSEE. The name of one of the United States of America.

It was originally a part of North Carolina. In April, 1784, North Carolina passed an act ceding to the United States, upon certain conditions, all her territory west of the Appalachian or Alleghany Mountains. Before the cession was accepted by congress, it was repealed by another act passed in October, 1784. In December, 1789, the legislature again ceded the territory to the United States; and the cession was accepted by congress by act, April 2, 1790. A convention was called, and a constitution established on February 6, 1796. Tennessee was admitted by an act approved June 1, 1796. Prior to this time a legislature had been elected, the state government organized, and many important laws enacted.

The constitution of 1796 was not submitted to the people for ratification. The authority of the convention established it as the constitution of the state. A new constitution went into effect in 1835. Amendments were ratified in 1853 and 1866. The present constitution was framed, submitted to the people, and ratified in 1870, and went into effect May 5, 1870.

TENOR. A term used in pleading to denote that an exact copy is set out. 1 Chitty, Cr. Law 235; Com. v. Stevens, 1 Mass. 203; 1 East 180.

The tenor of an instrument signifies the true meaning of the matter therein contained. Cowell.

In Chancery Pleading. A certified copy of records of other courts removed into chancery by *certiorari*. Gresl. Ev. 309.

TENORE INDICTAMENTI MITTENDO. A writ whereby the record of an indictment and the process thereupon was called out of another court into the Queen's bench. Reg. Orig. 69; Whart.

TENSE. A term used in grammar to denote a distinction of time.

The acts of a court of justice ought to be in the present tense; but the acts of the party may be in the perfect tense; and the continuances are in the perfect tense; 1 Mod. 81. The contract of marriage should be made in language of the present tense; Hantz v. Sealy, 6 Binn. (Pa.) 405. See 1 Saund. 393, n. 1.

TENT. A pavilion; or canvas house enclosed with walls of cloth and covered with the same material. Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432.

TENTERDEN'S ACT, LORD. The statute of George IV. c. 14, § 6, which provides that no action shall be brought whereby to charge any person upon any representation given concerning the character, credit, etc., of another, or to the intent that another person may obtain credit, unless such representation be made in writing, signed by the party to be charged therewith. See FRAUDS, STATUTE OF.

TENUIT (Lat. he held). A term used in stating the tenure in an action for waste done after the termination of the tenancy. See TENET.

TENURE (from Lat. *tenere*, to hold). The mode by which a man holds an estate in lands.

Such a holding as is coupled with some service, which the holder is bound to perform so long as he continues to hold.

The thing held is called a tenement; the occupant, a tenant; and the manner of his holding constitutes the tenure. Upon common-law principles, all lands within the state are held directly or indirectly from the king, as lord paramount or supreme proprietor. To him every occupant of land owes fidelity and service of some kind, as the necessary condition of his occupation. If he fails in either respect, or dies without heirs upon whom this duty may devolve, his land reverts to the sovereign as ultimate proprietor. In this country, the people in their corporate capacity represent the state sovereignty; and every man must bear true allegiance to the state, and pay his share of the taxes required for her support, as the condition upon which alone he may hold land within her boundaries; Co. Litt. 65 *a*; 2 Bla. Com. 105; 3 Kent 487.

In the earlier ages of the world the condition of land was probably *allodial*, that is, without subjection to any superior,—every man occupying as much land found unappropriated as his necessities required. Over this he exercised an unqualified dominion; and when he parted with his ownership the possession of his successor was equally free and absolute. An estate of this character necessarily excludes the idea of any tenure, since the occupant owes no service or allegiance to any superior as the condition of his occupation. But when the existence of an organized society became desirable to secure certain blessings only by its means to be acquired, there followed the establishment of governments, and a new relation arose between each government and its citizens,—that of protection on the one hand and dependence on the other,—necessarily involving the idea of service to the state as a condition to the use and enjoyment of lands within its boundaries. This relation was of course modified according to the circumstances of particular states; but throughout Europe it early took the form of the feudal system. See ALOD.

The principal species of tenure which grew out of the feudal system was the tenure by *knight's service* (*q. v.*). Many arbitrary and tyrannical incidents or lordly privileges were attached to this tenure, which was abolished by statute 12 Charles II. c. 24, which declared that all such lands should thenceforth be held in free and common socage.

Tenure *in socage* is where a tenant holds his tenement by any certain service, in lieu of all other services, so that they be not services of chivalry or knight's service: as, to hold by fealty and twenty shillings rent, or by homage, fealty, and twenty shillings rent, or by homage and fealty without any rents, or by fealty and a certain specified service, as, to plough the lord's land for three days. Littleton 117; 2 Bla. Com. 79. See SOCAGE

Other tenures have grown out of the two last mentioned species of tenure, and are still extant in England. See [1907] 1 ch. 366.

Among these are tenures by *copyhold* and in *frankalmoin*, in *burgage* and *gavelkind*, and *grand* and *petit serjeanty;* but their nature, origin, and history are explained in the several articles appropriated to those terms.

Tenures were distinguished, according to the quality of the service, into *free* or *base;* the former were such as were not unbecoming a soldier or a freeman to perform, as, to serve the lord in the wars; while the latter were only considered fit for a peasant, as to plough the land, and the like. They were further distinguished with reference to the person from whom the land was held, as a tenure in *capite*, where the holding was of the person of the king, and tenure in *gross*, where the holding was of a subject. By the statute of *Quia Emptores*, 18 Edw. I, it was provided that if any tenant should alien any part of his land in fee, the alienee should hold immediately of the lord of the fee, and should be charged with a proportional part of the service due in respect of the quantity of land held by him. The consequence of which was that upon every such alienation the services upon which the estate was originally granted became due to the superior lord, and not to the immediate grantee; 4 Term 443; 4 East 271; Crabb, R. P. § 735.

Only free tenures were recognized by the royal courts. The free tenures were frankalmoin, knight service, serjeanty and socage; see 2 Holdsw. 159; 3 *id.* 27.

In the United States every estate in fee-simple is held as absolutely and unconditionally as is compatible with the state's right of eminent domain. Many grants of land made by the British Crown prior to the Revolution created socage tenures, which were subsequently abolished or modified by the legislatures of the different states. Thus, by the charter of Pennsylvania, the proprietary held his estate of the crown in free and common socage, his grantees being thereby also authorized to hold of him directly, notwithstanding the

statute of *quia emptores*. An act of Pennsylvania of November 27, 1779, substituted the commonwealth in place of the proprietaries as the ultimate proprietor of whom lands were held. Pennsylvania titles are allodial not feudal; Wallace v. Harmstad, 44 Pa. 492. In New York there was supposed to have been some species of military tenure introduced by the Dutch previously to their surrender to the English, in 1664; but the legislature of that state in 1787 turned them all into a tenure in free and common socage, and finally, in 1830, abolished this latter tenure entirely, and declared that all lands in that state should thenceforth be held upon a uniform allodial tenure.

See QUIA EMPTORES; ALLODIAL.

See Parliamentary Report (1870) on Tenures in the countries of Europe.

TENURE OF OFFICE. By R. S. § 1765, etc., it was provided that federal officers appointed with the consent of the senate should only be removed during their terms with like consent or by a new appointment made by the consent of the senate; but it did not apply to certain suspensions during a recess of the senate. The law was repealed by act of March 3, 1887. See, as to the effect of the repeal, Parsons v. U. S., 167 U. S. 324, 17 Sup. Ct. 880, 42 L. Ed. 185.

See OFFICE.

TERM. The limitation of an estate: as a term for years, and the like. The word *term* does not merely signify the term specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like. 2 Bla. Com. 145; Farnum v. Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330.

In Practice. The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of the term, all adjournments are to be included; Leib v. Com., 9 Watts (Pa.) 200. Courts are presumed to know judicially when their terms are required to be held by public law; Foster v. Frost, 15 N. C. 427. A term of the circuit court may extend from the beginning of one term to the opening of the succeeding statutory term, and the beginning of another term in another district of the same circuit does not necessarily end the term of the first court; East Tennessee I. & C. Co. v. Wiggin, 68 Fed. 446, 15 C. C. A. 510, 37 U. S. App. 129.

In England Hilary term is from January 12 to April 8; Easter, from April 21 to May 29; Trinity, from June 9 to July 31; and Michaelmas, from Oct. 12 to Dec. 21. For the law terms before 1875, see 1 Reeves, H. E. L. 232; 3 Holdsw. H. E. L. 510.

TERM FEE. In English Practice. A certain sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party; payable for every term in which any proceedings subsequent to the summons shall take place. Whart. Lex.

TERM FOR YEARS. An *estate for years* and the *time* during which such estate is to be held are each called a term: hence the term may expire before the time, as, by a surrender. As to its origin, see 2 Poll. & Maitl. 105.

See ESTATE FOR YEARS.

TERM IN GROSS. An estate for years which is not held in trust for the party entitled to the land on the expiration of the term.

TERM PROBATORY. In an ecclesiastical suit, the time during which evidence may be taken. Cootes' Eccl. Pr. 240.

TERMINAL CHARGES. Demurrage charged for the detention of cars in loading or unloading is a terminal charge required to be shown by the schedules of rates filed and published by an interstate railroad company under the interstate commerce act; Lehigh Valley R. Co. v. U. S., 188 Fed. 879, 110 C. C. A. 513.

TERMINAL FACILITIES. See COMMERCE; RAILROADS.

TERMINUS (Lat.). A boundary or limit, either of space or time. A bound, goal, or borders parting one man's land from another's. It is used also for an estate for a term of years: *e. g.* "*interesse termini*." 2 Bla. Com. 143. See TERM.

Terminus a quo. The starting-point of a private way is so called. Hamm. N. P. 196.

Terminus ad quem. The point of termination of a private way is so called. In common parlance, the point of starting and that of termination of a line of railway are each called the terminus.

TERMOR. One who holds lands and tenements for a term of years, or life. Littleton § 100; 4 Tyrwh. 561.

TERMS, TO BE UNDER. A party is said to be *under terms*, when an indulgence is granted to him by the court in its discretion, on certain conditions. Thus, when an injunction is granted *ex parte*, the party obtaining it is put *under terms* to abide by such order as to damages as the court may make at the hearing. Moz. & W.

TERRA EXTENDENDA. A writ addressed to an escheator, that he inquire and find out the true yearly value of any land, etc., by the oath of twelve men, and to certify the extent into the chancery. Reg. Orig. 293; Whart.

TERRA HYDATA. Land subject to the payment of hydage. Seld.

TERRA LUCRABILIS. Land gained from the sea or enclosed out of a waste. Cowell.

TERRA NOVA. Land newly converted from wood ground to arable. Cowell.

TERRA PUTURA. Land in forests, held by the tenure of furnishing food to the keepers therein. 4 Inst. 307.

TERRA TESTAMENTALIS. Gavelkind land, being disposable by will, or lands held *in allodio*. Spelm.

TERRÆ DOMINICALES REGIS. The demesne lands of the crown.

TERRAGES. An exemption from all uncertain services. Cowell.

TERRE-TENANT. One who has the actual possession of land; but, in a more technical sense, he who is seised of the land; and in the latter sense the owner of the land, or the person seised, is the terre-tenant, and not the lessee. Jones v. Shawhan, 4 W. & S. (Pa.) 257; Bac. Abr. *Uses and Trusts*. It has been holden that mere occupiers of the land are not terre-tenants. See Chahoon v. Hollenback, 16 S. & R. (Pa.) 432, 16 Am. Dec. 587; 2 Bla. Com. 91, 328; Hulett v. Ins. Co., 114 Pa. 146, 6 Atl. 554.

Contribution among Terre-tenants. The question whether purchasers, at different times, of land bound by an incumbrance created by the grantor, stand in equal equity as regards this incumbrance, and if so, must each contribute proportionately to its discharge, has been settled in England in the affirmative, following the rule laid down in the Year Books and repeated in Coke's Reports; 2 Wms. Saund. p. 10, n.; 3 Rep. 14 *b*. In this country, the opposite view has been taken; Gill v. Lyon, 1 Johns. Ch. (N. Y.) 447; Nailer v. Stanley, 10 S. & R. (Pa.) 450, 13 Am. Dec. 691; Sauer v. Monroe, 20 Pa. 222.

TERRIER. In English Law. A roll, catalogue, or survey of lands, belonging either to a single person or a town, in which are stated the quantity of acres, the names of the tenants, and the like. It may be an ancient document; 12 M. & W. 205.

One of the old records in the office of the recorder of deeds of Philadelphia County is still called the *Germantown Terrier*. In it will be found the Latin Dedication of Pastorius, quoted by Whittier in the Pennsylvania Pilgrim.

By the ecclesiastical law, an inquiry is directed to be made from time to time of the temporal rights of the clergymen of every parish, and to be returned into the registry of the bishop: this return is denominated a terrier. 1 Phill. Ev. 602.

TERRITORIAL COURTS. The courts established in the territories of the United States. See UNITED STATES COURTS.

TERRITORIAL PROPERTY. The land and water over which the state has jurisdiction and control whether the legal title be in the state itself or in private individuals. Lakes and waters wholly within the state are its property and also the marginal sea within the three-mile limit, but bays and gulfs are not always recognized as state property.

TERRITORIAL WATERS. It is difficult to draw any precise conclusion as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, etc., over which it has unquestioned jurisdiction. All that can reasonably be asserted is that it extends as far as may be requisite for the state's safety, and for some lawful end. Until recent years it was generally recognized as extending as far as a cannon shot would reach—*i. e.* a marine league; 1 Kent 29; this limit was fixed when that was the range of a cannon; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; it is said that it can be extended as the range of cannon increases; Hall, Int. L. 157. It may be extended for protection in time of war, or for revenue purposes; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159; The Hungaria, 41 Fed. 109. Congress has recognized the customary limit by legislation as to captures made within a marine league of the shore; 1 Kent 29. It is three miles from low-water mark; Behr. Sea Case.

State legislation in Massachusetts which extends the territorial limit of a state three miles seaward from the shore is valid; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159; *i. e.* it may extend its territorial limits and the boundaries of its counties to the extent of the limits of the United States. So of a California act relating to a crime committed within the same limit; In re Humboldt Lumber Manuf'rs Ass'n, 60 Fed. 428. Parliament "may extend the realm how far soever it may please;" 2 Ex. D. 152. Under the Behring Sea Arbitration, it was decided that the United States cannot protect seals in the open sea beyond the three-mile limit.

It would not be unreasonable for the United States to assume control of the waters on the coast included within distant headlands, as from Cape Ann to Cape Cod, Nantucket to Montauk Point, and from the latter to the Capes of the Delaware; 1 Kent 30.

"As between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from the coast, and bays wholly within its territory which do not exceed two marine leagues at the mouth are within this limit." Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159. The Gulf of Mexico is part of the Atlantic Ocean; Merchants' Mut. Ins. Co. v. Allen, 121 U. S. 67, 7 Sup. Ct. 821, 30 L. Ed. 858; but on the other hand, the exclusive right of the British crown to the Bristol Channel, to the channel

between Ireland and Great Britain, and between Scotland and Ireland, is uncontested; 1 Phill. Int. L. § 189; and Chesapeake Bay and Delaware Bay are not a part of the high sea; 1 Whart. Int. L. § 28; Narragansett Bay is claimed, by usage, to be within the jurisdiction of Rhode Island; American S. B. Co. v. Chase, 16 Wall. (U. S.) 522, 21 L. Ed. 369; Chase v. Steamboat Co., 9 R. I. 419, 11 Am. Rep. 274; and Conception Bay in Newfoundland, though more than 20 miles wide at its mouth and nearly 50 miles long, is British territory; 2 App. Cas. 394. It is probable that the Delaware (1 Op. Atty. Gen. 15) and Chesapeake (4 Moore, Int. Arbitr.) bays are the property of the United States. England claims complete jurisdiction over the bays of Chaleur, Fortune, and Conception, and some other bays of Newfoundland, as closed seas; Snow, Int. Law 27. The Zuyder Zee and Hudson's Bay are probably parts of the territory of the nations which surround them; while the bays of Fundy and Chaleur are public; 3 Whart. Int. L. 28, 304, 305 *a*. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude was considered by the United States as against the rights of other nations; 1 Kent 29.

The territorial waters of the United Kingdom, under the act of Aug. 16, 1878, are such as are deemed so by international law, and for the purpose of any offence declared by the act to be within the jurisdiction of the admiralty, it is one marine league from low-water mark; 1 Moore Int. L. 714.

See 1895 Rep. Society for Reform and Codif. of the Laws, 17th meeting; 5 Eng. Rul. Cas. 946; PILOT; JURISDICTION; MARE CLAUSUM.

TERRITORY. A part of a country separated from the rest and subject to a particular jurisdiction.

A portion of the country subject to and belonging to the United States which is not within the boundary of any state or the District of Columbia.

The constitution of the United States, art. 4, s. 3, provides that the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States; and nothing in this constitution shall be construed so as to prejudice any claims of the United States or of any state.

The United States has supreme sovereignty over a territory, and congress has full and complete legislative authority over its people and government; Church of Jesus Christ of L. D. S. v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478.

Congress possesses the power to erect territorial governments within the territory of the United States: the power of congress over such territory is exclusive and universal, and their legislation is subject to no control, unless in the case of ceded territory, as far as it may be affected by stipulations in the cessions or by the ordinance of 1787, under which any part of it has been settled; Story, Const. § 1322; Rawle, Const. 237; 1 Kent 243, 359; 1 Pet. (U. S.) 511, 7 L. Ed. 242. Congress has plenary legislative power over the territories of the United States, and upon the admission of a territory into the Union, may, if it so desires, effect a collective naturalization of its foreign-born inhabitants as citizens of the United States; Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103.

The admission of a territory as a state is accomplished by means of what is generally known as an enabling act, which prescribes the terms and conditions upon which the new state is to be admitted.

A territory is the fountain from which rights ordinarily flow, though Congress might intervene; but the rights that exist are not created by congress or the constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by congress, and not by a legislature of the district; Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834, where this doctrine was applied to Hawaii. A territory is sovereign, not in the full sense of juridicial theory, but because in actual administration it may originate and change at will the law of contract and property, and it is therefore exempt from suit; *id.*

In determining rights and liabilities, local legislation under authority of congress previously granted is treated as emanating from the local legislature and not from congress; Honolulu R. T. & L. Co. v. Wilder, 211 U. S. 137, 29 Sup. Ct. 44, 53 L. Ed. 121; Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834.

A territorial legislature has plenary power in matters of procedure and practice and may prescribe the method of selecting grand and petty jurors and their qualifications in the territorial courts; Ex parte Moran, 144 Fed. 594, 75 C. C. A. 396.

Laws enacted by the legislatures of the territories are not laws of the United States; Ex parte Moran, 144 Fed. 594, 75 C. C. A. 396.

In passing the enabling act for the admission of Oklahoma, June 16, 1906, congress preserved the authority of the federal government over the Indians, their lands and property which it had prior to that act; Tiger v. Inv. Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

When the Louisiana territory was purchased in 1803, Jefferson believed that he had (in his own words) "done an act beyond the constitution"; but the treaty was ratified. When the question of the validity of the cession of Florida arose, Marshall, C. J., said: "The constitution confers absolutely on the government of the Union the powers of mak-

ing war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty;" American Ins. Co. v. Canter, 1 Pet. (U. S.) 511, 542, 7 L. Ed. 242.

The United States may extend its boundaries by conquest or treaty, and demand cession of territory as a condition of peace, the indemnification of its citizens or the reimbursement of the government for the expenses of a war; Fleming v. Page, 9 How. (U. S.) 603, 13 L. Ed. 276.

Where congress authorized the acquisition of territory in a specific manner, and it was otherwise acquired, the subsequent action of congress in enacting laws for the territory amounts to a full ratification of the action of the executive in regard thereto. The concurrent action of congress and the executive is conclusive upon the courts; Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351, where it was also said that it is now too late to question the right of acquiring territory by treaty.

"The United States has the powers of other sovereign nations" to "acquire territory in the exercise of the treaty-making power, by direct cession as the result of war and in making effectual the terms of peace," and until congress shall see fit to incorporate such territory into the United States, it is to be governed under the law-making power of congress, subject to such constitutional restrictions as are applicable to the situation; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697, where it was held that congress was not required to enact for the Philippines a system of laws including the right of trial by jury; in Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016, it was held that the mere annexation of Hawaii did not render applicable the provisions of the constitution as to grand and petty juries.

Where the United States acquires territory, the laws of the country transferred, unless inconsistent with provisions of the constitution and laws applicable thereto, continue in force until abrogated or changed by the authority of the United States; Ortega v. Lara, 202 U. S. 339, 26 Sup. Ct. 707, 50 L. Ed. 1055.

Congress may delegate legislative authority to such of the agencies as it may select; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697.

"The territories of the United States are entirely subject to the legislative authority of congress. They are not organized under the constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control. . . . It [congress] may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. . . . In a territory all the functions of government are within the legislative jurisdiction of congress, and may be exercised through a local government or directly;" Endleman v. U. S., 86 Fed. 456, 30 C. C. A. 186, citing Cross v. Harrison, 16 How. (U. S.) 164, 14 L. Ed. 889; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331.

When New Mexico was conquered by the United States it was only the allegiance of the people that was changed, their relation to each other and their property rights remained unchanged. The executive of the United States properly established a provincial government which ordained laws and instituted a judicial system, which continued in force until modified by the direct action of congress or by the territorial government established by it; Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891.

The treaty with Russia concerning Alaska, instead of exhibiting, as did the treaty with Spain concerning the Philippine Islands, a determination to reserve the question of the status of the acquired territory for action by congress, manifested a contrary intention to admit the inhabitants of the ceded territory to the enjoyment of citizenship and expressed the purpose to incorporate the territory into the United States. The constitution is applicable to that territory and under the fifth and sixth amendments, congress cannot deprive one there accused of a misdemeanor of trial by a common law jury; Rassmussen v. U. S., 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.

The court will take judicial notice as to whether or not a given territory is within the boundaries of the United States, and this is a political question; Pearcy v. Stranahan, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. Ed. 793, holding that the Isle of Pines is *de facto* under the jurisdiction of Cuba.

See STATE; UNITED STATES OF AMERICA; SOVEREIGNTY; SNOW, Administration of Dependencies

TERROR. The state of the mind which arises from an event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger. See RIOT; ROBBERY; PUTTING IN FEAR.

TERTIUS INTERVENIENS (Lat.). **In Civil Law.** One who, claiming an interest to the subject or thing in dispute in action between other parties, asserts his right to act with the plaintiff, to be joined with him, and to recover the matter in dispute, because he has an interest in it; or to join the defendant, and with him oppose the interest of the plaintiff, which it is his interest to defeat. He differs from the intervenor, or him who interpleads in equity. 4 Bouvier, Inst. n. 3819.

TEST. Something by which to ascertain the truth respecting another thing. Depue v. Place, 7 Pa. 428.

The requirement that an officer be a resident of the municipality in which he is to be elected for three years in order to be eligible to an office is not a *test* within the meaning of a constitutional provision that no other oath, declaration or test than a prescribed oath shall be required as a qualification for an office; Attorney General v. MacDonald, 164 Mich. 590, 129 N. W. 1056, 32 L. R. A. (N. S.) 835. Such a statute is not invalid as imposing disqualifications not imposed by the constitution; State v. Covington, 29 Ohio St. 102. That a state constitution designates the qualifications of certain officers named therein will not render invalid provisions in a city charter requiring a tax collector to have been an elector of the city and county for five years next preceding his election; Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

TEST ACT. The act of 25 Car. II. c. 2, by which it was enacted that all persons holding any office, civil or military (excepting some very inferior ones), or receiving pay from the crown, or holding a place of trust under it, should take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England, under a penalty of £500 and disability to the office. 4 Bla. Com. 59. Abolished 9 Geo. IV. c. 17, so far as taking the sacrament is concerned, and a new form of declaration substituted. Mozl. & W.

TESTA DE NEVIL. An ancient and authentic record in two volumes, in the custody of the queen's remembrancer in the exchequer, said to have been compiled by John de Nevil, a justice itinerant, in the eighteenth and twenty-fourth years of Henry III. Cowell.

TESTACY. The state or condition of leaving a will at one's death, as opposed to intestacy.

TESTAMENT. In Civil Law. The appointment of an executor or testamentary heir, according to the formalities prescribed by law. Domat, liv. 1, tit. 1, s. 1.

At first there were only two sorts of testaments among the Romans,—that called *calatis comitiis,* and another called *in procinctu.* (See below.) In the course of time, these two sorts of testament having become obsolete, a third form was introduced, called *per æs et libram,* which was a fictitious sale of the inheritance to the heir apparent. The inconveniences which were experienced from these fictitious sales again changed the form of testament; and the prætor introduced another, which required the seal of seven witnesses. The emperors having increased the solemnity of these testaments, they were called written or solemn testaments, to distinguish them from nuncupative testaments, which could be made without writing. Afterwards military testaments were introduced, in favor of soldiers actually engaged in military service.

A *testament calatis comitiis,* or made in the comitia,—that is, the assembly of the Roman people,—was an ancient manner of making wills used in times of peace among the Romans. The comitia met twice a year for this purpose. Those who wished to make such testaments caused to be convoked the assembly of the people by these words, *calatis comitiis.* None could make such wills that were not entitled to be at the assemblies of the people. This form of testament was repealed by the law of the Twelve Tables.

A *civil testament* is one made according to all the forms prescribed by law, in contradistinction to a military testament, in making which some of the forms may be dispensed with. Civil testaments are more ancient than military ones; the former were in use during the time of Romulus, the latter were introduced during the time of Coriolanus. See *Hist. de la Jurisp. Rom. de M Terrason,* p. 119.

A *common testament* is one which is made jointly by several persons. Such testaments are forbidden in Louisiana. Civ. Code of La. art. 1565, and by the laws of France, Code Civ. 968, in the same words, namely: "A testament cannot be made by the same act, by two or more persons, either for the benefit of a third person or under the title of a reciprocal or mutual disposition."

A *testament ab irato* is one made in a gust of passion or hatred against the presumptive heir, rather than from a desire to benefit the devisee When the facts of unreasonable anger are proved, the will is annulled as unjust and as not having been freely made. See AB IRATO.

A *mystic testament* (called a solemn testament, because it requires more formality than a nuncupative testament) is a form of making a will which consists principally in enclosing it in an envelope and sealing it in the presence of witnesses.

A *nuncupative testament* was one made verbally. See NUNCUPATIVE WILL.

An *olographic testament* is one which is written wholly by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form See La. Civ. Code, art. 1581.

TESTAMENTARY. Belonging to a testament; as, a testamentary gift; a testamentary guardian.

TESTAMENTARY CAPACITY. Mental capacity sufficient for making a valid will. As to what constitutes, see WILLS; UNDUE INFLUENCE; WILL.

TESTAMENTARY CAUSES Causes relating to probate of testaments and administration and accounts upon the same. They are enumerated among ecclesiastical causes by Lord Coke. 5 Co. 1.

TESTAMENTARY GUARDIAN. A guardian appointed by last will of a father to have custody of his child and his real and personal estate till he attains the age of twenty-one. In England, the power to appoint such guardian was given by 12 Car. II. c. 34. The principles of this statute have been generally adopted in the United States.

TESTAMENTARY PAPER. An instrument in the nature of a will; an unprobated will.

As to when a deed will have the effect of a testamentary instrument, see DEED; ESCROW; DONATIO MORTIS CAUSA.

TESTAMENTARY POWER. The power to make a will is neither a natural nor a constitutional right, but depends wholly upon stat-

ute. Brettun v. Fox, 100 Mass. 234. Such power has been expressly conferred by statute in most of the states, in some cases unrestricted, in others with various restrictions by reason of dower and homestead rights, and for other reasons; 3 Jarm. Wills 721, 731. See WILL.

TESTAMENTI FACTIO (Lat.). **In the Civil Law.** The ceremony of making a testament, either as testator, heir, or witness.

TESTATE. The condition of one who leaves a valid will at his death.

TESTATOR. One who has made a testament or will.

TESTATRIX. A woman who has made a will or testament.

TESTATUM (Lat.). The name of a writ which is issued by the court of one county to the sheriff of another county in the same state, when the defendant cannot be found in the county where the court is located: for example, after a judgment has been obtained, and a *ca. sa.* has been issued, which has been returned *non est inventus*, a *testatum ca. sa.* may be issued to the sheriff of the county where the defendant is. See Viner, Abr. *Testatum* 259.

In Conveyancing. That part of a deed which commences with the words "This indenture witnesseth."

TESTE MEIPSO (Lat.). **In Old English Law and Practice.** A solemn formula of attestation by the sovereign used at the conclusion of charters, and other public instruments, and also of original writs, out of chancery. Spelm.

TESTE OF A WRIT. The concluding clause, commencing with the word *witness*, etc. A signature in attestation of the fact that a writ is issued by authority. A writ which bears the teste is sometimes said to be *tested*.

The act of congress of May 8, 1792, directs that all writs and process issuing from the supreme or a circuit court shall bear teste of the chief justice of the supreme court, or, if that office be vacant, of the associate justice next in precedence; and that all writs of process issuing from a district court shall bear teste of the judge of such court, or, if the said office be vacant, of the clerk thereof. See R. S. §§ 911, 912.

TESTES. Witnesses. See TESTIS.

TESTIFY. To give evidence according to law.

TESTIMONIAL PROOF. **In Civil Law.** A term used in the same sense as *parol evidence* is used at common law and in contradistinction to *literal proof*, which is written evidence.

TESTIMONIUM CLAUSE. That clause of a deed or instrument with which it concludes.

TESTIMONY. The statement made by a witness under oath or affirmation.

The statement of a witness under oath; yet it need not necessarily be made to a judicial tribunal. Thus, a deposition may contain testimony, although never used in the cause pending; Woods v. State, 134 Ind. 35, 33 N. E. 901. It is a species of evidence by means of witnesses; Carroll v. Bancker, 43 La. Ann. 1078, 1194, 10 South. 187.

It is said that testimony refers more properly to oral evidence than to documentary, and that it is reasonable that a distinction be made between the two; Ensign v. Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658. See EVIDENCE.

TESTIS. A witness. *Testari:* to be a witness, bear witness to; to be witnessed, shown, certified.

In the medieval trial by oath the fellow swearers who swore merely to the truthfulness of another person's oath and had no knowledge necessarily of the facts were called by the ambiguous name of *testis*. Thayer, Prel. Treat. on Evid. See COMPURGATORS.

TESTMOIGNE. An old French word, signifying, in the old books, evidence. Com. Dig. *Testmoigne*.

TEXAS. The name of one of the states of the American Union.

It was a province of Mexico until 1836, when the inhabitants established a separate republic. On March, 1845, the congress of the United States, by a joint resolution, submitted to the new republic a proposition providing for the erection of the territory of Texas into a new state, and for its annexation under the name of the state of Texas. This proposition was accepted by the existing government of Texas on the 23d of June, 1845, and was ratified by the people in convention on the 6th of July. On the 29th of December following, by a joint resolution of congress, the new state was formally admitted into the Union. The present constitution of the state was adopted by a convention on November 24, 1875, and was voted upon and accepted by the people on February 17, 1876.

TEXTUS ROFFENSIS. An ancient manuscript containing many of the Saxon laws, and the rights, customs, tenures, etc., of the church of Rochester, drawn up by Ernulph, bishop of that see from 1114 to 1124. Cowell.

THAINLAND. **In Old English Law.** The land which was granted by the Saxon kings to their thains or thanes was so called.

THALWEG (German). The term thalweg is commonly used by writers on international law, in the definition of water boundaries between states, meaning the middle or deepest or most navigable channel, and while often styled "fairway" or "midway" or "main channel," the word has been taken over into various languages and the doctrine of the thalweg is often applicable in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea, and also applies to boundary lakes and landlocked seas whenever there is a deep water sailing

channel therein; Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 408, 571, 50 L. Ed. 913.

THANE. **In Saxon Law.** A word which sometimes signifies a nobleman, at others a freeman, a magistrate, an officer, or minister. A tenant of the part of the king's lands called the king's "thaneage." *Termes de la Ley.*

In later Anglo-Saxon days it became the general name for the higher classes of society, and among them were many different degrees. 2 Holdsw. Hist. E. L. 29. See THEGN.

THANKSGIVING DAY See HOLIDAY.

THAVIES INN. See INNS OF COURT.

THE. An article which particularizes the subject spoken of. "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite but 'the' refers to a certain object." Sharff v. Com., 2 Binn. (Pa.) 516; per Tilghman, C. J. It will not be construed as equivalent to "this"; Harris v. State (Tex.) 24 S. W. 290.

THEATRE. A house in which a story is represented by human action upon the stage. Jacko v. State, 22 Ala. 73. A house for the exhibition of dramatic performances. Bell v. Mahn, 121 Pa. 225, 15 Atl. 523, 1 L. R. A. 364, 6 Am. St. Rep. 786, where it was held that the performance of an opera is a "theatrical exhibition" within a statute providing that no theatrical exhibition should be allowed without a license. The court said: "A theatre, among the ancients, was an edifice in which spectacles or shows were exhibited for the amusement of the spectators; but in modern times a theatre is a house for the exhibition of dramatic performances: a theatrical exhibition must be either such as pertains to a theatre or to the drama, for the representation of which the theatre is designed: Webster. A drama is a story represented by action: the representation is as if the real persons were introduced and employed in the action itself. It is ordinarily designed to be spoken, but it may be represented in pantomime, when the actors use gesticulation, sometimes in the form of the ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary speech, and the dramatic treatment is essentially different from either." In an English case where the question was, what was a "stage play" in the language of a statute, there was a room containing a stage, foot lights, scenery, etc., and two living characters on the stage, while all the other characters were in the room below engaged in acting, speaking and dancing, and were so reflected upon the stage by mirrors as to appear to be actually there; it was held that the house was within the act, though the court was doubtful whether the performance of the actors in the room below was described by the term used in the statute; Day v. Simpson, 18 C. B. N. S. 680.

An edifice used for the purpose of dramatic, operatic, or other representations or performances for admission to which entrance money is received. The word does not import necessarily anything but the stage on which the actors play and the room in which the acting is done and seen; Lee v. State, 56 Ga. 477. Although the term has an extended signification and comprehends a variety of performances, yet it is conceived that all which it does legitimately comprehend partakes more or less of the character of the drama; Jacko v. State, 22 Ala. 73. It was there held that a theatrical performance does not include exhibitions of *legerdemain* or sleight of hand.

A music hall is not a theatre; 21 Q. B. D. 569. Theatrical performances may include negro minstrel performances; Taxing Dist. v. Emerson, 4 Lea (Tenn.) 312; but not tumbling or fencing; King v. Handy, 6 T. R. 286. Where a statute prohibits the obstruction of passage-ways in a theatre, it should be liberally construed, and does not give the proprietor any discretion to allow persons to stand in the passage-ways, even though the number be not so great as to prevent free exit in case of danger; Fire Department of New York v. Stetson, 14 Daly (N. Y.) 125. That a number of seats for a performance were sold after knowledge that the seats were filled is sufficient proof to sustain a judgment against the manager in the absence of evidence that such sale was in opposition to his wishes; *id.*

A theatre ticket is a mere license to enter the house and witness the performance and may be revoked at the pleasure of the manager; Wood v. Leadbitter, 13 M. & W. 838; Pearce v. Spalding, 12 Mo. App. 141; Johnson v. Wilkinson, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698; Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344, where it was held that the operation of a theatre is not a business affected with a public interest and a condition making void tickets sold by scalpers was valid. See TICKET. In Drew v. Peer, 93 Pa. 234, it was held that the purchaser of a particular seat acquired more than a mere license; that his right was more in the nature of a lease, entitling him to peaceful ingress and egress and exclusive possession of the designated seats during the performance; but in Horney v. Nixon, 213 Pa. 20, 61 Atl. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349, this was said to be a mere dictum and was disapproved, and it was held that a theatre ticket is a mere license, revocable before the holder has actually taken his seat, and that the only remedy is in assumpsit for breach of contract. A ticket of admission to a place of amusement is held a revocable license; 227

U. S. 633. The remedy of the purchaser of a ticket for refusal of the proprietor to honor it is not in tort, but by action for breach of contract; Taylor v. Cohn, 47 Or. 538, 84 Pac. 388, 8 Ann. Cas. 527.

A visitor is entitled to a seat. This right depends on the nature of his ticket. If it is for a reserved seat, he has a right to that particular seat; if not reserved, then to any one which he may find unoccupied and which has not been previously sold to another; Com v. Powell, 10 Phila. (Pa.) 180. Whether a return check given to one after the performance commences may be transferred by the spectator to some other person is a question as to which different opinions have been expressed and apparently no authoritative decision of the point has been made. An anonymous writer in 12 Cent. L. J. 359, expresses the opinion that such a check is transferable, but no authority is cited, while in the same issue of that periodical, in an article by W. H. Wittacker, the opinion is expressed that "the purchaser of a reserved seat, who sells his pass on leaving the house, together with the ticket for his seat, could convey no right on the second purchaser which would entitle him to admission." This opinion is concurred in by two text-writers on the subject; Bracket, Theatrical Law 179, § 153; Wandell, Law of the Theatre, 246. None of these writers cites any authority, but the last cited author quotes from 12 C. L. J. 359, and dissents from it, adding: "The holder of a return check could not transfer the same if the original ticket of admission was non-transferable." The same author also suggests that the holder of a return check cannot transfer the same if the ticket of admission was transferable. The opinions cited on the subject of the right to transfer a ticket or return check are all based upon the theory that a mere license is not transferable, and such cases are cited as Mendenhall v. Klinck, 51 N. Y. 246; Jackson v. Babcock, 4 Johns. (N. Y.) 418. This must be admitted as a settled principle with respect to licenses to enter upon land, of which the cases cited in this connection are instances, and, as appears by the authorities *supra*, the tendency of the courts has been to hold that the legal effect of a theatre ticket is a mere license. A ticket however is said to be more than a mere license, so far as the right to enter the building is concerned, as it includes a contract with the holder to permit him to enter and see the play; Beale, Innkeepers § 316. A revocation of the license, therefore, is a breach of this contract for which the holder may sue, though he may have been lawfully excluded from the premises; Burton v. Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; Purcell v. Daly, 19 Abb. N. C. (N. Y.) 301, where it was held that the proprietor has the right to annex to tickets of admission the condition that they shall not be transferable, and if transferred, that they shall be worthless.

The plaintiff, during the course of a moving picture performance, for which he had purchased a reserved seat, was ejected from the defendant's theatre, with no unnecessary force. Plaintiff was allowed recovery in an action for assault and battery; Hurst v. Picture Theatres, Ltd., 30 T. L. Rep. 98. The ticket holder has a license to enter the theatre and remain there, but since it is not coupled with an interest, it is revocable at the will of the licensor, although consideration has been paid; Hewlins v. Shippan, 5 B. & C. 221. On revocation the licensee becomes a trespasser; Ruggles v. Lesure, 24 Pick. (Mass.) 187. But in a jurisdiction like that in Hurst v. Picture Theatres, Ltd., *supra*, where there is a fusion of law and equity, it would seem enough to defeat the justification for the ejectment.

An agreement among theatre owners to exclude a certain dramatic critic is not unlawful; a theatre is a private enterprise, and the proprietor may say who shall enter; People v. Flynn, 114 App. Div. 578, 100 N. Y. Supp. 31.

Where a theatre ticket contained a statement that if sold on the sidewalk it would be rejected, a ticket speculator has no rights against the manager of the theatre: Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344. The manager of a theatre is not bound to sell his tickets at the price advertised, and it is not within the police power to regulate prices; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep 321.

It was held in Clifford v. Branden, 2 Camp. 358, that the audience had a right to express their sensations or opinions by applause or hisses, and that the right to do so had never been hindered or questioned, but that if any body of men went into a theatre with the intention of hissing an actor or condemning a piece, they would be guilty of riot; to the same effect was the expression of Tindal, C. J., in Gregory v. Duke of Brunswick, 1 C. & K. 24, who said: "The public who go to a theatre have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage, but have no right to go to the theatre by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme."

A theatrical performance being publicly given is subject to candid comment by a newspaper, but it must be done fairly and without malice or purpose to injure or prejudice the proprietor in the public mind; Lord Kenyon, charging the jury in Dibdin v. Swan, 1 Esp. 28.

The proprietor or manager is charged with the duty of protecting the spectators from personal danger resulting from the perform-

ance, so far as it could have been foreseen and by good care guarded against; Thompson v. Ry. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, where at a shooting entertainment the plaintiff was hit in the eye by a metallic piece which flew from the target when it was hit by the bullet; Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333, where the spectator was hit by an exploded fire cracker. It is also the duty of the proprietor or manager to protect the spectator from violence or wrong-doing of his servants; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440; Fowler v. Holmes, 3 N. Y. Supp. 816; or a bystander; Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446. He is also responsible for providing a safe building as little dangerous as is practicable with reference to its intended use; Sebeck v. P. V. Verein, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512; Hart v. Park Club, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; Schofield v. Wood, 170 Mass. 415, 49 N. E. 636; Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282; Francis v. Cockerell, L. R. 5 Q. B. 501; though he is not held as an insurer; Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453. It has been held that the proprietor is not liable to a patron for property left in his private box which was stolen; Pattison v. Hammerstein, 17 Misc. 375, 39 N. Y. Supp. 1039, where it was said that he is not an insurer nor can he be expected, whether regarded as lessor or licensor, to control the access to the box while occupied by the party renting it.

The state or municipal government may require the granting of a license for a theatre and the payment of a license fee; Boston v. Schaffer, 9 Pick. (Mass.) 415; and the license need not be formally in writing, but may be by parol; *id;* but a mere statement that the authorities would not grant a license, but would not object to the entertainment so long as it was proper, is not a license; Simpson v. Wood, 105 Mass. 263. A gratuitous or amateur exhibition need not be licensed; State v. Lundie, 47 La. Ann. 1596, 18 South. 636; Oellers v. Horn, 3 Pa. Super. Ct. 537; *contra*, Com. v. Colton, 8 Gray (Mass.) 488; Shelly v. Bethell, 12 Q. B. 11.

A municipality may designate policemen and firemen for service at theatres, who shall be paid therefor by the managers of the theatre; Tannenbaum v. Rehm, 152 Ala. 494, 44 South. 532, 11 L. R. A. (N. S.) 700, 126 Am. St. Rep. 52; and a city ordinance may compel proprietors of theatres to require ladies to remove their hats at performances; Oldknow v. Atlanta, 9 Ga. App. 594, 71 S. E. 1015. A statute was held a valid exercise of the police power which makes it unlawful to exclude from places of amusement persons presenting tickets who are of age, not being under the influence of liquor, boisterous, or of lewd or immoral character; Greenberg v. Turf Ass'n, 140 Cal. 357, 73 Pac. 1050. Exemplary damages cannot be recovered for ejection without force or insult, where the tickets handed out from the box office proved to be, by mistake, for the previous evening; MacGowan v. Duff, 14 Daly (N. Y.) 315; but compensatory or consequential damages are allowed for the indignity and disgrace of expulsion from a dance hall of a ticket holder; Smith v. Leo, 92 Hun, 242, 36 N. Y. Supp. 949; or of a man and wife from a theatre on account of their color; Drew v. Peer, 93 Pa. 234; and additional punitive damages are not precluded under a statute allowing the recovery of actual damages and $1000 in addition; Greenberg v. Turf Ass'n, *supra.*

THEFT. A popular term for larceny.

It is a wider term than larceny and includes other forms of wrongful deprivation of property of another. Encycl. Br.

Acts constituting embezzlement or swindling may be properly so called. Smith v. State, 21 Tex. App. 133, 17 S. W. 558. See Quitzow v. State, 1 Tex. App. 68.

THEFT-BOTE. The act of receiving a man's goods from the thief, after they had been stolen by him, with the intent that he shall escape punishment. This is an offence punishable at common law by fine and imprisonment. Hale, Pl. Cr. 130.

THEGN. An Anglo-Saxon term meaning a retainer. Afterwards it came to designate the territorial nobility. At a later period these were king's Thegns, who were persons of great importance, and inferior thegns. Military service appears to have run through it all. After the Conquest, they were merged into the class of knights. Encycl. Br.

THEGNAGE TENURE. A kind of tenure in Northumbria in the 13th century and beyond, of which little is known. 2 Holdsw. Hist. E. L. 132.

THELONMANNUS. The toll-man or officer who receives toll. Cowell.

THELUSSON ACT. The stat. 39 & 40 Geo. III., passed in consequence of objections to a Mr. Thelusson's will for the purpose of preventing the creation of perpetuities. See PERPETUITY; 4 Ves. 221.

THEME. The power of jurisdiction over naifs or villeins and their suits, off-spring, lands, goods, and chattels. Co. Litt. 116 *a.*

THEMMAGIUM. A duty or acknowledgment paid by inferior tenant in respect of theme or team. Cowell.

THEN. As an adverb, means "at that time," referring to a time specified, either past or future. Mangum v. Piester, 16 S. C. 329. See Dove v. Torr, 128 Mass. 40. It may also denote a contingency and be equivalent to "in that event." Pintard v. Irwin, 20 N. J. L. 505; it may sometimes mean "soon

after"; Merritt v. Portchester, 8 Hun (N. Y.) 40; or "further." 2 Jarm. 595. In a will it has been held to import the time at which the class described is to be ascertained; 3 Ves. 486; but see 17 Beav. 417.

THEN AND THERE. Words of reference, and when the time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words. State v. Cotton, 24 N. H. 146. Where an averment merely declares a legal conclusion, the words "then and there" need not be repeated to it. State v. Willis, 78 Me. 74, 2 Atl. 848.

THENCE. In surveying, and in description of land by courses and distances, this word preceding each course given, imports that the following course is continuous with the one before it. Flagg v. Mason, 141 Mass. 66, 6 N. E. 702.

THEOCRACY. A species of government which claims to be immediately directed by God.

THEOWES, THEOWMEN, THEWS. Slaves, captives, or bondmen, Spelm. Feuds. They were the slaves of the old Saxon times. Vinogradoff, Engl. Soc. 466.

THEREUPON. Without delay or lapse of time. Putnam v. Langley, 133 Mass. 205. See Hill v. Wand, 47 Kan. 340, 27 Pac. 988, 27 Am. St. Rep. 288. Immediately. 6 M. & W. 492. See 3 Q. B. 79, where the terms thereupon and thereby are distinguished.

THEREWITH. As used in the reform act; 2 W. IV. c. 45; referring to house, etc., the clause *that any land occupied therewith*, has reference to time and not to locality. 22 L. J. C. P. 38; 50 *id.* 117.

THESAURUS INVENTUS. Treasure-trove (*q. v.*).

THESAURUS, THESARIUM. A treasure.

THESMOTHETE. A law-maker; a lawgiver.

THIEF. One who has been guilty of larceny or theft. The term covers both compound and simple larceny. American Ins. Co. v. Bryan, 1 Hill (N. Y.) 25.

THINGS. By this word is understood every object, except man, which may become an active subject of right. *Code du Canton de Berne*, art. 332. In this sense it is opposed, in the language of the law, to the word persons.

"Thing, in legal contemplation, even when we have to do with a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons." Pollock, First Book of Jurispr. 133.

An operation for abortion is a *thing*, within the act of congress declaring non-mailable obscene books and every article and thing for procuring abortion, etc.; U. S. v. Somers, 164 Fed. 259.

See CHOSE; PROPERTY; RES.

THINGUS. In Saxon Law. A thane or nobleman; knight or freeman. Cowell.

THINK. To believe, to consider, to esteem. Martin v. R. Co., 59 Ia. 414, 13 N. W. 424.

THIRD-BOROW. In Old English Law. A constable. Lombard, Duty of Const. 6; 28 Hen. VIII. c. 10.

THIRD DEGREE. See CONFESSION.

THIRD-NIGHT-AWN-HINDE. By the laws of Edward the Confessor, if any man lay a third night in an inn, he was called a "third-night-awn-hinde," and his host was answerable for him if he committed any offence. The first night he was reckoned a stranger; the second night a guest; and the third night an awn-hinde. Bract. 1. 3; Whart.

THIRD PARTIES. A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. Morrison v. Trudeau, 1 Mart. N. S. (La.) 384.

THIRD PENNY. Of the fines and other profits of the county courts (originally, when those courts had superior jurisdiction, before other courts were created) two parts were reserved to the king, and a third part or *penny* to the earl of the county. See Kennett, Paroch. Antiq. 418.

THIRD PERSON. Any person other than one of the parties to the contract or his representatives. Pollock, Contr. 209.

But it is difficult to give a very definite idea of *third persons;* for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered third persons. See 1 Bouvier, Inst. n. 1335.

THIRD PERSON, CONTRACTS FOR THE BENEFIT OF. The English rule is that only he can sue from whom the consideration has moved. That is, even a promisee cannot sue, if he has not provided the consideration; 1 B. & S. 393; L. R. 4 Q. B. 706.

In America the rule is well-nigh universal that the promisee can sue, although the consideration has moved from a third party; Bell v. Sappington, 111 Ga. 391, 36 S. E. 780; Williamson v. Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184; Palmer Sav. Bank v. Ins. Co., 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387. Sometimes the right is based upon code provisions giving the "real party in interest" the right to sue; sometimes upon the theory of a trust; sometimes upon agency. It is essential that the promise be made to the third party in fact, although not in form. It must appear that the parties intend to recognize him as a primary party in interest and as privy to the promise; Pennsylvania Steel Co. v. R. Co., 204 Fed. 513, 122 C. C. A. 633.

The contract must be made for the benefit

of the third person as its object, and he must be the party intended to be benefited; Simson v. Brown, 68 N. Y. 355, quoted with approval in Constable v. S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. Other New York cases are Embler v. Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; Lorillard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113.

The difficult question comes when the plaintiff is not the promisee, but is attempting to sue on a contract made for his benefit. Such cases can be divided into two classes: 1. Where the plaintiff is attempting to enforce an agreement made on his behalf which operates as a gift to him (he is then usually called a "sole beneficiary"). 2. Where the fulfilment of the promisor's promise is to operate as satisfaction of an obligation due from the promisee to his creditor. The rules as to these two classes are different.

The cases of the "sole beneficiary" type arise principally in regard to life insurance. England has been compelled to pass a statute to allow a beneficiary of a life policy to sue; 45 & 46 Vict. c. 75, § 11. The sole beneficiary cannot sue at law; Goodyear Shoe Mach. Co. v. Dancel, 119 Fed. 692; Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169; Clare v. Hatch, 180 Mass. 194, 62 N. E. 250; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; Union R. Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Curry v. Rogers, 21 N. H. 247; Fugure v. Mut. Society, 46 Vt. 362; Ross v. Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646; Hostetter v. Hollinger, 117 Pa. 606, 12 Atl. 741. Most of the other states allow a sole beneficiary to sue even at law. The rights of the sole beneficiary in equity have not been defined as yet. Insurance cases constitute a class by themselves, in which the sole beneficiary is universally allowed to recover, either by statute or by judicial decision; 3 Am. & Eng. Cyc. 980; also, when property is given or devised to a promisor on condition that he make certain payments to others, the beneficiaries are generally allowed to sue, even in England; see Poll. Contr. 3d Am. Ed. 252. In New York the sole beneficiary cannot recover; injured workmen cannot recover on an insurance policy, taken out for their benefit by their employer; Embler v. Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; a subway contractor is not liable to abutting owners for the negligence of sub-contractors, though he has so agreed with the city; Haefelin v. McDonald, 96 App. Div. 213, 89 N. Y. Supp. 395; a contract made by a shareholder to guarantee the credits of the corporation to a transferee is not enforceable by the corporation; Rochester D. G. Co. v. Fahy, 111 App. Div. 748, 97 N. Y. Supp. 1013.

In cases of the second class where the promise is exacted in order to meet a liability of the promisee to the beneficiary, most states allow an action at law. Exceptions are:- Morgan v. Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; White v. Mill Corp., 172 Mass. 462, 52 N. E. 632; Bliss v. Plummer's Estate, 103 Mich. 181, 61 N. W. 263. The United States Supreme Court, Maryland, New Hampshire, Pennsylvania, and Wyoming are undecided. Mortgage cases are in a class by themselves. Massachusetts, England, Ireland and Canada are the only jurisdictions which do not allow the mortgagee to sue the grantee of the mortgagor who has assumed the payment of the mortgage. The fundamental idea is that the promise to pay the debtor-promisee's debt is an asset of the debtor of which the creditor can avail himself. This reasoning has gone so far as to allow the holder of a check a right of action against the bank on which it was drawn; Poll. Contr. 3d Am. Ed. 267. Such a promise is an asset of a peculiar sort, however, and can be gotten at only by the creditor for whose benefit the contract is made; Coleman v. Hatcher, 77 Ala. 217; Clinton N. Bk. v. Studemann, 74 Ia. 104, 37 N. W. 112; Edgell v. Tucker, 40 Mo. 523; Baker & Smith v. Eglin, 11 Ore. 333, 8 Pac. 280; Vincent v. Watson, 18 Pa. 96; Putney v. Farnham, 27 Wis. 187, 9 Am. Rep. 459. When these conditions are not fulfilled, the creditor is denied a right of action. So when a mortgagor conveys to one who does not assume the mortgage, who in turn conveys to one who does assume it, the mortgagee cannot sue the latter; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Mount v. Van Ness, 33 N. J. Eq. 262; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; *contra*, Dean v. Walker, 107 Ill. 541, 47 Am. Rep. 467; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436; Merriman v. Moore, 90 Pa. 78; Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38. The result reached is right in theory since the original transferee of the mortgaged property was never liable to the creditor, and it is unlikely that the ultimate transferee intends to make a gift to the mortgagee.

When a contract is only incidentally for the benefit of the plaintiff, that is, when he can neither be regarded as realizing on an asset of his debtor nor enforcing his right as sole beneficiary, he is denied relief. In Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, A and his wife had mortgaged his farm to X, the wife releasing her dower. Later A conveyed his equity to defendant, who agreed to pay the mortgage, the wife's dower being expressly reserved. Defendant failed to pay, and the farm was sold on foreclosure. It was held that the wife was not intended to be benefited, and could not sue. Hatters who agree to close their shops on Sundays, and in case of a breach to pay $100 to a

charitable corporation, do not subject themselves to a suit by the charitable corporation in case of breach; New Orleans St. Joseph's Ass'n v. Magnier, 16 La. Ann. 338.

As to revocation between the promisor and promisee, it is generally held in the sole beneficiary contracts that the promisee may revoke before collection; the question is whether the gift is executed or still in action; see Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Smith v. Flack, 95 Ind. 116; Emmitt v. Brophy, 42 Ohio St. 82; allowing revocation; *contra*, Waterman v. Morgan, 114 Ind. 237, 16 N. E. 590; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003. As to cases of the debtor and creditor type, since even an insolvent debtor must be allowed to change the form of his property, releases are held valid if for good consideration. In general, the debtor may effect such releases unless it constitutes a fraud on his creditors; Youngs v. Trustees, 31 N. J. Eq. 290; Willard v. Worsham, 76 Va. 392.

The question whether the promisor in the second type of cases can set up questions as to the validity of the original debt depends upon the nature of the promise. Usually the promisor is denied the right to set up defenses of which the debtor might have availed himself; see Poll. Contr. 3d Am. ed. 275.

A creditor, who sues on a contract made by a third person with the debtor to assume and pay the debt, does so subject to all the equities existing between the original parties to the contract; Fish v. Bank, 157 Fed. 87, 84 C. C. A. 502.

For a full and learned treatment of the subject, see Poll. Contr. 3d Am. ed. ch. 5, and note by Prof. Williston. The view there taken is that in all cases the third person should bring a bill in equity joining the promisor and promisee as defendants. Since the promisee has a vital interest in the performance of the contract, he should have his day in court. Most states allow suits both by the promisee and the third party; Poll. Contr. 3d Am. ed. 269, and this frequently results in injustice to the promisor.

THIS. When referring to different things before expressed, "this" refers to the thing last mentioned, and "that" to the thing first mentioned. Russell v. Kennedy, 66 Pa. 251. It is a simple word of relation and its ordinary grammatical meaning will not be extended so as to include something else than that to which it relates. 14 Q. B. D. 720.

THOROUGHFARE. A street or way opening at both ends into another street or public highway, so that one can go through and get out of it without returning. It differs from a *cul de sac*, which is open only at one end.

Whether a street which is not a thoroughfare is a highway was held not fully settled; 1 Ventr. 189. In a case tried in 1790 where the *locus in quo* had been used as a common street for fifty years, but was no thoroughfare, Lord Kenyon held that it would make no difference; for otherwise the street would be a trap to make people trespassers; 11 East 375. This decision in several subsequent cases was much criticised, though not directly overruled; 5 B. & Ald. 456; 1 Camp. 260; 4 Ad. & E. 698; but was affirmed by the unanimous opinion of the court of queen's bench holding that it is a question for the jury on the evidence, whether a place which is not a thoroughfare is a highway or not; 14 E. L. & E. 69. And see 28 *id.* 30. The United States authorities seem to follow the English; Danforth v. Durell, 8 Allen (Mass.) 242; People v. Kingman, 24 N. Y. 559 (overruling Holdane v. Trustees, 23 Barb. [N. Y.] 103); Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49; *contra*, Simmons v. Mumford, 2 R. I. 172.

Where a lane originally established as a private way was a *cul de sac*, it was not incumbent on the owners of the fee to place obstructions therein or to notify persons using it that the license pursuant to which the travel was first permitted was revocable, the burden was on the users to notify the owners that they claimed an adverse right of use; Bohrnstedt Co. v. Scharen, 60 Or. 349, 119 Pac. 337.

See HIGHWAY; STREET; CUL DE SAC; WAY.

THOUSAND. This word may by custom or usage of trade acquire a peculiar meaning, as when applied to rabbits it has been held to denote one hundred dozen; 3 B. & Ad. 728.

THREAD. A figurative expression used to signify the central line of a stream or watercourse. See FILUM AQUÆ; WATERCOURSE; RIVER.

THREAT. A menace of destruction or injury to the person, character, or property of those against whom it is made.

A declaration of an intention or determination to injure another by the commission of some unlawful act. If the act intended to be done is not unlawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense; Payne v. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

To extort money under threat of charging the prosecutor with an unnatural crime has been held to be robbery; People v. McDaniels, 1 Park. Cr. R. (N. Y.) 199; but to extort money or other valuable thing by threat of prosecution for passing counterfeit money, or any prosecution except that for an unnatural crime, is not robbery; Britt v. State 7 Humph. (Tenn.) 45; though it is a criminal offense; 11 Mod. 137; United States v. Ravara, 2 Dall. 299, n., 1 L. Ed. 388. It must be under such circumstances as to operate, to some extent at least, on the mind of the one

whom it is expected to influence. The meaning of the word implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected; State v. Brownlee, 84 Ia. 473, 51 N. W. 25. See THREATENING LETTER.

Threats to commit suicide are not admissible unless part of the *res gestæ*, in a case where one is on trial for murder of the person who made the threats; State v. Fitzgerald, 130 Mo. 407, 32 S. W. 1113; but they were admitted in such a case when made the day before the death; Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; or where there were successive declarations more or less contemporaneous with the taking of a life insurance policy, and efforts to borrow money on it, which tended to show a concerted scheme of fraud; Smith v. Benefit Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; but not when made two years before the issuing of the policy; Hale v. Inv. Co., 65 Minn. 548, 68 N. W. 182.

In Evidence. Menace. See CONFESSION.

THREATENING LETTER. Sending threatening letters to persons for the purpose of extorting money is said to be a misdemeanor at common law. 4 Bla. Com. 126. The threat must be of a nature calculated to overcome a firm and prudent man; but this rule has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed; 1 Den. Cr. Cas. 512. The party who makes a threat may be held to bail for his good behavior. See Com. Dig. *Battery* (D).

By act of congress of Sept. 26, 1888, the sending of any postal card or mail matter with threatening language on the outside thereof is forbidden and made punishable by fine and imprisonment; R. S. 1 Supp. 621. Postal cards held within the act were: One from a creditor threatening to "place the claim with our law agency for collection;" U. S. v. Bayle, 40 Fed. 664, 6 L. R. A. 742; demanding payment and threatening to place it in the hands of a lawyer for collection; *id.;* so of the deposit in the mails of a stamped envelope on the face of which was printed in large red letters: "$1,000 reward will be paid to any person who kidnaps Ex-Gov. Taylor and returns him to Kentucky authorities;" Warren v. U. S., 183 Fed. 718, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800; and of letters threatening to accuse certain persons to whom they were sent of crimes and disgraceful matters; U. S. v. Horman, 118 Fed. 780. But a newspaper without a wrapper, though containing scurrilous and defamatory matter marked with blue pencil and so folded as to expose the same, is not nonmailable matter within section 12, Cr. Code; U. S. v. Higgins, 194 Fed. 539. Held not within the act: notice that a debt is past due and that a collector has called several times; U. S. v. Bayle, *supra;* and notice that rent was due and if not paid would be placed in the hands of an officer; U. S. v. Elliott, 51 Fed. 807. Extraneous evidence is not admissible to show that the language of a postal card on its face threatening or abusive, was not so intended by the sender, and not so understood by the recipient; Griffin v. Pembroke, 2 Mo. App. Repr. 980.

Statutes exist in many of the states, though they vary somewhat in their provisions, some of them requiring the threatening to have been done "maliciously," others "knowingly." The indictment for this offence need not specify the crime threatened to be charged, for the specific nature of the crime which the prisoner intended to charge might intentionally be left in doubt; State v. Morgan, 3 Heisk. (Tenn.) 262; Biggs v. People, 8 Barb. (N. Y.) 547. The threat need not be to accuse before a judicial tribunal; 2 M. & R. 14; People v. Braman, 30 Mich. 460. A person whose property has been stolen has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him; State v. Bruce, 24 Me. 71; Com. v. Coolidge, 128 Mass. 55. A mere threat that the prosecutor would be indicted or complained of has been held to be within the statute, even though no distinct crime was spoken of in the letter, because of the likelihood of threatening letters being written with as much disguise and artifice as possible, but still being sufficient to accomplish the purpose intended; State v. Patterson, 68 Me. 473; State v. Linthicum, 68 Mo. 66.

See LETTER.

THREE-DOLLAR PIECE. A gold coin of the United States, of the value of three dollars.

The three-dollar piece was authorized by the seventh section of the act of Feb. 21, 1853. 10 Stat. at L. It was of the same fineness as the other gold coins of the United States. The weight of the coin was 77.4 grains.

Its coinage was discontinued by act of Sept. 26, 1890. See LEGAL TENDER.

THREE ESTATES. See ESTATES OF THE REALM.

THREE-MILE LIMIT. See SEAL FISHERIES; TERRITORIAL WATERS.

THREE-WEEKS COURT. In the Kentish custom of gavelet, it was the lord's court. 18 Harv. L. R. 40.

THRITHING. The third part of a county consisting of three or more hundreds. Cowell. Corrupted to the modern "riding," which is still used to designate a subdivision of Yorkshire. 1 Bla. Com. 116.

THROAT. In Medical Jurisprudence. The anterior part of the neck. Dunglison, Med. Dict.; 1 Chitty, Med. Jur. 97, n.

The word *throat*, in an indictment which charged the defendant with murder by cutting the throat of the deceased, does not mean, and is not to be confined to, that part of the neck which is scientifically called the throat, but signifies that which is commonly called the throat. 6 C. & P. 401.

THROUGH. It has been held to be equivalent to "over" in a statute providing for laying out the road through certain grounds; Hyde Park v. Cemetery Ass'n, 119 Ill. 147, 7 N. E. 627; and it may mean within; Provident L. & T. Co. v. Mercer County, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156.

THROW OUT A BILL. A phrase used to indicate the action of a grand jury in refusing to find a "true bill."

THURINGIAN CODE. See CODE.

TICK. Colloquially used for credit; as, if a servant usually buy for the master upon tick, and the servant buy something without the master's order, yet if the master were trusted by the trader he is liable; 10 Mod. 111.

TICKET. A railroad ticket is a receipt or voucher, rather than a contract; 5 L. R. A. 818, note; Logan v. R. Co., 77 Mo. 663; Frank v. Ingalls, 41 Ohio St. 560; it is the evidence of a contract, but does not constitute the whole contract; 34 Am. & Eng. R. R. Cas. 219; Kansas City, St. J. & C. B. R. Co. v. Rodebaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715; it may contain some condition or limitation which becomes a part of the contract; Terry v. R. Co., 13 Hun (N. Y.) 359; Lake S. & M. S. Ry. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545. The actual contract may be shown by parol testimony; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Peterson v. Ry. Co., 80 Ia. 92, 45 N. W. 573; and that, not the ticket, which is merely evidence of it, controls the rights and duties of carriers and passengers; C. N. O. & T. P. R. Co. v. Harris, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A. (N. S.) 779. The ticket has been termed a contract between the purchaser and the company; Louisville, N. A. & C. Ry. Co. v. Wright, 18 Ind. App. 125, 47 N. E. 491; but one purchased by a husband for his wife is not a contract between him and the company for her safe transportation; Georgia, C. & N. R. Co. v. Brown, 120 Ga. 380, 47 S. E. 942.

As between the passenger and the carrier the ticket is a mere memorandum of the contract, but as between the passenger and the conductor it is conclusive evidence of the passenger's rights; Illinois C. R. Co. v. Fleming, 148 Ky. 473, 146 S. W. 1110, 1112.

It is subject to the statute of limitations, running from the date of issue; Cassiano v. R. Co. (Tex.) 82 S. W. 806.

Ejection of the passenger is not lawful when the ticket is defective or void without his fault, and he cannot be required to pay a second fare to prevent it; O'Rourke v. R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639; Georgia R. & E. Co. v. Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. Rep. 246, 5 Ann. Cas. 484; *contra*, Norton v. R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132, 6 Ann. Cas. 943; Maxson v. R. Co., 49 Misc. 502, 97 N. Y. Supp. 962; Montgomery T. Co. v. Fitzpatrick, 149 Ala. 511, 43 South. 136, 9 L. R. A. (N. S.) 851; Cleveland C. R. Co. v. Conner, 74 Ohio St. 225, 78 N. E. 376, 6 Ann. Cas. 941; Illinois C. R. Co. v. Gortikov, 90 Miss. 787, 45 South. 363, 122 Am. St. Rep. 324, 14 L. R. A. (N. S.) 464, and note; but it is otherwise when the passenger has bought a ticket and lost or mislaid it; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128; Nicholson v. R. Co., 118 App. Div. 13, 103 N. Y. Supp. 310. See 43 L. R. A. 706, note, and 2 L. R. A. (N. S.) 695, note.

The purchaser of a railroad ticket has a right to rely upon the statements of the agent; Peabody v. Nav. Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823; Pouilin v. R. Co., 52 Fed. 197, 3 C. C. A. 23; Maroney v. R. Co., 106 Mass. 153, 8 Am. Rep. 305; but agents at intermediate stations and gatekeepers cannot vary the terms of the contract; Murdock v. R. Co., 137 Mass. 293, 50 Am. Rep. 307; Johnson v. R. Co., 63 Md. 106.

Railroad companies may make reasonable regulations as to tickets, such as to keep and show a coupon ticket undetached; Delucas v. R. Co., 38 La. Ann. 930; or require the purchase of tickets before entering the car; Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337; Pittsburgh, C. & St. L. R. W. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 568; to charge additional fare if paid on the train; St. Louis, A. & T. H. R. Co. v. South, 43 Ill. 176, 92 Am. Dec. 103; Crocker v. R. Co., 24 Conn. 249; State v. Goold, 53 Me. 279; McGowen v. S. S. Co., 41 La. Ann. 732, 6 South. 606, 5 L. R. A. 817, 17 Am. St. Rep. 413; provided that an opportunity was given to procure tickets; Chicago & A. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; or restrict holders of a certain class of tickets to special trains, provided that, if the ticket does not show it, the rule must be brought to the notice of the passenger; Maroney v. R. Co., 106 Mass. 153, 8 Am. Rep. 305; indeed, knowledge or notice of any condition not apparent on the face of the ticket must be brought home to the passenger, otherwise the railroad company is liable for his expulsion; Erie R. Co. v. Littell, 128 Fed. 546, 63 C. C. A. 44; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Murdock v. R. Co. 137 Mass. 293, 50 Am. Rep. 307; a passenger was held bound by a con-

dition that the carrier should not be liable for delay; 84 L. T. 774, following [1901] 1 C. P. Div. 286. As to what constitutes notice of conditions to holders of tickets, see 23 L. R. A. 746, note. See as to what are reasonable regulations, 5 L. R. A. 817, note; and as to the validity of an extra charge when fare is paid on the train, and what is reasonable, Phettiplace v. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

When the passenger separates the two parts of a round trip ticket, a tender is good if both parts are shown, although it is marked not good if detached; Wightman v. R. Co., 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778; Louisville, N. & G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180, 42 Am. Rep. 668, but if, while detaching it, his attention is called by the conductor to his duty not to do so, he should desist; *id.*

There is a conflict of authority whether it is the duty of a passenger of whom fare is wrongfully demanded to pay it to avoid expulsion in order to lessen damages. The weight of authority is that he need not do so, but may stand on his rights, and need not pay an extra fare to avoid expulsion; Sprenger v. Traction Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Krueger v. R. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487; Ellsworth v. R. Co., 95 Ia. 98, 63 N. W. 584, 29 L. R. A. 173; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; English v. Canal Co., 66 N. Y. 454, 23 Am. Rep. 69; Philadelphia, W. & B. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97; unless the passenger is at fault or negligent; Weaver v. R. Co., 3 Thomp. & C. (N. Y.) 270; Zagelmeyer v. R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514; Murdock v. R. Co., 137 Mass. 293, 50 Am. Rep. 307; Ellsworth v. R. Co., 95 Ia. 98, 63 N. W. 584, 29 L. R. A. 173; Hufford v. R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; Cherry v. R. Co., 191 Mo. 489, 90 S. W. 381, 109 Am. St. Rep. 830, 2 L. R. A. (N. S.) 695, and note, in which are cited as *contra* many cases, but on examination most, if not all, of them are cases in which the passenger had not a ticket or evidence of payment, good on its face; such are Peabody v. Nav. Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823 (in which the opinion and the note cite many such cases); Townsend v. R. Co., 56 N. Y. 295, 15 Am. Rep. 419. In other cases it is held to be the passenger's duty to pay the fare or submit to ejection; Monnier v. R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619; and recover it back without aggravation; Van Dusan v. R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; Gibson v. R. Co., 30 Fed. 904; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238. The cases, which are numerous, are collected in 43 L. R. A. 706, note. When the passenger expects and desires to be ejected, he is limited to actual damages; St. Louis & S. F. Ry. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899; Cincinnati, H. & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; and he cannot recover when a transfer is demanded in order to lay a foundation for a suit; Johnston v. R. Co., 54 Misc. 642, 104 N. Y. Supp. 812; nor where he has not acted in good faith; Nicholson v. R. Co., 118 App. Div. 858, 103 N. Y. Supp. 695. A condition in case of dispute to pay and apply for reimbursement is unreasonable and void; O'Rourke v. R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639; Cherry v. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

The passenger need not tender the exact fare, but the sum tendered for change must be reasonable, and what is reasonable is a question of law for the court; Barker v. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626; a rule fixing $2 as the maximum to be changed on a street car is reasonable; *id.;* Burge v. Electric Co., 133 Ga. 423, 65 S. E. 879, 18 Ann. Cas. 42; a $20 gold coin for a fare of $1.25 is unreasonable; 17 U. C. Q. B. 428; a $5 bill for a five cent fare is unreasonable; *id.;* Muldowney v. B. T. Co., 8 Pa. Super. Ct. 335; Barker v. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626; *contra*, Barrett v. R. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. Rep. 61; and see 35 L. R. A. 489, note; it is a question of law; Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579, 10 Ann. Cas. 641; but he cannot demand change before giving up the money; Louisville & N. R. Co. v. Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871, 13 L. R. A. (N. S.) 624, and note.

A stipulation that a return coupon shall be presented to and signed in the presence of the agent is reasonable; Louisville, N. A. & C. R. Co. v. Wright, 18 Ind. App. 125, 47 N. E. 491; but if the company fails to provide an agent to stamp the ticket as required, the purchaser has a right, on explanation to the conductor, to ride on any train, and has a right of action for expulsion; Southern R. Co. v. Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536. So where a ticket agent refused to sell a ticket to a point, thinking that the train would not stop there, and the passenger refused to pay more than the regular fare, his ejection was held unlawful; Phillips v. R. Co., 114 Ga. 284, 40 S. E. 269; and when the first conductor took up a ticket on which there was a right to stop over, the second conductor had no right to eject the passenger, whose right to go on without a ticket could be founded on a parol agreement; Scofield v. Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224.

Where a ticket provided that it should be forfeited if used for any other station than the one named, it was held that a passenger who rode on it to a point beyond the station named, paying his fare for the additional distance, was liable for the fare for the entire distance traveled; [1895] 1 Q. B. 862. One who takes the wrong train by mistake can leave it at the first stopping-place, without payment of fare; this rule does not apply to one who has a season ticket and takes a train believing that it is good on that train; New York & N. E. R. Co. v. Feely, 163 Mass. 205, 40 N. E. 20. Where a mileage book purchased by one person is sold to another who presents it, the conductor cannot take it up, but may collect full fare; Morton v. R. Co., 10 Ohio Dec. 812. As between a conductor and a passenger, a ticket is conclusive as to the right of the latter to travel; Chicago & N. W. R. Co. v. Bannerman, 15 Ill. App. 100; New York, L. E. & W. R. Co. v. Bennett, 50 Fed. 496, 1 C. C. A. 544; Callaway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238. As a rule a passenger has a right to presume that a ticket agent will perform his whole duty and is not bound to examine his ticket to see that it is correct, unless put upon his inquiry; Northern Pac. R. Co. v. Pauson, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730; Laird v. Traction Co., 166 Pa. 4, 31 Atl. 51; Georgia R. Co. v. Olds, 77 Ga. 673. When a carrier has notified a connecting carrier that it will not recognize the tickets of the latter, it may refuse to accept such tickets; Pennsylvania R. Co. v. R. Co., 157 U. S. 225, 15 Sup. Ct. 576, 39 L. Ed. 682.

A passenger presenting the wrong transfer, received by the agent's mistake, may recover damages for ejection on refusal to pay fare; Lawshe v. Power Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350; Jacobs v. R. Co., 71 App. Div. 199, 75 N. Y. Supp. 679; *contra*, as to the remedy in tort and held that the suit must be for breach of contract of carriage; Bradshaw v. R. Co., 135 Mass. 407, 46 Am. Rep. 481; and see comments on these cases, 16 Harv. L. Rev. 139; where the passenger demands and pays for a ticket to one station, and the agent by mistake gives him a ticket to another station, it was held that on explanation to the conductor he had a right to ride to his destination; Evansville & T. H. R. Co. v. Cates, 14 Ind. App. 172, 41 N. E. 712; Georgia R. & B. Co. v. Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. These cases are criticized as against the weight of authority, but no authority is given for that statement; 9 Harv. L. Rev. 353. He cannot be ejected because he refused to pay additional fare, where the ticket agent was in fault; Richardson v. R. Co., 71 S. C. 444, 51 S. E. 261; Head v. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Murdock v. R. Co., 137 Mass. 293, 50 Am. Rep. 307; Louisville & N. R. Co. v. Breckinridge, 99 Ky. 1, 34 S. W. 702; and evidence is admissible to show good faith in acting upon the information of the ticket agent; Vankirk v. R. Co., 76 Pa. 66, 18 Am. Rep. 404; he was held to be required to pay the extra fare in Pennsylvania Co. v. Lenhart, 120 Fed. 61, 56 C. C. A. 467; Sprenger v. Traction Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 766; Peabody v. Nav. Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823; in such case, if he leaves the train he may sue, but not if he goes on; Lake S. & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157. A statement of the agent that the train would stop at a certain station binds the company only when made contemporaneously with the sale of the ticket; Atchison, T. & S. F. R. Co. v. Cameron, 66 Fed. 709, 14 C. C. A. 358.

The plaintiff, an illiterate, showed the defendant's ticket agent a slip of paper, and asked for a railroad ticket to the place named thereon; the agent gave him a ticket to a different place; held that the defendant's agent in selling tickets is bound to use only ordinary care; Texas & N. O. R. Co. v. Wiggins (Tex.) 156 S. W. 1131.

A ticket defaced by a passenger so as to be unintelligible, may be refused; Northern C. R. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422. A carrier may specify upon what trains a ticket is good; Thorp v. R. Co., 61 Vt. 378, 17 Atl. 791; or charge fare for the actual distance travelled if a passenger takes a wrong train; Columbus, C. & I. C. R. Co. v. Powell, 40 Ind. 37; it must stop at a station for which it has sold a ticket; Richmond, F. & P. R. Co. v. Ashby, 79 Va. 130, 52 Am. Rep. 620. A purchaser for value and without notice, of a ticket fraudulently obtained from a carrier, acquires no title thereto; Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617. A passenger who accepts a ticket and signs it is bound by the conditions expressed in it; Boylan v. R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; Terre H. & I. R. Co. v. Fitzgerald, 47 Ind. 79; if such conditions are reasonable; New York C. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; but not if he is unable to read, and no explanation is made by the agent who sells it; Mauritz v. R. Co., 23 Fed. 765; or if he is misled by the carrier; Louisville, N. A. & C. R. Co. v. Nicholai, 4 Ind. App. 119; 30 N. E. 424, 51 Am. St. Rep. 206. There is no presumption that the passenger has read a notice on his ticket; Malone v. R. Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598; Rawson v. R. Co., 48 N. Y. 212, 8 Am. Rep. 543; but see 46 L. J. C. P. 768.

A passenger having lost his ticket cannot show by others that he purchased it; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128. The rule which requires the

production of a ticket is reasonable; Van Dusan v. R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; Hibbard v. R. Co., 15 N. Y. 455; [1896] 1 Q. B. 253; reasonable time to produce one should be given; Chicago & A. R. Co. v. Willard, 31 Ill. App. 435; a conductor is not bound to search the pockets of a passenger to find his ticket; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea (Tenn.) 128. A passenger may be required to exhibit his ticket before entering a train; Chicago, B. & Q. R. Co. v. Boger, 1 Ill. App. 472; and if he exhibits his ticket and demands a seat he has a right to a seat before he surrenders it; Davis v. R. Co., 53 Mo. 317, 14 Am. Rep. 457.

A passenger cannot stop over at an intermediate station unless such right is conferred by his contract; Drew v. R. Co., 51 Cal. 425; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Terry v. R. Co., 13 Hun (N. Y.) 359; McClure v. R. Co., 34 Md. 532, 6 Am. Rep. 345; Louisville & N. R. Co. v. Klyman, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755; Dixon v. R. Co., 179 Mass. 242, 60 N. E. 581. A purchaser of a limited ticket over connecting lines is only bound to make a continuous trip over the part of the route covered by each coupon of the ticket, but must complete the trip within the time limited in the ticket; Little Rock & F. S. Ry. v. Dean, 43 Ark. 529, 51 Am. Rep. 584; Churchill v. R. Co., 67 Ill. 393; Nichols v. Southern Pac. Co., 23 Or. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664.

Expulsion for refusing to pay the fare when the ticket tendered had passed the time limit was held not actionable although the passenger paid full fare and should have received an unlimited ticket; Shelton v. R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883. Where a train was chartered for an excursion, a passenger had a right to be carried upon it upon tender of the regular fare, if he had no notice that passengers on that train were required to purchase round trip tickets; Kirkland v. Ry. Co., 79 S. C. 273, 60 S. E. 668, 128 Am. St. Rep. 848.

When a commuter is unable to show his ticket, when requested by the conductor, according to one of its conditions, his ejection, because he cannot find it, is unlawful, as he is entitled to a reasonable time to find it; here the ticket was on his person but could not be found at the time; Naples v. R. Co., 38 Conn. 557, 9 Am. Rep. 434; but when the commuter had left his ticket at home and refused to pay the extra fare, he was lawfully ejected; Downs v. R. Co., 36 Conn. 287, 4 Am. Rep. 77.

When a carrier furnishes facilities, it may require a passenger to purchase a ticket before entering a train; Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Swan v. R. Co., 132 Mass. 116, 42 Am. Rep. 432. It must keep a ticket office open for a reasonable time before the departure of trains; Illinois C. R. Co. v. Cunningham, 67 Ill. 316.

A statute regulating the issuance and taking up of tickets by carriers is an exercise of the police power; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; and does not impair the obligation of contracts nor interfere with commerce between the states; *id.*

The Michigan supreme court held that a railroad company could be compelled to sell mileage books, goods only within the state, at a flat two-cent rate; Smith v. R. Co., 114 Mich. 460, 72 N. W. 328; but on appeal it was held that it was not a regulation of rates and that the statutes compelling the sale of mileage railroad ticket books are unconstitutional; Lake S. & M. S. R. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. This decision (the Chief Justice and Gray and McKenna, JJ., dissenting), though the subject of much criticism, was impliedly followed and construed in Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. In some cases the authority of the case is acknowledged though without approval of the reasoning; Beardsley v. R. Co., 162 N. Y. 230, 56 N. E. 488. A like statute is valid as to railroads incorporated or reorganized after its passage; Purdy v. R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; but see Tiedm. Lim. Pol. Pow. 293.

A ticket sold at a reduced rate on condition that it is not transferable is not valid in the hands of a transferee; Levinson v. R. Co., 17 Tex. Civ. App. 617, 43 S. W. 901.

The holder of a ticket from Trenton to Elmira was injured in Pennsylvania through defendant's negligence; it was held that his right to recover was governed by the law of Pennsylvania; Burnett v. R. Co., 176 Pa. 45, 34 Atl. 972.

See BAGGAGE; PASSENGER; COMMON CARRIERS OF PASSENGERS; INTERSTATE COMMERCE COMMISSION; RATES; THEATRE.

Ticket Brokerage. In most of the jurisdictions where the question has arisen, statutes prohibiting the business of ticket brokerage are held to be constitutional; Com. v. Keary, 198 Pa. 500, 48 Atl. 472; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; In re O'Neill, 41 Wash. 174, 83 Pac. 104, 3 L. R. A. (N. S.) 558, 6 Ann. Cas. 869; State v. Bernheim, 19 Mont. 512, 49 Pac. 441; State v. Thompson, 47 Or. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480, 8 Ann. Cas. 646; Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805 (cited with approval as one "where the subject is elaborately reviewed"; Bitterman v. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693); *contra*, People v. Warden, 157 N. Y. 116, 51 N. E. 1006,

43 L. R. A. 264, 68 Am. St. Rep. 763; and see Jannin v. State, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821); Tiedm. Lim. Pol. Pow. 293. The Illinois case above cited has been challenged in the circuit courts of that state as being a collusive case and therefore not binding; 3 Chic. L. J. 337; *id.* 504; 4 *id.* 75; 31 Chic. L. N. 293; and see In re Burdick, 162 Ill. 48, 44 N. E. 413, where the fictitious character of the former case is conceded and it is said to be binding only between the parties; but the question is not further considered. So also an ordinance for the same purpose is constitutional; Ex parte Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47.

An injunction may issue to restrain the sale of return coupons of non-transferable round trip tickets issued and to be issued; Bitterman v. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Pennsylvania Co. v. Bay, 150 Fed. 770; Kinner v. R. Co., 69 Ohio St. 339, 69 N. E. 614 (although in that case the tickets were issued under an unlawful combination with other companies, on which ground an injunction was refused in Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689); Lytle v. R. Co., 41 Tex. Civ. App. 112, 90 S. W. 316 (where the injunction was restricted to tickets announced and offered for sale though not actually issued); Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452 (where the jurisdiction was based on a local statute); *contra*, New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28, a decision of a trial court much referred to as standing alone and as to which White, J., in the United States Supreme Court case above cited says, "The reasoning there relied on, in our opinion, is inconclusive."

Where a railroad sells non-transferable excursion tickets at a reduced rate, the non-transferability and forfeiture embodied therein binds the buyer and any one subsequently acquiring them; also, the railroad is bound by the act to regulate commerce to prevent the wrongful use of such tickets; Bitterman v. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 12 Ann. Cas. 693; not so much for the protection of the railroad company as for the protection of the public; Missouri, K. & T. R. Co. v. McCrary, 182 Fed. 401.

Where the contract of the company with the original purchaser was that the ticket should be non-transferable, one who ordered the breaking of the contract was held liable to the injured party; Angle v. R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55.

In California an act prohibiting the sale of tickets to theatres and other places of amusement, at more than the regular price, was held invalid as conflicting with the state constitution securing the right of property; Ex parte Quarg, 149 Cal. 79, 84 Pac. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747. A former act making such tickets "property" when sold unconditionally (but excepting those on which any condition was printed or written) was held constitutional; Greenberg v. Turf Ass'n, 140 Cal. 360, 73 Pac. 1050.

The right of the original vendor to make the ticket non-transferrable was upheld; Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344.

TICKET OF LEAVE. A term first invented in the days of Australian penal transportation. It was a "pass" given to a convict who has completed the second stage of his sentence, and has entered on the third, conditional liberation, in which he goes at large to earn his own livelihood. He is required to report at fixed times to the nearest police station. The "pass" may be forfeited for disobedience or neglect of certain conditions. It filled a place analogous to the modern "probation" system. In 1910 it was proposed in parliament to abolish the English system. Encycl. Br.

As to a similar practice in the United States, see PAROLE.

TIDE LANDS. Lands covered and uncovered by the flow and ebb of the tide. The United States may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some case of international duty or public exigency, have acted upon the policy of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union; Mann v. Land Co., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. See STATE LANDS.

Those wholly subject to the tidal action of the waters of a bay, which overflow them at high tide. Sawyer v. Osterhaus, 212 Fed. 765.

The words "public lands," as used in legislation, mean such as are subject to sale or other disposal under general laws, and not tide lands; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844. Tide lands are not subject to the location of land scrip under the act of 1872; Mann v. Land Co., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; Baer v. Moran Bros. Co., 153 U. S. 287, 14 Sup. Ct. 823, 38 L. Ed. 718.

TIDE-WATER. Water which flows and reflows with the tide. All arms of the sea, bays, creeks, coves, or rivers, in which the tide ebbs and flows, are properly denominated tide-waters.

That current is running down stream is not conclusive that it was ebb tide; it might

be flood tide lower down; The Bangor, 212 Fed. 706.

The term tide-water is not limited to water which is salt, but embraces, also, so much of the water of fresh rivers as is propelled backwards by the ingress and pressure of the tide; 5 Co. 107; Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380; which might be said to be within the ebb and flow; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700. The flowing, however, of the waters of a lake into a river do not constitute such a river a tidal or, technically, navigable river; Hooker v. Cummings, 20 Johns. (N. Y.) 98, 11 Am. Dec. 249.

The bed or soil of all tide-waters belongs, in England, to the crown, and in this country to the state in which they lie; and the waters themselves are public; so that all persons may use the same for the purpose of navigation and fishery, unless restrained by law; 5 B. & A. 304; 1 Macq. Hou. L. 49; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. See Bowlby v. Shively, 22 Or. 410, 30 Pac. 154. In England, the power of parliament to restrain or improve these rights is held to be absolute; 4 B. & C. 598. In this country, such a power is subject to the limitations of the federal constitution; and while both the general and state governments may adopt measures for the improvement of navigation; Lehigh Bridge Co. v. Nav. Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111; Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36; and the states may grant private rights in tide-waters, provided they do not conflict with the public right of navigation; Rowe v. Bridge Corp., 21 Pick. (Mass.) 344; yet neither the general nor the state governments have the power to destroy or materially impair the right of navigation. See BRIDGE; FISHERY; RIVER; RIPARIAN PROPRIETORS; TERRITORIAL WATERS; WHARF.

TIE. When two persons receive an equal number of votes at an election, there is said to be a tie. Neither is elected. When the votes are given on any question to be decided by a deliberative assembly, and there is a tie, the question is lost. See MAJORITY.

TIEL. An old manner of spelling *tel;* such as, *nul tiel* record, no such record.

TIEMPO INHABIL. In Louisiana. A time when a man is not able to pay his debts.

TIERCE. A liquid measure, containing the third part of a pipe, or forty-two gallons.

TIGNI IMMITTENDI. See SERVITUS.

TIMBER. The body, stem, or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles, or lath which may be used to complete the structure. Babka v. Eldred, 47 Wis. 192, 2 N. W. 102, 559. The term now seems to include all sorts of wood from which any useful articles can be made or which may be used to advantage in any class of manufacture or construction; U. S. v. Stores, 14 Fed. 824. Timber means generally such trees as are fit to be used in buildings or ships. Trees too small to be used for these purposes are not, strictly speaking, timber; Broad River L. Co. v. Middleby, 194 Fed. 817, 114 C. C. A. 521. Railroad ties are held to be timber; Kollock v. Parcher, 52 Wis. 393, 9 S. W 67; fence rails are not; McCauley v. State, 43 Tex. 374; nor are trees, when suitable only for firewood; Nash v. Drisco, 51 Me. 417.

A federal act of 1897 makes it a penal offence to set fire to timber on the public domain.

See WOODS AND FORESTS.

TIMBER TREES. Oak, ash, elm, in all places, and, by local custom, such other trees as are used in building. 2 Bla. Com. 281; also beech, chestnut, walnut, cedar, fir, aspen, lime, sycamore, and birch trees; 6 George III. ch. 48; and also such as are used in the mechanical arts. Lewis, Cr. L. 506. Timber-trees, both standing, fallen, and severed and lying upon the soil, constitute a portion of the realty, and are embraced in a mortgage of the land; 1 Washb. R. P. 13; Gore v. Jenness, 19 Me. 53; and pass, by a judicial sale under such mortgage, to the purchaser; Hutchins v. King, 1 Wall. (U. S.) 53, 17 L. Ed. 544; Brackett v. Goddard, 54 Me. 313; Pattison's Appeal, 61 Pa. 294, 100 Am. Dec. 637. Some contracts for the sale of timber trees are contracts for the sale of an interest in lands; McGregor v. Brown, 10 N. Y. 117; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Hostetter v. Auman, 119 Ind. 7, 20 N. E. 506; and, as such, within the statute of frauds; Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641. When both the land and standing timber are vested in one person, the latter are real estate; France v. Logging Co., 140 Pac. 361.

The interest of a grantee of growing timber to be removed within a certain period is a determinable fee in real estate and will pass to his heirs and not to his administrator; Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278. It is held that an oral contract for the sale of standing timber, to be cut at once and removed in a reasonable time, relates to personal property; Strause v. Berger, 220 Pa. 367, 69 Atl. 818.

The right of a grantor of land who reserves to himself timber standing thereon, to be removed within a specified time, terminates at the expiration of such time; Adkins v. Huff, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246. Where only the timber is granted, it is incumbent on the grantee to cut and remove it within a reasonable time; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513. A parol sale of standing timber is but a license to enter, cut and remove, which may be revok-

ed; Hodsdon v. Kennett, 73 N. H. 225, 60 Atl. 686, 111 Am. St. Rep. 607. Where timber is sold and no time is fixed for cutting and removing, such sale passes an equitable interest in the real estate; McCoy v. Fraley (Ky.) 113 S. W. 444.

The better action for damages for cutting and carrying away timber trees seems to be that of trespass *quare clausum fregit et de bonis asportatis* (unless otherwise designated by statute); 2 Greenl. 173, 387. See WASTE; SALE; TREE; TIMBER.

TIME. The measure of duration. Lapse of time often furnishes a presumption, stronger or weaker according to the length of time which has passed, of the truth of certain facts, such as the legal title to rights, payment of or release from debts.

Time in Great Britain, in any statute or legal instrument, means, by statute, Greenwich mean time, and in Ireland, Dublin time. The only standard of time recognized by the courts is the meridian of the sun; not any arbitrary standard; Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; 3 H. & N. 866.

Greenwich time is also in use in Holland and Belgium; France follows Paris time; Switzerland, Italy and Central Germany use mid-European time, which is one hour in advance of Greenwich time. A 24-hour system is adopted in Italy and Canada.

Where a policy of insurance expires at twelve o'clock noon, the exact time of noon will be determined by the common or solar time, unless it is shown that a different time was intended by the parties; Jones v. Ins. Co., 110 Ia. 75, 81 N. W. 188, 46 L. R. A. 860, *contra*, Rochester German Ins. Co. v. Gaulbert Co., 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324, where a custom of reckoning by standard time was shown. The termination of a term of court is determined by sun time; Texas T. & L. Co. v. Hightower, 100 Tex. 126, 96 S. W. 1071, 6 L. R. A. (N. S.) 1046, 123 Am. St. Rep. 794.

A time restriction in a statute refers to local or actual, and not conventional, time; 7 S. C. (So. Africa) 115.

The general rule of law is that the performance of a contract must be completed at or within the time fixed by the contract; Leake, Contr. 772. Wherever, in cases not governed by particular customs of trade, the parties bind themselves to the performance of duties within a certain number of days, they have to the last minute of the last day to perform their obligations; 6 M. & G. 593. See PERFORMANCE.

In legal documents the primary meaning of month is lunar month; [1904] 1 Ch. 305.

A requirement for publication of a notice twice a week refers to two publications in each successive seven days and it is not necessary to count the week from Sunday to Saturday; Leach v. Burr, 188 U. S. 510, 23 Sup. Ct. 393, 47 L. Ed. 567.

Generally, in computing time, the first day is excluded and the last included; Owen v. Slatter, 26 Ala. 547, 62 Am. Dec. 745; see State v. Elson, 77 Ohio St. 489, 83 N. E. 904, 15 L. R. A. (N. S.) 686; excluding the day on which an act is done, when the computation is to be made from such an act; 15 Ves. Ch. 248; 16 Cow. 659; Bigelow v. Willson, 1 Pick. (Mass.) 485; Kimm v. Osgood's Adm'r, 19 Mo. 60; including it, according to Presbrey v. Williams, 15 Mass. 193; except where the exclusion will prevent forfeiture; 2 Camp. 291; Windsor v. China, 4 Greenl. (Me.) 298. The rule which excludes the *terminus a quo* is not absolute, it may be included when necessary to give effect to the obvious intention; Taylor v. Brown, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313. Time from and after a given day excludes that day; Bigelow v. Willson, 1 Pick. (Mass.) 485; Weld v. Barker, 153 Pa. 465, 26 Atl. 239. But see Dutcher v. Wright, 94 U. S. 560, 24 L. Ed. 130. A policy of insurance includes the last day of the term for which it is issued; L. R. 5 Exch. 296. Particular words, *e. g. at, on,* or *upon* a certain time, will be construed according to a reasonable interpretation of the contract; 10 A. & E. 370. The use of the word *until* generally implies an intention to exclude the day to which it refers, unless it appears otherwise from the context; Ryan v. Bank, 10 Neb. 524, 7 N. W. 276; Kendall v. Kingsley, 120 Mass. 94; *till* is held to include the day referred to; Bunce v. Reed, 16 Barb. (N. Y.) 352.

Whether the expiration of a policy was by standard railroad time was left to the jury, the burden being on the insurance company to prove that such time was customarily used at that place; Jones v. Ins. Co., 110 Ia. 75, 81 N. W. 188, 46 L. R. A. 860. In a notice of a foreclosure sale, "two o'clock" means standard time; Orvik v. Casselman, 15 N. D. 34, 105 N. W. 1105. If, at the opening of a term of court, the court clock is set by sun time, that governs the closing of the term; Ex parte Parker, 35 Tex. Cr. R. 12, 29 S. W. 480, 790.

Sunday is a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day; Street v. U. S., 133 U. S. 299, 10 Sup. Ct. 309, 33 L. Ed. 631. Sunday is said to be included in the computation when the time exceeds, and excluded when less than, seven days; Snell v. Scott, 2 Mich. N. P. 108.

Where the last day wherein an act is to be performed falls on a Sunday, the act may be done on the succeeding day; Pressed S. C. Co. v. R. Co., 121 Fed. 609, 57 C. C. A. 635.

Sundays cannot be excluded in computing the time for signing bills of exception; American Tobacco Co. v. Strickling, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909. A statute which declares that a holiday should be considered as Sunday applies only to public business, and where an option for stock expires on New Year's Day, the time was not extended to the succeeding day; Page v. Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173.

See SUNDAY; DIES NON.

Deeds, bills of exchange, letters, and other written instruments are generally construed to have been made and issued at the time of their date, but the execution of a deed may be averred and proved according to the fact; 10 Exch. 40. Courts will always adopt that construction in the computation of time which will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the *dies a quo* will be included; otherwise it will be excluded; Taylor v. Brown, 5 Dak. 335, 40 N. W. 525.

The law will take account of the fraction of a day when justice so requires; Gallagher v. Pub. Co., 75 N. J. Eq. 171, 71 Atl. 741, 138 Am. St. Rep. 514; Tower v. Stimpson, 175 Fed. 130.

The construction of contracts with regard to the time of performance is the same in equity as at law; but in case of mere delay in performance, a court of equity will in general relieve against the legal consequences and decree specific performance upon equitable terms notwithstanding the delay, if the matter of the contract admits of that form of remedy. In such cases it is said that in equity time is not considered to be of the essence of the contracts; L. R. 3 Ch. 67. Ordinarily time is not of the essence of the contract, but it may be made so by express stipulation of the parties; see Brown v. Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; or it may be so by implication, because of the nature of the property involved; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; or because of the avowed object of the seller or purchaser; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; or from the nature of the contract itself; or by one party giving the other notice that performance must be made within a certain reasonable time fixed in the notice; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Bullock v. Adams' Ex'rs, 20 N. J. Eq. 367; time is always of the essence of unilateral contracts; Maughlin v. Perry, 35 Md. 352; Smith v. Gillett, 50 Ill. 298. Completion of a contract within a reasonable time is sufficient, if no time is stipulated; Minneapolis Gas Light Co. v. Mfg. Co., 122 U. S. 300, 7 Sup. Ct. 1187, 30 L. Ed. 1190.

Time is of the essence of the contract where land is to be paid for in monthly installments and after three months default the contract is to be void and the money paid is to be forfeited to the vendor; Axford v. Thomas, 160 Pa. 8, 28 Atl. 443; and so where the contract shows an intention of the parties to limit it to a certain period; Hull C. & C. Co. v. Coke Co., 113 Fed. 260, 51 C. C. A. 213; Scarlett v. Stein, 40 Md. 512.

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court will seek to discover the real intention of the parties in deciding whether time is of the essence of the contract; Benj. Sales § 593. If a thing sold is of greater or less value according to the lapse of time, stipulations with regard to it must be literally complied with both at law and in equity; Gale v. Archer, 42 Barb. (N. Y.) 320; Goldsmith v. Guild, 10 Allen (Mass.) 239.

When notice is to be given "immediately" under an employers' liability policy, it means reasonable notice; John B. Stevens & Co. v. Ins. Co., 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214.

Stat. 43 & 44 Vict. c. 9, was passed to "remove doubts as to the meaning of expressions relative to time in acts of parliament and other legal instruments."

See YEAR; IDES; FROM; DAY; REGNAL YEARS; OLD STYLE.

In Pleading. A point in or space of duration at or during which some fact is alleged to have been committed.

In *criminal actions*, both the day and the year of the commission of the offence must appear; but there need not be an express averment, if they can be collected from the whole statement; Jacobs v. Com., 5 S. & R. (Pa.) 315. The prosecutor may give evidence of an offence committed on any day which is previous to the finding of the indictment; Jacobs v. Com., 5 S. & R. (Pa.) 316; but a day subsequent to the trial must not be laid; Pennsylvania v. McKee, Add. (Pa.) 36.

In *mixed and real actions*, no particular day need be alleged in the declaration; 3 Chitty, Pl. 620; Gould, Pl. c. 3, § 99.

In personal actions, all traversable affirmative facts should be laid as occurring on some day; Steph. Pl. 292; but no day need be alleged for the occurrence of negative matter; Com. Dig. *Pleader* (C 19); and a failure in this respect is, in general, aided after verdict; 13 East 407. Where the cause of action is a trespass of a permanent nature or constantly repeated, it should be laid with a *continuando*, which title see. The day need not, in general, be the actual day of commission of the fact; Amory v. McGregor, 12 Johns. (N. Y.) 287; Drown v. Smith, 3 N. H. 299; if the actual day is not stated, it should be laid under a videlicet; Gould, Pl. c. 3, § 63. The exact time may

become material, and must then be correctly laid; 10 B. & C. 215; Jordan v. Cooper, 3 S. & R. (Pa.) 564; Eastman v. Bodfish, 1 Stor. 528, Fed. Cas. No. 4,255; as, the time of execution of an executory written document; Gould, Pl. § 67. The defence must follow the time laid in the declaration, if time is not material; 1 Chitty, Pl. 509; 1 Saund. 14, 82; need not when it becomes material; 2 Saund. 5 *a*, *b* (n. 3); or in pleading matter of discharge; 2 Burr. 944; or a record; Gould, Pl. § 83.

The Christian era was first adopted in Italy in the 6th, and accepted by England in the 8th, century. It commenced originally on March 25, but in England Christmas day was adopted as the beginning of the year, from the 7th to the 12th century, after which March 25 prevailed until January 1 was adopted in 1752, when the calendar was reformed, omitting 11 days from the year in order to connect the civil and astronomical years. Thereafter the New Style was adopted, and the previous period was known as the Old Style; the difference between them is now 13 days. The Eastern Church retains the Old Style (Greek and Russian).

Jewish. In the 15th century the Jews adopted as their epoch the Creation of the World, which was placed in a year called in the Christian chronology 3760 B. C. The year 1914 A. D. is 5675 in the Jewish calendar.

Mohammedan. This epoch is the Hejira, or the flight of Mahomet from Mecca to Medina in 622 A. D.; the first day of the first month of that era corresponds with July 16, 622 A. D.

Roman. The Roman epoch was the foundation of Rome. It was assumed to fall in the year 753 B. C. It is indicated by the abbreviation A. U. C. (ab urbe condita).

Chinese. In 1913 China adopted the calendar of Western Europe.

Macedonian. This epoch was the occupation of Babylon in 311 B. C., and this prevailed in all Greek countries until the Middle Ages, and among the Jews until the 15th century.

Greek. The ancient Greeks recorded time by the four-year periods of the Olympic games, called Olympiads. The first recorded Olympiad is 776 B. C.

TIME BARGAIN. An agreement to buy or sell stock at a future time or within a fixed time at a certain price. See FUTURES; OPTION; MARGIN.

TIME CHARTER. A charter under which the ship is at the disposal of the charterer for a specified time.

TIME CLOCK. Where a workman was injured while running to punch a time clock, it was held to be "in the course of his employment"; Rayner v. Furniture Co. (Mich.) 146 N. W. 665. See MASTER AND SERVANT.

A workman who had admittedly done his work is entitled to his pay, although he did not punch the time clock as required; Matthews v. Lumber Co., 91 S. C. 568, 75 S. E. 170, 45 L. R. A. (N. S.) 644, Ann. Cas. 1914A, 45.

TIME IMMEMORIAL. Time beyond legal memory.

See 14 L. R. A. 120, n.; OLD STYLE; PRESCRIPTION; MEMORY; LIMITATIONS; MONTH; DAY; STATUTE.

TIME-TABLES. A time-table is a proposal or part of a proposal, addressed to all intending passengers and sufficiently accepted by tender of the fare at the station in time for the advertised train. 5 E. & B. 860; 25 L. J. Q. B. 129. See PUNCTUALITY.

TIPPING. An immigrant employed as a boot-black received tips and paid them to the employer at night. After two years he sued to recover the payments. The jury found that there was no contract between the parties and that they belonged to the plaintiff; Zappas v. Roumeliote, 156 Iowa, 709, 137 N. W. 935; in the absence of a contract to the contrary, tips belong to the employee; Polites v. Barlin, 149 Ky. 376, 149 S. W. 828, 41 L. R. A. (N. S.) 1217. Acts forbidding tipping have been passed in England and New York.

TIPPLING-HOUSE. A place where spirituous liquors are sold and drunk in violation of law. Sometimes the mere selling is considered as evidence of keeping a tippling-house. Patten v. Centralia, 47 Ill. 370.

A public drinking-place, where liquor or other intoxicating drink is sold, to be drunk on the premises. Harris v. People, 1 Colo. App. 289, 28 Pac. 1133.

TIPSTAFF. An officer appointed by the marshal of the court of king's bench, to attend upon the judges with a kind of rod or *staff tipped* with silver.

In the United States, the courts sometimes appoint an officer who is known by this name, whose duty it is to attend on the court. Similar officers employed in the courts of Pennsylvania are so called.

TITHES. In English Law. A right to the tenth part of the produce of lands, the stock upon lands, and the personal industry of the inhabitants. These tithes are raised for the support of the clergy. Almost all the tithes of England and Wales are now commuted into rent charges, under 6 & 7 Will. IV. c. 71, and the various statutes since passed; 3 Steph. Com. 731. In the United States there are no tithes.

A form of taxation, secular and ecclesiastical, usually, as the name implies, consisting of one-tenth of a man's property or produce. The custom was almost universal in antiquity. They were generally regarded, up to the 17th century, as existing *jure divino*, and as having been payable to the support of the church ever since the earliest days of Chris-

tianity. Various acts have been passed on the subject. The act of 1891 places the burden on the landowner, who cannot contract otherwise with the tenant. If a tenant is in possession, a receiver is appointed for the rents and profits. Neither the owner nor the tenant is personally liable. Encycl. Br.

See Phillimore, Eccl. Law; Selborne, Ancient Facts and Fictions Concerning Churches and Tithes; Lansdell, The Sacred Tenth.

TITHING. In English Law. A group of ten, twelve or more persons, under the superintendence of a tithingman, mutually responsible for one another's misdeeds. In some places the roll is the tithing. This system is called the Frithborh or Frankpledge. 1 Holdsw. Hist. E. L. 8.

TITHINGMAN. In Saxon Law. The head or chief of a tithing or decennary of ten families; he was to decide all lesser causes between neighbors. Now tithingmen and constables are the same thing. Jacob, Law Dict.

In New England, a parish officer to keep good order in church. Webster, Dict.

TITLE. Estates. The means whereby the owner of lands hath the just possession of his property. Co. Litt. 345; 2 Bla. Com. 195. See Courcier v. Graham, 1 Ohio 349. This is the definition of title to lands only.

A *bad* title is one which conveys no property to the purchaser of an estate.

A *doubtful* title is one which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it; 1 J. & W. 568; Sebring v. Mersereau, 9 Cow. (N. Y.) 344.

A *good* title is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable* title is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser.

The doctrine of marketable titles is purely equitable and of modern origin; Atk. Tit. 26. At law every title not bad is marketable; 5 Taunt. 625; 6 *id.* 263.

There are several stages or degrees requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is a *presumptive title* or the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession: this happens when one man disseises another. The next step to a good and perfect title is the *right of possession*, which may reside in one man while the actual possession is not in himself, but in another. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. The mere *right of property*, the *jus proprietatis*, without either possession or the right of possession. 2 Bla. Com. 195.

Title to real estate is acquired by two methods, namely, by *descent* and by *purchase;* also under the statute of limitations; Montoya v. Gonzales, 232 U. S. 375, 34 Sup. Ct. 413, 58 L. Ed. —.

Prescription, in the Roman law, gave the possessor a perfect title. The statute of limitations provides, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Still, as in the Roman law, title is gained by prescription. James Barr Ames, Lect. on Leg. Hist. 197, 3 Sel. Essays in Anglo-Amer. L. Hist. 567, where he notes a contrary view held by Prof. Langdell in Summary of Eq. Pl. § 122.

See ADVERSE POSSESSION; LAND TITLE AND TRANSFER.

Proceedings by the United States against a corporation for the condemnation of land, in which the state of the title and pending litigation as to it is set up in the pleadings, is not a concession that title is in such corporation; U. S. v. Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063.

Title to personal property may accrue in three different ways: by *original acquisition;* by *transfer by act of law;* by *transfer by act of the parties.*

Title by original acquisition is acquired by *occupancy*, see OCCUPANCY; by *accession*, see ACCESSION; by *intellectual labor*, see PATENT; COPYRIGHT; TRADE-MARK.

The title to personal property is acquired and lost by transfer by act of law, in various ways: by *forfeiture; succession; marriage; judgment; insolvency; intestacy.*

Title is acquired and lost by the act of the party, by *gift, by contract or sale.*

In general, possession constitutes the criterion of title of *personal* property (*q. v.*), because no other means exist by which a knowledge of the fact to whom it belongs can be attained. A seller of a chattel is not, therefore, required to show the origin of his title, nor, in general, is a purchaser, without notice of the claim of the owner, compellable to make restitution; but it seems that a purchaser from a tenant for life of personal chattels will not be secure against the claims of those entitled in remainder; Cowp. 432; 1 Bro. C. C. 274.

Ordinarily possession of personal property constitutes the indicia of title thereto. It is, however, at best but *prima facie* evidence of ownership; Miller Piano Co. v. Parker, 135 Pa. 208, 26 Atl. 303, 35 Am. St. Rep. 873. One who is not the owner cannot in general pass the title. The chief exception is under the doctrine of market overt, which see. There are exceptions also in cases where one in possession has evidences of title which enable him to commit a fraud on a third party, in which cases the law may protect the third party. One in possession of stolen mon-

ey or negotiable securities may pass title to them.

See SALES; FRAUDULENT CONVEYANCES; POSSESSION; MARKET OVERT; MARKETABLE TITLE; FINDER; VESSEL; F. O. B.

As an exception to the rule that possession is the criterion of title of property may be mentioned the case of ships, the title of which can be ascertained by the register; 15 Ves. Ch. 60; 8 Price 256.

In Legislation. That part of an act of the legislature by which it is known and distinguished from other acts; the name of the act. While the title of a statute cannot be used to add to or take from the body thereof, yet in cases of doubt, it may be referred to as a help to the interpretation; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. See CONSTRUCTION.

Formerly the title was held to be no part of a bill, though it could be looked to when the statute was ambiguous; Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002; Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504; Smith v. Scott, 31 Wis. 431; but it could not enlarge or restrain the provisions of the act itself; Hadden v. The Collector, 5 Wall. (U. S.) 107, 18 L. Ed. 518. In later years constitutional provisions have required that the title of every legislative act shall correctly indicate the subject-matter of the act; Cooley, Const. Lim. 172. The object of this was mainly to prevent surprise in legislation.

An act must have but one general object, which is fairly indicated by the title; a title may be general if it does not cover incongruous legislation; Endl. Interp. Stat. 59; Indiana C. Ry. Co. v. Potts, 7 Ind. 681; People v. Briggs, 50 N. Y. 553; the use of the words "other purposes" have no effect; Town of Fishkill v. Road Co., 22 Barb. (N. Y.) 642; Board of County Com'rs v. Smelting Co., 3 Colo. App. 223, 32 Pac. 717. It is said that the courts will construe these provisions liberally rather than embarrass legislation by a construction, the strictness of which is unnecessary to the attainment of the beneficial purposes for which they were adopted; Cooley, Const. Lim. 178. In construing an act, the court will strike from it all that relates to the object not indicated by the title, and sustain the rest if it is complete in itself; *id.* 181; Ex parte Cowert, 92 Ala. 94, 9 South. 225. These provisions are usually considered mandatory, though they were held to be directory in Washington v. Page, 4 Cal. 388. In Pennsylvania, where an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to that of the original act, its subject is sufficiently expressed; State Line & J. R. Co.'s Appeal, 77 Pa. 429.

Where the constitution requires that the subject of every act shall be clearly expressed in its title, if the title of an act is materially changed after its passage and before enrollment and approval, the act is invalid; Chicago, B. & Q. R. Co. v. Smyth, 103 Fed. 376.

The inclusion in a statute of a section foreign to the subject of the act and not mentioned in the title does not invalidate the remainder of the act, though it may itself be void; Southern Pac. Co. v. Bartine, 170 Fed. 725.

In England the title was formerly held to be no part of a statute, but was commonly framed by the clerk after the bill had passed; Eby's Appeal, 70 Pa. 314, per Sharswood, J. It is now held to be a part of a statute; [1899] 1 Ch. 3.

Personal Relations. A distinctive appellation denoting the rank to which the individual belongs in society. See RANK; NOBILITY.

Titles are assumed by foreign princes, and among their subjects they may exact these marks of honor; but in their intercourse with foreign nations they are not entitled to them as a matter of right; Wheat Int. Law, 3d Eng. ed. § 159.

In Pleading. The right of action which the plaintiff has. The declaration must show the plaintiff's title, and if such title be not shown in that instrument the defect cannot be cured by any of the future pleadings. Bacon, Abr. *Pleas*, etc. (B 1).

In Rights. The name of a newspaper, a book, and the like. See TRADE-MARK.

TITLE, COVENANTS FOR. See COVENANT.

TITLE DEEDS. Those deeds which are evidences of the title of the owner of an estate. The person who is entitled to the inheritance has a right to the possession of the title-deeds; 1 Carr. & M. 653.

A pledge of title deeds is as effectual as the pledge of any other chattel. They are, it is true, so far an accessory of the title to the land as to pass with it to the grantee, although not mentioned in the conveyance. But they are not inseparably attached to the title, and the owner of the land may sever them and dispose of them as chattels; Ames, Lectures on Leg. Hist. 256.

As to a lien created by deposit of title-deeds, see LIEN.

TITLE INSURANCE. See INSURANCE.

TITLE OF A CAUSE. The peculiar designation of a suit, consisting usually of the name of the court, the venue, and the parties. The method of arranging the names of the parties is not everywhere uniform. The English way, and that formerly in vogue in this country, and still retained in many of the states, is for the actor in each step of the cause to place his name first, as if he were plaintiff in that particular proceeding, and his adversary's afterwards. Thus the case of Upton *v.* White would, if taken from a county court to the supreme court on a writ of error by defendant, be entitled White *v.* Upton. In New York and many other states

which have enacted codes of procedure, the rule now is that the original order of names of parties is retained throughout. See AD SECTAM.

TITLE OF ENTRY. The right to enter upon lands. Cowell. See ENTRY.

TITULUS. In the Civil Law. Title; the source or ground of possession.

In Ecclesiastical Law. A temple or church.

TO. A term of exclusion, unless by necessary implication it is manifestly used in a different sense. Bradley v. Rice, 13 Me. 201, 29 Am. Dec. 501; Montgomery v. Reed, 69 Me. 514; State v. Bushey, 84 Me. 460, 24 Atl. 940.

An order extending the time for signing a bill of exceptions to a certain day, is inclusive of such day; Gottleib v. Wolf Co., 75 Md. 126, 23 Atl. 198; but "from" an object "to" an object excludes the terminus referred to; State v. Bushey, 84 Me. 459, 24 Atl. 940. See FROM.

TO WIT. That is to say; namely; scilicet; videlicet.

TOBACCO. An ordinance prohibiting using or carrying tobacco on any street of a city was held an unwarrantable interference with the private rights of the citizen; Zion v. Behrens, 262 Ill. 510, 104 N. E. 836.

See ORIGINAL PACKAGE.

TOFT. A place or piece of ground on which a house formerly stood, which has been destroyed by accident or decay. 2 Broom & H. Com. 17.

TOGATI (Lat.). **In Roman Law.** Under the empire, when the *toga* had ceased to be the usual costume of the Romans, advocates were nevertheless obliged to wear it whenever they pleaded a cause. Hence they were called *togati*.

TOKEN. A document or sign of the existence of a fact.

Tokens are either public or general, or privy tokens. They are either true or false. When a token is false and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating; People v. Johnson, 12 Johns. (N. Y.) 292; but if it is a mere privy token, as, counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable; People v. Stone, 9 Wend. (N. Y.) 182; Respublica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31.

TOKEN-MONEY. Originally used to designate the counters issued by traders to meet the lack of small change. Now used by economists to denote the smaller money that circulates at a nominal value higher than its cost. Encycl. Br. See TOKEN.

TOLERATE. To allow so as not to hinder; to permit as something not wholly approved of; to suffer; to endure. Gregory v. U. S., 17 Blatchf. 330, Fed. Cas. No. 5,803.

TOLERATION. In some countries, where religion is established by law, certain sects who do not agree with the established religion are nevertheless permitted to exist; and this permission is called toleration. They are permitted and allowed to remain rather as a matter of favor than a matter of right. By the Toleration Act of 1 W. & M. c. 18, and subsequent statutes down to the 35 & 36 Vict. c. 26, enabling any person to take any degree (other than a divinity degree) in the universities of Oxford, Cambridge, or Durham, the disabilities of the Roman Catholics, Jews, and Dissenters have been almost wholly removed; 2 Steph. Com. 707. See CATHOLIC EMANCIPATION ACT.

In the United States there is no such thing as toleration; all men have an equal right to worship God according to the dictates of their consciences. See CHRISTIANITY; RELIGION; RELIGIOUS TEST.

TOLL. A sum of money for the use of something, generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature.

The compensation paid to a miller for grinding another person's grain. Quoted in Lake S. & M. R. Co. v. U. S., 93 U. S. 458, 23 L. Ed. 965.

The rate of taking toll for grinding is regulated by statute in most of the states. See 2 Washb. R. P.; 6 Q. B. 31. See RATES.

A state has no power to regulate tolls upon a bridge connecting it with another state without the assent of congress and without the concurrence of such other state in the proposed tariff; Willamette I. B. Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629.

In Anglo-Saxon, the right to take tallage of one's villeins. 1 Holdsw. Hist. E. L. 11.

To bar, defeat, or take away: as, to toll an entry into lands is to deny or take away the right of entry.

To *toll* the statute of limitation is to show facts which remove its bar of the action.

TOLL-GATE. A gate on a bridge or a turnpike where toll is collected for the right of traveling on them.

The right to obstruct a public road by means of a toll-gate and to demand payment of toll for passing must be given by an act of the legislature,—either a general incorporation act or special charter. In the absence of legislation authorizing it, such gate is a public nuisance as is any other purpresture. The maintenance of it may be punished by indictment or prevented by injunction; Wales v. Stetson, 2 Mass. 143, 37 Am. Dec. 39; Maysville & Mt. S. T. Co. v. Ratliff, 85 Ky. 244, 3 S. W. 148; Craig v. People, 47 Ill. 487.

The granting of a franchise to construct a turnpike road implies the right to erect toll-gates and collect tolls for the use of the road, and also to change the location of the gate from time to time; Com. v. Turnpike

Road Co., 5 S. W. 743, 9 Ky. L. Rep. 538; Fowler v. Pratt, 11 Vt. 369; but it has been held that after once locating a gate there is no power to change it, the power of location having been exhausted; Gourley v. Turnpike Co., 104 Tenn. 305, 56 S. W. 855; Griffen v. House, 18 Johns. (N. Y.) 397; Hartford, N. L., W. & T. C. Soc. v. Hosmer, 12 Conn. 361; but this view is criticised as being without either sense or justice; Thomps. Corp. § 5913; the power of location cannot be exercised so as to create a nuisance; Snell v. Buresh, 123 Ill. 151, 13 N. E. 856; and a provision in the charter against the erection of gates within city limits does not require a company to remove gates brought within the limits of a city by subsequent extension thereof; Detroit v. R. Co., 43 Mich. 140, 5 N. W. 275.

TOLL-TRAVERSE. A toll for passing over a private man's ground; a toll for passing over the soil of another or over soil which though now a public highway was once private and which was dedicated subject to a toll. It can be claimed by prescription. 37 L. J. Q. B. 209; 3 Q. B. 521.

TOLLBOOTH. A prison; a customhouse; an exchange; also the place where goods are weighed; a place where merchants met; a local tribunal for small civil cases held at the Guild Hall, Bristol. Whart.

TOLLS. In a general sense, tolls signify any manner of customs, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandise, to be taken of the buyer. Co. 2d Inst. 58.

TOLT. A writ whereby a cause depending in a court baron was taken and removed into a county court. O. N. B. 4.

TOLZEY COURT. An inferior court of record having civil jurisdiction, still existing at Bristol, England.

TOMBSTONE. A gift or bequest to keep perpetually, a tombstone in repair offends against a rule as to perpetuities and is void, but such a condition to that effect attached to a bequest to a charity in case of failure to comply with condition is good. L. R. 3 Ch. 252. See MONUMENT; HEARSAY.

TON. Twenty hundredweight, each hundredweight being one hundred and twelve pounds avoirdupois. Such is the meaning of the word in the administration of federal law concerning customs duties; U. S. Comp. St. p. 1941. See MEASURE.

TONLIEU (Fr.). See TAILLE.

TONNAGE. The capacity of a ship or vessel.

This term is most usually applied to the capacity of a vessel in tons as determined by the legal mode of measurement; in England reckoned according to the number of tons burden a ship will carry, but here to her internal cubic capacity; and, as a general rule, in the United States the official tonnage of a vessel is considerably below the actual capacity of the vessel to carry freight. Roberts v. Opdyke, 40 N. Y. 259.

The duties paid on the tonnage of a ship or vessel.

For the rule for determining tonnage in the United States, see R. S. § 4150 *et seq.*; 3 U. S. Comp. St. 2812, and amendments in Suppt. (1911) 1190.

A foreign built vessel purchased by a citizen of the United States and brought into the waters thereof was held not taxable under the tariff laws of the United States; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. The tariff act of August 5, 1909, imposed an annual tonnage tax of $7 per gross ton on foreign-built yachts and pleasure boats, owned or chartered for more than six months by citizens of the United States, which could be commuted by paying a duty of 35 per cent. *ad valorem*. It was held that this tax was an excise, not on the actual use, but on the privilege of using, and was collectible if a yacht had been out of commission during the entire preceding year. But it must be shown that a foreign-built yacht had been used, to some extent at least, in the United States, especially where the owner, although a citizen of the United States, was domiciled in a foreign country. The tax is imposed on the owners of yachts, etc., or on charterers for a period of more than six months; U. S. v. Billings, 190 Fed. 359 (an opinion covering five cases). Four of these cases were before the supreme court and the judgments were affirmed, except that it was held that there was no liability where the yacht (which was laid up at Brooklyn) had not been used at all during the preceding year; Billings v. U. S., 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. —; U. S. v. Billings, 232 U. S. 289, 34 Sup. Ct. 428, 58 L. Ed. —; Pierce v. U. S., 232 U. S. 290, 34 Sup. Ct. 427, 58 L. Ed. —; U. S. v. Goelet, 232 U. S. 293, 34 Sup. Ct. 431, 58 L. Ed. —. The act was repealed by the tariff act of Oct. 3, 1913. In U. S. v. Blair, 190 Fed. 372, it was held that a yacht which had burned and sunk, and been expensively repaired, remained "foreign-built."

The constitution provides, art. 1, s. 10, n. 2, that no state shall, without the consent of congress, lay any duty on tonnage; State Tonnage Tax Cases, 12 Wall. (U. S.) 204, 20 L. Ed. 370; Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. Ed. 118. But a municipal corporation situated on a navigable river can, consistently with the constitution of the United States, charge and collect from the owner of licensed steamboats, which moor at a wharf constructed by it, wharfage proportioned to their tonnage; Keokuk N. L. P. Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377; Keokuk v. Packet Co., 45 Ia. 196. See COMMERCE.

The duty of tonnage prohibited by the constitution is a charge upon a vessel according to its tonnage as the instrument of commerce, for the privilege of entering or leaving a port or navigating public waters; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487.

By act of March 24, 1908, to carry out the International Convention of December 21, 1904, hospital ships in time of war are exempted from all dues and taxes under United States laws, and from all pilotage charges in waters of the United States.

TONNAGE-RENT. Rent reserved by a mining lease consisting of a royalty on every ton of minerals.

TONNAGE TAX. A small tax per ton on vessels entering a port. It has not been levied in Great Britain, nor, it is believed, in any European country except Spain; Cent. Dict. It was first in force in the United States in the early part of the last century. It is now (Act Aug. 5, 1909) two cents per ton (but not to exceed ten cents per ton in any one year) on entries from ports in North America, Central America, West India Islands, Bahamas, Bermudas, coast of South

America bordering on the Caribbean Sea, and Newfoundland, and six cents on entries from all other ports (not to exceed 30 cents in any one year). It is, however, sometimes varied from this act under treaties. See TONNAGE; OYSTERS; YACHT.

TONNAGIUM. A custom or impost upon wines and other merchandise exported or imported. Cowell.

TONNETIGHT. The quantity of a ton in a ship's freight or bulk. Cowell.

TONTINE INSURANCE. See INSURANCE.

TOOK AND CARRIED AWAY. Technical words necessary in an indictment for simple larceny. Bac. Abr. *Indictment* (G 1). See CEPIT ET ASPORTAVIT; LARCENY.

TOOLS. The implements which are commonly used by the hand of one man in some manual labor, necessary for his subsistence. Oliver v. White, 18 S. C. 241. It includes patterns used in manufacturing; Adams v. Ins. Co., 85 Ia. 6, 51 N. W. 1149; a mill-saw; 1 Fairf. 135; an instrument called a billy and jennie; Hoar v. Com'rs of Jail Delivery, 2 Vt. 402; a gin and grist mill; Cullers v. James, 66 Tex. 494, 1 S. W. 314; a threshing machine; Meyer v. Meyer, 23 Ia. 359, 92 Am. Dec. 432. As used in exemption laws, it includes any instrument necessary for the prosecution of trade, including a lathe; In re Robb, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48; sewing machines; Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648; a piano; Amend v. Murphy, 69 Ill. 337; a violin; Goddard v. Chaffee, 2 Allen (Mass.) 395, 79 Am. Dec. 796; a cornet; Baker v. Willis, 123 Mass. 195, 25 Am. Rep. 61; a gun; Choate v. Redding, 18 Tex. 581; a net and boat; Sammis v. Smith, 1 Th. & C. (N. Y.) 444; cheese vats, presses, and knives; Fish v. Street, 27 Kan. 270; the surgical instruments of a physician; In re Robinson, 3 Abb. Pr. (N. Y.) 466; and the office furniture of a lawyer; Abraham v. Davenport, 73 Ia. 111, 34 N. W. 767, 5 Am. St. Rep. 665; an iron safe used by an insurance agent; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710; Estate of McManus, 87 Cal. 292, 25 Pac. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250. It does not include the apparatus of a printing office; Danforth v. Woodward, 10 Pick. (Mass.) 423, 20 Am. Dec. 531. See TRADE; EXEMPTION; SIMPLE TOOLS.

TORRENS SYSTEM. See LAND TITLE AND TRANSFER.

TORT (Fr. *tort*, from Lat. *torquere*, to twist, *tortus*, twisted, wrested aside). A private or civil wrong or injury. A wrong independent of contract. 1 Hill. Torts 1. The breach of a legal duty. Big. Torts 3. In admiralty it includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case; Mills v. U. S., 46 Fed. 738, 12 L. R. A. 673; Smith v. Burnett, 10 App. D. C. 469.

The right of action is very broad in France. Thus:

"Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le reparer.

"Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." Civil Code of France, secs. 1382, 1383.

The law recognizes certain rights as belonging to every individual, such as the right to personal security, to liberty, to property, to reputation, to the services of a daughter or servant, to the companionship of a wife, etc. Any violation of one of these rights is a tort. In the like manner the law recognizes certain duties as attached to every individual, as the duty of not deceiving by false representations, of not persecuting another maliciously, of not using your own property so as to injure another, etc. The breach of any of these duties coupled with consequent damages to any one is also a tort. Underhill, Torts 4.

The performance of an act forbidden by a statute or the omission or failure to perform any act specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury; Poll. Torts 23. No action will lie for doing that which the legislature has authorized, if it be done without negligence: *id.* 121.

The word torts is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of *contracts*, *torts*, and *crimes*. *Contracts* include agreements and the injuries resulting from their breach. *Torts* include injuries to individuals, and *crimes* injurious to the public or state. 1 Hill. Torts 1.

This division of the redress of injuries by civil suit into actions of tort and actions of contract is not thoroughly accurate. For often the party injured has his election whether he will proceed by tort or by contract, as in the case of a fraudulent sale or the fraudulent recommendation of a third person; 10 C. B. 83; Ives v. Carter, 24 Conn. 392. But for general usage this division has been found sufficient, and is universally adopted; Cooley, Torts 2.

As the same act may sometimes constitute the breach of a contract as well as a tort, so the same act may often constitute a tort and also a crime. For a tort may amount to, or may be likely to lead to, a breach of the peace, and thus become a matter of public concern. The torts which are usually at the same time crimes are assault, libel, and nuisance. In such cases it is the general rule of law that a public prosecution and a private

action for damages can both be maintained either at the same or at different times; 1 B. & P. 191; 3 Bla. Com. 122. See Williams v. Dickenson, 28 Fla. 90, 9 South. 847.

According to Sir F. Pollock, from the point of view of the plaintiff as regards the kind of damage suffered by him, actionable wrongs may be divided into four groups: 1. Of a strictly personal kind; 2. Those which affect ownership and rights analogous to ownership; 3. Those which extend to the safety, convenience and profit of life generally; 4. Those which may, according to circumstances, result in damage to person, property or estate, or any or all of them.

Personal wrongs touching a man's body or honor or assault, false imprisonment, seduction or enticing away of members of his family. Wrongs to property are trespass to lands or goods, conversion of goods, disturbance of easements and other individual rights in property not amounting to exclusive possession. Trespass is essentially a wrong to possession. Then there are infringements of incorporeal rights which, though not the subject of trespass proper, are exclusive rights of enjoyment and have many incidents of ownership. Actions (in some cases expressly given by statute) lie for the piracy of copyright, patents and trade-marks. Wrongs to a man's estate in the larger sense above noted are defamation, deceit, so-called slander of title, and fraudulent trade competition, which are really varieties of deceit, malicious prosecution and nuisance. Finally we have the results of negligence and omission to perform special duties regarding the safety of one's neighbors or customers or of the public, which may affect persons, property, or estate generally. See Encyc. Brit. *v.* Tort.

An action brought by a passenger against a railroad company for personal injuries caused by the negligence of the servants of the company while he was traveling on their line is an action founded on tort; [1895] 1 Q. B. 944, where it is said: "If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rise to a cause of action (because no duty apart from the contract to do what is complained of exists), then the action complained of is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort." Quoted and followed in Atlantic & P. R. Co. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. Ed. 485.

As to the doctrine of the merger of a tort in a crime, see MERGER.

The infringement of a right or the violation of a duty are necessary ingredients of a tort. If neither of these is present the act is not a tort, although damage may have resulted. Hence the maxim: *Ex damno sine injuria non oritur actio.*

The fact alone that an act of defendant was in violation of a penal statute does not afford ground for the recovery of damages by a third person, unless such act was also the proximate cause of the injury complained of; The Santa Rita, 173 Fed. 413.

The existence of contractual relations between two parties is no bar to a right of action for a tort committed, pending the contract and connected with it; Schoppel v. Daly, 112 La. 201, 36 South. 322.

One not a party to a contract cannot maintain an action of tort in respect to a breach of duty arising out of the contract; Conklin v. Staats, 70 N. J. L. 771, 59 Atl. 144.

A wrongful or malicious intent is an essential element in some torts. As, for example, deceit, slander, and libel, malicious prosecution, and conspiracy. In general, however, it may be stated as a prominent distinction between torts and crimes, that in the former the party's intent is immaterial, while in prosecutions for the latter a criminal purpose must always be alleged and proved; Cooley, Torts 688. Thus one may be made liable in damages for what is usually called a mere accident. So insane persons and minors, under the age of discernment, are in general liable for torts. See MALICE.

A tort sounding in exemplary damages is one when there is an evasion of some right of person or property, maliciously, violently, wantonly, or with reckless disregard of social or civil obligations; Samuels v. R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

In general, it may be said that whenever the law creates a right, the violation of such right will be a tort, and wherever the law creates a duty, the breach of such duty coupled with consequent damage will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute; Cooley, Torts 650.

An actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break the contract to the injury of the other. In the absence of an adequate remedy at law, equitable relief will be granted; Dr. Miles Med. Co. v. J. D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502.

Where a defendant corporation induced another to break a contract to furnish certain machines, plaintiff was entitled to recover from defendant damages sustained thereby without proof that defendant was actuated by actual malice or ill will; Tubular R. & S. Co. v. Shoe Co., 159 Fed. 824, 86 C. C. A. 648.

Torts may also arise in the performance of the duties of a ministerial officer, when such duties are due to individuals and not to the state; Cooley, Torts 376; but the act of a British officer in excess of his authority (burning certain barracoons in Africa

and releasing slaves therefrom), when approved by the government, becomes an "act of state" and is not a ground of action against him; 2 Ex. 167.

As to torts committed against property or in the relations of master and servant, husband and wife, parent and child, bailor and bailee, landlord and tenant, mortgagor and mortgagee, see these several titles.

In order to maintain an action of tort the relation of cause and effect between the act and the injury must be clearly shown. The damage must not be remote or indirect. See CAUSA PROXIMA, etc.

All who aid, advise, command, or countenance the commission of a tort, or approve of it after it is done, are liable, if done for their benefit, in the same manner as if done with their hands; Mack v. Kelsey, 61 Vt. 399, 17 Atl. 780; Brown v. Webster City, 115 Ia. 511, 88 N. W. 1070; and joint tortfeasors are liable jointly and severally; Weathers v. R. Co., 111 Mo. App. 315, 86 S. W. 908; but where two or more are acting lawfully together to make an arrest, one is not liable for the unlawful act of another done in furtherance of the common purpose, without his concurrence; Wert v. Potts, 76 Ia. 612, 41 N. W. 374, 14 Am. St. Rep. 252. Where there are several wrongdoers, each is liable for the entire damage; all are equal. But where the injured party has elected to sue one or more and obtains judgment, he cannot sue the others, even though his judgment remains unsatisfied; L. R. 7 C. P. 547; but it is held generally in this country that a judgment without satisfaction is not a bar; Cooley, Torts 138; 11 Harv. L. Rev. A recovery by a husband for injuries sustained to himself is not a bar to a subsequent action for injuries to his wife sustained at the same time as a result of the same negligence; Texas & P. Ry. Co. v. Nelson, 9 Tex. Civ. App. 156, 29 S. W. 78; but judgment is held to be a bar if satisfaction has been tendered; Berkley v. Wilson, 87 Md. 219, 39 Atl. 502; *contra*, Lincoln Sav. Bk. v. Ewing, 12 Lea (Tenn.) 598; People v. Beebe, 1 Barb. (N. Y.) 379.

A party injured cannot generally maintain an action for the injury if caused in any degree by his own contributory negligence. See NEGLIGENCE.

An action to recover damages for a tort is transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found; Dennick v. R. Co., 103 U. S. 11, 26 L. Ed. 439; Stewart v. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

An action for tort causing death, in a state where the statute has provided a right of action therefor, can be maintained in any other state in which the common law obstacle to such an action has been removed, if the statute of the place where the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced; Stewart v. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

A corporation of Colorado domiciled in Texas, whose line of railroad extends into Mexico, fatally injured an employé working in its yard in Mexico. An action was brought in the circuit court of the United States on the ground of diverse citizenship. The two countries concur in holding that the act complained of is the subject of legal redress, and the question was whether recovery must be defeated because the law of Mexico controlled and could not be enforced in Texas. It was held that a common law action could not be maintained where the right of recovery given by a foreign country is so dissimilar to that given by the law of the state in which the action is brought as to be incapable of enforcement in such state; Slater v. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.

The term *tort* in reference to admiralty jurisdiction is not confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others where the remedy at common law is by an action on the case; Leathers v. Blessing, 105 U. S. 626, 26 L. Ed. 1192.

Where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the locus of the damage and not that of the origin of the tort; as where the plaintiff working in the hold of a vessel was injured by a piece of lumber negligently sent down through a chute by a person working on the pier, it was held to be a case of admiralty jurisdiction; Hermann v. Mill Co., 69 Fed. 646.

Corporations are responsible for acts not strictly within their corporate powers, but done in their corporate name and by corporation officers who are competent to exercise the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power, in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary liability for them to the party injured; Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; Washington G. L. Co. v. Lansden, 172 U. S. 544, 19 Sup. Ct. 296, 43 L. Ed. 543.

A judgment of damages for a tort is not a contract within the constitutional provision against the impairment of a contract obligation; Louisiana v. Police Jury, 111 U. S. 716, 4 Sup. Ct. 648. 28 L. Ed. 574; see Sherman v. Langham, 92 Tex. 19, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

For a classification of torts, see Holland, Jurispr. 316. See Torts before Bracton, Ames, Lect. in Leg. Hist. 39.

TORTFEASOR. A wrong-doer; one who commits or is guilty of a tort. See JOINT TORTFEASOR.

TORTURE. The rack, or question, or other mode of examination by violence to the person, to extort a confession from supposed criminals, and a revelation of their associates. It is to be distinguished from punishment, which usually succeeds a conviction for offences; as it was inflicted *in limine*, and as part of the introductory process leading to trial and judgment. It was wholly unknown to the common and statute law of England, and was forbidden by Magna Carta, ch. 29; 4 Bla. Com. 326.

It was gradually introduced throughout the Continent in the 14th–16th centuries—connected with the revival of the Roman law. Lea, Superstition and Force 371–522.

It prevailed in Scotland, where the civil law which allowed it obtained: Dig. 48. 18. It was, however, declared contrary to the claim of right, and was expressly prohibited; 7 Anne, c. 21, § 5 (1708). Several instances of its infliction may be found in Pitcairn's Criminal Trials of Scotland.

Although torture was confessedly contrary to the common law of England, it was, nevertheless, often employed as an instrument of state to wring confessions from prominent criminals,—especially in charges of treason. It was usually inflicted by warrant from the privy council. Jardine, Torture 7, 15, 42.

Mr. Jardine proves from the records of the privy council that the practice was not infrequent during the time of Elizabeth, and continued to the close of the reign of the first two Stuarts. There is positive evidence that Guy Fawkes was directed to be tortured in regard to the Gunpowder Plot, in the warrant in the king's handwriting authorizing the commissioners, of whom Coke was one, to examine him upon the rack, "using the gentler tortures first, *et sic per gradus ad ima tenditur;*" 1 Jardine, Cr. Tr. Int. 17; 2 *id.* 106. It was not given up in England till Cromwell's time; Baldwin, Mod. Pol. Inst. 119.

An attempt to torture a person to extort a confession of crime is a criminal offence; State v. Hobbs, 2 Tyl. (Vt.) 380. See Miller v. People, 39 Ill. 457; Hector v. State, 2 Mo. 166, 22 Am. Dec. 454. As to its use in suppressing the Irish rebellion in 1798, see 27 How. St. Tr. 766; see the trial of Gen. Picton, 30 St. Tr. 226; 24 L. Q. R. 484; Brown, Narrations of State Trials.

See QUESTION; PEINE FORTE ET DURE; MUTE.

This practice has never obtained in the United States, except in a few instances in New York under the Dutch rule. It is said to have been used under French law in Quebec.

TOTAL LOSS. Under a policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial; Monroe v. Ins. Co., 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179. See Loss.

TOTIDEM VERBIS. In so many words.

TOTIES QUOTIES (Lat.). As often as the thing shall happen.

TOTTED. A good debt to the crown, *i. e.* a debt paid to the sheriff, to be by him paid over to the king. Cowell. See FOREIGN APPOSER.

TOUCH AND STAY. Words frequently introduced in policies of insurance, giving the party insured the right to stop and stay at certain designated points in the course of the voyage. A vessel which has the power to touch and stay at a place in the course of the voyage must confine herself strictly to the terms of the liberty so given; for any attempt to trade at such a port during such a stay, as, by shipping or landing goods, will amount to a species of deviation which will discharge the underwriters, unless the ship have also liberty to trade as well as to touch and stay at such a place; 1 Marsh. Ins. 275.

TOUJOURS ET UNCORE PRIST (L. Fr.). Always and still ready. This is the name of a plea of tender: as, where a man is indebted to another, and he tenders the amount due, and afterwards the creditor brings a suit, the defendant may plead the tender, and add that he has always been and is still ready to pay what he owes, which may be done by the formula *toujours et uncore prist.* He must then pay the money into court; and if the issue be found for him the defendant will be exonerated from costs, and the plaintiff made liable for them; 3 Bouvier, Inst. n. 2923.

See TOUT TEMPS PRIST; TENDER; UNCORE PRIST.

TOUR D'ECHELLE. In French Law. A right which the owner of an estate has of placing ladders on his neighbor's property to facilitate the reparation of a party-wall or of buildings which are supported by that wall. It is a species of servitude. *Lois des Bât.* part 1, c. 3, sect. 2, art. 9, § 1.

The space of ground left unoccupied around a building for the purpose of enabling the owner to repair it with convenience: this is not a servitude, but an actual corporeal property.

TOURN. See SHERIFF'S TOURN.

TOUT TEMPS PRIST (L. Fr. always ready). A plea by which the defendant signifies that he has always been ready to perform what is required of him. The object of the plea is to save costs: as, for example, where there has been a tender and refusal. 3 Bla. Com. 303. So, in a writ of dower, where the plea is detinue of charters, the demandant might reply, *always ready;* Rast. Entr. 229 *b*. See TOUJOURS ET UNCORE PRIST.

TOW-BOATS. According to the weight of authority, the owners of steamboats engaged

in the business of towing are not common carriers; Lawson, Carriers 3. So held in Wells v. Nav. Co., 2 N. Y. 204; Leonard v. Hendrickson, 18 Pa. 40, 55 Am. Dec. 587; Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435; The Fannie Tuthill, 12 Fed. 446; The Margaret, 94 U. S. 494, 24 L. Ed. 146; *contra*, Walston v. Myers, 50 N. C. 174; Adams v. Tow-Boat Co., 11 La. 46.

TOWAGE. The act of towing or drawing ships and vessels, usually by means of a small steamer called a tug.

Towage service is confined to vessels who have received no injury or damage; McConnochie v. Kerr, 9 Fed. 53.

Where towage is rendered in the rescue or relief of a vessel from imminent peril, it becomes *salvage* service, entitled to be compensated as such; 6 N. Y. Leg. Obs. 223.

Where a service was salvage, one claiming it to have been a towage service must plead and prove a contract; The Lowther Castle, 195 Fed. 604.

A tug, sometimes called towing or tow-boat, while not held to the responsibility of a common carrier, is bound to exercise reasonable care and skill in everything pertaining to its employment; The James Jackson, 9 Fed. 614; The E. V. MacCaulley, 84 Fed. 500; The City of New York, 54 Fed. 181, 4 C. C. A. 268, 14 U. S. App. 39; Vessel Owners T. Co. v. Wilson, 63 Fed. 626, 11 C. C. A. 366, 24 U. S. App. 49; The Blue Bell, 189 Fed. 824; taking into consideration the fact that it contracts as an expert and is bound to know the channel, its usual currents and dangers, and to avoid obstructions which ought to be known to men experienced in its navigation; The El Rio, 162 Fed. 567.

A tug is the dominant mind, and the tow must follow her directions; The Fort George, 183 Fed. 731, 106 C. C. A. 169.

Proof of a loss suffered by tow does not raise a presumption of negligence on the part of the tug; The Webb, 14 Wall. (U. S.) 406, 20 L. Ed. 774; The A. R. Robinson, 57 Fed. 667.

Where two vessels, each in charge of a tug, came in collision from the faulty navigation of the tugs whose masters gave directions to the vessels which were obeyed, the tugs alone were held liable; The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494, 1 U. S. App. 129. A steamship in charge of a tug is not liable in case of accident; International M. M. Co. v. Gaffney, 143 Fed. 305, 74 C. C. A. 443. Tugs cannot abandon their tows for slight causes; The Charles Runyon, 56 Fed. 312, 5 C. C. A. 514, 14 U. S. App. 410.

The duty of a tug to tow is a continuous one from the time the service commences until it is completed, and where it becomes necessary to anchor the tow, the tug's obligation of reasonable care continues at least until it is safely anchored; The Printer, 164 Fed. 814, 90 C. C. A. 246. The vessel owner can bind the cargo owner by a contract with a tug; The Oceanica, 170 Fed. 893, 96 C. C. A. 69. See TUG.

The burden of proving that a contract of towage was at the owner's risk, is on the tug; The American Eagle, 54 Fed. 1010; The Snap, 24 Fed. 292.

The use of long tow lines in New York Harbor, while not to be commended, does not render the tug liable for damages caused by her tow by collision with another vessel through the fault of the latter to which the length of the tow did not contribute; The Domingo De Larrinaga, 172 Fed. 264.

An admiralty lien for towage is inferior to a statutory lien for repairs, the towage having been performed more than six months before, without effort to collect until after the repairs; The Sleepy Hollow, 114 Fed. 367.

TOWARD. The word has been held to mean not simply "to" but to include "about." Hudson v. State, 6 Tex. App. 565, 32 Am. Rep. 593. See To.

TOWN. A term of somewhat varying signification, but denoting a division of a country next smaller in extent than a county.

A town is a municipal corporation comprising the inhabitants within its boundaries and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been or may be conferred or imposed upon it by law. Dunn v. Whitestown, 185 Fed. 585.

It is generic, and includes cities; State v. Craig, 132 Ind. 54, 31 N. E. 352, 16 L. R. A. 688, 32 Am. St. Rep. 237; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466.

In Pennsylvania and some other of the Middle states, it denotes a village or city, but it is not, strictly, a legal term. In the New England states, it is to be considered for many purposes as the unit of civil organization,—the counties being composed of a number of towns. Towns are regarded as corporations or *quasi*-corporations; Fourth School Dist. in Rumford v. Wood, 13 Mass. 193. In New York and Wisconsin, towns are subdivisions of counties; and the same is true of the *townships* of most of the Western states. In Ohio, Michigan, and Iowa, they are called townships In Illinois it is synonymous with village; Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523. Town and borough, though legally distinct, are often used interchangeably; Bloomsburg Case, 33 Pa. Co. Ct. R. 137.

"Towns were of themselves corporations having perpetual succession, consisting of all persons inhabiting within certain territorial limits." Shaw, C. J., Overseers of Poor v. Sears, 22 Pick. (Mass.) 130. But see an article by A. M. Eaton in 14 Harv. L. Rev. and 15 *id.*, and 1902 Report Am. Bar Assoc. 336.

In England, the term *town* or *vill* compre-

hends under it the several species of cities, boroughs, and common towns. 1 Bla. Com. 114.

See Garland, New Engl. Town Law.

TOWN CAUSE. **In English Practice.** A cause tried at the sittings for London and Middlesex. 3 Steph. Com. 556.

TOWN-CLERK. A principal officer who keeps the records, issues calls for town meetings, and performs generally the duties of a secretary to the political organization.

TOWN-MEETING. A legal assembly of the qualified voters of the town held at stated intervals or on call.

TOWN-PLAT. The acknowledgment and recording of a town-plat vests the legal title to the ground embraced in the streets and alleys in the corporation of the town; therefore it is held that the proprietor who has thus dedicated the streets and alleys to the public cannot maintain trespass for an injury to the soil or freehold. The corporation alone can seek redress for such injury; Board of Trustees v. Haven, 11 Ill. 554. This is not so, however, with a highway; the original owner of the fee must bring his action for an injury to the soil; Hunter v. Middleton, 13 Ill. 54. See HIGHWAY. If the streets or alleys of a town are dedicated by a different mode from that pointed out by the statute, the fee remains in the proprietor, burdened with the public easement; Manly v. Gibson, 13 Ill. 312. See DEDICATION.

TOWN SITES. The president is authorized (Act of March 3, 1863) to reserve from the public lands, surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population; they are to be plotted and appraised and sold at public sale, and thereafter at private sale, but not below the appraisal. The title is made subject to mineral rights when possessed under local authority (March 3, 1865) and shall not include any mine of gold, silver, copper or cinnabar (Act of March 2, 1867).

Town site entries may be made by incorporated towns and cities in the mineral lands, but not to include the above minerals or lead, and the title is subject to possessed veins (Act of March 3, 1891). There are numerous provisions on the subject and special acts as to Oklahoma and Alaska.

TOWNSHIP. The public lands of the United States are surveyed first into tracts called townships, being in extent six miles square. The subdivisions of a township are called sections, each a mile square and containing six hundred and forty acres; these are subdivided into quarter-sections, and from that into lots of forty acres each. This plan of subdividing the public lands was adopted by act of congress of May 18, 1796.

In Pennsylvania, a subdivision of a county, having minor governmental powers. They do not, under existing laws possess municipal powers; Pennsylvania R. R. v. Pass. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659. By recent acts in that state first class townships have been created, with more complete organization.

In the old English period, the households of a township had the common and undivided use of the waste land, but this use could be limited and apportioned by the community. This waste land stretched usually over a great part of the territory assigned to the township, and the reclaiming of this land for purposes of exclusive cultivation and enjoyment was subjected to restrictive rules; the scarce and highly valued meadows were assigned under strict rules of proportionate division and redivision; the arable, which formed the most important, and the most conspicuous portion of the whole, lay in scattered strips in the various fields and spots of the village, so that every holding presented a bundle of these strips equal to other bundles of the same denomination; everybody had to conform to the same rules and methods in regard to the rotation and cultivation of crops, and when these had been gathered the strips relapsed into the state of an open field in common use. The homesteads and closes around them were kept under separate management, but had been allotted by the community and could in some cases be subjected to reallotment. If this is a correct general description of the main system in operation in the course of the thousand years from 500 till 1500 A. D., and extending many of its incidents to even later times, one can scarcely escape the conclusion that whatever inroads the individual and the state may have made upon it, and whatever bias legal theory may have shown towards more definite and individualistic conceptions, the average English householder of the Middle Ages lived under conditions in which his power of free disposal and free management was hemmed in on all sides by customs and rules converging towards the conceptions of a community of interests and rights between all the household shares of a village. Vinogradoff, Growth of the Manor 165.

The activity of the township during the 13th century, as a unit of police organization, was developed later by legislation, ending in 1285, when the constabulary and militia took the form they were to keep during the rest of the Middle Ages. 1 Poll. & Maitl. 551.

See VILL.

TOXICOLOGY. The science of poisons (*q. v.*).

TRACING. A tracing is a mechanical copy or *fac simile* of an original, produced by following its lines, with a pen or pencil, through a transparent medium, called tracing paper. Chapman v. Ferry, 18 Fed. 540.

TRACT. A lot, piece, or parcel of land, of greater or less size, the term not importing in itself any precise dimensions. Edwards v. Derrickson, 28 N. J. L. 45.

TRADAS IN BALLIUM. You deliver to bail. The name of a writ which might be issued in behalf of a party who upon the writ *de odio et atia* had been found to have been maliciously accused of a crime. 1 Reeve, Eng. L. 252.

TRADE. Any sort of dealings by way of sale or exchange; commerce, traffic. May v. Sloan, 101 U. S. 231, 25 L. Ed. 797; In re Pinkney, 47 Kan. 89, 27 Pac. 179. The deal-

ings in a particular business: as, the Indian trade; the business of a particular mechanic; hence boys are said to be put apprentices to learn a trade: as, the trade of a carpenter, shoemaker, and the like. Bac. Abr. *Master and Servant* (D 1). Trade differs from art.

In exemption laws it is usually confined to the occupation of a mechanic; Enscoe v. Dunn, 44 Conn. 93, 26 Am. Rep. 430; but in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft, or business; May v. Sloan, 101 U. S. 231, 25 L. Ed. 797; In re Pinkney, 47 Kan. 89, 27 Pac. 179. One cannot by multiplying his pursuits claim cumulatively several exemptions, but the fact that he carries on two or more pursuits concurrently does not deprive him of all exemptions, but the article exempted must belong to his principal business; Jenkins v. McNall, 27 Kan. 532, 41 Am. Rep. 422.

The term is also construed in cases arising under the "anti-trust" act forbidding trusts and combinations in restraint of trade, and it is held in that connection to have the broader sense; In re Pinkney, 47 Kan. 89, 27 Pac. 179, where the definition of the word is much discussed.

See RESTRAINT OF TRADE.

The word is held to apply to the business of insurance; *id.;* Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710; of a telegraph company; 3 Exch. Div. 108; transportation of merchandise for hire; The Eliza, 2 Gall. 4, Fed. Cas. No. 4,346; 7 Cra. 113; a blacksmith, who also builds wagons; Stewart v. Welton, 32 Mich. 59; a harness-maker, painter, and carriage-builder; Eager v. Taylor, 9 Allen (Mass.) 156; a dealer in ice who was also a farmer; Pierce v. Gray, 7 Gray (Mass.) 67; a tinner who owned and partly supported himself by playing a cornet; Baker v. Willis, 123 Mass. 194, 25 Am. Rep. 61; a saddle and harness-maker; Nichols v. Porter, 7 Tex. Civ. App. 302, 26 S. W. 859; keeping a home for working girls even though it appeared that no profits were made; 25 Ch. Div. 206; but maintaining a private lunatic asylum is held not a trade; 2 Ad. & El. 161.

Trade and commerce, as used in the Sherman anti-trust act, are synonymous. Their use in the first section thereof does not enlarge the statute beyond the meaning of the common law expression "contracts in restraint of trade," as they are analogous to "monopolize," which is the basis and limitation of the statute; U. S. v. Patterson, 55 Fed. 605.

See TOOLS; EXEMPTION; RESTRAINT OF TRADE; TRADER; TRADESMAN.

TRADE COMMISSION, FEDERAL. An act of congress was passed September 26, 1914, creating a Federal Trade Commission, composed of five commissioners appointed by the President with the advice and consent of the Senate, three only to be members of the same political party. The first commissioners remain in office for terms of three, four, five, six and seven years respectively, and their successors are appointed for seven years. They shall not engage in any other occupation. The salary is $10,000 a year. Upon the organization of the commission, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist, and its work shall be continued by the commission. Its principal office shall be in Washington, but it may meet and exercise its powers in other places.

The act provides: "That unfair methods of competition in commerce are hereby declared unlawful," and the commission is "directed to prevent persons, partnerships or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

If the commission "shall have reason to believe that any such person, etc., has been or is using any unfair method of competition in commerce and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public," it shall serve upon such person, etc., a complaint stating the charges, with notice of the hearing at least thirty days after service. Such person, etc., shall be permitted to appear and show cause why an order should not be entered requiring such person, etc., to cease from a violation of the law as charged. Any person, etc., may be allowed by the commission to intervene by counsel or in person. Testimony may be taken and is to be filed with the commission. If the commission is of opinion that the method of competition is prohibited by the act, it shall make a report in writing, with findings of fact, and shall issue and serve an order requiring such person, etc., to cease from such method of competition.

Until a transcript of the record of the hearings has been filed in the Circuit Court of Appeals, the commission may modify or set aside any report or order.

If such person, etc., fails or neglects to obey such order, the commission may apply to the Circuit Court of Appeals in any circuit where the method of competition was used or where such person, etc., resides or carries on its business, to enforce such order, and file a transcript of the entire proceedings; whereupon the court, having caused notice to be served upon such person, etc., shall "have jurisdiction of the proceeding and of the question determined therein" and the power to enter upon the pleadings, etc., a decree affirming, modifying or setting aside the order of the commission. "Findings of fact of the commission, if supported by testimony, shall be conclusive."

The court may on application of the person, etc., order additional evidence to be taken before the commission and to be adduced upon the hearing. The commission may modify its findings of facts or make new findings by reason of the additional evidence, which, if supported by testimony, shall be conclusive, and shall file its recommendation, if any, for the modification or setting aside of its original order. The decree of the court shall be final, subject only to review by the Supreme Court on certiorari under Jud. Code, § 240.

Any party against whom an order is made by the commission may obtain a review of the order in the Circuit Court of Appeals upon written petition served upon the commission, whereupon the commission shall certify and file in the court a transcript of the record, and the court shall then have the same jurisdiction to affirm, modify or set aside the order as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the court shall be exclusive. The proceedings therein shall have precedence over other cases pending, and "shall be in every way expedited." No order of the commission or judgment of the court shall relieve any person, etc., "from any liability under the anti-trust acts."

By section 6 the commission has power (except as to banks, and common carriers subject to the acts to regulate commerce): a. To gather and compile information concerning, and investigate, the organization, business management, etc., of any corporation, etc., engaged in commerce (but not those excepted as above), and its relation to other corporations, individuals, etc.; b. To require by general or special orders such corporations, or any class of them, to file with the commission under its forms, annual or special, or both, reports, or answers in writing to specified questions of the commission as to its organization, business, etc., and its relation to other corporations, etc. These are to be made under oath or as the commission may prescribe. c. Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States under the anti-trust acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General, it shall be its duty to make such investigation; d. Upon the direction of the President or either House of Congress to report upon the alleged violation of the anti-trust acts by any corporation; e. Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts; f. To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient; and to make annual and special reports to Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions, etc.; g. From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the act; h. To investigate trade conditions and with foreign countries; and report to Congress with recommendations.

Section 7. In any suit in equity brought by the Attorney General, as provided in the anti-trust acts, the court may, upon the conclusion of the testimony, if of the opinion that the complainant is entitled to relief, refer the same to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein.

The act contains drastic provisions for eliciting evidence, through the District Court, and an immunity clause to witnesses, and other details as to which reference must be made thereto. See Act of Oct. 15, 1914 (Clayton Act), discussed by Mr. Taft in Amer. Bar Assoc. Rep. (1914).

TRADE-MARK. A symbol, emblem, or mark, which a tradesman puts upon or attaches in some way to the goods he manufactures or has caused to be manufactured, so that they may be identified and known in the market. Brown, Trade-Marks, 2d ed. § 87.

"A particular mark or symbol used by a person for the purpose of indicating that the article to which it is affixed is sold or manufactured by him or his authority, or that he carries on business at a particular place." 35 L. J. Ch. 61.

A sign or symbol primarily confined exclusively to the indication of the origin or ownership of the goods to which it may be attached, and it may be composed of any name, device, line, figure, mark, word, letter, number, or combination or arrangement of any or all of these which would serve the sole purpose of a trade-mark, and which no other person can adopt or use with equal truth." Avery v. Meikle, 81 Ky. 73.

Broadly defined, a trade-mark is a mark by which the wares of the owner are known in trade. Shaw Stocking Co. v. Mack, 12 Fed. 707.

The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer; Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247.

It may consist of a name, a device, or a peculiar arrangement of words, lines, or figures, or any peculiar mark or symbol not

theretofore in use, adopted and used by a manufacturer, or a merchant for whom goods may be manufactured, to designate them as those which he has manufactured or sells. It may be put either upon the article itself or its case, covering, or wrapper, and is assignable with the business; Metcalfe v. Brand, 86 Ky. 331, 5 S. W. 773, 9 Am. St. Rep. 282.

It may be in any form of letters, words, vignettes, or ornamental design. Newly-coined words may form a trade-mark; Brown, Trade-Marks 151.

The exclusive right to a trade-mark or device rests not on invention, but on such use as makes it point out the origin of the claimant's goods and must be early enough for that, but absolute priority of invention is not required; Tetlow v. Tappan, 85 Fed. 774.

Property in a trade-mark is acquired by the original application to some species of merchandise manufactured of a symbol or device not in actual use, designating articles of the same kind or class; Delaware & H. C. Co. v. Clark, 13 Wall. (U. S.) 322, 20 L. Ed. 581.

The use by different persons of a particular manufactured article for a short time and in a distant section of the country, of a label containing a particular word printed for the use of any purchaser, will not prevent the acquisition of the word as a trade name by one who works up under it a trade in such article in a particular section of the country; Cohen v. Nagle, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 964, 5 Ann. Cas. 553.

A number of workmen, engaged in a branch of industry, may acquire a trade-mark; Schmalz v. Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 43 L. R. A. 86, 73 Am. St. Rep. 637.

"A trade-mark or trade-name is of no virtue in and of itself. It becomes of value only through use, and because by use it is an assurance to purchasers of the excellence of the article to which it is affixed as manufactured by the one whose name appears as the producer. . . . Disassociated from such manufacture, it is not an assurance of genuineness. When used by another, its use works a fraud upon the purchaser. A trade-mark is analogous to the good will of the business. . . . The good will is inseparable from the business itself. So, likewise, is a trade-mark;" Bulte v. Igleheart Bros., 137 Fed. 498, 70 C. C. A. 76. It cannot be assigned, or licensed, except as incidental to the transfer of a business or property in connection with which it has been used; Macmahan Pharmacal Co. v. Mfg. Co., 113 Fed. 468, 51 C. C. A. 302.

It can be acquired only in connection with an established business, and retained only in connection therewith; Filkins v. Blackman, 13 Blatch. 440, Fed. Cas. No. 4,786. There is no such thing as an abstract trade-mark apart from some business in which it is used; Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Witthaus v. Mattfeldt & Co., 44 Md. 303, 22 Am. Rep. 44; Morgan v. Rogers, 19 Fed. 596, per Colt, J. A trade-mark will pass with the transfer of the business in which it was used; Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 Sup. Ct. 30, 40 L. Ed. 155; Noera v. Mfg. Co., 158 Mass. 110, 32 N. E. 1037; whether specifically mentioned or not; Le Page Co. v. Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354; Allegretti v. Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487; Morgan v. Rogers, 19 Fed. 596. The transfer of a business (in which the owner's name is used as a trade-mark) carries with it the use of the name; Horton Mfg. Co. v. Mfg. Co., 18 Fed. 816; a transfer of all the property of a business carries the right to use all the trade-marks used in it; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72. Where a trade-mark indicates the product of a particular factory, it passes with the ownership of the factory, though the business formerly carried on there has gone elsewhere; 3 Myl. & C. 1; Carmichel v. Latimer, 11 R. I. 395, 23 Am. Rep. 481; Symonds v. Jones, 82 Me. 302, 19 Atl. 820, 8 L. R. A. 570, 17 Am. St. Rep. 485. In the sale of a going concern, an assignment of trade-marks, patents, trade rights, good will and all assets carries a trade-name; Herring-Hall-Marvin Safe Co. v. Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616.

A trade-mark may be part of the good will of a firm, and one who has come into an existing firm and after some years goes out, leaving it to carry on the business under the same title, does not take with him the right to use the trade-marks of the firm; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

A trade-mark adapted to a brand of cigars is not assignable separate from the good will of the business; Falk v. Trading Co., 180 N. Y. 445, 73 N. E. 239, 105 Am. St. Rep. 778, 2 Ann. Cas. 216, 1 L. R. A. (N. S.) 704, with note on the assignability of trade-marks.

By the trade-mark act of April 20, 1905, a trade-mark is assignable, in connection with the good-will of the business in which it is used, by an instrument in writing, acknowledged according to the laws of the country or state in which it is executed; it is void, as against a subsequent purchaser for a valuable consideration without notice, unless recorded within three months from its date.

The ownership of trade-marks is considered as a right of property; Upton, Trade-Marks 10. It is on this ground that equity protects by injunction against their infringement. It is, however, not property within the meaning of the constitution requiring all property to be taxed; Com. v. Warehouse

Co., 132 Ky. 521, 116 S. W. 766, 21 L. R. A. (N. S.) 30, 136 Am. St. Rep. 186, 18 Ann. Cas. 1156, where it is said that the only other case on this subject is People v. Kelsey, 185 N. Y. 546, 77 N. E. 1195, where it was held that the value of a trade-mark might be taken into consideration in determining the value of the franchises of a foreign corporation.

Trade names should be distinguished from trade-marks. A trade-mark owes its existence to the fact that it is affixed to a commodity; a trade name is more properly allied to the good will of a business; Browne, Tr. Marks § 91.

The *trade-name* of a firm, a corporate name, and the name of a publication, though not strictly trade-marks, are nevertheless a species of property of the same nature as trade-marks, and will be protected in like manner; 33 Am. Rep. 335, note; 9 Am. Rep. 331, note. See NAME.

So a tradesman may adopt a fictitious name, and sell his goods under it as a trade-mark, and the property right he thus acquires in the fanciful name will be protected; Gouraud v. Trust, 6 Thomp. & C. (N. Y.) 133.

Equity will protect a corporation in the exclusive possession of its name. State authorities will ordinarily not grant a charter to a new corporation under the name of an existing corporation. But equity will not restrain a corporation of the state of the *forum* from the use of its corporate name at the suit of a foreign corporation; Thomp. Corp. §§ 296, 7903; Hazelton Boiler Co. v. Boiler Co., 142 Ill. 494, 30 N. E. 339. See International T. Co. v. Trust Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

In a bill by the "Sun Life Assurance Company," long established in London, to enjoin the "Sun Life Assurance Company of Canada" from doing business under that name in London, it was held that the defendant's use of its full name was lawful, but that the use of the "Sun Life" alone could be enjoined; [1894] 1 Ch. 537.

A corporation may not so use an individual's name as to imitate a prior corporate name of a company engaged in the same business, if the public is thereby deceived; Martin Co. v. Wilckes Co., 75 N. J. Eq. 39, 71 Atl. 409. A corporation cannot select a name which is the same as or similar to that of another corporation created under the laws of the same sovereignty; 41 Ch. Div. 678. It is held that priority of incorporation determines the right to a corporate name; German H. & O. C. H. Ass'n v. Coach Horse Ass'n, 46 Ill. App. 281.

The Continental Insurance Company cannot obtain an injunction against another insurance company against using "Continental" in its corporate name, where there is no attempt to deceive the public; Continental Ins. Co. v. Fire Ass'n, 101 Fed. 255, 41 C. C. A. 326. The rules governing the right to trade-marks and trade-names should not be applied with strictness to actions for infringements upon a right to an exclusive name between societies formed for patriotic and unselfish ends; Colonial Dames of America v. Colonial Dames of New York, 29 Misc. 10, 60 N. Y. Supp. 302; and in New York, on the particular facts of the case, an injunction was refused against the New York Hygeia Ice Company at the suit of Hygeia Water Ice Company; Hygeia Water Ice Co. v. Ice Co., 140 N. Y. 94, 35 N. E. 417.

Equity will interfere with the use of names; 1. Where the effort is to get an unfair and fraudulent share of another's business; 2. Where the effect of defendant's action, irrespective of his intent, is to produce confusion in the public mind and loss to the plaintiff; Suburban Press v. Pub. Co., 227 Pa. 148, 75 Atl. 1037, where "Philadelphia Suburban Life" was enjoined at the suit of the owner of "Suburban Life," to which it bore a striking resemblance in style, size, etc.

The Philadelphia Trust, Safe Deposit & Insurance Company, by usage commonly spoken of as the Philadelphia Trust Company, and doing a large business in Philadelphia, Delaware and other states, obtained an injunction against the Philadelphia Trust Company in the circuit court, district of Delaware, prohibiting the use of that name; Philadelphia T., S. D. & I. Co. v. Trust Co., 123 Fed. 534; and so did "The Benevolent and Protective Order of Elks" against "The Improved Benevolent and Protective Order of Elks," enjoining the use of that name and of similar society cards, etc.; B. & P. O. E. v. Elks, 60 Misc. Rep. 223, 111 N. Y. Supp. 1067. But "American Wine Company" cannot be appropriated as a trade-name; and the imitation is not unfair trade unless used fraudulently to deceive the public; American Wine Co. v. Kohlman, 158 Fed. 830. And it has been held that a municipal corporation has not a right to the exclusive use of its name, at least that an injunction will not be granted to restrain a railroad company from giving the same name to a new station; Gulf & S. I. R. Co. v. Seminary, 81 Miss. 237, 32 South. 953.

The names of hotels and stores are protected; L. R. 13 Ch. D. 512; Howard v. Henriques, 3 Sandf. (N. Y.) 725: as, the "Mechanic's Store," against "Mechanical Store"; Weinstock L. & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57.

In the following the titles of newspapers and periodicals have been protected (the name in italics being held to infringe): Hagerstown Almanac—*Hagerstown Town and Country Almanac;* Robertson v. Berry, 50 Md. 591, 33 Am. Rep. 328; The Real John Bull—*The Old Real John Bull;* Cox, Man. 33; Minnie—*Minnie Dale* and *Minnie Dear*

Minnie; 2 K. & J. 123; 8 De G. M. & G. 1; Payson, Dunton & Scribner's National System of Penmanship—*Independent National System of Penmanship;* Potter v. McPherson, 21 Hun (N. Y.) 559; Our Young Folks—*Our Young Folks' Illustrated Paper;* Osgood v. Allen, Fed. Cas. No. 10,603; Birthday Scripture Textbook—*The Children's Birthday Textbook;* L. R. 14 Eq. 431; Chatterbox—*Chatterbook;* Estes v. Worthington, 31 Fed. 154; Estes v. Leslie, 27 Fed. 22; The United States Investor—*The Investor;* Investor Pub. Co. v. Dobinson, 72 Fed. 603; Social Register—*Howard's Social Register;* Social Register Ass'n v. Howard, 60 Fed. 270; Good Things of Life—*Spice of Life;* Stokes v. Allen, 2 N. Y. Supp. 643; Bell's Life in London and Sporting Chronicle—*Penny Bell's Life and Sporting News;* 1 Giff. 98; The National Police Gazette—*The United States Police Gazette;* Matsell v. Flanagan, 2 Abb. Pr. N. S. (N. Y.) 459; The Times—*Times;* 25 Sol. Jour. 742.

Protection has been refused in the following cases (the name in italics being held not to infringe): Old Sleuth Library—*New York Detective Library;* Munro v. Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245; Id., 129 N. Y. 619, 29 N. E. 10, reversing Munroe v. Tousey, 59 Hun, 622, 13 N. Y. Supp. 79; Electric World—*Electric Age;* W. J. Johnston Co. v. Pub. Co., 60 Hun 578, 14 N. Y. Supp. 803; Good Things of Life—*The Spice of Life;* Stokes v. Allen, 56 Hun 526, 9 N. Y. Supp. 846; The New North West—*The Northwest News;* Duniway Pub. Co. v. Pub. Co., 11 Ore. 322, 8 Pac. 283; Republican New Era—*New Era;* Bell v. Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371; Splendid Misery or East End and West End, by C. H. Hazlewood—*Splendid Misery,* by the author of Lady Audley's Secret, Vixen, etc., published as a serial in periodicals; 18 Ch. D. 76; Mail—*Morning Mail;* 54 L. J. Ch. 1059; Morning Post—*Evening Post;* 37 Ch. D. 449; The Canadian Bookseller—*The Canada Bookseller and Stationer;* 27 Ont. 325; Punch—*Punch and Judy;* 39 L. J. Ch. 57; The American Grocer—*The Grocer;* American Grocer Pub. Ass'n v. Pub. Co., 51 How. Pr. (N. Y.) 402; Monthly Magazine of Fiction—*Cassell's Magazine of Fiction and Popular Literature;* 29 T. L. R. 272.

Where the title of a book shows that it is adopted for unfair competition with another work, though the conflicting titles are not identical, it will be restrained; Harper v. Holman, 84 Fed. 224.

The names of springs have been protected, even against those who are rightfully selling the genuine product under the true name; Congress & Spring Co. v. Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Parkland Hills B. L. W. Co. v. Hawkins & Co., 95 Ky. 502, 26 S. W. 389, 44 Am. St. Rep. 254; City of Carlsbad v. Schultz, 78 Fed. 469.

Geographical names cannot, ordinarily, be monopolized as trade-marks; Weyman v. Soderberg, 108 Fed. 63; Allen B. Wrisley Co. v. Soap Co., 122 Fed. 796, 59 C. C. A. 54; but a valid trade-mark may consist of the name of a place and a maker; Lynn Shoe Co. v. Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960; and they may be used arbitrarily; Sanders v. Utt, 16 Mo. App. 322; Java, in connection with face powder, has been held entitled to protection; Wertheimer v. Importing Co., 185 Fed. 850; and a geographical name will be protected as against one using it so as to constitute a fraud; Elgin Nat. Watch Co. v. Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; the name of a French spring (Vichy) will be protected against any one whose waters were not drawn from that region; French Republic v. Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247; Angostura, for bitters, is held a valid trade-mark; A. Bauer & Co. v. Siegert, 120 Fed. 81, 56 C. C. A. 487.

The name of a person or town may become so associated with a particular product that the mere attaching it to a similar product would have all the effect of a falsehood; this will be enjoined except when accompanied by sufficient explanation to prevent confusion; Herring-Hall-Marvin Safe Co. v. Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616.

The plaintiff had for years manufactured and sold "Yorkshire Relish," made under a secret recipe, and the term had come to mean that particular manufacture. The defendant had made a sauce resembling the "Yorkshire Relish" and sold it as "Yorkshire Sauce." It was held that the plaintiff was entitled to an injunction prohibiting defendant from using "Yorkshire Sauce" in connection with its sauce unless clearly distinguished from the respondent's sauce; [1897] App. Cas. 710, in H. of L.

A manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district; Pike Mfg. Co. v. Stone Co., 35 Fed. 896; Metcalfe v. Brand, 86 Ky. 331, 5 S. W. 773, 9 Am. St. Rep. 282; Gebbie v. Stitt, 82 Hun, 93, 31 N. Y. Supp. 102; so of "Chicago Waists" as against one who makes similar waists in a different state; Gage-Downs Co. v. Corset Co., 83 Fed. 213.

A number of competing millers in Minneapolis can maintain a joint bill on behalf of themselves and others similarly situated, to enjoin a grocer from selling flour made in Wisconsin, and marked with his own name and the word "Best Minnesota Patent, Minneapolis, Minn."; Pillsbury-Washburn Flour Mills Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162.

Where a word which is descriptive, or is the place where an article is manufactured, has acquired a secondary signification in connection with its use, protection from imposition and fraud will be afforded by the courts, although the word may not be suitable

for registration as a trade-mark under the act of Congress; Elgin Nat. Watch Co. v. Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; if the name be used fraudulently to mislead buyers, the owner may assert an exclusive right to such name against every one not doing business within the same geographical limits, and even against them, if the name be used fraudulently to mislead buyers as to the actual origin of of the article; French Republic v. Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247.

Where a geographic or family name (Hunyadi) becomes the name for a natural water coming from a more or less extensive district, all are free to imitate it, if there is no attempt to deceive the public; Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525.

Generic names, or names merely descriptive of an article, are not valid trade-marks; Browne, Trade-Marks § 34. Thus: Clubhouse Gin: Corwin v. Daly, 7 Bos. (N. Y.) 222; Desiccated Codfish; Town v. Stetson, 3 Daly (N. Y.) 53; Liebig's Extract of Meat; Bininger v. Wattles, 28 How. Pr. (N. Y.) 206; New York Cough Remedy; Gilman v. Hunnewell, 122 Mass. 139; Rock and Rye; Van Beil v. Prescott, 82 N. Y. 630.

Names merely descriptive, which have acquired by long use a secondary distinctive meaning and have come to mean the goods of a particular trader, and where the defendant is not selling the genuine goods (as where the composition is a secret), the defendant cannot rely on the defence that the plaintiff has not a valid trade-mark. Thus "Camel-Hair Belting" has acquired a secondary meaning; [1896] App. Cas. 199; but if the primary meaning is simple and well known, it is difficult to establish a secondary meaning; thus, "Naphtha Soap;" [1904] 21 R. P. C. 373.

Nor can the name of the party be a valid trade-mark, as others may, under some circumstances, use the same name; Borden I. C. Co. v. Milk Co., 201 Fed. 510, 121 C. C. A. 200; see *infra*.

No property can be acquired in words, marks, or devices which denote the mere nature, kind, and quality of articles; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. Ed. 993; L. R. 17 Eq. 29. See Colgan v. Danheiser, 35 Fed. 150; Goodyear I. R. G. Mfg. Co. v. Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; and where a device, mark, or symbol is adopted for any purpose other than a reference to, or indication of its ownership, it cannot be sustained as a valid trade-mark; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

Numerals can be used as trade-marks; Shaw Stocking Co. v. Mack, 12 Fed. 717; *contra*, Avery v. Meikle, 81 Ky. 73; but not if they indicate quality or grade; Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; and the same is true of letters when used as trade-marks. See Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. A numeral, when combined with some other symbol, may become a vital part of a valid trade-mark; Goldsmith Silver Co. v. Savage, 211 Fed. 751. The use of the numerals 303 in connection with the maker's name, impressed on pens to distinguish their character from other patterns of the same maker, which has become well known and established, vests a right in the maker, and another manufacturer of pens would not be permitted to place those numerals on pens of like size, etc., if it appear that the public would be deceived; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553.

As to the right to protection of numerals as trade-marks, see Rocky Mountain Bell Tel. Co. v. Telephone Co., 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153.

Marks that simply indicate the quality of articles do not constitute a valid trade-mark; so of words, etc., which indicate the peculiar excellence of goods, for instance "Ne Plus Ultra" for needles; 13 L. T. N. S. 746; "Nourishing" Stout; L. R. 17 Eq. 59. Words which indicate the purpose and character of medicines or articles cannot be exclusive property for a trade-mark, thus: "Cramp" Cure; Harris Drug Co. v. Stucky, 46 Fed. 625; "Microbe Killer;" Alff v. Radam, 77 Tex. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792. Words which are simply descriptive of the quality or appearance of an article or the place where it was manufactured cannot be monopolized as a trade-mark; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. Thus, "Acid Phosphate;" Rumford Chemical Works v. Muth, 35 Fed. 524, 1 L. R. A. 44; "Cherry Pectoral;" Ayer v. Rushton, 7 Daly (N. Y.) 9.

The color of a label or package does not constitute a valid trade-mark. See Coats v. Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; 37 Ch. Div. 112.

A trade-mark for wire rope of a red or other distinctively colored streak applied to or woven into the rope is too wide and too indefinite; A. Leschen & Sons Rope Co. v. Rope Co., 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710. But colored stripes woven into the fabric of the entire length of canvas hose (two blue lines with a red line between them, of about half an inch in width) constitute, in England, a trade-mark proper for registration; [1914] R. P. C. 147 (Ch. Div.).

A form of package cannot be a trade-mark; Fischer v. Blank, 138 N. Y. 245, 33 N. E. 1040.

The following are instances of valid trade-marks; "Celluloid;" Celluloid Mfg. Co. v. Read, 47 Fed. 712; "Kaiser," beer; J. & P.

Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co., 74 Fed. 222, 20 C. C. A. 402; "Royal Baking Powder;" Royal Baking Powder Co. v. Raymond, 70 Fed. 376; "Bromo-Caffeine;" Keasbey v. Chemical Works, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623; "La Favorita," flour; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; "Star," shirts; Hutchinson v. Blumberg, 51 Fed. 829; "Saponifier," soap; Pennsylvania Salt Mfg. Co. v. Myers, 79 Fed. 87; "Vulcan," matches; Taendsticksfabriks Aktiebolagat Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; "Ideal," pens; Waterman v. Shipman, 130 N. Y. 301, 29 N. E. 111; "Elk," cigars; Lichtenstein v. Goldsmith, 37 Fed. 359; "Bromidia;" Battle v. Finlay, 50 Fed. 106; "Swans Down," complexion powder; Tetlow v. Tappan, 85 Fed. 774; "Moxie," nerve food; Moxie Nerve Food Co. v. Beach, 33 Fed. 248; "Charter Oak," for a stove; Filley v. Child, 16 Blatchf. 376, Fed. Cas. No. 4,787; "Nickle In," cigars; Schendel v. Silver, 63 Hun 330, 18 N. Y. Supp. 1; "Valvoline," lubricating oil; Leonard v. Lubricator Co., 38 Fed. 922; "Tin Tag," tobacco; Lorillard v. Pride, 28 Fed. 434; "Sapolio," soap; Enoch Morgan's Sons' Co. v. Schwachhofer, 55 How. Pr. 37; "Syrup of Figs," of a medicinal preparation; Improved Fig Sirup Co. v. Fig Sirup Co., 54 Fed. 175, 4 C. C. A. 264; 7 U. S. App. 588; "Sunshine," stoves; Reading Stove Works v. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979; "Uneeda," biscuits; National Biscuit Co. v. Baker, 95 Fed. 135.

The following have been held invalid; "Instantaneous," tapioca; Bennett v. McKinley, 65 Fed. 505, 13 C. C. A. 25; "Black Package Tea;" Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; "International Banking Company;" Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; "Sarsaparilla and Iron;" Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; "Taffy Tolu," chewing gum; Colgan v. Danheiser, 35 Fed. 150; "Imperial," beer; Beadleston & Woerz v. Brewing Co., 74 Fed. 229, 20 C. C. A. 405; "Acid Phosphate;" Rumford Chemical Works v. Muth, 35 Fed. 524, 1 L. R. A. 44; "Goodyear Rubber Company;" Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; "Snowflake," as applied to bread; Larrabee v. Lewis, 67 Ga. 561, 44 Am. Rep. 735.

A few instances may be given of the use of words which have been held to infringe existing trade-marks: Shrimpton & Hoover is infringed by *Shrimpton Turvey;* 18 Beav. 164; Beats-All, on lead pencils, by *Knoxall;* American Lead Pencil Co. v. Gottleib, 181 Fed. 178; Ceresota, on flour, by *Cressota;* Northwestern Consol. Mill. Co. v. Mauser, 162 Fed. 1004; Rameses, on cigarettes, by *Radames;* Stephano v. Satmatopoulos, 199 Fed. 451; Uneeda on biscuits, by *Abetta* (there being close imitation of cartons); Nat. Bisc. Co. v. Pac. Bisc. Co. (not yet reported); Julicks by *Josephs;* L. J., Notes of Cases (1867), 134; Stephens' by *Steelpen's* for ink; 16 L. T. N. S. 145; Cocoaine by *Cocoine;* Burnett v. Phalon, *42 N. Y. 594; The Hero by *The Heroine;* Rowley v. Houghton, 7 Phila. (Pa.) 39; Bovilene by *Bovina;* Lockwood v. Bostwick, 2 Daly (N. Y.) 521; Hostetter & Smith by *Holsteter & Smyte;* Hostetter v. Vowinkle, 1 Dill. 329, Fed. Cas. No. 6714; Cuticura soap by *Curative* (the package being also imitated); Potter D. & C. Corp. v. Miller, 75 Fed. 656; Old Homestead bread by *New Homestead Bread* (the stamping of the name in the bread being similar); Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704; but No-to-bac is not infringed by *Baco-Curo;* Sterling Remedy Co. v. Mfg. Co., 80 Fed. 105, 25 C. C. A. 314; nor is Cuticura soap infringed by *Cuticle* soap (the packages not being imitated); Potter D. & C. Corp. v. Soap Co., 106 Fed. 914, 46 C. C. A. 40; nor Muresco, as a wall finish, by *Murafresco;* Benjamin & Co. v. Auwell, 178 Fed. 543, 102 C. C. A. 53; nor Don Carlos, in connection with olives, by *Don Caesar;* Chance v. Gulden, 165 Fed. 624, 92 C. C. A. 58; nor Grape Nuts, a cereal, by *Grain Hearts;* Postum Cereal Co. v. Food Co., 119 Fed. 848, 56 C. C. A. 360; nor Union Leader by *Union World;* American Tobacco Co. v. Tobacco Co., 193 Fed. 1015; nor Valvoline, for oils in general, by *Halvoline,* for gas engine oils; Valvoline Oil Co. v. Oil Co., 211 Fed. 189.

In technical trade-mark cases, if the plaintiff proves that the defendant has used his trade-mark or a colorable imitation of it, he has established his right to relief.

Numerous cases have arisen where a party, by imitating the labels and packages used in connection with an article already on the market, has attempted to "pass off" his spurious goods on the public as the real article. In this country this is usually called *unfair competition;* in England, *passing off,* and in France, *concurrence déloyale.* The doctrine has been thus stated: The grounds on which unfair competition in trade will be enjoined are either that the means used are dishonest, or that, by false representation or imitation of a name or device, there is a tendency to create confusion in the trade, and work a fraud upon the public, by inducing it to accept a spurious article; Vitascope Co. v. U. S. Phonograph Co., 83 Fed. 30.

Under this doctrine will come most of the cases referred to above where geographical names were used. In this class of cases it is held that it is not necessary to show actual deception. That the defendant's method of doing business tends to deceive the public, or that there is a probability of deception, is sufficient; Drummond Tobacco Co. v. Tobacco Co., 52 Mo. App. 10; Von Mumm v. Frash, 56 Fed. 830; Tarrant & Co. v. Hoff, 76 Fed. 959, 22 C. C. A. 644; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828. A valid trade-mark

is not essential to a right of action for unfair competition; Samson Cordage Works v. Cordage Mills, 211 Fed. 603; Elgin Nat. Watch Co. v. Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

A fraudulent intent is presumed whenever a false statement is used in order to approximate the mark of the competitor; Scheuer v. Muller, 74 Fed. 225, 20 C. C. A. 161; and also when a word identical with or resembling an important word is placed in the same position on a label or wrapper of the same shape; Anheuser-Busch Brewing Ass'n v. Clarke, 26 Fed. 410; or catch words are printed in conspicuous type; L. R. 5 H. L. 508.

If the intent to deceive is established, it will be inferred that the mark is calculated to deceive; Drummond Tobacco Co. v. Tobacco Co., 52 Mo. App. 10; L. R. 18 Eq. 138.

In trade-mark cases, strictly, the wrongful intent is presumed from the fact of infringement, while, in cases of unfair competition, it must be proved; Samson Cordage Works v. Cordage Mills, 211 Fed. 603; in the latter class of cases, such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of; Elgin Nat. Watch Co. v. Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. That proof of a fraudulent intent is necessary, see Lynn Shoe Co. v. Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960; that it is immaterial, see 3 App. Cas. 376; Colman v. Crump, 70 N. Y. 573. See the cases in note, 4 L. R. A. (N. S.) 961. It is immaterial that there was no intent to imitate plaintiff's labels; Wirtz v. Bottling Co., 50 N. J. Eq. 164, 24 Atl. 658.

Imitation which would be likely to deceive is infringement; Samson Cordage Works v. Cordage Mills, 211 Fed. 603; a manufacturer is guilty of unfair competition if he dresses his goods so as to represent those of another and assists the retailer in passing them off as such; Winterton Gum Co. v. Chocolate Co., 211 Fed. 612. The real question is held to be whether the one name so nearly resembles the name of another as to be calculated to deceive. It is perfectly immaterial whether they were fraudulent or not, or whether they intended it or not; Halsbury, C., in [1899] App. Cas. 83.

Relief is granted on the ground that plaintiff's business is injured; if the parties were in a different line of business, there is no competition; Borden Ice Cream Co. v. Milk Co., 201 Fed. 510, 121 C. C. A. 200.

The imitation by one manufacturer of the goods of another in name, appearance and marking and color of packages, even if such similarity singly would not be unlawful if accompanied by good faith, may constitute unfair competition, which will be enjoined, where there is an actual purpose to deceive and defraud purchasers; Coca Cola Co. v. Gay Ola Co., 200 Fed. 720, 119 C. C. A. 164.

Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark or symbol, as it may arise from the use of words, etc., which everybody may use; the test being whether what has been done tends to pass off the goods of one for those of another, or to deprive such other of his rights; Bates Mfg. C. v. Mach. Co., 172 Fed. 892.

The basis of an action for unfair competition is fraud or deceit, inducing the public to believe that defendant's goods are those of complainants and where the likeness is in the goods themselves, because of copying the design of complainant's article, which is unpatented, and there is no attempt to deceive purchasers with respect to the manufacturer, there is no ground on which a court can grant an injunction; Keystone Type Foundry v. Pub. Co., 186 Fed. 690, 108 C. C. A. 508; Rathbone Sard & Co. v. Range Co., 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258.

Unfair competition is distinguishable from infringement of a trade-mark in that it does not necessarily involve the question of the exclusive right of another to the use of the name, symbol or device copied or imitated. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of it which will constitute unfair competition; G. W. Cole Co. v. Oil Co., 130 Fed. 703, 65 C. C. A. 105.

When the question is simply one of unfair competition, it is not essential that there should be any exclusive or proprietary right in the words or labels used, as, irrespective of any trade-marks, rival manufacturers have no right by imitative devices to beguile the public into buying their wares under the impression that they are buying those of their rivals; Pillsbury-Washburn Flour Mills v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162.

The name of a person or a town may have become so associated with a particular product that the mere attaching of that name to a similar product, without more, would have all the effect of a falsehood; Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138. An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been reconciled by allowing its use if an explanation is attached. Of course, the explanation must accompany the use, so as to give the antidote with the bane; Herring-Hall-Marvin Safe Co. v. Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, Holmes, J., delivering the opinion.

A manufacturer of goods may obtain a monopoly in the right to use a distinctive dress for boxes and cartons which have come to

be known as designating his product; Winterton Gum Co. v. Chocolate Co., 211 Fed. 612; and color may be one of the elements; *id.* Even if the trade-mark be not registered, if it be well known, it is an imposition on the public to use an imitation of it; Ubeda v. Zialcita, 226 U. S. 452, 33 Sup. Ct. 165, 57 L. Ed. 296.

Where a firm has for many years used the name of its predecessors in connection with its goods, and has built up an extensive trade thereunder, such name, even if it could not be used as a trade-mark, is to be treated as a descriptive term, to the benefit of which they are entitled; Garrett v. Garrett & Co., 78 Fed. 472, 24 C. C. A. 173.

The Wamsutta Mills obtained an injunction against the defendant, who advertised "Men's Laundered Shirts, Wamsutta Cotton." They were made of cloth inferior to that from plaintiff's mills; Wamsutta Mills v. Fox, 49 Fed. 141.

In Enoch Morgan's Sons Co. v. Wendover, 43 Fed. 420, 10 L. R. A. 283, where customers came to defendant's store and asked for Sapolio, and the salesmen would wrap up and sell another soap, defendant was enjoined. So also, where defendant sold threads with labels like plaintiff's; Coates v. Holbrook & Co., 2 Sand. Ch. (N. Y.) 586; and where defendants sold whiskey in bottles of the same general shape as plaintiff's bottle; Cook & B. Co. v. Ross, 73 Fed. 203. See, also, Coats v. Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Charles E. Hires Co. v. Consumers' Co., 100 Fed. 809, 41 C. C. A. 71.

"National," as applied to a mail order cloak business, had become well known and had acquired a distinctive meaning, and defendant was enjoined from its use in advertisements which were likely to deceive the public; National Cloak & Suit Co. v. Londy & Friend, 211 Fed. 760.

"Hooton's Cocoa and Chocolate" Company was enjoined as infringing upon "Van Houten's Cocoa," although there was no imitation of packages, or any evidence that "Hooton's" was adopted for any dishonest purpose, but it did appear that it had a tendency to deceive and that dealers had been deceived; Van Houten v. Chocolate Co., 130 Fed. 600.

The doctrine of unfair competition in trade rests on the proposition that equity will not permit any one to palm off his goods on the public as those of another. Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape or quality, and as such open to the public, yet there may be unfair competition in trade by an improper use of such word, mark or symbol; Dennison Mfg. Co. v. Mfg. Co., 94 Fed. 651.

A manufacturer is guilty of unlawful competition if he dresses his goods to represent those of another and assists the retailer in palming them off as such; Winterton Gum Co. v. Chocolate Co., 211 Fed. 612.

The placing of spurious goods upon the market is *prima facie* evidence of damage to the plaintiff; 5 D. G. & S. 126; 6 Hare 325.

It is not necessary to prove that any customer or plaintiff had been deceived; it is sufficient to show that defendant knowingly put it in the power of retail dealers to deceive their customers; Williamson C. & B. Co. v. Corset Co., 70 Mo. App. 424. The fact that the defendants, who formerly used a label not imitative of complainant's, adopted a new one much resembling his, shortly after a former infringer of complainant's trademark came into their employ, is most suggestive of an intentional imitation; Scheuer v. Muller, 74 Fed. 225, 20 C. C. A. 161. The similarity must be such as to mislead the ordinary purchaser; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; the ordinary or usual buyer; Samson Cordage Works v. Mills, 211 Fed. 603. The test of infringement is whether the alleged infringing article is so dressed up as to be likely to deceive persons of ordinary intelligence, exercising the slight care ordinarily used, into purchasing one man's goods for the goods of another; Sterling Remedy Co. v. Mfg. Co., 80 Fed. 105, 25 C. C. A. 314.

Cases of passing off frequently involve the use of a person's own name on his goods.

It is generally said that every man has an inherent, natural right to the free employment of his own name in his business; Garrett v. T. H. Garrett & Co., 78 Fed. 472, 24 C. C. A. 173; Tarrant & Co. v. Hoff, 76 Fed. 959, 22 C. C. A. 644; Walter Baker & Co. v. Baker, 77 Fed. 181; 13 Beav. 209; Painter v. People, 147 Ill. 462, 35 N. E. 64; De Long v. Hook & Eye Co., 7 App. Div. 33, 39 N. Y. Supp. 903; Cigar Mfg. Co. v. Gato, 25 Fla. 886, 7 South. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537. But the doctrine has its limitations. Where one uses his own name to identify the origin of his goods which are made at a particular place, no other person by the same name will be permitted to use his name on his own goods if he does it in such a way as to injure the trade and business of another, or so as to represent his goods as the goods of another; Cigar Mfg. Co. v. Gato, 25 Fla. 886, 7 South. 23, 6 L. R. A. 823, 23 Am. St. Rep. 537; Gilman v. Hunnewell, 122 Mass. 139. And one who uses his name in competition with an established business carried on by another of the same name, must avoid putting up his goods in such a way as to resemble the goods of the other; Walter Baker & Co. v. Sanders, 80 Fed. 889, 26 C. C. A. 220. And one is not entitled to use

his name as part of the name of a corporation in order to compete with another of the same name; Rogers Co. v. Mfg. Co., 70 Fed. 1017, 17 C. C. A. 576; Garrett v. T. H. Garrett & Co., 78 Fed. 473, 24 C. C. A. 173.

One who uses his name will be protected against the use of that name, even by a person bearing it, in such form as to constitute a false representation of the origin of the goods; Landreth v. Landreth, 22 Fed. 41. One cannot use his own name to deceive the public; Pillsbury v. Flour Mills Co., 64 Fed. 841, 12 C. C. A. 432; 1 Ch. App. 192. One may trade honestly in his own name, but he must be careful not to trade under his own name in such a manner as to take away that which lawfully belongs to another; he must be careful not to deceive; 4 R. P. C. 215. This right applies only to the party's own line of business; Nims, Unfair Comp. 23; thus *Simplex* on automobiles is not infringed by *Simplex* on fire extinguishers; Simplex Automobile Co. v. Kahnweiler, 162 App. Div. 480, 147 N. Y. Supp. 617.

A trader cannot be prevented from trading in his own name, if he uses it in good faith, even though it be similar to that of another trader who is well established; [1907] App. Cas. 430. A name may acquire a secondary meaning, but this does not give the party an exclusive right to it, but others would be enjoined from using it so as to pass off their goods as those of the person whose name is in question; [1906] 23 R. P. C. 348.

A personal name (an ordinary family surname such as Remington) cannot be exclusively appropriated against any one having a right to use it, and its registration as such cannot in itself give it validity. Every one has the right to use his name fairly and honestly, whether in a firm or corporation. It is not the use, but dishonesty in the use, that is condemned. One corporation cannot exclude another from using in its corporate title a name to which others have a common right. The essence of the wrong in unfair competition consists in the sale of the goods of one as that of another, and if defendant is not trying to palm off its goods as those of another, the action fails; Howe Scale Co. v. Wyckoff, S. & B., 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.

Where Arthur A. Waterman left the employ of the complainant, L. E. Waterman Company, which had built up a business in fountain pens under the name "Waterman's Ideal," and entered into a partnership under the name of A. A. Waterman & Company to compete with the complainant, which partnership afterwards transferred its business and good will and right to use such name to defendant, and it was clearly shown that confusion was created thereby, the defendant was enjoined from using the name Waterman at all unless it substituted for its firm name on its pens the name "Arthur A. Waterman & Company" and followed it with the words "Not connected with L. E. Waterman & Company"; Waterman Co. v. Pen Co., 197 Fed. 534, 117 C. C. A. 30.

In Chickering & Sons v. Chickering, 198 Fed. 958, where Chickering & Sons (piano makers) had obtained an injunction, it was held that the use of the words "Chickering Bros., Chicago," on the fall-board of the defendant's piano, without other means of advising the purchaser that the piano was not of the original Chickering & Sons, exhibited adjacent thereto and as prominently as the name "Chickering Bros., Chicago," was unlawful and that the use in that connection of the words "The only Chickering making pianos" was not sufficient.

Where two grandsons of the original piano maker, "William Knabe," transferred their interests in the corporation manufacturing it and started a new piano company, it was held that they were entitled to make a piano having all the qualities of the first manufacturer and so to advertise, but must exercise care to prevent the public from believing that their article was that of the first manufacturer, or that they were his successors; Stix, B. & F. D. G. Co. v. Piano Co., 211 Fed. 271. When one as a stockholder and officer of a corporation joined in a sale by it of his own name, he cannot use any mark, etc., indicating that he is the successor to the original corporation, or that his goods are its product or that of his successor, nor can he interfere with the good will so sold; Donnell v. Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481. A retiring partner is not, in the absence of an agreement, precluded from using his surname in business because it was part of the partnership trade-mark; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862.

In the absence of fraud or facts raising an estoppel, the fact that a person assists in the formation of a corporation, in the name of which his own name is used, does not preclude the use of his own name as a part of the name of another corporation in which he subsequently becomes interested; Bates Mfg. Co. v. Mach. Co., 141 Fed. 213.

There being no evidence of dishonesty, defendant could not be enjoined from placing his own name (Brinsmead) on his pianos, though it might bring him some advantage in consequence of that being the name of the piano of the plaintiff firm; 29 T. L. R. 237.

One cannot recharge and sell empty Prest-O-Lite gas tanks except after complete and permanent obliteration of the trade-mark; mere covering by a label is not enough; Prest-O-Lite Co. v. Davis, 215 Fed. 349; and where the defendant sold liquor in bulk to plaintiff's detective, and at the same time delivered to him bottles bearing plaintiff's labels to be refilled with the liquor, it was held unfair trade; Hennessy v. Wine Growers' Ass'n, 212 Fed. 308.

Where the long and successful use of a trade-mark or name is clearly established, the fact that the owner has recognized and permitted the limited use thereof by another which does not appear to have misled anybody, is not sufficient to defeat the owner's right to prevent others from using it; Tetlow v. Tappan, 85 Fed. 774.

A party may affect his right to a trade-mark by non-use, by a forbearance in suing protectively, and by adopting a new one. But the question of abandonment is always a question of intention; Brown, Trade-Marks 536; equity, however, will not in general refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits; 31 L. T. 285; 45 L. Jour. 505. Where the excuse for the intentional use of another's trade-mark is that the owner permitted such use, that excuse is disposed of by an action to stop it and no estoppel arises; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

A delay of two years in seeking to recover profits for the infringement of a trade-mark, partly taken up in negotiations for a settlement, will not bar a suit, at least where the defendants had express notice that they would be held accountable; Nelson v. Winchell & Co., 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150. But one otherwise entitled to the exclusive use of a name, may lose his right by laches and by acquiescence for nearly thirty years in its use and allowing the name to become generic; French Republic v. Spring Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247. A delay for several years in bringing suit, during which the defendant was openly selling its product and expending large sums in advertising it, bars a relief in equity and an accounting.

Acquiescence in the use by another of a certain trade name for a number of years in a wholesale shoe business does not preclude objection to its use in a retail shoe business; Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 Pac. 480, 53 L. R. A. 384, 82 Am. St. Rep. 346, where the contention that the name used was a family name was ineffectual, because used in such manner upon a sign as to deceive the public.

Acts tending to show an abandonment of a trade-mark are insufficient unless they show an actual intent to abandon; Saxlehner v. E. & M. Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

An injunction against the use of marks which cannot be protected as trade-marks, will not be granted, where the defendant has persistently warned the public that it has no connection with the plaintiff; Goodyear I. R. G. Co. v. Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535.

A foreigner selling medicinal preparations in his own country, under a registered trade-mark, has no common-law right to such trade-mark here, as against a domestic firm which had an established business under a similar trade-mark, adopted in good faith, before the other had sold any goods in this country; Richter v. Remedy Co., 52 Fed. 455.

A trade-mark has no extra-territorial effect; see 122 Fed. 105. Certain Carthusian monks in France had made and sold a liqueur under the name of Chartreuse, which name was registered in the United States, where it had a market. The French government having expelled them from France and confiscated their business and, as it appears, their trade-mark, they re-established the business in Spain; it was held that the action of the French government did not affect the title of the monks to the United States trade-mark; Baglin v. Cusenier Co., 156 Fed. 1016; on appeal it was held that the defendants had the right to state on their labels the place where the liqueur was made, but must clearly distinguish their product from that made by the monks, and must not, by their labels, mislead purchasers; Baglin v. Cusenier Co., 164 Fed. 25, 90 C. C. A. 499.

Where the owner of a patented article marked it as patented, and also called it by a designated name, by which it became known, upon the expiration of the patent, other manufacturers having the right to make the article have also the right to use the name, provided they take care not to have their product confused with that of the original maker; Yale & Towne Mfg. Co. v. Ford, 203 Fed. 707, 122 C. C. A. 12, following Singer Mfg. Co. v. Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118 (the Singer Sewing Machine Case). When the right to manufacture an article becomes public, the right to use the only word descriptive of the article manufactured becomes public also; Holzapfel's Compositions Co. v. Am. Composition Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49.

After the patent expired on "Jenkins' Valves," another could sell Jenkins' valves, but he must disclose the source of manufacture so as to prevent the public from believing that his valves were those of the successor of the patentee; Jenkins Bros. v. Kelly, 212 Fed. 328. Upon the expiration of the patent on "Castoria," the word became the property of the public; Centaur Co. v. Heinsfurter, 84 Fed. 955, 28 C. C. A. 581; so of "Linoleum"; 7 Ch. Div. 834; and of "Granite"; St. Louis Stamping Co. v. Piper, 12 Misc. 270, 33 N. Y. Supp. 443.

When the copyright of Webster's Dictionary expired, the exclusive right to the name also expired, and another publisher might use "Webster" if he printed his name on the back or cover and title page to distinguish his publication; Western Electric Co. v. Tel. Co., 148 Fed. 858; to the same effect after expiration of a patent or copyright; G. & C.

Merriam Co. v. Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, and note, 14 Ann. Cas. 796.

A word which might become a valid trade-mark when applied to an unpatented article may not be so when applied to a patented article; the patent indicates the ownership and origin; Dover Stamping Co. v. Fellows, 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448.

The members of a voluntary union of cigar-makers are entitled to protection in the exclusive use of a label to designate the exclusive product of their labor, though they are only employed for wages; Hetterman v. Powers, 102 Ky. 133, 43 S. W. 180, 39 L. R. A. 211, 80 Am. St. Rep. 348; *contra*, McVey v. Brendel, 144 Pa. 235, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 625.

The courts will not grant relief where there is a false representation, calculated to deceive the public, as to the manufacture of an article, and the place where it is manufactured; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53. See *supra*. Where a complainant uses a geographical name to represent untruthfully the place of his manufacture he cannot obtain relief; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Pepper v. Labrot, 8 Fed. 29; [1891] 2 Ch. 166.

The doctrine that he who comes into equity must come in with clean hands does not apply to the owner of a trade-mark seeking protection where, in his trade-mark or label, no misrepresentations are made, but they are extrinsic or collateral thereto; Johnson & Johnson v. Seabury, 71 N. J. Eq. 750, 67 Atl. 36, 12 L. R. A. (N. S.) 1201, 124 Am. St. Rep. 1007, 14 Ann. Cas. 840. The mere fact that a jobber of shoes, who has them manufactured for him by another, describes himself on his letter head as a manufacturer of shoes, will not destroy his right to equitable relief against one who infringes his trade-mark; Nelson v. Winchell & Co., 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1151.

Where the owner of a trade-mark, in his trade-marks or advertisements and business, is guilty of any false or misleading representation, he loses his right to the assistance of a court of equity; Worden v. Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282.

Where a symbol or label claimed as a trade-mark contains a distinct assertion which is false, no right to its exclusive use can be maintained; Holzapfel's Compositions Co. v. Comp. Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49 (here the use of the word "patent" when there has been none); so in Raymond v. Baking Powder Co., 85 Fed. 231, 29 C. C. A. 245, of a statement that the article was made in London, by "Purveyors to the Queen," when it was made in New York. In State v. Hagen, 6 Ind. App. 167, 33 N. E. 223, offensive words on a cigar box label, referring to rat-shop, filthy tenement house cigars of other makers, were held not to disentitle the label to protection.

"Imposition on the public is not a ground on which a plaintiff can come into court, but it is a very good ground for keeping him out of it;" Ubeda v. Zialcita, 226 U. S. 452, 33 Sup. Ct. 165, 57 L. Ed. 296.

It is not necessary that the owner of a trade-mark himself should manufacture the goods which the trade-mark designates; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; Smith v. Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; he may import them; Godillot v. Harris, 81 N. Y. 263; or have them made for him; Nelson v. Winchell & Co., 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1151.

Manufacture and sale of cards like plaintiff's, which latter are not copyrighted, is not unlawful competition; Bamforth v. Machine Co., 158 Fed. 355.

Where the plaintiff transferred baggage from landing places to hotels and placed upon the hat of each of his solicitors in conspicuous letters the word "Morton," and the defendant started a rival business and used a badge attached to his hat bearing the single word "Morton's," of the same size and appearance, there was an injunction issued; Morton v. Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. (N. S.) 660, with note.

The adoption by a telephone company for its trouble department of the number long in use by a rival company is not unlawful; Rocky Mountain Bell Tel. Co. v. Tel. Co., 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153.

To constitute infringement of a trade-name, it is necessary that the two places of business be in competition with each other, and if one is engaged exclusively in retailing shoes and the other in manufacturing and wholesale jobbing of shoes, there is no such competition as will warrant a restraining order, although the names of the firms have secondary import and the retail firm had legally acquired its trade-name before the wholesale company was organized; Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. (N. S.) 447.

A trade-mark is not subject to execution unless under authority of statute; Prince Mfg. Co. v. Paint Co., 20 N. Y. Supp. 462. It cannot be seized and sold upon execution apart from the business or article with which it has been used; 28 Am. & Engl. Encycl. L. 405.

The fact that a manufacturer has a remedy under a patent does not preclude him from bringing a suit against another manufacturer for unfair competition; Fonotipia Limited v. Bradley, 171 Fed. 951.

In a suit for infringement of a technical trade-mark, the owner is entitled, not only to an injunction, but to the recovery of profits issuing from the infringement, as incident to

and a part of his property right; while in suits for unfair competition complainant is entitled to only such damages as will compensate him for the injury actually suffered; P. E. Sharpless Co. v. Lawrence, 213 F. 423. Where a decree awarding an injunction and damages was affirmed in a suit for unlawful competition, in which a recovery for infringement of a trade-mark was denied, an order for an accounting of profits made by defendant was improper; the word "damages" being limited to the indemnity recoverable for the injury sustained by complainants; *id.*

The federal trade-mark act of February 20, 1905, as amended in 1906, 1907, and 1908, provides for trade-marks used in commerce with foreign nations or among the several states or with the Indian tribes, provided the owner shall be domiciled within the United States or reside in any foreign country which by any treaty, convention or law affords similar privileges to United States citizens.

Applicants for registration or renewal of registration, who are not domiciled within the United States, shall designate by writing filed in the patent office some person residing within the United States on whom process or notice of proceedings affecting the right of ownership may be served. Where the person has previously filed in any foreign country, which affords similar privileges to citizens of the United States, an application for registration of a trade-mark, his trade-mark shall be given the same force and effect as if filed in this country, if filed within four months from the date of the application in such foreign country.

Section 5, as amended January 8, 1913, provides that "no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark unless such mark—(a) Consists of or comprises immoral or scandalous matter. (b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any state or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag or banner adopted by any institution, organization, club or society which was incorporated in any state in the United States prior to the date of the adoption and use by the applicant: Provided, that trade-marks which are identical with a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: Provided, that no mark which consists merely in the name of an individual firm, corporation or association not written, printed, impressed or woven in some particular or distinctive manner, or in association with the portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act: Provided further, that no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: And provided further, that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several states or with Indian tribes which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February 20, 1905: Provided further, that nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof."

Applicants for registration or renewal, when refused, or parties to an application against whom a decision has been rendered or a party has filed notice of an opposition, may appeal from the examiner in charge of trade-marks or interferences to the commissioner of patents. There is an appeal from the commissioner of patents to the court of Appeals of the District of Columbia.

A registered trade-mark and a mark for the registration of which an application has been made, together with the registration, shall be assignable "in connection with the good will of the business in which the mark is used" by an instrument in writing, duly acknowledged, which assignment shall be void as against any subsequent purchaser for value without notice unless recorded in the patent office within three months from its date.

A certificate of registration remains in force for 20 years, except that trade-marks previously registered abroad shall cease to be in force on the day on which they cease to be protected abroad. They may be renewed from time to time upon payment of fees.

The registration is made prima facie evidence of ownership. Infringers are made liable to an action for damages and upon a verdict for the plaintiff the court may enter judgment for any amount in excess of the amount of the verdict not exceeding three times the amount of such verdict, together with the costs.

Under the judiciary act of March 3, 1911, the district court has original jurisdiction of

all suits at law or in equity arising under the trade-mark laws. Courts may grant injunctions in equity and the plaintiff shall be entitled to recover, in addition to the profits, the damages which he has sustained, which the court may increase as above stated. No action shall be maintained where the trade-mark is used in unlawful business or on any article injurious in itself or on a mark which has been used with the design of deceiving the public or has been abandoned or upon any registration fraudulently obtained. The act does not prevent any remedy at law or in equity which any party aggrieved might have had before the act.

Registrants shall give notice of their trade-marks by affixing the words "Registered in U. S. Patent Office," or abbreviated thus, "Reg. Pat. Off.," or, if this cannot be done, then by affixing a label containing a like notice on the package. In the absence of such notice, no damages can be recovered except on proof of notice of infringement and continued infringement after such notice.

In a suit in the circuit court under the trade-mark act, where diverse citizenship does not exist, the jurisdiction extends only to the use of the registered trade-mark in commerce between the states, with foreign nations and the Indian tribes. A final decision of the circuit court of appeals can only be reviewed by the supreme court upon certiorari; Hutchinson, Pierce & Co. v. Loewy, 217 U. S. 457, 30 Sup. Ct. 613, 54 L. Ed. 838.

The International Convention for the Protection of Industrial Property was held at Paris in 1883. The signatories agreed that the citizens of each should in the other states enjoy as registered trade-marks the advantages of their respective laws.

As to accounting in trade-mark cases, see 20 Harv. L. Rev. 620; as to the difference between trade-mark and unfair trade cases, see 10 *id.* 275; 12 *id.* 243; See Nims, Unfair Business Competition; Paul, Trade-Marks; Hopkins, Trade-Marks.

TRADE-NAME. See TRADE-MARK.

TRADE, RESTRAINT OF. See RESTRAINT OF TRADE.

TRADE SECRETS. The owner of a trade secret is protected against invasion of his rights therein by fraud or breach of trust or contract; Tabor v. Hoffman, 118 N. Y. 36, 23 N. E. 12, 16 Am. St. Rep. 740. So long as one keeps his secret process from disclosure, equity will enjoin any one who discovers it through fraud from disclosing or using it; Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 402, 31 Sup. Ct. 376, 55 L. Ed. 502; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; and a purchaser from the owner acquires the same right; Vickery v. Welch, 19 Pick. (Mass.) 523 (but not the right of action against a subsequent innocent purchaser from the owner; Stewart v. Hook, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255). He may protect himself by contract against its disclosure by one to whom it is communicated in confidence or restrict its use by such person; Park & Sons Co. v. Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135. Equity will enforce such a contract; National G. & M. Co. v. Braendly, 27 App. Div. 219, 51 N. Y. Supp. 93. One who has sold a secret process, for a valuable consideration, will be enjoined from revealing it to a third person and the use of the secret will be enjoined; Simmons Medicine Co. v. Simmons, 81 Fed. 163.

A bill will lie against one divulging the secret, without joining the competitor to whom he divulged it; Sanitas N. F. Co. v. Cemer, 134 Mich. 370, 96 N. W. 454.

One must not use or disclose to others trade secrets of his employer of which he gained knowledge in his employ; 14 Ch. Div. 748; Sanitas N. F. Co. v. Cemer, 134 Mich. 370, 96 N. W. 454; Fralich v. Despar, 165 Pa. 24, 30 Atl. 521; see a note in 12 L. R. A. (N. S.) 103. An ex-servant, confidentially employed in manufacturing under a secret process, must not use or disclose any knowledge or information as to it acquired during his employment, whether retained in his memory or existing in tangible form; an injunction may issue, although the actual details of the process are not disclosed at the trial; [1913] 2 Ch. 239, distinguishing [1910] 1 Ch. 336, and earlier cases.

If one honestly learns a trade secret, not violating any contract or confidence, no injunction will lie; Stewart v. Hook, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Watkins v. Landon, 52 Minn. 389, 54 N. W. 193, 19 L. R. A. 236, 38 Am. St. Rep. 560; in such case, one may sell medicines specified as made according to a secret; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442.

One who had contracted to work for five years for another and not to divulge a trade secret entrusted to him was enjoined from divulging it to a third person, as was also the third person from employing him and from using information received from him; Taylor I. & S. Co. v. Nichols, 70 N. J. Eq. 541, 61 Atl. 946; so also in Fralich v. Despar, 165 Pa. 24, 30 Atl. 521. But where a servant denies any intention to divulge the secret, no injunction will issue; S. S. White Dental Mfg. Co. v. Mitchell, 188 Fed. 1017.

An injunction lies against the superintendent of a factory, who has learned its secrets and then broken his contract of employment and become employed in another factory which at once began to manufacture the same product; Harrison v. Sugar Refin-

ing Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; but where a steel manufacturer, using a secret process entered into a contract with an employé binding him not to divulge, during the term of the agreement or afterwards, information relating thereto, whether then had or to be acquired by him, the contract was held to be in restraint of trade and void; Taylor Iron Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753. One employed by an optician will, after leaving his employ, be enjoined from using a list of the names of his former employer's customers whom he had personally examined; Stevens & Co. v. Stiles, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140, following 64 L. J. Q. B. (N. S.) 593; Loven v. People, 158 Ill. 159, 42 N. E. 82; so also Simmons Hardware Co. v. Waibel, 1 S. D. 492, 47 N. W. 814, 11 L. R. A. 267, 36 Am. St. Rep. 755. A servant who has copied his employer's list of customers, to use it in soliciting their custom after leaving his employ, was enjoined, and the list was ordered to be destroyed; 2 Q. B. 315. One who has obtained from an employer of another patterns of pumps was enjoined from using or disposing of them; Tabor v. Hoffman, 41 Hun (N. Y.) 5.

Where a corporation director, who knew a secret process of his company, became president of another company and, with the aid of discharged employees of his former company, installed the secret process for such other company, the director, the company and the discharged employees were all enjoined; Vulcan D. Co. v. Can Co., 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102, with a full note.

A secret process may be the subject of confidential communication and of sale or license to use with restriction as to territory and prices; Dr. Miles Medical Co. v. J. D. Parks & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, citing Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67. An agreement in a sale of a secret process for manufacturing a drug, which restricts the vendor from using or divulging it to others, or selling the article, is a reasonable restriction, it being necessary for the vendee's protection, and the article not being of prime necessity for the public; Mallinckrodt C. Works v. Nemnich, 169 Mo. 388, 69 S. W. 355. So of a covenant of the vendor not to divulge it to any one else for five years; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; and of a covenant not to use it or disclose it to others or to sell the article made under it; L. R. 9 Eq. 345; Vickery v. Welch, 19 Pick. (Mass.) 526.

Assumpsit will lie against one who contracted not to take advantage of the communication of a trade secret, and then obtained a patent on it; 3 Bos. & P. 630.

That cases involving a disclosure of trade secrets at the trial may be privately heard, see IN CAMERA. In Taylor Iron Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N. S.) 933, 133 Am. St. Rep. 753, a case was heard *in camera* and the evidence was then sealed. A disclosure of a secret necessarily made to the court at a trial does not preclude an injunction; Stone v. Goss, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 104 Am. St. Rep. 794. See [1913] 2 Ch. 239.

The manufacturer of proprietary medicines under secret process cannot contract with dealers in such medicines, wholesale and retail, to control prices and fix the prices which consumers shall pay; Dr. Miles Medical Co. v. J. D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. See RESTRAINT OF TRADE.

A witness may refuse to give testimony or produce documents which would disclose trade secrets and where the evidence is irrelevant or otherwise inadmissible; Crocker-Wheeler Co. v. Bullock, 134 Fed. 241.

A person conducting a private enquiry business does not impliedly warrant to his client that his servants will not disclose their secrets after leaving his employ; and *quære* as to disclosures made while in his employ; Easton v. Hitchcock [1912] 1 K. B. 535.

See Vulcan Detinning Co. v. American Can Co., 73 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102; Stevens & Co. v. Stiles, 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, 17 Ann. Cas. 140.

TRADER. One who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit. See State v. Chadbourn, 80 N. C. 481, 30 Am. Rep. 94; Sylvester v. Edgecomb, 76 Me. 500. The *quantum* of dealing is immaterial, when an intention to deal generally exists; 2 C. & P. 135; 1 Term 572. The principal question is whether the person has the intention of getting a living by his trading; if this is proved, the extent or duration of the trading is not material; 3 Camp. 233.

Questions as to who is a trader most frequently arise under the bankrupt laws; and the most difficult among them are those cases where the party follows a business which is not that of buying and selling principally, but in which he is occasionally engaged in purchases and sales.

A farmer who, in addition to his usual business, occasionally buys a horse not calculated for his usual occupation, and sells him again to make a profit, and who in the course of two years had so bought and sold five or six horses, two of which had been sold, after he had bought them, for the sake of a guinea profit, was held to be a trader; 1 Term 537, n.; 1 Price 20. Another farmer, who bought a large quantity of potatoes, not to be used on his farm, but merely to sell again for a profit, was also declared to be a trader; 1 Stra. 513. A butcher who

kills only such cattle as he has reared himself is not a trader, but if he buy them and kill and sell them with a view to profit, he is a trader; 4 Burr. 21. A brickmaker who follows the business for the purpose of enjoying the profits of his real estate merely is not a trader; but when he buys the earth by the load or otherwise, and manufactures it into bricks, and sells them with a view to profit, he is a trader; 3 C. & P. 500; so is a brewer; Hastings Malting Co. v. Heller, 47 Minn. 71, 49 N. W. 400; and one who is engaged in the manufacture and sale of lumber is a trader; 1 B. R. 281; so is one engaged in buying and selling goods for the purpose of gain, though but occasionally; 2 *id.* 15; but the keeper of a livery stable is not; 3 N. Y. Leg. Obs. 282; nor is one who buys and sells shares; 2 Ch. App. 466.

A corporation engaged principally in operating hotels is not engaged principally in trading and mercantile pursuits under the bankruptcy act; it was so held where such a corporation conducted a small store as an incident to its hotel business; an occupation that is not trading is not a mercantile pursuit; Toxaway Hotel Co. v. Smathers & Co., 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558, where the brief of counsel cites the cases in many states. The opinion of the court quotes In re Cote, Fed. Cas. No. 3,267, where Judge Lowell said the bankruptcy act was addressed to the common usage of the country and defined tradesman as "substantially the same as shopkeeper," and cites In re U. S. Hotel Co., 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588, as in accord and as reviewing the cases upon the subject. A restaurateur is not a trader nor engaged in commercial pursuits; In re Excelsior Café Co., 175 Fed. 294; nor is a corporation engaged principally in the business of renting films for moving pictures; In re Imperial Film Exch., 198 Fed. 80, 117 C. C. A. 188. As to what businesses are subject to the bankruptcy act, see Mattoon Nat. Bank v. First Nat. Bk., 102 Fed. 728, 42 C. C. A. 4, and note.

TRADES UNIONS. See LABOR UNION.

TRADESMAN. In England, a shopkeeper; in the United States, a mechanic or artificer of any kind, whose livelihood depends on the labor of his hands; Richie v. McCauley, 4 Pa. 472; a farmer is not a tradesman; 33 L. J. M. C. 80; a laundryman is not; Steininger v. Butler, 5 Pa. Dist. R. 43.

TRADING PARTNERSHIP. See PARTNERSHIP.

TRADING STAMPS. The current name for a method of conducting some kinds of retail business which consists of an agreement between a number of merchants and a corporation that the latter shall print the names of the former in its subscribers' dictionary and circulate a number of copies of the book, and that the merchants shall purchase of the corporation a number of so-called trading stamps, to be given to purchasers with their purchases, and by them preserved and pasted in the books aforesaid until a certain number have been secured, when they shall be presented to the corporation in exchange for the choice of certain articles kept in stock by the corporation. Lansburgh v. D. of Col., 11 App. D. C. 512. Under Act of Congress Feb. 17, 1873, which forbids the sale of real estate or any article of merchandise or taking of payment with a promise to give any article or thing, in consideration of the purchase by any person of any other article or thing, etc., it was held that the business was nothing more nor less than a gaming device; *id.* But later cases hold otherwise. The trading stamp business, when conducted honestly, is not contrary to public policy; S. & H. Co. v. Temple, 137 Fed. 992; and statutes which attempt to prohibit such business or which levy a license or excise tax on it as a separate business are uniformly held unconstitutional; State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Young v. Com., 101 Va. 853, 45 S. E. 327; Montgomery v. Kelly, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209; Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; O'Keeffe v. Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, 5 Ann. Cas. 684; and so of a municipal ordinance forbidding it; Denver v. Frueauff, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521; City Council of Montgomery v. Kelly, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43; and such business is not a gift enterprise or a lottery; Winston v. Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; an injunction will be granted against a competing trading stamp company whose agents exchange its stamps for partly filled books containing plaintiff's stamps which are non transferable; Sperry & Hutchinson Co. v. Weber & Co., 161 Fed. 219. An act forbidding the issue and distribution of trading stamps to be redeemed by any person other than the merchant who sells the goods with which such stamps are given is not a lawful exercise of the police power and is unconstitutional as being an unlawful deprivation of liberty and property; People v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111.

TRADITIO BREVIS MANUS (Lat.). **In Civil Law.** The delivery of a thing by the mere consent of the parties. Putting the thing so that the transferee could take it with hindrance. Voet. Com. 4. 1. 34.

TRADITIO LONGA MANU. A species of delivery which takes place where the trans-

feror places the article in the hands of the transferee. Mackeld. Rom. L. § 284.

TRADITION (Lat. *trans*, over, *do*, *dare*, to give). The act by which a thing is delivered by one or more persons to one or more others.

The transfer of ownership by means of placing the transferee in legal possession of the object, with the intention of vesting the ownership in him.

The delivery of possession by the proprietor with an intention to transfer the property to the receiver. Two things are, therefore, requisite in order to transmit property in this way: the *intention* or *consent* of the former owner to transfer it, and the *actual delivery* in pursuance of that intention.

Tradition is either real or symbolical. Real tradition takes place where the *ipsa corpora* of movables are put into the hands of the receiver. *Symbolical tradition* is used where the thing is incapable of real delivery, as, in immovable subjects, such as lands and houses, or such as consist *in jure* (things incorporeal), as, things of fishing, and the like. The property of certain movables, though they are capable of real delivery, may be transferred by symbol. See DELIVERY; SYMBOLICAL DELIVERY.

TRADITOR. A traitor; one guilty of treason. Fleta, lib. 1, c. 21, 8.

TRAFFIC. Commerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. Senior v. Ratterman, 44 Ohio St. 673, 11 N. E. 321.

TRAFFIC RATES. See RATES.

TRAHENS. The drawer of a bill. Story, Bills § 12.

TRAIL BASTON. See JUSTICE OF TRAIL BASTON.

TRAIN. A number of cars coupled together and moving from point to point, under an impetus imparted by a locomotive which had been detached, is a train. Caron v. R. Co., 164 Mass. 523, 42 N. E. 112.

Within the safety appliance act, it is one aggregation of cars drawn by the same engine. If the engine is changed then there is a different train; U. S. v. R. Co., 168 Fed. 148.

TRAIN-WRECKING. A conviction is not justified, where no actual wreck occurred, unless the intention of the defendant to do so is shown; Nowell v. State, 94 Ga. 588, 21 S. E. 591. The indictment need not specify the passengers who were endangered; Barton v. State, 28 Tex. App. 483, 13 S. W. 783.

TRAITOR. One guilty of treason. See TREASON.

TRAITOROUSLY. In Pleading. A technical word, which is essential in an indictment for treason in order to charge the crime, and which cannot be supplied by any other word or any kind of circumlocution. Having been well laid in the statement of the treason itself, it is not necessary to state every overt act to have been traitorously committed.

TRAJECTITIA PECUNIA. A loan to a shipper to be repaid only in case of a successful voyage. The lender could charge an extraordinary rate of interest, *nauticum fœnus*. Holland, Jurispr. 250. See BOTTOMRY; RESPONDENTIA.

TRAMP. One who roams about from place to place, begging or living without labor or visible means of support; a vagrant. Many of the states have adopted suitable legislation upon the subject, corresponding to the English vagrant acts. The object of these statutes is accomplished by arresting offenders and setting them to work on municipal improvements, or hiring them out to private employers, for a limited time, for which they receive food, lodging, and reasonable wages. In some states the punishment is by imprisonment. It is doubtful if mere vagrancy was indictable at common law; 1 Bish. Cr. L. § 515. Where there is no statutory definition of vagrancy, it will depend upon the common-law meaning; In re Jordan, 90 Mich. 3, 50 N. W. 1087. See VAGRANT.

TRANSACT. In common parlance, equivalent to carry on, when used with reference to business. Territory v. Harris, 8 Mont. 140, 19 Pac. 286.

TRANSACTIO (Lat.). **In the Civil Law.** The settlement of a suit or matter in controversy, by the litigating parties between themselves without referring it to arbitration. Halifax, Civil Law b. 3, c. 8, no. 14. A part payment, coupled with a promise not to claim the residue; compromise. Holland, Jurispr. 260.

TRANSACTION. The doing or performing of any business; the management of an affair. Montague v. Thomason, 91 Tenn. 173, 18 S. W. 264. A group of facts so connected together as to be referred to by a single legal name; as, a crime, a contract, a wrong. Steph. Dig. Evid. art. 3. The term transaction is a broader one than contract; Roberts v. Donovan, 70 Cal. 113, 9 Pac. 180, 11 Pac. 599.

Under the Elkins act the offense of accepting a concession in rates is the "transaction" that the given rebate consummates, and not the units of mere measurement of the physical thing transported; Standard Oil Co. v. U. S., 164 Fed. 376, 386, 90 C. C. A. 364.

In Civil Law. An agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their difference, by mutual consent, in the manner which they agree on. In Louisi-

ana this contract must be reduced to writing. La. Civ. Code, art. 3038.

To transact, a man must have the capacity to dispose of the things included in the transaction. In the common law this is called a compromise.

TRANSCRIPT. A copy of an original writing or deed.

TRANSCRIPT OF RECORD. The printed record as made up in each case for the supreme court of the United States is so called; also in the circuit court of appeals. If a necessary part has been omitted and is subsequently presented to the appellate court, duly certified, it may be made part of the record by direct order. Jurisdiction attaches upon the filing in the court above of the writ of error and is not defeated by irregularity in the transcript or its certification; Burnham v. R. Co., 87 Fed. 168, 30 C. C. A. 594.

Substantially complete sets in the supreme court of the United States since printing was required have been preserved and may be found in the libraries of the Law Association of Philadelphia (from 1832), the Bar Association of the City of New York and of the supreme court itself.

TRANSFER. The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter. See Ex parte Thomason, 16 Neb. 238, 20 N. W. 312; ESTOPPEL; STOCK.

TRANSFERABLE. The word includes every means by which property may be passed from one person to another. 17 Ch. Div. 9.

TRANSFEREE. He to whom a transfer is made.

TRANSFEROR. One who makes a transfer.

TRANSGRESSION. The violation of a law.

TRANSGRESSIONE. In Old English Law. A writ or action of trespass.

TRANSHIPMENT. The act of taking the cargo out of one ship and loading it in another.

When this is done from necessity, it does not affect the liability of an insurer on the goods; Abbott, Shipp. 240. But when the master transhipps goods without necessity, he is answerable for the loss of them by capture by public enemies; Trott v. Wood, 1 Gall. 443, Fed. Cas. No. 14,190.

TRANSIENT. Within the meaning of a poor-law a "transient person" is not exactly a person on a journey from one place to another, but rather a wanderer ever on the tramp. Goodell v. Mount Holly, 51 Vt. 423. A transient foreigner is one who visits the country, without the intention of remaining; Yates v. Iams, 10 Tex. 170. A doctor's office is not merely "transient," where he rents it by the year, and there keeps regular hours on three certain days per week; Com. v. Townley, 7 Pa. Dist. R. 413.

TRANSIRE. A warrant for the custom-house to let goods pass; a permit. Equivalent to a clearance. See, for a form of a *transire*, Hargr. L. Tr. 104.

TRANSITIVE COVENANT. An obligation which binds not only the covenantor, but also his representatives.

TRANSITORY ACTION. An action the cause of which might have arisen in one place or county as well as another.

In general, all personal actions, whether *ex contractu;* 5 Taunt. 25; New York Corp. v. Dawson, 2 Johns. Cas. (N. Y.) 335; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; or *ex delicto;* 1 Chitty, Pl. 243; for personal injuries; Gunther v. Dranbauer, 86 Md. 1, 38 Atl. 33; Myers v. R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; for quarrying stone on defendant's land in one state and removing it to another; Phelps v. Church, 99 Fed. 683, 40 C. C. A. 72; to recover damages for a tort; Dennick v. R. Co., 103 U. S. 11, 26 L. Ed. 439; Stewart v. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; are transitory, and may be maintained in a state other than the one in which the injuries were inflicted, where the cause of action is grounded on the principles of the common law, recognized in both states; Eingartner v. Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859. Such an action may at common law be brought in any county which the plaintiff elects.

Quo warranto proceedings against a corporation must be brought in the county where its office is; State v. Hancock, 2 Pennewill, 231, 45 Atl. 850; so of an action to recover a statutory penalty for refusal to obey an order of the railroad commission; Central of Georgia R. Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518, an action to enjoin railroad commissioners should be brought in a county where one or more of them reside; Railroad Commission of Georgia v. Hardware Co., 124 Ga. 633, 53 S. E. 193; an action on the case for rescue is local; Poor v. Doble, Quincy (Mass.) 86. Ordinarily actions relating to land are local; Grace v. Cox, 16 Ind. App. 150, 44 N. E. 813; so of trespass for damages to land; Du Breuil v. Pennsylvania Co., 130 Ind. 137, 29 N. E. 909; and of an action for damages to a mill privilege caused by a dam in another county; Thompson v. Crocker, 9 Pick. (Mass.) 59; and of an action to establish a trust and obtain partition; Hanna v. Clark, 189 Pa. 321, 41 Atl. 981; but not a petition for the appointment of a trustee of land; Cone v. Cone, 61 S. C. 512, 39 S. E. 748.

An exception to the venue must be taken in abatement; Davis v. Marston, 5 Mass. 199; a plea to the merits is not a waiver; Robinson v. Mead, 7 Mass. 353.

See JURISDICTION; LOCAL ACTION; TORT

TRANSITUS (Lat.). A transit. See STOPPAGE IN TRANSITU.

TRANSLATION. The reproduction in one language of what has been written or spoken in another.

In pleading, when a libel or an agreement written in a foreign language must be averred, it is necessary that a translation of it should also be given.

"Making a translation [of a contract in a foreign language] is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the words used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you want a competent translator, competent to translate in that way, and if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what was that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert." [1891] 1 Q. B. 82, per Lord Esher, M. R.

In evidence, when a witness is unable to speak the English language so as to convey his ideas, a translation of his testimony must be made. In that case an interpreter should be sworn to translate to him, on oath, the questions propounded to him, and to translate to the court and jury.

See INTERPRETER.

The bestowing of a legacy which had been given to one, on another: this is a species of ademption; but it differs from it in this, that there may be an ademption without a translation, but there can be no translation without an ademption. Bacon, Abr. *Legacies* (C).

The transfer of property; but in this sense it is seldom used. 2 Bla. Com. 294.

In Ecclesiastical Law. The removal from one place to another; as, the bishop was translated from the diocese of A to that of B.

In the Civil Law. The transfer of property. *Clef des Lois Rom.*

TRANSMISSION. In Civil Law. The right which heirs or legatees may have of passing to their successors the inheritance or legacy to which they were entitled, if they happen to die without having exercised their rights. Domat, liv. 3, t. 1, s. 10; 4 Toullier, n. 186.

TRANSPORTATION. In English Law. Transportation to the Australian colonies was a punishment inflicted by virtue of sundry statutes; it was unknown to the common law. 2 H. Blackst. 223. Abolished in 1867.

In railroad practice, the word includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage. Shepard v. R. Co., 184 Fed. 770; including all services in connection with the receipt, delivery and handling of property; Southern R. Co. v. Reid, 222 U. S. 441, 32 Sup. Ct. 140, 56 L. Ed. 257.

TRAPS. See NEGLIGENCE.

TRAVAIL. The act of child-bearing.

A woman is said to be in her travail from the time the pains of child-bearing commence until her delivery. Bacon v. Harrington, 5 Pick. (Mass.) 63.

TRAVELLER. One who passes from place to place, whether for pleasure, instruction, business, or health. Lockett v. State, 47 Ala. 45; 10 C. B. N. S. 429. The term is used to designate those who patronize inns; the distance which they travel is not material. Walling v. Potter, 35 Conn. 185.

The question whether one is or is not a traveller is one of fact; [1893] 1 Q. B. 522. One would be a traveller if he came abroad from any legitimate motive and needed refreshment, but not if he came abroad merely to go to a public house and obtain a drink; 17 C. B. N. S. 539. Walking for exercise is not travelling; Hamilton v. Boston, 14 Allen (Mass.) 475. Within the meaning of a policy of insurance, one who has been carried by a steamboat and walked eight miles from the landing to his home is not, whilst walking, a traveller by public or private conveyance; Ripley v. Assur. Co., 16 Wall. (U. S.) 336, 21 L. Ed. 469. Within the meaning of a law allowing a person travelling to carry concealed weapons, the travelling must be on a journey beyond the ordinary habit, business, or duties of a person, and beyond the circle of his friends and acquaintances; Gholson v. State, 53 Ala. 520, 25 Am. Rep. 652; Smith v. State, 42 Tex. 464. A horse that had escaped into the highway without his owner's fault and was finding his way home is a traveller within a statute making a town liable for injuries to a traveller; Howrigan v. Bakersfield, 79 Vt. 249, 64 Atl. 1130, 9 Ann. Cas. 282. See SUNDAY.

TRAVELLING SALESMAN. One who is employed under a contract assigning to him certain territory in which to take care of the trade, who was paid by a commission on sales made and who exercised full discretion as to when and where he should travel, was held a travelling salesman within the bankruptcy act; In re Dexter, 158 Fed. 788.

TRAVERSE. To deny; to put off.

In Civil Pleading. To deny or controvert anything which is alleged in the previous pleading. Lawes, Pl. 116. A denial. Willes 224. A direct denial in formal words: "Without this, that, etc." (*absque hoc*). 1 Chitty, Pl. 523, n. *a*. A traverse may deny all the facts alleged; 1 Chitty, Pl. 525; or any particular material fact; Bradner v. Demick, 20 Johns. (N. Y.) 406.

A *common traverse* is a direct denial, in common language, of the adverse allegations, without the *absque hoc*, and concluding to the country. It is not preceded by an inducement, and hence cannot be used where an inducement is requisite; 1 Saund. 103 *b*.

A *general traverse* is one preceded by a general inducement and denying all that is last before alleged on the opposite side, in general terms, instead of pursuing the words of the allegation which it denies; Pepper, Pl. 17. Of this sort of traverse the replication *de injuria sua propria absque tali causa*, in answer to a justification, is a familiar example; Steph. Pl. 171.

A *special traverse* is one which commences with the words *absque hoc*, and pursues the material portion of the words of the allegation which it denies; Lawes, Pl. 116. It is regularly preceded by an inducement consisting of new matter; Steph. Pl. 188. A special traverse does not complete an issue, as does a common traverse; 20 Viner, Abr. 339.

A traverse upon a traverse is one growing out of the same point or subject-matter as is embraced in a preceding traverse on the other side; Gould, Pl. c. 7, § 42, n. It is a general rule that a traverse well intended on one side must be accepted on the other. And hence it follows, as a general rule, that there cannot be a traverse upon a traverse if the first traverse is material. The meaning of the rule is that when one party has tendered a material traverse the other cannot leave it and tender another of his own to the same point upon the inducement of the first traverse, but must join in that first tendered; otherwise the parties might alternately tender traverses to each other in unlimited succession, without coming to an issue; Gould, Pl. c. 7, § 42. The rule, however, does not apply where the first traverse is immaterial, nor where it is material if the plaintiff would thereby be ousted of some right or liberty which the law allows; Cro. Eliz. 99, 418; Bacon, Abr. *Pleas* (H 4).

In Criminal Practice. To put off or delay the trial of an indictment till a succeeding term. More properly, to deny or take issue upon an indictment. 4 Bla. Com. 351.

A toll exacted for passing through a town or lordship. Baldwin's Britton 63.

TRAVERSE JURY. See JURY.

TREASON. This word imports a betraying, treachery, or breach of allegiance. 4 Bla. Com. 75. In England, treason was divided into high and petit treason. The latter, originally, was of several forms, which, by 25 Edw. III. st. 5, c. 2, were reduced to three: the killing by a wife, of her husband; by a servant, of his master; of a prelate by an ecclesiastic owing obedience to him. These kinds of treason were abolished in 1828. In America they were unknown; here treason means high treason.

"*Treason* it has been said is not felony but a grade of crime by itself." Johnson v. State, 29 N. J. L. 453, 464.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. By the same article of the constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

It is "the only crime defined by the constitution. . . . The clause was borrowed from an ancient English statute, enacted in the year 1352. Previous to the passage of that statute there was great uncertainty as to what constituted treason. Numerous offences were raised to its grade by arbitrary construction of the law. The statute was passed to remove this uncertainty and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates." No other acts can be declared to constitute the offence. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment. Field, J., in U. S. v. Greathouse, 4 Sawy. 465, Fed. Cas. No. 15,254. See James C. Carter, The Law, etc., 107.

By the same article of the constitution, no "attainder of treason shall work corruption of blood except during the life of the person attainted." Every person owing allegiance to the United States who levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason; R. S. § 5331. The penalty is death, or at the discretion of the court, imprisonment at hard labor for not less than five years and a fine of not less than ten thousand dollars; and every person convicted of treason is rendered incapable of holding any office under the United States; R. S. § 5332.

The term *enemies*, as used in the constitution, applies only to subjects of a foreign power in a state of open hostility with us. To constitute a "levying of war" there must be an assemblage of persons with force and arms to overthrow the government or resist the laws. All who aid in the furtherance of the common object of levying war against the United States, in however minute a degree, or however remote from the scene of action, are guilty of treason; U. S. v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254.

Treason may be committed against a state; Charge to Grand Jury—Treason, 1 Sto. 614, Fed. Cas. No. 18,275; People v. Lynch, 11 Johns. (N. Y.) 549.

The words "treason, felony and breach of the peace" in section 6, art. 1, of the United States constitution should be construed in the same sense as they were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offences, and confining the privilege alone to arrests in civil cases; Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

Treason felony in England is a statutory offense punishable with penal servitude for life under an act of 1848, and relates to the offense of deposing the king from the style, honor or royal name of the imperial crown, or declaring war against him to compel him to change his measures or councils, or to put any force upon parliament, etc. By the Act of 1814, treason was punished by mutilation after death; by the act of 1870, by hanging, unless the king substitutes decapitation. 4 Steph. Com. 144.

Treason, or its French equivalent, "*Trahison*" (German, *Kriegsverrath*), as employed to indicate any acts on the part of the inhabitants of an invaded territory which are calculated to deceive the invader or to inform their own side of his forces or movements. Holland, War on Land 49.

See SEDITION.

TREASURE. A thing hidden or buried in the earth which no one can prove as his property, and which is discovered by chance. La. Civ. C. art. 3423, par. 2.

TREASURE TROVE. Found treasure.

This name is given to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him; and in case of not finding him, the property, according to the English law, belongs to the king. By the civil law, when the treasure was found by the owner of the soil he was considered as entitled to it by the double title of owner and finder; when found on another's property, one-half belonged to the owner of the estate and the other to the finder; when found on public property, it belonged one-half to the public treasury and the other to the finder. *Leçons du Dr. Rom.* §§ 350–352. This includes not only gold and silver, but whatever may constitute riches: as vases, urns, statues, etc.

If the owner is known it is not technically treasure trove; Livermore v. White, 74 Me. 456, 43 Am. Rep. 600. The crown is *prima facie* entitled to treasure trove; [1903] 2 Ch. 598; and there need not be an inquest to inform the crown of its rights; 41 W. R. 294. Gold and silver articles hidden for safe keeping, and forgotten or remaining undiscovered by reason of the death of the person who hid them, are technically known as treasure trove; Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700; [1903] 2 Ch. 598. There is some doubt in this country as to who is entitled to the treasure trove. Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627, holds that the finder is entitled as against the owner of the land on which the treasure is found; but a contrary case in the same volume of reports gives it to the landowner; Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. Another case holds that the owner of the soil acquires no title as such; Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, 129 Am. St. Rep. 390, 15 Ann. Cas. 1156. In the Roman law valuables hid in the earth for safety were not treasure trove, unless hid so long before that the owner was not known; Hunter, Rom. Law 256. See Murray, Arch. Surv. of the United Kingdom.

TREASURER. An officer intrusted with the treasures or money either of a private individual, a corporation, a company, or a state. See OFFICER; SURETYSHIP.

TREASURER OF THE UNITED STATES. An officer in the treasury department appointed by the president by and with the advice and consent of the senate. He is required to give bond, with sufficient sureties, approved by the secretary of the treasury and the first comptroller, in the sum of $150,000.

His principal duties are—to receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the secretary of the treasury, countersigned by either comptroller and recorded by the register; to take receipts for all moneys paid by him; to render his account to the first comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the secretary of the treasury; to lay before each house, on the third day of every session of congress, fair and accurate copies of all accounts by him from time to time rendered to and settled with the first comptroller, and a true and perfect account of the state of the treasury; to submit at all times to the secretary of the treasury and the comptroller, or either of them, the inspection of the moneys in his hands. R. S. §§ 301–311.

TREASURER'S REMEMBRANCER. He whose charge was to put the lord treasurer and the rest of the judges of the exchequer in remembrance of such things as were called on and dealt in for the sovereign's behoof. Whart.

TREASURY. The place where treasure is kept; the office of a treasurer. The term is more usually applied to the public than to a private treasury. The word is held not to be understood in the sense of locality as de-

scriptive of a particular building, but whenever and wherever moneys are in the official custody of the treasurer or subject to his direction they are to be considered as in the state treasury. People v. McKinney, 10 Mich. 86.

TREASURY CHEST FUND. A fund in England originating in the unusual balances of certain grants of public money, and which is used for the purpose of banking and loan companies by the commissioners of the treasury. Whart.

TREASURY, FIRST LORD OF. A high office of state in Great Britain, usually held by the Prime Minister.

TREASURY NOTES. The treasury notes of the United States payable to holder or to bearer at a definite future time are negotiable commercial paper, and their transferability is subject to the commercial law of other paper of that character. Where such a paper is overdue a purchaser takes subject to the rights of antecedent holders to the same extent as in other paper bought after its maturity; Vermilye v. Express Co., 21 Wall. (U. S.) 138, 22 L. Ed. 609. See LEGAL TENDER.

TREATY. A compact made between two or more independent nations with a view to the public welfare. (Quoted in Altman & Co. v. U. S., 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894.) Treaties are for a perpetuity, or for a limited time. Those matters which are accomplished by a single act and are at once perfected in their execution are called agreements, conventions, and pactions, but the distinction in name is not always observed.

Personal treaties relate exclusively to the persons of the contracting sovereigns, such as family alliances, and treaties guaranteeing the throne to a particular sovereign and his family. As they relate to the persons, they expire of course on the death of the sovereign or the extinction of his family. With the advent of constitutional government in Europe these treaties have lost their importance.

Real treaties relate solely to the subject-matters of the convention, independently of the persons of the contracting parties, and continue to bind the state, although there may be changes in its constitution or in the persons of its rulers. Boyd's Wheat. Int. Law § 29.

On the part of the United States, treaties are made by the president, by and with the advice and consent of the senate, provided two-thirds of the senators present concur. Const. art. 2, s. 2, n. 2.

No state shall enter into any treaty, alliance, or confederation; Const. art. 1, s. 10, n. 1; nor shall any state, without the consent of congress, enter into any agreement or compact with another state or with a foreign power; *id.* art. 1, sec. 10, n. 2.

A treaty is declared to be the supreme law of the land, and is, therefore, obligatory on courts, whenever it operates of itself without the aid of a legislative provision; U. S. v. Peggy, 1 Cra. (U. S.) 103, 2 L. Ed. 49; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; Maiorano v. R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; but when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the court; Foster v. Neilson, 2 Pet. (U. S.) 314, 7 L. Ed. 415. A treaty is a law of the land whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232. So an award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land and is as binding on the courts as an act of congress; Whitelaw v. U. S., 75 Fed. 513, 21 C. C. A. 434, reversing The La Ninfa, 49 Fed. 575.

It need hardly be said that a treaty cannot change the constitution or be held valid if it be in violation of that instrument. A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty; and this is true both of treaties with Indians and foreign nations; Cherokee Tobacco, 11 Wall. (U. S.) 620, 20 L. Ed. 227; U. S. v. Old Settlers, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

A treaty is of like obligation as an act of legislation; both are the supreme law of the land, and no supreme efficacy is given to the one over the other; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386. As between a statute and a treaty, if the two are found to conflict, the one last in time must control; Ribas y Hijo v. U. S., 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994; Sanchez v. U. S., 216 U. S. 167, 30 Sup. Ct. 361, 54 L. Ed. 432; as far as this country is concerned; U. S. v. Lee Yen Tai, 185 U. S. 221, 22 Sup. Ct. 629, 46 L. Ed. 878.

When a treaty is inconsistent with a subsequent act of congress, the latter will prevail; the constitution does not declare that the law established by a treaty shall never be altered or repealed by congress; and while good faith may cause congress to refrain from making any change in such law, if it does so its enactment becomes the law. No person acquires any vested right to the continued operation of a treaty. Although the

other party to the treaty may have ground of complaint, still every one is bound to obey the latest law passed; Rainey v. U. S., 232 U. S. 310, 34 Sup. Ct. 429, 58 L. Ed. ——.

A collector of customs cannot refuse to follow the directions of a statute because it is in conflict with a prior treaty; Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. Ed. 1118. A treaty is a part of the law of every state; Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. Ed. 227; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628. A treaty may remove the disability of aliens under state laws to inherit lands; Bahuaud v. Bize, 105 Fed. 485; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Opel v. Shoup, 100 Ia. 407, 69 N. W. 560, 37 L. R. A. 583; Succession of Rixner, 48 La. Ann. 552, 19 South. 597, 32 L. R. A. 177, with full note. A treaty binds the courts as fully as an act of congress; U. S. v. Peggy, 1 Cra. (U. S.) 103, 2 L. Ed. 49; but it cannot deprive a citizen of a constitutional right; The Neck, 138 Fed. 144. See also, Burr, The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Power of the States.

The question whether the United States is justified in disregarding its engagements with another nation is not one for the determination of the courts; The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068.

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. Where concessions are made, the treaty is to be construed most favorably to the conceding nation; U. S. v. De la Maza, Arredondo, 6 Pet. (U. S.) 691, 8 L. Ed. 547.

So far as a treaty can be made the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386; The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266.

Treaties are agreements between nations of a general nature bearing upon political or commercial questions, and are distinguished from conventions which are agreements relating to minor or specific subjects, such as consular conventions and postal conventions. The right to negotiate treaties is one of the tests of sovereignty. The king is usually the treaty-making power in a monarchy, subject to the advice of his ministers in constitutional governments, and in a republic, the chief executive or some part of the legislature. After treaties have been negotiated and signed they must be ratified by the proper authorities of each state.

Treaties usually provide for their own termination, but independently of that it has been held that when a treaty becomes dangerous to the life or incompatible with the independence of a state or a permanent obstacle to the development of its constitution or the rights of its people, it can be abrogated, and also when the condition of affairs which formed the basis of the treaty has become so modified by time that its execution has become contrary to the nature of things and the original intention of the parties; Hooper v. U. S., 22 Ct. Cls. 408. See REBUS SIC STANTIBUS. See also Hall, Int. L. § 116.

A treaty with a state is considered by the United States as abrogated when such state is conquered by or incorporated into another state. But England has taken an opposite position. War may affect existing treaties in various ways, but only those binding upon one or both belligerents; where they expressly provide for matters that relate only to a condition of war, they are not affected. Such was the Geneva Convention, 1864, as to the treatment of the wounded. Similarly those which create some permanent state affairs by an act done once for all; *e. g.* the settlements made by the Treaty of Vienna, 1815. So of a treaty ceding territory. But treaties which regulate commercial and social relations between the belligerents are at least suspended and possibly annulled by a war between them. That which relates to a continuous course of conduct, binding upon one or more belligerents and one or more third powers, will be continued, suspended, or annulled, according to the provisions. Risley, Law of War 85. But the practice has been so various and inconsistent that there is no basis for any general rule as to the effect of war on treaties; *id.* All treaties do not become so extinguished; where they stipulate for a permanent arrangement of territorial and other national rights, they are at most suspended during war and revive at peace; Society for Propogation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. Ed. 662.

On breach of a treaty by one party to it, the other may declare a breach, or waive the breach and let the treaty remain in force; 1 Opp. Int. L. § 547. Unless otherwise stipulated the breach of any one article of a treaty is a violation of the whole; 1 Kent 175. Private rights may be sacrificed by treaty, for the public safety, but the government should compensate the individuals whose rights are affected; 1 Kent 167; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. Ed. 568.

"All treaties, as well those for the cessions of territory as for other purposes, are binding upon the contracting parties, unless otherwise provided in them, from the day they are signed. The ratification to them relates back to the time of signing;" Davis v.

Concordia Parish, 9 How. 280, 13 L. Ed. 138; meaning, of course, "treaties made by plenipotentiaries having full powers to do so and . . . afterwards ratified;" *id.* The exchange of ratifications is retroactive, except where the treaty operates on individual rights, as to which it is not "concluded" until the exchange of ratification; Haver v. Yaker, 9 Wall. (U. S.) 32, 19 L. Ed. 571.

When the senate amended the Hay-Pauncefote treaty before ratification, it was the object of some criticism on the ground that it had arrogated to itself a power foreign to its constitutional rights. The treaty-making power is defined in article 2, § 2, of the Constitution as follows: "He [the president] shall have the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur." It is contended that the power given to the senate by this provision, like that conferred upon it to concur in the appointment of federal officials, is one of veto purely, giving no right to amend. This position has been characterized as untenable by Senator Henry C. Lodge in an article on "The Treaty-Making Powers of the Senate," published January, 1902, in Scribner's Magazine (Sen. Doc. 104, 57 Congr. 1 Sess.), where he cites in support of his view sixty-eight treaties which have been amended by the senate before ratification. The senate's right to amend has also been affirmed in an unequivocal dictum in Haver v. Yaker, 9 Wall. (U. S.) 32, 35, 19 L. Ed. 571; 1 Bryce, Amer. Commonwealth 104.

If the senate amends a treaty, it is then, as amended, submitted to the other contracting power, and if it be accepted as amended, neither further action by the senate nor resigning is required; 5 Moore, Int. L. Dig. 201. Where a senate amendment to a treaty with Cuba provided that it should not take effect until approved by congress, such approval (with the consent of Cuba) fixed the date when it should operate; U. S. v. Refining Co., 202 U. S. 563, 26 Sup. Ct. 717, 50 L. Ed. 1149.

Whether it is within the treaty-making power to provide by treaty for administration of property of foreigners dying within a state, and to commit such administration to consuls of the nation of the deceased, was considered, but not decided, in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453 (where the Argentine treaty under consideration was held to provide only for "intervention" in the administration of intestate aliens, and to give no absolute right to administer), the opinion citing In re Lobrasciano's Estate, 38 Misc. 415, 77 N. Y. Supp. 1044, and Carpigiani v. Hall, 172 Ala. 287, 55 South. 248, Ann. Cas. 1913D, 651, as holding that it is within the treaty-making power, and *contra*, Succession of Thompson, 9 La. Ann. 96 (but going off on another point). See INTERVENE.

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. When made with an Indian tribe its words are to be construed as an Indian would understand them; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. A liberal construction is to be preferred; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628. A strict construction was adopted in The Neck, 138 Fed. 144. A treaty is to be construed by the same rules of decision as a statute; Maiorano v. R. Co., 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778. While they are to be liberally construed, they are to be read in the light of conditions existing when entered into, with a view to effecting the objects of the parties; Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453.

Where a treaty is made in two languages and each version is "original," neither version controls the other; U. S. v. De La Maza Arredondo, 6 Pet. (U. S.) 691, 8 L. Ed. 547. In the treaty between the United States and the kingdom of Tonga, two copies were signed as originals, one in English and the other in Tongan, and as the American commissioner did not understand the Tongan language, while the Tongan commissioner understood both languages, a provision was inserted that in case of difference in meaning the English version should control.

In B. Altman & Co. v. U. S., 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894, the question was raised but not decided, as to whether under the provisions of the constitution of the United States an agreement is a treaty unless made by the president and ratified by two-thirds of the senate.

See Herstlet, Commercial Treaties; Molloy's Coll. of U. S. Treaties to Include 1913 (by authority); Devlin, Treaty Power; Power of Congress over Treaties, in 37 Am. L. Rev. 363; Frank B. Kellogg's Address, Amer. Bar Assoc., 1913; Charles H. Burr, Prize Essay, Amer. Philos. Soc. 1912, on the Treaty-Making Power; 37 L. R. A. (N. S.) 549, note; 1 Opp. Int. L. §§ 491-554; PRECEDENCE; SIGNATORY; EXECUTIVE POWER.

TREATY OF PEACE. A treaty of peace is an agreement or contract made by belligerent powers, in which they agree to lay down their arms, and by which they stipulate the conditions of peace and regulate the manner in which it is to be restored and supported. Vattel, b. 4, c. 2, § 9.

Peace may be restored between belligerents by the cessation of hostilities; by the submission of one belligerent to another; and by a treaty of peace between the belligerents; 3 Phill. Int. L. 772; a formal declara-

tion that war has ceased is not necessary; *id.* The belligerents may agree that territory and other property shall be restored as they were before the war, that is, according to the *status quo ante bellum;* or that they shall remain as they were at the end of the war, which is expressed by the formula, *uti possidetis* (*q. v.*).

Overtures of peace may be made by either belligerent; or by a neutral; or by a state acting as a passive ally of either belligerent; or a neutral power may act as a mediator or interpose its good offices; 3 Phill. Int. L. 775.

Peace renders unlawful every act of force or violence between the states, and a capture, though made by a person ignorant of the completion, must be restored; 3 Phill. Int. L. 777; territory occupied after the treaty of peace must be evacuated, prisoners must be liberated, and contributions imposed must be repaid; 2 Opp. § 272. Where a period has been fixed by the treaty of peace for the cessation of hostilities, there is a difference of opinion as to whether a capture made before that period, but with knowledge of the peace, is lawful; that it is, see 1 Kent *172; 3 Phill. Int. L. 779. Where a capture was made before the period fixed for a cessation of hostilities, and in ignorance of the peace, and after the period, but in ignorance of the peace, there was a recapture, the recapture was held unlawful; the intervention of peace barred the title of the owner; 1 Kent 173; 6 C. Rob. 138.

TREBLE COSTS. In England, the taxed costs and three-fourths of the same added thereto. It is computed by adding one-half for double costs, and in addition one-half of one-half for treble costs. 1 Chitty, Pr. 27.

In American Law. In Pennsylvania the party is allowed three times the usual costs, with the exception that the fees of the officers are not to be trebled when they are not regularly or usually payable by the defendant; Shoemaker v. Nesbit, 2 Rawle (Pa.) 201.

TREBLE DAMAGES. See MEASURE OF DAMAGES; RESTRAINT OF TRADE.

TREBUCKET. The name of an engine of punishment, said to be synonymous with *tumbrel.*

TREE. A woody plant, the branches of which spring from, and are supported upon, a trunk or body. It may be young or old, small or great. Clay v. Tel. Co., 70 Miss. 411, 11 South. 658.

Trees are part of the real estate while growing and before they are severed from the freehold; but as soon as they are cut down they are personal property. Some trees are timber trees, while others do not bear that denomination. See TIMBER.

Trees belong to the owner of the land where they grow. When the roots grow into the adjoining land, the owner of such land may lawfully claim a right to hold the tree in common with the owner of the land where it was planted; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the owner of the estate where the roots grow; 1 Ld. Raym. 737. See Rehoboth & Seekonk v. Hunt, 1 Pick. (Mass.) 224; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470. When the tree grows directly on the boundary-line, so that the line passes through it, it is the property of both owners, whether it be marked as a boundary or not; Musch v. Burkhart, 83 Ia. 301, 48 N. W. 1025, 12 L. R. A. 484, 32 Am. St. Rep. 305; Relyea v. Beaver, 34 Barb. (N. Y.) 547; Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645. As to sales of standing timber, see TIMBER; SALE.

The owner of trees in a highway is held, in Hazlehurst v. Mayes, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805, to have no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality; *contra*, Moore v. Light Co., 163 N. C. 300, 79 S. E. 596: Norman M. & G. Co. v. Bethurem (Okl.) 139 Pac. 830. An abutting owner has an equitable interest in a tree grown by him on the street, the fee of which is in the city, and may sue for an injury thereto; *id.;* he has a property in shade trees on the sidewalk, subject to the city's right; Moore v. Light Co., 163 N. C. 300, 79 S. E. 596.

A street commissioner may remove trees standing within the limits of a street, if reasonably necessary to the proper construction of the sidewalk which the city council has directed him to build; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380.

Where the branches of a tree growing upon the land of one person overhang that of his neighbor, one may, without notice, cut off so much of a tree as overhangs his land, if he can do so without going upon the land of the owner, and such owner cannot acquire, either by prescription or the statute of limitations, the right to overhang his neighbor's land; [1895] App. Cas. 1, affirming [1894] 3 Ch. 1; and where a tree stands on the dividing line between adjoining lots, either owner may cut off branches or roots extending over his own land; Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582, distinguishing Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; but it has been held that an injunction will lie to restrain an adjoining owner of a rural lot from destroying a tree growing on the division line; Comfort v. Everhardt, 35 W. N. C. Pa. 364. The owner of land on which a partially decayed tree is permitted to stand in such position that by falling it would damage the house of another, is liable for damages caused by its falling after he has been notified that it was dangerous; Gibson v. Denton, 4 App. Div. 198, 38 N. Y. Supp. 554.

TRESAILE, or TRESAYLE. The grandfather's grandfather. 1 Bla. Com. 186.

TRESPASS. An unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another.

Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another.

Any unauthorized entry upon the realty of another to the damage thereof.

The wanton and unnecessary destruction of the property of another in removing it where there is a right to do so, as, for example, in abating a nuisance or putting out of the way an obstruction of a highway, constitutes a trespass; Beardslee v. French, 7 Conn. 125, 18 Am. Dec. 86. "Throughout the Middle Ages, trespass is regarded as a crime;" Maitland, 2 Sel. Essays Anglo Amer. Leg. Hist. 589.

In determining the nature of the act, neither the amount of violence or the intent with which it is offered, nor the extent of the damage accomplished or the purpose for which the act was committed, are of any importance: since a person who enters upon the land of another without leave, to lead off his own runaway horse, and who breaks a blade of grass in so doing, commits a trespass; Heermance v. Vernoy, 6 Johns. (N. Y.) 5.

It is said that *some* damage must be committed to make an act a trespass. It is undoubtedly true that damage is required to constitute a trespass *for which an action will lie;* but, so far as the tort itself is concerned, it seems more than doubtful if the mere commission of an act affecting another, without legal authority, does not constitute trespass, though until damage is done the law will not regard it, inasmuch as the law does not regard trifles. See *infra.*

The distinction between the different classes of trespass is of importance in determining the nature of the remedy.

A trespass committed with force is said to be done *vi et armis;* one committed by entry upon the realty, *by breaking the close.*

In Practice. A form of action which lies to recover damages for the injury sustained by the plaintiff, as the immediate consequence of some wrong done forcibly to his person or property, against the person committing the same.

The action of trespass, properly so called, is distinguished from trespass on the case, which is an action for injuries committed without force, and is usually termed simply *case* (*q. v.*). In states where common law forms of actions are still used, the distinction between trespass and trespass on the case is generally abolished by statute and a declaration good for either is good for both. In other states, either action is known merely as an action of tort and in others as a civil action.

The action lies for *injuries to the person* of the plaintiff, as, by assault and battery, wounding, imprisonment, and the like; Beecher v. Parmele, 9 Vt. 352, 31 Am. Dec. 633; Andre v. Johnson, 6 Blackf. (Ind.) 375.

It lies, also, for forcible injuries to the person of another, whereby a direct injury is done to the plaintiff in regard to his rights as parent, master, etc.; Akerley v. Haines, 2 Caines (N. Y.) 292; Hornketh v. Barr, 8 S. & R. (Pa.) 36, 11 Am. Dec. 568. It does not lie for mere non-feasance, nor where the matter affected was not tangible.

An action of trespass at common law will lie in a state court by the owner of one vessel against the owner of another for damages by fire at a wharf; Chappell v. Bradshaw, 128 U. S. 132, 9 Sup. Ct. 40, 32 L. Ed. 369.

The action lies for *injuries to personal property,* which may be committed by the several acts of unlawfully striking, chasing if alive, and carrying away to the damage of the plaintiff, a personal chattel; 1 Wms. Saund. 84; of which another is the owner and in possession; Brainard v. Burton, 5 Vt. 97; and for the removal or injury of inanimate personal property; Robinson v. Mansfield, 13 Pick. (Mass.) 139; Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; of which another has the possession, actual, or constructive; Daniels v. Pond, 21 Pick. (Mass.) 369, 32 Am. Dec. 269; Hoyt v. Gelston & Schenck, 13 Johns. (N. Y.) 141; Dallam v. Fitler, 6 W. & S. (Pa.) 323; without the owner's assent. A naked possession or right to immediate possession is sufficient to support this action; Carter v. Simpson, 7 Johns. (N. Y.) 535; Hower v. Geesaman, 17 S. & R. (Pa.) 251; Whitney v. Ladd, 10 Vt. 165.

An action lies for an unintentional act of trespass, even if there is no malice; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; but a man who accidentally shoots another, without negligence, is not liable in an action of trespass; [1891] 1 Q. B. 86. See Wilson v. Live Stock Co., 153 U. S. 39, 14 Sup. Ct. 768, 38 L. Ed. 627; TRESPASSER.

The action lies also for *injuries to the realty* consequent upon entering without right upon another man's land (breaking his close). The inclosure may be purely imaginary; Dougherty v. Stepp, 18 N. C. 371; but reaches to the sky and to the centre of the earth; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

Where the rightful owner of land, entitled to the immediate possession, attempts to recover it, he is not liable in a civil action of trespass for assault upon a trespasser, if he used no more force than was necessary for the expulsion of the intruder; Souter v. Codman, 14 R. I. 119, 51 Am. Rep. 364; Low v. Elwell, 121 Mass. 310, 23 Am. Rep. 272; Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710; Walker v. Chanslor, 153 Cal. 118, 94 Pac. 606, 17 L. R. A. (N. S.) 455, and note, 126 Am. St. Rep. 61. But in such case, where the question of criminal liability is raised, it is held that the owner has no right to resort to force to regain his possession, Com. v. Haley, 4 Allen (Mass.) 318; State v. Bradbury, 67 Kan. 808, 74 Pac. 231; Terrell v. State, 37 Tex. 442; Hickey v. U. S., 168 Fed.

536, 93 C. C. A. 616, 22 L. R. A. (N. S.) 728; and the same rule was said to apply with respect to recovering possession of real or personal property; Corey v. People, 45 Barb. (N. Y.) 262. But as to the use of force by the owner to recover possession of them, there is not unanimity of decision. The right to use such force as is reasonably necessary was upheld in Hamilton v. Arnold, 116 Mich. 684, 75 N. W. 133; Wright v. So. Exp. Co., 80 Fed. 85; Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766; Hopkins v. Dickson, 59 N. H. 235; at least short of wounding or the use of a dangerous weapon; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623, and note. In that case the transaction involved but a momentary parting with the possession of money tendered on condition that it was to be accepted as payment in full, and the other party having taken the money and then repudiated the condition, it was retaken by force, which Holmes, J., said was justified "by ancient and modern authority," citing among others two cases in that court. The case of Churchill v. Hulbert, *infra*, was entirely different, turning on the right to enter upon the freehold of the other party under an irrevocable license and it can scarcely be considered as deciding the precise point under consideration. The same is true of Drury v. Hervey, *infra*, which was a case of default on a conditional sale, and it was held that possession of the chattel could not be forcibly resumed. Among the cases which deny the right to use force are Churchill v. Hulbert, 110 Mass. 42, 14 Am. Rep. 578; Drury v. Hervey, 126 Mass. 519; Bliss v. Johnson, 73 N. Y. 529; Monson v. Lewis, 123 Wis. 583, 101 N. W. 1094; Stanley v. Payne, 78 Vt. 235, 62 Atl. 495, 112 Am. St. Rep. 911, 6 Ann. Cas. 501, 3 L. R. A. (N. S.) 251, and note citing cases on both sides of the question.

In an action of trespass, or trespass on the case, on land, the courts cannot try the title to the land; Johnson v. Gravel Co., 86 Fed. 269, 30 C. C. A. 35. An action for trespass on land is a local action and can be brought only within the state in which the land lies; Ellenwood v. Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913.

An injunction will lie to restrain a trespass when the injury is irreparable, or when the trespass is a continuing one, as by cutting trees on forest land; King v. Stuart, 84 Fed. 546; Pom. Eq. Jur. 165, § 1357; or repeated trespasses upon a door yard for the purpose of erecting and maintaining a fence there; Miller v. Hoeschler, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49, with note on injunctions to compel or prevent the erection, maintenance or removal of fences or gates. See INJUNCTION.

The plaintiff must be in possession with some title; 5 East 485; Stuyvesant v. Tompkins, 9 Johns. (N. Y.) 61; Bigelow v. Lehr, 4 Watts (Pa.) 377; Kempton v. Cook, 4 Pick. (Mass.) 305; Zell v. Ream, 31 Pa. 304; Adkinson v. Simmons, 33 N. C. 417; though mere title is sufficient where no one is in possession; Buck v. Aiken, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; Goodrich v. Hathaway, 1 Vt. 485, 18 Am. Dec. 701; as in case of an owner to the centre of a highway; Avery v. Maxwell, 4 N. H. 36; and mere possession is sufficient against a wrongdoer; State v. Blackwell, 9 Ala. 82; or a stranger; Witt v. R. Co., 38 Minn. 122, 35 N. W. 862; Baylington v. Squires, 71 Wis. 276, 37 N. W. 227; and the possession may be by an agent; Davis v. Clancy, 3 McCord (S. C.) 422; but not by a tenant; Lienow v. Ritchie, 8 Pick. (Mass.) 235; other than a tenant at will; Hingham v. Sprague, 15 Pick. (Mass.) 102. But a person holding lands under a contract of sale without any possessory rights before payment, cannot maintain an action; Des Jardins v. Boom Co., 95 Mich. 140, 54 N. W. 718.

An action will not lie unless some damage is committed; but slight damage only is required; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492. Some damage must have been done to sustain the action; Massey v. Trantham, 2 Bay (S. C.) 421; though it may have been very slight: as, breaking glass; Coolidge v. Williams, 4 Mass. 140; Jeffries v. Hargis, 50 Ark. 65, 6 S. W. 328; Little Pittsburg C. M. Co. v. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

But "with respect to damages as an essential the common law recognizes two kinds of actions. In the first class there is a direct invasion of another's person or property without permission, which is actionable *per se*, or which gives rise to a presumption of at least some damage, without proof of any actual damage. Unpermitted contact with the person constitutes assault and battery. Unpermitted invasion of premises constitutes a trespass *quare clausum fregit*. In the second class, actions on the case, in which the damages are indirect and consequential, there can be no recovery, unless the plaintiff shows, as an essential part of his case, that damages, pecuniary in kind, proximate in sequence and substantial in extent have resulted"; Whittaker v. Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921, 117 Am. Rep. 703, 10 Ann. Cas. 528; and see TRESPASS QUARE CLAUSUM FREGIT.

The action will not lie where the defendant has a justification sufficient to excuse the act committed, though he acted without authority from the owner or the person affected; 8 Law Rep. 77. See JUSTIFICATION; TRESPASSER.

Necessarily exceptions have from time to time been recognized to the rule that any entry upon the land of another without his consent is a trespass. An entry may be

justified in the course of legal proceedings as where an officer is required to make a levy under an execution; Haggerty v. Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; an execution; Bell v. Douglass, 1 Yerg. (Tenn.) 397; Fullerton v. Mack, 2 Aikens (Vt.) 415; or an arrest; State v. Oliver, 2 Houst. (Del.) 585; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; State v. Smith, 1 N. H. 346. Indeed with respect to the right to enter upon land the public necessity and convenience is a justification as in so many other cases, as, for example, where the destruction of property in time of war is required for the public defence; U. S. v. R. Co., 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634; Respublica v. Sparhawk, 1 Dall. (U. S.) 357, 1 L. Ed. 174; Salt Peter Case, 12 Rep. 12; or safety, as to prevent a general conflagration; Metallic C. C. Co. v. R. Co., 109 Mass. 277, 12 Am. Rep. 689; Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385; or the spread of a contagious disease; Seavey v. Preble, 64 Me. 120.

In many cases there is held to be an implied license as from habitual use of a foot path without objection; Driscoll v. Cement Co., 37 N. Y. 637, 97 Am. Dec. 761; or space under a sidewalk; West Chicago Masonic Ass'n v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327, reversing 94 Ill. App. 333. A private owner may enter without force seeking the recovery of land; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; or of personal property; Madden v. Brown, 8 App. Div. 454, 40 N. Y. Supp. 714; Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; or to abate a nuisance; Lancaster Turnpike Co. v. Rogers, 2 Pa. 114, 44 Am. Dec. 179; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53. In some cases accident may excuse trespass but it must be unintentional, unavoidable and without fault on the part of the trespasser; Jennings v. Fundeburg, 4 McCord (S. C.) 161; and mere mistake is not a justification; Hobart v. Hagget, 12 Me. 67, 28 Am. Dec. 159. So also an entry which would ordinarily be a trespass is sometimes justified on the ground of necessity as where the highway is impassable and one travelling over it must go upon private property around the obstruction; Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811; Campbell v. Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; though he must go upon it near the highway and use as little as possible; White v. Wiley, 59 Hun, 618, 13 N. Y. Supp. 205; other cases which have been recognized as sufficient to prevent an entry from being a trespass are, saving goods of the owner or of a third person from destruction by water or fire; Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500; 20 Vin. Abr. Trespass (H. a. 4), pl. 24; *ibid* (K. a.) pl. 3; (though this was a case of trespass to personal property); the preservation of life; Mouses' Case, 12 Rep. 63; see Respublica v. Sparhawk, *supra*; crossing another's land when in flight for safety from an attack; 6 Bacon, Abr. Trespass, 674; or mooring to a dock for safety in a storm; Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188, 20 L. R. A. (N. S.) 132, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151; and such necessity was held sufficient to justify a violation of the embargo act; The Brig William Gray, 1 Paine, 16, Fed. Cas. No. 17,694. But where a right of entry is claimed by reason of necessity, it must be some such overruling one as indicated by those enumerated, and it must arise without fault in the trespasser; 6 Bacon, Abr. Trespass, 674; Anon., Y. B. 6 Ed. IV, 7 pl. 18. Such excuses are not sufficient as family affection or charity; Neilson v. Brown, 13 R. I. 651, 43 Am. Rep. 58; Parlet v. Bowman, 2 Rolle, Abr. 567; or the pursuit of wild animals or game; Glenn v. Kays, 1 Ill. App. 479; Paul v. Summerhayes, 4 Q. B. D. 9.

The declaration must contain a concise statement of the injury complained of, whether to the person, personal or real property, and it must allege that the injury was committed *vi et armis* and *contra pacem*. See CONTINUANDO.

The plea of not guilty raises the general issue, and under it the defendant may give in evidence any facts which show that the property was not in possession of the plaintiff rightfully as against the defendant at the time of the injury, or that the injury was not committed by the defendant with force. Other matters must, in general, be pleaded specially. See TRESPASS QUARE CLAUSUM. Matters in justification, as, authority by law; Burton v. Sweaney, 4 Mo. 1; defence of the defendant's person or property, taking a distress on premises other than those demised, etc.; 1 Chitty, Pl. 439; custom to enter; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; right of way; Strout v. Berry, 7 Mass. 385; etc., must be specially pleaded. In trespass at common law the declaration need not describe the close on which the trespass was committed; Meixsell v. Feezor, 43 Ill. App. 180.

Judgment is for the damages assessed by the jury when for the plaintiff, and for costs when for the defendant.

Where debt in trespass pays the judgment, title passes as by analogy to sale; Williston, Sales, sec. 4. See JUSTIFICATION.

As to the early history of trespass, see 2 Holdsw. Hist. E. L. 307, where it is called the "Fertile mother of actions." See 3 Harv. L. Rev. 177, by Maitland.

TRESPASS DE BONIS ASPORTATIS (Lat. *de bonis asportatis*, for goods which have been carried away).

A form of action brought by the owner of goods to recover damages for unlawfully taking and carrying them away. Ricker v. Kelly, 1 Greenl. (Me.) 117, 10 Am. Dec. 38. It is

no answer to the action that the defendant has returned the goods; 1 Bouvier, Inst. n. 36 (H). See Ames' Lect. on Leg. Hist. 56.

TRESPASS FOR MESNE PROFITS. A form of action supplemental to an action of ejectment, brought against the tenant in possession to recover the profits which he has unlawfully received during the time of his occupation. 3 Bla. Com. 205; 4 Burr. 1668. See MESNE PROFITS.

TRESPASS ON THE CASE. The form of action by which a person seeks to recover damages caused by an injury unaccompanied with force or which results indirectly from the act of the defendant. It is more generally called, simply, case. See CASE.

TRESPASS QUARE CLAUSUM FREGIT (Lat. *quare clausum fregit*, because he had broken the close). The form of action which lies to recover damages for injuries to the realty consequent upon entry without right upon the plaintiff's land.

Close means the interest a person has in any piece of ground, whether enclosed or not; when the plaintiff had not an interest in the soil, but an interest in the profits only, trespass may be maintained; 2 Wheat. Selw. [1340].

Mere possession is sufficient to enable one having it to maintain the action; Gault v. Jenkins, 12 Wend. (N. Y.) 488; Branson v. Studabaker, 133 Ind. 147, 33 N. E. 98; Langdon v. Templeton, 61 Vt. 119, 17 Atl. 839; except as against one claiming under the rightful owner; Harris v. Gillingham, 6 N. H. 9, 23 Am. Dec. 701; Webb v. Sturtevant, 2 Scam. (Ill.) 181; Richardson v. Murrill, 7 Mo. 333; Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668, 20 L. R. A. 590; and no one but the tenant can have the action; Holmes v. Seely, 19 Wend. (N. Y.) 507; except in case of tenancies at will or by a less secure holding; Woodruff v. Halsey, 8 Pick. (Mass.) 333, 19 Am. Dec. 329. It cannot be maintained if defendant was in possession of the *locus in quo* at the time of the alleged trespass, and for some years before; Collins v. Beatty, 148 Pa. 65, 23 Atl. 982. See CLOSE.

The action lies where an animal of the defendant breaks the plaintiff's close, to his injury; Dolph v. Ferris, 7 W. & S. (Pa.) 367, 42 Am. Dec. 246.

"In trespass *quare clausum fregit*, it is immaterial whether the *quantum* of harm suffered be great, little, or unappreciable;" Whittaker v. Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921, 117 Am. St. Rep. 703, 10 Ann. Cas. 528; where it was held that shooting guns over another's land was a wrong which, being planned to be repeated or continuous, would be prevented by injunction. As to damages as an essential in trespass. See TRESPASS.

TRESPASS TO TRY TITLE. The name of the action used in South Carolina for the recovery of the possession of real property and damages for any trespass committed upon the same by the defendant.

TRESPASS VI ET ARMIS (Lat. with force and arms). The form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property; Caldwell v. Julian, 2 Mill, Const. (S. C.) 294. It is distinguished from case in this, that the injury in case is the indirect result of the act done. See CASE.

TRESPASSER. One who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. Any act which is injurious to the property of another renders the doer a trespasser, unless he has authority to do it from the owner or custodian; Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729; or by law; Luddington v. Peck, 2 Conn. 700; Warner v. Shed, 10 Johns. (N. Y.) 138; and in this latter case any defect in his authority, as, want of jurisdiction by the court; Allen v. Gray, 11 Conn. 95; Adkins v. Brewer, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; defective or void proceedings; Baldwin v. Whittier, 16 Me. 33; Allen v. Greenlee, 12 N. C. 370; misapplication of process; Wickliffe v. Sanders, 6 T. B. Monr. (Ky.) 296; renders him liable as a trespasser.

So, too, the commission of a legal act in an illegal manner, as, the execution of legal process illegally; Case v. Shepherd, 2 Johns. Cas. (N. Y.) 27; abuse of legal process; Ragsdale v. Bowles, 16 Ala. 62; exceeding the authority conferred by the owner; Abbott v. Wood, 13 Me. 115; or by law; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Kuhn v. North, 10 S. & R. (Pa.) 399; renders a man a trespasser. A ministerial officer, where it is his duty to act, cannot be made a trespasser; Harding v. Woodcock, 137 U. S. 43, 11 Sup. Ct. 6, 34 L. Ed. 580; and acting in obedience to process regular on its face, and issued by a tribunal having jurisdiction and power to issue the process, is not liable for its regular enforcement, although errors may have been committed by the tribunal which issued it; Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018. See FALSE IMPRISONMENT.

In all these cases where a man begins an act which is legal by reason of some authority given him, and then becomes a trespasser by subsequent acts, he is held to be a trespasser *ab initio* (from the beginning), *q. v.*

A person may be a trespasser by ordering such an act done as makes the doer a trespasser; Blake v. Jerome, 14 Johns. (N. Y.) 406; or by subsequently assenting, in some cases; Floyd v. Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602; or assisting, though not present; Prince v. Flynn, 2 Litt. (Ky.) 240.

It seems that a verdict for the plaintiff in *quare clausum fregit* does not operate as an estoppel in a subsequent action of ejectment; Stevens v. Hughes, 31 Pa. 381.

TRESPASSER AB INITIO. A term applied to denote that one who has commenced a lawful act in a proper manner, has performed some unlawful act, or some lawful act in an unlawful manner, so connected with the previous act that he is to be regarded as having acted unlawfully from the beginning. See 6 Carpenters' Case, 8 Co. 146; s. c. 1 Sm. L. C. *216; Webb's Poll. Torts. See AB INITIO; Ames' Lect. on Leg. Hist. 56.

TRIAL. In Practice. The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. U. S. v. Curtis, 4 Mas. 232, Fed. Cas. No. 14,905.

The examination of the matter of fact in issue in a cause. The decision of the issue of fact; Steph. Pl. 77; Deane v. Bridge Co., 22 Or. 167, 29 Pac. 440, 15 L. R. A. 614.

The final examination and decision of matter of law as well as facts for which every antecedent step is a preparation; Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842.

"Trial," as used in the acts of congress of July 27, 1866, and March 2, 1867, appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and "final hearing," in contradistinction to hearings upon interlocutory matters, the hearing of a cause upon its merits by a judge sitting in equity; Galpin v. Critchlow, 112 Mass. 343, 17 Am. Rep. 176; Home L. Ins. Co. v. Dunn, 19 Wall. (U. S.) 214, 22 L. Ed. 68.

Undoubtedly the word "trial" in the common law meant the examination and determination of the case upon the facts, and the word was usually applied to a trial by jury; "hearing" was used with respect to cases in equity. The word "trial" is now used not only colloquially but by courts, with a more comprehensive signification, and it has been defined to be "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue"; Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746; In re Chauncey, 32 Hun (N. Y.) 429, 431; Second N. Bk. of Grand Forks v. Bank, 8 N. D. 50, 76 N. W. 504; including all the steps in the case from the submission to the jury to the rendering of the judgment; Castellaw v. Blanchard, 106 Ga. 97, 31 S. E. 801; or before a judge who has jurisdiction of it; Bullard v. Kuhl, 54 Wis. 544, 11 N. W. 801 (citing Jacob's Law Dict. Tit. "Trial"). In many cases it is said to be a judicial examination of the issues in a case; Tingley v. Dolby, 13 Neb. 371, 14 N. W. 146, 148; Miller v. King, 32 App. Div. 349, 52 N. Y. Supp. 1041; or in an action; Spencer v. Thistle, 13 Neb. 227, 229, 13 N. W. 214; Trustees of Swan Tp. v. McClannahan, 53 Ohio St. 403, 42 N. E. 34; or of the issues between parties, whether of law or fact; Vertrees' Adm'r v. Newport News & M. V. R. Co., 95 Ky. 314, 25 S. W. 1 (and this is the expression in many state codes and statutes); and the "trial" is not concluded until finally submitted to the court, referee or jury; Mygatt v. Willcox, 35 How. Prac. (N. Y.) 410; or until the decision is reduced to writing and signed by the judge; Connolly v. Ashworth, 98 Cal. 205, 33 Pac. 60. The word has been applied to the decision of issues arising on demurrer; Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491; Hume v. Woodruff, 26 Or. 373, 38 Pac. 191; Pratt v. Lincoln County, 61 Wis. 62, 20 N. W. 726; Louisville, N. A. & C. R. Co. v. Reynolds, 118 Ind. 170, 20 N. E. 711; to an inquest which was said to be by a trial of issue of fact where the plaintiff alone introduced testimony; Haines v. Davis, 6 How. Pr. (N. Y.) 118; or a feigned issue out of chancery as to the amount due on a land contract; Parks v. Andrews, 56 Hun, 391, 10 N. Y. Supp. 344.

"Trial" has been held not to include a decision on demurrer that the plea in abatement was bad; Winet v. Berryhill, 55 Ia. 411, 7 N. W. 681; the taking of proof before a master to dispose of a motion for an injunction *pendente lite;* Doughty v. W. Bradley & C. Mfg. Co., 8 Blatchf. 107, 7 Fed. Cas. No. 4,030; the hearing of a case on appeal where the object is to correct errors of the trial court; Eldridge v. Strenz, 39 N. Y. Super. Ct. 295; the granting of an allowance in a divorce case; Stewart v. Stewart, 28 Ind. App. 378, 62 N. E. 1023; a hearing before a mayor for the removal of a city official; Avery v. Studley, 74 Conn. 272, 50 Atl. 752; a question of taxation of costs of the marshal, before the United States supreme court, on a certificate of division; Bank of U. S. v. Green, 6 Pet. (U. S.) 26, 8 L. Ed. 307; or the presentation or determination of a motion for a new trial; McDermott v. Halleck, 65 Kan. 403, 69 Pac. 335.

The precise meaning of the word "trial" has become material in the construction of statutes regulating appeal or error costs, criminal procedure, voluntary non-suits, the removal of causes and official fees. The trial was held to be used, not in its limited and restricted, but in its general, sense, including all the steps of a criminal case from its submission to the court or jury to the rendering of the judgment; Hotsenpiller v. State, 144 Ind. 9, 43 N. E. 234. In such a statute it includes as well an issue of law as an issue of fact; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40; but pleading is not a part of the trial; it does not commence until an issue of fact is joined, so that an error in overruling a demurrer is not an error in law occurring at the trial; Mechanics' Sav. Bank v. Harding, 65 Kan. 655, 70 Pac. 655; but it includes the impanelling of a jury;

Palmer v. State, 42 Ohio St. 596; and commences at last immediately after they are sworn; Wagner v. State, 42 Ohio St. 537.

Within statutes authorizing extra allowances, there is no trial where no issue is joined on the pleadings; Randolph v. Foster, 3 E. D. Smith (N. Y.) 648; but there was a trial where the plaintiff voluntarily submitted to a non-suit after evidence had been taken on both sides and the summing up was begun; Allaire v. Lee, 11 N. Y. Super. Ct. 609. In a criminal case the trial does not include the arraignment and other preliminary proceedings before the jury is sworn; Com. v. Soderquest, 183 Mass. 199, 66 N. E. 801; Byers v. State, 105 Ala. 31, 16 South. 716; nor the holding to bail upon an examination; State v. Gerry, 68 N. H. 495, 38 Atl. 278, 38 L. R. A. 228; it does not extend to the act of pronouncing a sentence; Reed v. State, 147 Ind. 41, 46 N. E. 135.

Trial by certificate is a mode of trial allowed by the English law in those cases where the evidence of the person certifying is the only proper criterion of the point in dispute.

Trial by grand assize is a peculiar mode of trial allowed in writs of right. See ASSIZE; GRAND ASSIZE.

Publicity. To insure fairness a trial must be in public. Where an order was made to admit to a trial, where the testimony was known to be of a decidedly loathsome and disgusting character, none except jury, counsel, members of the bar, newspaper men and one witness, it was held on appeal to infringe the constitutional right to "a speedy and public trial," and failure to protest at the time would not constitute a waiver of it, which could not be done by mere silence; State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108; People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294; *contra*, State v. Callahan, 100 Minn. 63, 110 N. W. 342. The similar provision in the federal constitution is contained in the 6th amendment, which is one of those held to apply only to the federal government and not to judicial proceedings in the state courts, and hence that requirement of a public trial is held to affect only the United States courts; Spies v. Illinois, 123 U. S. 131, 166, 8 Sup. Ct. 22, 31 L. Ed. 80. The court may discriminate as to the unlimited admission into the court room of persons whose presence as a class, for any reason will endanger the security of the administration of justice, or prevent the policing of the court; U. S. v. Buck, Fed. Cas. No. 14,680, 4 Phila. 161.

In dealing with this question the courts have ranged in at least three classes their decisions authorizing exclusion: (1) Excluding all persons excepting jury, officers, defendant and counsel; Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630. The trial court was justified in ordering the court room cleared because part of the audience laughed and thereby embarrassed the witness, a girl of fourteen, and the testimony was of a vulgar or indecent character, or where the county attorney requested that ladies in attendance should leave the court room as he was about to refer to evidence unfit for them to hear; State v. McCool, 34 Kan. 617, 9 Pac. 745; see note to State v. Hensley, supra, 9 L. R. A. (N. S.) 277. (2) In addition to the persons admitted in the first class, permission was given to the accused to name any special friends he desired to have present. As to sustaining this exclusion there is conflict. In favor of it: People v. Hall, 51 App. Div. 57, 64 N. Y. Supp. 433; but in People v. Yeager, 113 Mich. 228, 71 N. W. 491, it was held that a statute was unconstitutional in denying the right to a public trial which authorized the presiding judge to exclude persons from the court room who were not necessarily in attendance, where it appeared that evidence of licentious, lascivious, degrading or immoral acts or conduct would be given; and in People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, an order excluding from the court room all persons except those necessary in attendance on account of the character of the testimony was held error. But it has been held that a public trial, when that word is used in the constitution, means *not secret*, and the right is not violated where all persons were excluded except judge, jurors, witnesses and persons connected with the case; People v. Swafford, 65 Cal. 223, 3 Pac. 809. That a public trial does not necessarily contemplate that every person shall be enabled to gratify a morbid curiosity for indecent detail by being permitted to listen to the recital of disgusting facts, see Benedict v. People, 23 Colo. 126, 46 Pac. 637. (3) To exclude a part of the audience, consisting of children, court loungers, and the like. In supporting this degree of exclusion there are to be found only *dicta* in some cases, as in State v. Hensley, *supra*, and two authoritative text writers; Cooley, Prin. Const. L. 320; Wigm. Ev. § 1834.

See OPEN COURT.

In Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 558, 51 L. Ed. 879, 10 Ann. Cas. 689, it was said by Mr. Justice Holmes: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court."

Presence of Accused. The rule that in a criminal trial, certainly in case of felony, the accused must be present during the entire proceedings, was a fundamental principle of the common law, repeated in constitutional or statutory provisions, probably in nearly

every state, and while the necessity for its strict enforcement may be less urgent than in former times, it is still stringently enforced; French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855; Maurer v. People, 43 N. Y. 1.

A person indicted for a misdemeanor is entitled to be present throughout the trial and particularly to plead at the arraignment; Rose v. State, 20 Ohio 31; but if absent because he cannot be brought into court on account of insanity, or his misbehavior interferes with the trial, it may be conducted in his absence; U. S. v. Davis, 6 Blatchf. 464, Fed. Cas. No. 14,923; Rex v. Mary Browne, 70 J. P. 472, where the defendant was twice removed from the court for misbehavior, and informed that if it was persisted in she should be tried in her absence, and the proof showed that she was capable of behaving otherwise, a plea of not guilty was entered and she was tried and convicted. Where the defendant stands mute at his arraignment, the common law proceeding was to empanel the jury to determine whether he did so through malice or the act of God; in the former case the judge might enter a plea of not guilty; Reg. v. Israel, 2 Cox C. C. 263. See DEAF AND DUMB; MUTE. On this authority it has been contended that in the case of Rex v. Mary Browne, *supra*, the procedure was wrong and the jury should have been empaneled to determine her ability to plead; 20 Harv. L. R. 235.

In cases of felony, it has been held as a general rule that the accused must be present during the trial and when the verdict is rendered; 1 Bish. Cr. Pr. § 265; but that in cases not capital he might waive the right; State v. Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299; *contra*, Prine v. Com., 18 Pa. 103; but where the prisoner was indicted for murder and being out on bail left the court room when the jury went out, in his absence a verdict was returned of guilty of manslaughter and the receiving of a verdict in his absence was held reversible error; Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509; but in other cases of felony where the prisoner was out on bail, it was held not error to receive the verdict, it being his privilege to waive the right to be present; Stoddard v. State, 132 Wis. 520, 112 N. W. 453, 13 Ann. Cas. 1211; State v. Waymire, 52 Or. 281, 97 Pac. 46, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56, and note collecting cases on the subject of waiver. Among the reasons given against the right to waive are that the prisoner should be within the jurisdiction of the court when the verdict is rendered; Andrews v. State, 2 Sneed (Tenn.) 550; Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102; Rex v. Ladsingham, T. Raym. 193.

There is quite general recognition of the right to waive being present during trials for misdemeanors; U. S. v. Mayo, 1 Curt. 433, Fed. Cas. No. 15,754; Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; Sahlinger v. People, 102 Ill. 245; State v. Gorman, 113 Minn. 401, 129 N. W. 589, 32 L. R. A. (N. S.) 306; the rule being purely for the prisoner's benefit, there is no reason why he should not waive it; Wilson v. State, 2 Ohio St. 319; but many judges resist the relaxation of common law rules as did Smith, C. J., in a dissenting opinion in State v. Kelly, *supra*. The right of the accused to be present when a verdict is returned may be waived, and a verdict may be returned in his absence, if his absence is voluntary while he is at liberty on bond; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603; Price v. State, 36 Miss. 531, 72 Am. Dec. 195; Lynch v. Com., 88 Pa. 189, 32 Am. Rep. 445. So the flight of the accused during the trial or after submission of the case to the jury is a waiver of the right to be present; U. S. v. Loughery, 13 Blatchf. 267, Fed. Cas. No. 15,631; State v. Kelly, *supra;* but it was held otherwise in Summeralls v. State, 37 Fla. 162, 20 South. 242, 53 Am. St. Rep. 247; Andrews v. State, 2 Sneed (Tenn.) 550. The waiver of the prisoner's right to be present cannot be made by counsel, either expressly; Cook v. State, 60 Ala. 39, 31 Am. Rep. 31; State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643; or by failure to object; Rose v. State, 20 Ohio 32; Percer v. State, 118 Tenn. 765, 103 S. W. 780; but an express waiver by counsel was held sufficient in Cawthon v. State, 119 Ga. 395, 46 S. E. 897. And see notes to Gore v. Arkansas, 5 L. R. A. 834; Kansas v. Way, 14 L. R. A. (N. S.) 603.

Conduct of the Judge. Where the judge leaves the court room without suspending proceedings, a new trial is granted, it being a deprivation of liberty without due process of law; People v. Tupper, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44; O'Brien v. People, 17 Colo. 561, 31 Pac. 230; Hayes v. State, 58 Ga. 35; such absence is reversible error; Smith v. Sherwood, 95 Wis. 558, 70 N. W. 682. But where the judge obtains the consent of the defendant's counsel to leave the court room, or his absence cannot prejudice the interest of the defendant, a new trial is not necessarily granted; Pritchett v. State, 92 Ga. 65, 18 S. E. 536; Turbeville v. State, 56 Miss. 793; and so it was held not error where the judge was absent only for a brief time, where the evidence demanded the verdict rendered, and the absence was known to counsel, and there was no request made to suspend the trial nor any motion for mistrial on his return; Horne v. Rogers, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176; *contra*, Ellerbe v. State, 75 Miss. 522, 22 South. 950, 41 L. R. A. 569.

Suggestions by the trial judge to the jury that in default of agreement they be kept to the end of the term, to save expense to the county, are ground for reversal; North D. C. R. Co. v. McCue (Tex.) 35 S. W. 1080. There ought to be no communication between a

judge and a jury after the latter have retired unless in open court and if practicable, in the presence of counsel; Colorado C. C. M. Co. v. Turck, 50 Fed. 888, 2 C. C. A. 67, 4 U. S. App. 290. See PRESENCE; JUDGE; JUDICIAL POWER.

As to the *Conduct or misconduct of jurors* in a trial, see JURY.

Comment by the Court on Testimony of Defendant. General instructions as to the credit to be given to the testimony of the accused are usually discouraged by the appellate courts whether the effect of it is to invoke the giving of credit to the testimony; Bryant v. State, 116 Ala. 446, 23 South. 40; U. S. v. Borger, 19 Blatch. 249, 7 Fed. 193; or of inducing lack of confidence in it; State v. Wyse, 32 S. C. 45, 10 S. E. 612; State v. Bartlett, 50 Or. 440, 93 Pac. 243, 19 L. R. A. (N. S.) 802, and note where the cases on instructions as to the testimony of the accused person are collected and classified, 126 Am. St. Rep. 751.

Remarks of Counsel. Ordinarily exception does not lie to a remark of counsel, but to the refusal upon proper request to charge the jury with reference to it; Pressy v. R. I. Co. (R. I.) 67 Atl. 447; and if no exception is taken, and no motion made with reference to such remarks, the objection will not be considered on appeal; Nelson v. Shelby etc. Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116; State v. Ward, 61 Vt. 153, 17 Atl. 483; State v. Watson, 63 Me. 128; and if the court requires the objectionable remark to be withdrawn, the error is usually held to be cured; Dunlop v. U. S., 165 U. S. 486, 489, 17 Sup. Ct. 375, 41 L. Ed. 799. The abuse of the privilege of counsel may be sufficiently objectionable to warrant a reversal, though there was no interference by court or opposing counsel; Klink v. People, 16 Colo. 467, 27 Pac. 1062. It has been held error that irrelevant matter was discussed by counsel without objection from his opponent; Willis v. McNeill, 57 Tex. 465; Prather v. McClelland (Tex.) 26 S. W. 657; the duty of correcting the error of counsel in such cases is said to rest with the judge and not the opposing counsel; Berry v. Georgia, 10 Ga. 511.

The latitude to be allowed to courts in denouncing or rebuking counsel in a trial must be regulated largely by discretion, with the single limitation that it shall not prevent a fair trial; Williams v. W. Bay City, 119 Mich. 395, 78 N. W. 328; Laporte v. Cook, 22 R. I. 554, 48 Atl. 798; and the appellate court has no concern with the conduct or language in the trial court except to ascertain whether it constituted legal error; McDuff v. Detroit Even. Jour. Co., 84 Mich. 1., 47 N. W. 671, 22 Am. St. Rep. 673; it will not interfere with the discretion of the trial court unless that has been abused to the prejudice of the complaining party; Gulf C. & S. F. R. Co. v. Curb, 66 Fed. 519, 13 C. C. A. 587, 27 U. S. App. 663; but where an attorney was fined for persisting in a style of questioning which had been forbidden by the court, it was held not to affect the conviction of his client in a capital case, and the attorney himself could not complain of it; Grant v. State (Tex.) 148 S. W. 760, 42 L. R. A. (N. S.) 428, with note, which contains an extensive list of remarks to counsel by the court which have been held to be or not to be prejudicial error.

Where, in an action for personal injuries, the counsel for plaintiff invites the jury to return a verdict for the defendant, if they find that the plaintiff is only entitled to nominal damages, and such verdict is returned, the plaintiff cannot complain that the evidence did not support it; Langdon v. Clarke, 73 Neb. 516, 103 N. W. 62.

The English criminal evidence act of 1898 does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury, nor does it deprive the court of the right to comment on the failure of the prisoner to give evidence at the trial; [1899] 1 Q. B. 77.

Where objectionable remarks are made by counsel in the presence of the jury, a juror may be withdrawn and the cause continued; Benson v. R. Co., 228 Pa. 290, 77 Atl. 492; and where irrelvant or improper remarks are made before the jury by a witness a juror should be withdrawn; Surface v. Bentz, 228 Pa. 610, 77 Atl. 922, 21 Ann. Cas. 215, where the court said that "it is quite as necessary to protect a party against the improper remarks to a jury made by a witness as * * * by counsel. The misconduct of a bystander, in open court, during the progress of a criminal trial, having been suitably dealt with by the judge, furnishes no ground for the discharge of the jury, unless it is of such a nature as to have necessarily influenced the verdict; State v. Wimby, 119 La. 139, 43 South. 984, 12 L. R. A. (N. S.) 98, and note, 121 Am. St. Rep. 507, 12 Ann. Cas. 643; Bowles v. Com., 103 Va. 816, 48 S. E. 527; State v. Gartrell, 171 Mo. 489, 71 S. W. 1045.

Right of Jury to Hear Shorthand Notes. In some cases it is held that the jury may have the stenographer's notes of evidence read to them as a matter of right; Roberts v. R. Co., 104 Ga. 805, 30 S. E. 966; State v. Perkins, 143 Ia. 55, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217; *contra*, State v. Manning, 75 Vt. 185, 54 Atl. 181; it is within the discretion of the court; *id;* People v. Shuler, 136 Mich. 161, 98 N. W. 986.

Different Indictments in One Trial. A defendant may be tried before the same jury on different indictments charging separate offences of a kindred nature; Lucas v. State, 144 Ala. 63, 39 South. 821, 3 L. R. A. (N. S.) 412; State v. McNeill, 93 N. C. 552; but it was held otherwise in McClellan v. State, 32 Ark. 609, and Com. v. Bickum, 153 Mass. 386, 26 N. E. 1003. In some cases such consolidation is authorized by statute either of the state; Chesnut v. People, 21 Colo. 512, 42 Pac. 656; though such statute is said to be merely an embodiment of an established com-

mon law rule; Cummins v. People, 4 Colo. App. 71, 34 Pac. 734; or of the United States; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; this applies where two persons are jointly charged in each indictment; Turner v. U. S., 66 Fed. 280, 13 C. C. A. 436, 30 U. S. App. 90; but this statute does not authorize the consolidation of separate indictments against different persons, though for a joint offense; U. S. v. Durkee, Fed. Cas. No. 15,008; or indictments against persons for the same crime committed against the property of different persons at different times; Mac Elroy v. U. S., 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355.

Effect of Pleading Guilty on an Appeal. Although the defendant pleads guilty to an indictment which charged no criminal offence, advantage may be taken of it upon writ of error or appeal; Klawanski v. People, 218 Ill. 481, 75 N. E. 1028; Henderson v. State, 60 Ind. 296, and other cases in which the question whether the indictment was sufficient was considered for the first time on appeal; O'Brien v. State, 63 Ind. 242; Hays v. State, 77 Ind. 450; if the defect in the indictment is fatal it may be raised on appeal for the first time; Pattee v. State, 109 Ind. 545, 10 N. E. 421; Cancemi v. People, 18 N. Y. 128; but if it is formal, and may be cured by amendment, it is otherwise; People v. Kelly, 99 Mich. 82, 57 N. W. 1090; King v. State, 3 Tex. App. 7; a failure to demur to an indictment does not waive the objection; People v. Nelson, 58 Cal. 104.

Presumption of Harm. There is a presumption of harm caused by errors in admitting or excluding evidence in a jury trial, and the judgment should be reversed unless absence of harm clearly appears by the record; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392. Crime committed in two districts may be tried where it originated.

Where a conspiracy is charged as entered into in one district, the court thereof has jurisdiction of the offence, although the overt acts were committed in another jurisdiction; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90, where the court said: "We do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this district, where an indictment will lie in the state of the domicil of such person, unless in exceptional cases, where the circumstances seem to demand that this course shall be taken." See VENUE.

It is within the discretion of the trial court to allow the introduction of evidence out of the usual order, and in the absence of gross abuse its exercise of this discretion is not reviewable; Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. It is also discretionary with the court to admit evidence to prove a point after the testimony is closed; Union P. R. Co. v. R. Co., 51 Fed. 309, 2 C. C. A. 174, 10 U. S. App. 98; and to refuse to allow the examination of witnesses for the purpose of elaborating previous testimony; Sutherland v. Round, 57 Fed. 467, 6 C. C. A. 428, 16 U. S. App. 30.

Where objection is made in a criminal trial to comments on facts not in evidence or exaggerated expressions of the prosecuting officer, the court should interfere and put a stop to them if they are likely to be prejudicial to the accused; Graves v. U. S., 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021.

An objection of disorderly conduct of a trial is within the sound discretion of the trial court; and it is only when such discretion has been abused to the prejudice of the complaining party that the appellate court will interfere; Gulf, C. & S. F. Ry. Co. v. Curb, 66 Fed. 519, 13 C. C. A. 587, 27 U. S. App. 663.

Judges of courts of equity frequently decide facts upon mere inspection. The most familiar examples are those of cases where the plaintiff prays an injunction on an allegation of piracy or infringement of a patent or copyright; 5 Ves. Ch. 709, and the cases there cited.

Trial at nisi prius. Originally, a trial before a justice in eyre. Afterwards, by Westm. 2, 13 Edw. I. c. 30, before a justice of assize; 3 Bla. Com. 353. See NISI PRIUS.

Trial by the record. This trial applies to cases where an issue of *nul tiel* record is joined in any action.

The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue; and the parties cannot put themselves upon the country; Steph. Pl., And. ed. 171; 2 Bla. Com. 330.

Trial by wager of battle. See WAGER OF BATTLE.

Trial by wager of law. See OATH DECISORY; WAGER OF LAW.

Trial by witnesses is a species of trial by witnesses, or *per testes*, without the intervention of a jury. This is the only method of trial known to the civil law.

In England, when a widow brings a writ of dower and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and, for greater expedition, allowed to be tried by witnesses examined before the judges; and so, says Finch, shall no other case in our law; Finch, Law 423. But Coke mentions others: as, to try whether the tenant in a real action was duly summoned; or, the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues.

Trial at bar. A species of trial now seldom resorted to, and, as to civil causes, abolished by the Judicature Act, 1875, was one held before all the judges of one of the supreme courts of Westminster, or before a quorum

representing the full court. The celebrated case of Reg. v. Castro, otherwise Tichborne v. Orton, L. R. 9 Q. B. 350, was a trial at bar; Brown, Dict. See POSTULATION; OPEN COURT; PUBLIC TRIAL; WITNESS.

As to evidence taken at a former trial, see MEMORANDUM.

See, for an article on the conduct of counsel at trial, 45 Cent. L. J. 292.

TRIAL LIST. A list of cases marked down for trial for any one term.

TRIBUNAL. The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction. The jurisdiction which the judges exercise.

The term is Latin, and derives its origin from the elevated seat where the tribunes administered justice.

Any court, forum, or judicial body. Anderson's L. Dict.

TRIBUNAUX DE COMMERCE. See COURTS OF FRANCE.

TRIBUTARY. All streams flowing directly or indirectly into a river. [1895] 1 Q. B. 237.

TRIBUTE. A contribution which is sometimes raised by the sovereign from his subjects to sustain the expenses of the state. It is also a sum of money paid by one nation to another under some pretended right. Wolff § 1145.

TRIENNIAL ACT. An act of parliament of 1641, which provided that if in every third year parliament was not summoned and assembled before September 3, it should assemble on the second Monday of the next November.

Also an act of 1694, which provided that a parliament be called within three years after dissolution, and that the utmost limit of a parliament be three years. This was followed by the Septennial Act of 1716.

TRIGAMUS. **In Old English Law.** One who has been thrice married; one who, at different times and successively, has had three wives.

TRIGILD. **In Saxon Law.** A triple payment, three times the value of a thing paid as compensation or satisfaction.

TRINEPOS (Lat.). **In Roman Law.** Great-grandson of a grandchild.

TRINEPTIS (Lat.). Great-granddaughter of a grandchild.

TRINITY HOUSE. See ELDER BRETHREN.

TRINITY SITTINGS. See LONDON AND MIDDLESEX SITTINGS.

TRINITY TERM. See TERM.

TRINIUMGELDUM. An extraordinary offence, consisting of three times nine, or twenty-seven times the single geld or payment. Spelm. Gloss.

TRINKETS. Small articles of personal adornment or use when the object is essentially ornamental. 28 L. J. C. P. 626. See JEWELRY.

TRINODA NECESSITAS (Lat.). The *threefold* necessary public duties to which all lands were liable by Saxon law,—viz. for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasions. 1 Bla. Com. 263.

It fell upon all freemen, or at least upon all free house-holders. Vinogradoff, Engl. Soc. 82. There appear to have been book lands which were free from army-service, bridge-bote, or burh-bote. Maitl. Domesd. Book 273.

TRIORS. Persons appointed according to law to try whether a person challenged to the favor is or is not qualified to serve on the jury. They do not exceed two in number, without the consent of the prosecutor and defendant, or unless some special case is alleged by one of them, or when only one juror has been sworn and two triors are appointed with him. Co. Litt. 158 *a;* Bacon, Abr. *Juries* (E 12).

The method of selecting triors is thus explained. Where the challenge is made to the first juror, the court will appoint two indifferent persons to be triors; if they find him indifferent, he shall be sworn and join the triors in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triors will cease, and every subsequent challenge will be decided upon by the jurymen. If more than two jurymen have been sworn, the court may assign any two of them to determine the challenges. To the triors thus chosen no challenges can be admitted.

The triors examine the juryman challenged, and decide upon his fitness; Thompson v. People, 3 Park. Cr. Cas. (N. Y.) 467. Their decision is final. They are liable to punishment for misbehavior in office; 4 Sharsw. Bla. Com. 353; Whelen v. Watmough, 15 S. & R. (Pa.) 156; People v. Rathbun, 21 Wend. (N. Y.) 509. The office is abolished in many of the states, the judge acting in their place; Licett v. State, 23 Ga. 57; State v. Knight, 43 Me. 11; Reynolds v. U. S., 98 U. S. 157, 25 L. Ed. 244.

The lords also chosen to try a peer, when indicted for felony, in the court of the Lord High Steward, are called triors.

TRIPARTITE. Consisting of three parts: as, a deed *tripartite*, between A of the first part, B of the second part, and C of the third part. See DEED.

TRIPLE ALLIANCE. A treaty between Germany, Austria-Hungary and Italy, formed at the close of the Franco-Prussian War (1870-71).

TRIPLE ENTENTE. A treaty between Russia, France and Great Britain, formed early in the 20th century. See Sir T. Barclay's Thirty Years' Anglo-French Reminiscences.

TRIPLICATIO (Lat.). **In Civil Law.** The reply of the plaintiff (*actor*) to the rejoinder (*duplicatio*) of the defendant (*reus*). It corresponds to the surrejoinder of common law. Inst. 4. 14; Bracton, G. l. 5, t. 5, c. 1.

TRIPLICATION. A pleading in admiralty, second in order after a replication; now obsolete. See PLEADING.

TRISTIS SUCCESSIO. See HÆREDITAS LUCTUOSA.

TRITAVUS (Lat.). **In Roman Law.** The male ascendant in the sixth degree. For the female ascendant in the same degree the term is *tritavia*. In forming genealogical tables this convenient term is still used.

TRITHING (Sax. *trithinga*). The third part of a county, consisting of three or four hundreds.

A court within the circuit of the trithing, in the nature of a court-leet, but inferior to the county court. Camd. 102. The ridings of Yorkshire are only a corruption of trythings. 1 Bla. Com. 116; Spelm. Gloss. 52.

TRIUMVIRICAPITALES, or TREVIRI, or TRESVIRI. In Roman Law. Officers who had charge of the prison, through whose intervention punishments were inflicted. Sallust, *in Catilin.*

TRIVIAL. Of small importance. It is a rule in equity that a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. 4 Bouvier, Inst. n. 4237. See MAXIMS, *De minimis*, etc.

TRONAGE. A customary duty or toll for weighing wool: so called because it was weighed by a common *trona*, or beam. Fleta, lib. 2, c. 12.

TROOPS, FOREIGN. See FOREIGN TROOPS.

TROVER (Fr. *trouver*, to find). **In Practice.** A form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property.

A generic name, applied to those torts, arising from the unlawful conversion of any particular piece of personal property owned by another. Spellman v. R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858.

In form it is a fiction: in substance, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use. 1 Burr. 31.

The action was originally an action of trespass on the case where goods were *found* by the defendant and retained against the plaintiff's rightful claim. The manner of gaining possession soon came to be disregarded, as the substantial part of the action is the *conversion* to the defendant's use; so that the action lies whether the goods came into the defendant's possession by *finding or otherwise*, if he fails to deliver them upon the rightful claim of the plaintiff. It differs from *detinue* and *replevin* in this, that it is brought for damages and not for the specific articles; and from *trespass* in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie; but the converse is not true. In case possession was gained by a trespass, the plaintiff by bringing his action in this form waives his right to damages for the taking, and is confined to the injury resulting from the conversion; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; McNear v. Atwood, 17 Me. 434.

The *action lies* for one who has a *general* or absolute property; Bull. N. P. 33; Pope v. Tucker, 23 Ga. 484; together with a right to immediate possession; 1 Ry. & M. 99; Clark v. Draper, 19 N. H. 419; Stewart v. Bright, 6 Houst. (Del.) 344; see Owens v. Weedman, 82 Ill. 409; Landon v. Emmons, 97 Mass. 37; as, for example, a vendor of property sold upon condition not fulfilled; Houston v. Dyche, 1 Meigs (Tenn.) 76, 33 Am. Dec. 130; or a *special* property, including actual possession as against a stranger; 2 Saund. 47; Eaton v. Lynde, 15 Mass. 242; Coffin v. Anderson, 4 Blackf. (Ind.) 395; as, for example, a sheriff holding under rightful process; Blackley v. Sheldon, 7 Johns. (N. Y.) 32; a mortgagee in possession; Reynolds v. Shuler, 5 Cow. (N. Y.) 323; a simple bailee; see Hopper v. Miller, 76 N. C. 402; Brown v. Dempsey, 95 Pa. 243; Clark v. Bell, 61 Ga. 147; or even a finder merely; McLaughlin v. Waite, 9 Cow. (N. Y.) 670; and including lawful custody and a right of detention as against the general owner of the goods or chattels; Spoor v. Holland, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; M'Connell v. Maxwell, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428. An executor or administrator is held an absolute owner by relation from the death of the decedent. And he may maintain an action for a conversion in the lifetime of the decedent; Towle v. Lovet, 6 Mass. 394; and is liable for a conversion by the decedent; Avery v. Moore, 1 N. C. 362, 1 Am. Dec. 560.

Trustees having title to chattels with an immediate right of possession may sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the occupation of their *cestui que trust;* [1891] 2 Ch. 172.

The property affected must be some personal chattel; Mather v. Ministers of Trinity Church, 3 S. & R. (Pa.) 513, 8 Am. Dec. 663; specifically set off as the plaintiff's; 4 B. & C. 948; Chapman v. Searle, 3 Pick. (Mass.) 38; including title deeds; Weiser v. Zeisinger, 2 Yeates (Pa.) 537; a copy of a record; Sawyer v. Baldwin, 11 Pick. (Mass.) 492; money, though not tied up; Donohue v. Henry, 4 E. D. Smith (N. Y.) 162; negotiable securities; 3 B. & C. 45; Todd v. Crookshanks, 3 Johns. (N. Y.) 432; Firemen's Ins. Co. v. Cochrane, 27 Ala. 228; animals *feræ naturæ*,

but reclaimed; Amory v. Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; trees and crops severed from the inheritance; Davis v. Barnes, 3 Mo. 137; James v. Snelson, 3 Mo. 393; Nelson v. Burt, 15 Mass. 204; Sampson v. Hammond, 4 Cal. 184. It will lie by a surviving partner to recover possession of the firm assets as against the representatives of the deceased partners; Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466. It will not lie for property in custody of the law; Jenner v. Joliffe, 9 Johns. (N. Y.) 381; if rightfully held; see Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 576; or to which the title must be determined by a court of peculiar jurisdiction only; 1 Cam. & N. 115; or where the bailee has lost the property, or had it stolen, or it has been destroyed by want of due care; Simmons v. Sikes, 24 N. C. 98. Unless an actual conversion by bailee be shown, an action of trover against him will not lie without a previous demand for the goods; Loveless v. Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407. See CONVERSION.

There must have been a conversion of the property by the defendant; Stone v. Waggoner, 8 Ark. 204. And a waiver of such conversion will defeat the action; Hewes v. Parkman, 20 Pick. (Mass.) 90. Nondelivery of goods by a vessel is not a conversion of the goods; 35 U. S. App. 369. See CONVERSION.

The declaration must state a rightful possession of the goods by the plaintiff; Seivier v. Holliday, Hempst. 160, Fed. Cas. No. 12,680a; but need not show the nature or evidence of plaintiff's title; Warren v. Dwyer, 91 Mich. 414, 51 N. W. 1062; it must describe the goods with convenient certainty, though not so accurately as in detinue; Bull. N. P. 32; Hall v. Burgess, 5 Gray (Mass.) 12; must formally allege a finding by the defendant, and must aver a conversion; Decker v. Mathews, 12 N. Y. 313. It is not indispensable to state the price or value of the thing converted; Pearpoint v. Henry, 2 Wash. (Va.) 192; and where there is an actual conversion of property, demand before action is not necessary; Baker v. Lothrop, 155 Mass. 376, 29 N. E. 643; Knipper v. Blumenthal, 107 Mo. 665, 18 S. W. 23.

The plea of not guilty raises the general issue.

Judgment, when for the plaintiff, is that he recover his damages and costs, or, in some states, in the alternative, that the defendant restore the goods or pay, etc.; Mitchell v. Printup, 19 Ga. 579; when for the defendant, that he recover his costs. The measure of damages is the value of the property at the time of the conversion, with interest; Jenkins v. McConico, 26 Ala. 213; Polk's Adm'r v. Allen, 19 Mo. 467; Forbes v. R. Co., 133 Mass. 158.

See the History of Trover by James Barr Ames, 3 Sel. Essays in Anglo-Amer. L. H. 417.

TROY WEIGHT. See MEASURES; WEIGHT.

TRUCE. An agreement between belligerent parties by which they mutually engage to forbear all acts of hostility against each other for some time, the war still continuing. At the present day there is no practical distinction between truces and armistices (*q. v.*).

Arts. 36–41 of the Convention Concerning the Laws and Customs of War on Land lay down the following rules:

"An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

"An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

"An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

"It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with and between the populations.

"Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

"A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained."

During the continuance of a truce, either party may do within his own territory or the limits prescribed by the armistice, whatever he could do in time of peace, *e. g.* levy and march troops, collect provisions, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged; but neither party can do what the continuance of hostilities would have prevented him from doing, *e. g.* repair fortifications of a besieged place; and all things, the possession of which was especially contested when the truce was made, must remain in their antecedent places; Hall, Int. Law 500; 2 Opp. §§ 231–240.

TRUCE OF GOD (Law L. *treuza Dei;* Sax. *treuge* or *trewa*, from Germ. *treu;* Fr. *trêve de Dieu*). In the middle ages, a limitation of the right of private warfare introduced by the church. This truce provided that hostilities should cease on holidays, from Thursday evening to Sunday evening of each week, the whole season of Advent and Lent, and the octaves of great festivals. The penalty for breach of the truce was excommuni-

cation. The protection of this truce was also extended constantly to certain places, as, churches, convents, hospitals, etc., and certain persons, as, clergymen, peasants in the field, crusaders, and, in general, all defenceless persons. It was first introduced into Acquitaine in 1041, and into England under Edward the Confessor. 1 Rob. Charles V. App. n. xxi. Another authority places it in 1031, and in Limoges. See Orations from Homer to McKinley, vol. 25, p. 1055.

TRUCK ACTS. Acts in England, 1 & 2 Wm. IV, amended in 1887 and 1896, which provide that workmen shall not have unreasonable deductions made from their wages (as for fines, damaged goods, materials, or tools), nor have their wages paid otherwise than in current coin, nor be obliged to spend them in any particular place or manner.

TRUE. That only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word "true" is often used as a synonym of honest, sincere, not fraudulent. Moulor v. Ins. Co., 111 U. S. 345, 4 Sup. Ct. 466, 28 L. Ed. 447.

TRUE BILL. In Practice. Words indorsed on a bill of indictment when a grand jury, after having heard the witnesses for the government, are of opinion that there is sufficient cause to put the defendant on his trial. Formerly the indorsement was *Billa vera* when legal proceedings were in Latin; it is still the practice to write on the back of the bill *Ignoramus* when the jury do not find it to be a true bill; the better opinion is that the omission of the words a true bill does not vitiate an indictment; Com. v. Smyth, 11 Cush. (Mass.) 473; State v. Freeman, 13 N. H. 488. See GRAND JURY.

TRUE COPY. A true copy, does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it. It may contain an error or omission. 51 L. J. Ch. 905.

TRUE, PUBLIC, AND NOTORIOUS. These three qualities used to be formally predicted in the libel in the ecclesiastical courts, of the charges which it contained, at the end of each article, severally. Whart.

TRUST. A right of property, real or personal, held by one party for the benefit of another.

"A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation." This definition is proposed after an enumeration of many given by judges and text-writers, and a critical discussion of them, by W. G. Hart, 15 L. Q. R. 294.

An equitable right, title, or interest, in property, real or personal, distinct from its legal ownership.

A personal obligation for paying, delivering, or performing anything where the person trusting has no real right or security, for by that act he confides altogether to the faithfulness of those intrusted.

An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence. Tiedm. Eq. Jur. § 253; 4 Kent 295; 1 Saunders, Uses & Tr. 6; 3 Bla. Com. 431.

A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formerly applied to uses; Fisher v. Fields, 10 Johns. (N. Y.) 506. A trust is a use not executed under the statute of Hen. VIII; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762. The words *use* and *trust* are frequently used indifferently. See 3 Jarm. Wills *1139.

Trust implies two estates or interests,—one equitable and one legal; one person as trustee holding the legal title, while another as the *cestui que trust* has the beneficial interest. Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

Sometimes the equitable title of the beneficiary, sometimes the obligation of the trustee, and, again, the right held, is called the trust.

But the right of the beneficiary *is in* the trust; the obligation of the trustee *results from* the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust itself. All together they constitute the trust.

The distinction between the *fidei commissa* and a trust, is that in the former there was no separation of the equitable and legal title, but there was simply a request, which afterwards became a duty imposed upon the *gravatus* to convey the inheritance to another person, either immediately or after a certain event; whereas, in the trust, the perfect ownership is decomposed into its constituent elements of legal title and beneficial interest, which are vested in different persons at the same time. Besides the *fidei commissa* arose out of testamentary dispositions; whereas English trusts, until the statute of wills, were created only by conveyances *inter vivos;* Bisph. Eq. 893, § 50. See McDonogh v. Murdoch, 15 How. (U. S.) 367, 14 L. Ed. 732.

Active or *special trusts* are those in which the trustee has some duty to perform, so that the legal estate must remain in him or the trust be defeated.

Express (or *direct*) *trusts* are those which are created in express terms in the deed, writing, or will. The terms to create an express trust will be sufficient if it can be fairly collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as marriage settlements, terms for years, mortgages, assignments for the payment of debts, raising portions, or other purposes; and in wills and testaments, when the be-

quests involve fiduciary interests for private benefit or public charity. They may be created even by parol; Miller v. Pearce, 6 W. & S. (Pa.) 97; except so far as forbidden by the statute of frauds.

A written instrument though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

In express trusts, title does not vest until acceptance by the trustee, which may be expressly or by implication, or by assuming the duties of the trust; In re Robinson, 37 N. Y. 261; Armstrong v. Morrill, 14 Wall. (U. S.) 138, 20 L. Ed. 765; but there is a presumption of acceptance; Read v. Robinson, 6 W. & S. (Pa.) 331; 3 B. & Ald. 36. Parol evidence of the acts and admissions of a party are admissible to prove his acceptance; Ridenour v. Wheritt, 30 Ind. 485; collecting income; 1 Ves. 522; giving a receipt; Kennedy v. Winn, 80 Ala. 166; see Perry, Trusts § 259 *et seq.* See TRUSTEE.

A *simple* trust is said to be a simple conveyance of property to one upon trust for another, without further directions. A *special* trust is where special and particular duties are pointed out to be performed by the trustee. A trust to do a simple act (as to convey to another) is a *ministerial* trust; if judgment by the trustee is required, it is a *discretionary* trust. See Perry, Trusts § 18.

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties. The term is used in this general sense, including *constructive* and *resulting* trusts *(q. v.)*, and also in a more restricted sense, excluding those classes.

Implied trusts do not come within the statute of frauds; Seichrist's Appeal, 66 Pa. 237.

Resulting trusts are those which the courts presume to arise out of the transactions of parties, as if one man pays the purchase-money for an estate, and the deed is taken in the name of another, a trust is presumed in favor of the person who pays the money. Perry, Trusts § 26.

Constructive trusts are those which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties. Such trusts have not, technically, any element of fraud in them; Bisph. Eq. § 91. Under this branch of trusts it has been said that "wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business; he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." 1 Lead. Cas. Eq. 62. The rule as to such trusts applies not only to persons standing in a direct fiduciary position towards others, such as trustees, attorneys, etc., but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise: as against partners; Anderson v. Lemon, 8 N. Y. 236; tenants in common; Duff v. Wilson, 72 Pa. 442; mortgagees; Woodlee v. Burch, 43 Mo. 231; as against agent, buying goods with the principal's money; Balloch v. Hooper, 6 Mackey (D. C.) 421; Bisph. Eq. § 93. A constructive trust must rest on fraud, either actually intended or resulting from a failure to recognize the rules of business integrity; Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81.

See definitions in Russell v. Peyton, 4 Ill. App. 473, and separate titles in this work.

If one obtains a title to land by artifice or concealment, equity will enforce a trust in favor of the party justly entitled thereto; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719. Whoever comes into possession of trust property, with notice of the trust, is bound to the execution of the trust; School Trustees v. Kirwin, 25 Ill. 73.

A trustee who buys at his own sale, even if public, will still be considered, at the option of the *cestui que trust*, a trustee. See 1 Lead. Cas. Eq. 248. This is not upon the ground of fraud, but of public policy. See Yeackel v. Litchfield, 13 Allen (Mass.) 419, 90 Am. Dec. 207; and this rule was applied to the wife of the trustee; Appeal of Dundas, 64 Pa. 325, where the sale was confirmed upon terms that the executors be surcharged with an additional sum of $20,000, the difference between the price paid and the full value of the property. That a trustee can buy at his own sale only by leave of court and notice to the parties, see 38 Amer. L. Rev. 783. See TRUSTEE.

So if a person obtains from a trustee trust property without paying value for it, although without notice of the trust, he will in such case be held a trustee by construction; Bisph. Eq. § 95; Tiedm. Eq. Jur. § 312. And in case of a contract for the sale of land, equity considers the vendor as a trustee of the legal title for the purchaser; *ibid.*

A *passive* or *dry* or *simple* trust is one which requires the performance of no duty by the trustee to carry out the trust, but by force of which the mere legal title rests in the trustee. Thus, a gift by will to a trustee to deliver the property to the beneficiary on certain conditions; Marvel v. Trust Co. (Del.) 87 Atl. 1014.

As to *executory* and *executed trusts*, see those titles. An executed trust is one explicitly declared in writing, duly signed, stating the conditions upon which the legal title is held, and the final intention of the creditor, so that the trustee can carry that intention

into effect. Gaylord v. Lafayette, 115 Ind. 423, 17 N. E. 899.

Trusts may also be distinguished as *public* and *private* trusts. The former are constituted for the benefit either of the public at large or some particular portion of it answering to a particular description (as a public charity); while the latter are those wherein the beneficial interest is vested absolutely in one or more individuals who are, or may be within a certain time, definitely ascertained. Bisph. Eq. § 59.

A trust arises when property has been conferred upon one person and accepted by him for the benefit of another. The former is a trustee, and holds the legal title, and the latter is called the *cestui que trust*, or beneficiary. In order to originate a trust, two things are essential,—*first*, that the ownership conferred be connected with a right, or interest, or duty for the benefit of another; and, *second*, that the property be accepted on these conditions.

The modern trust includes not only those technical *uses* which were not executed by the statute of uses, but also equitable interests which never were considered uses, and did not, therefore, fall within the provisions of this statute. These equitable interests, in common with the unexecuted uses, received the name of trusts; Bisph. Eq. § 52. The statute of uses provided that where one was seized to the use of another, the *cestui que use* should be deemed to be in lawful seizin and possession of the same estate in the land itself as he had in the use.

A trust which at the time of its creation is a passive trust will be executed by this statute, although the word *trust* instead of *use* is employed. But where a trust which has once been active becomes passive, such a trust is not necessarily executed by the statute. If the mere fact that the trustee had active duties to perform was the only circumstance that prevented the statute from operating, the trust will be executed when the active duties have ceased. But if the non-execution of the trust by the statute did not originally and solely depend upon the activity of the trust, the fact that the trust has ceased to be active will not of itself cause the statute to apply; but the trustee is then bound to convey the legal estate at the request of the *cestui que trust;* and after a great lapse of time, and in support of long-continued possession on the part of the person holding the beneficial interest, such a conveyance will be presumed; Bisph. Eq. § 55. A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property of the fund in the beneficiary; Martin v. Fort, 83 Fed. 19, 27 C. C. A. 428.

When active duties are to be performed by the trustee, it will, generally, not be executed; Bisph. Eq. § 56; Stanley v. Colt, 5 Wall. (U. S.) 119, 168, 18 L. Ed. 502; though where there was a separate use for a *feme sole* not in contemplation of marriage, it was held that as this separate use was void, the trust fell, although the trustee had active duties to perform; Yarnall's Appeal, 70 Pa. 335. When the trustee is vested with a discretion, however slight, he takes the place of the donor and the trust is an active trust; Hemphill's Estate, 18 Pa. Co. Ct. 527. Where the income only was to be paid to a son "after deducting taxes and necessary expenses," it was held to be an active trust; Com. v. Oblender, 135 Pa. 535, 19 Atl. 1057.

Where an estate is given in trust to pay one-half the income to each of two persons, it is not a gift of one-half the principal to be held for each, but of all to be held jointly for both, and it should remain intact until the period of distribution arises; Aubert's Appeal, 119 Pa. 52, 12 Atl. 810.

Before the statute of frauds, a trust, either in regard to real or personal estate, might have been created by parol as well as by writing. The statute requires all trusts as to real estate to be in writing; 4 Kent 305; Adams, Eq. 27. Trusts as to partnership interests in real estate are not within the statute of uses and trusts. See Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228.

If a gratuitous declaration of trust of land by the owner is void under the statute and the trustee repudiates it, the *cestui que trust* has no remedy; but if it was made for value received, he is bound to make restitution. If one conveys land to another on an oral trust to hold for the grantor, and the trustee repudiates the trust, he will be compelled to re-convey, and meantime will be considered as holding a constructive trust; [1897] 1 Ch. 196; or pay the value of the land; Twomey v. Crowley, 137 Mass. 184; but that he will not be compelled to do either, see Mescall v. Tully, 91 Ind. 96; Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; and the "prevailing American doctrine" is said to be that he can get neither the land nor its value; 20 Harv. L. Rev. 552, citing Barry v. Hill, 166 Pa. 344, 31 Atl. 126; Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896; Jacoby v. Funkhouser 147 Ala. 254, 40 South. 291; Pavey v. Ins. Co., 56 Wis. 221, 13 N. W. 925, and other cases. If one conveys to another on an oral trust for a third party, the latter cannot enforce the trust, but the grantor may recover his land, or its value in certain jurisdictions, and not in others; see the cases just cited.

Where a *devise* is to one on an oral trust for another, the cases enforce a different rule and permit the *cestui que trust* to get the benefit of the trust; and in such case, if the trustee fraudulently induces the devise to himself intending to keep the property, equity will compel him to convey to the intend-

ed beneficiary; but if the trustee has acquired the property with the intention of fulfilling his promise, but afterwards, relying on the statute, refuses to do so, then, it is said, equity will compel him to surrender the property to the heir.

Where there has been a conveyance, by direction of the buyer, to a third person on an oral trust, the law raises a presumption that the grantee was a trustee for the one who paid the purchase money. This was deemed a trust by operation of law and to be thereby within the statute of frauds. See RESULTING TRUST. Statutes have been passed in some states dealing with this presumption and defining the rights of the parties in such circumstances; reference as to such acts is made to James Barr Ames' article on Oral Trusts of Land (Lect. on Leg. Hist. 425, 20 Harv. L. Rev. 549), from which the above abstract as to oral trusts is made.

If the trustee recognizes a parol trust, no one whose equities are not affected can interfere; Patton v. Chamberlain, 44 Mich. 5, 5 N. W. 1037.

A resulting trust arises by implication of law and not by contract; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; it cannot exist where there is an express trust; Coleman v. Parran, 43 W. Va. 737, 28 S. E. 769; it is not within the statute of frauds; Tillman v. Murrell, 120 Ala. 239, 24 South. 712; Butler v. Carpenter, 163 Mo. 597, 63 S. W. 823; Lynch v. Herrig, 32 Mont. 267, 80 Pac. 240.

No particular form of words is requisite to create a trust. The court will determine the intent from the general scope of the language; Fisher v. Fields, 10 Johns. (N. Y.) 496; 4 Kent 305; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138. The words, however, to warrant the inference of a trust, must be more than loose and general declarations; but, on the other hand, parol declarations will not be received to contradict the inference of a trust in land fairly deducible from written declarations; Steere v. Steere, 5 Johns. Ch. (N. Y.) 2, 9 Am. Dec. 256.

In voluntary and express trusts, no title vests in a trustee unless he expressly or impliedly accepts the trust or in some way assumes its duties; F. G. Oxley Stave Co. v. Butler Co., 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; *contra*, Davis v. Hall, 128 Ia. 649, 105 N. W. 122. It is held that the knowledge or the acceptance of the beneficiary is immaterial; City of Marquette v. Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840; Moloney v. Tilton, 22 Misc. 682, 51 N. Y. Supp. 19. The refusal of the trustee to accept an active trust does not vest the trust fund in the beneficiary; Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470.

A voluntary trust arising on a meritorious consideration and perfectly created is irrevocable; Gaylord v. Lafayette, 115 Ind. 423, 17 N. E. 899; Lovett v. Farnham, 169 Mass. 1, 47 N. E. 246; without the consent of the beneficiary; Krankel's Ex'x v. Krankel, 104 Ky. 745, 47 S. W. 1084; but a deed to a trustee which is testamentary in its character may be revoked; Chestnut St. Nat. Bank v. Ins. Co., 186 Pa. 333, 40 Atl. 486, 65 Am. St. Rep. 860; and so if the purposes for which the trust was created have failed, the trust being voluntary and without a valuable consideration; Sturgeon v. Stevens, 186 Pa. 350, 40 Atl. 488; a valid trust cannot usually be revoked; Skeen v. Marriott, 22 Utah 73, 61 Pac. 296; Carr v. Branch, 85 Va. 597, 8 S. E. 476. See REVOCATION.

A trust, as to personal property, may be proved by parol evidence; 1 Hare 158; 3 Bla. Com. 431; Chase v. Perley, 148 Mass. 289, 19 N. E. 398; and parol evidence is admissible against the face of a deed itself to show all the facts out of which a resulting trust arises; Seiler v. Mohn, 37 W. Va. 507, 16 S. E. 496; as to a *cestui que trust* holding the beneficial enjoyment of property free from the rights of his creditors, Nichol v. Levy, 5 Wall. (U. S.) 441, 18 L. Ed. 596. See SPENDTHRIFT.

Equity will follow trust moneys as far as they can be identified; F. & M. Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391, 19 U. S. App. 256; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14; but the right fails when the means of ascertainment fail; Thompson's Appeal, 22 Pa. 16. If one knowingly permits the employment of trust funds in the purchase and improvement of property, the same, even though commingled with other money belonging to such person, may be traced and the return awarded out of the property purchased in part and improved in part by such trust fund; Wobbe v. Schaub, 143 Ill. App. 361.

Trust funds may be followed into a trustee's estate, though no particular property can be identified as acquired by him, where the trust fund was mingled with the general funds of the trustee's estate and went into his general assets, either in payment of debts or purchase of securities; State v. Bruce, 17 Idaho 1, 102 Pac. 831, 134 Am. St. Rep. 245. But it is held that a trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust moneys had gone into it; National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. —.

When trust property is turned into money and mixed with the general mass of property of like description, it is no longer earmarked; Phillips v. Overfield, 100 Mo. 466, 13 S. W. 705. If a trustee mixes his own property with the property of a trust, so that it cannot be separated, the whole becomes the property of the trust; Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679; or only so far as the trustee may not be able to distinguish them; Hutchinson v. Bank, 145 Ala. 196, 41 South.

143. If they cannot be distinguished, it is held that the beneficiary stands on a par with the creditors of his trustee; State v. Osborne, 69 Conn. 257, 37 Atl. 491.

Where one has mingled trust funds in his individual bank account, and it has been wholly depleted, the trust funds are thereby depleted, and cannot be considered as appearing in sums subsequently deposited in the same account; Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. —.

The rules applicable where a trustee has wrongfully disposed of trust property are thus, in substance, formulated by Prof. James Barr Ames in Lect. on Leg. Hist. 412, 19 Harv. L. Rev. 511:

If a trustee wrongfully sells the trust property or exchanges it for other property, the *cestui que trust* may charge him as a constructive trustee of the money or newly acquired property, or of any subsequent product of either; or he may enforce an equitable lien upon any property in the hands of the wrongdoer, which is the traceable product of the trust property. If the new property is worth less than the misappropriated trust property, he may exhaust his lien and have a personal claim against the trustee for the difference. If the new property is worth as much as, or more than, the trust property, the enforcement of the constructive trust or of the equitable lien will be a full satisfaction. If the value of the new property exceed the trust property, the *cestui que trust* may make the profit, no matter how great; in a case of a misuse of trust funds, the trustee loses for himself and wins for the beneficiary.

If the trust property, or its product, has been transferred by the wrongdoer, the rights of the defrauded owner against the transferee will vary accordingly as the latter is (1) a *mala fide* transferee, or (2) a *bona fide* donee, or (3) a *bona fide* purchaser. The first is in the same case as the original wrongdoer. The second, if he gets the title, is, from the moment of his discovery of the grantor's fraud, in the same position as if he had at that moment acquired the property *mala fide*. If, however, he should dispose of the property before such discovery, he is not accountable for its value to the *cestui que trust*. If his transfer was gratuitous, he is not responsible to him in any way; but if it was for value, he must either surrender the value, or account for it. If the value received was less than the trust property, or if the newly acquired property has depreciated in value below that of the trust property, he can be required only to give up what he received; if the newly acquired property appreciates, the transferee need only give up the value of the misappropriated property; if he be insolvent, justice will be done if the beneficiary have a lien to the extent of the value of the newly acquired property, the surplus going to the transferee's creditors.

If the *bona fide* transferee does not acquire the title to the misappropriated property (as when he receives it from a thief), he must surrender it to the true owner, or make reparation in value. If, after discovering the title of the true owner, he should transfer the property in exchange, he would be chargeable as a constructive trustee of the newly acquired property, as also if his transfer was before he discovered the tort of his transferror.

If a *bona fide* purchaser acquired the title to the property, he will hold it clear of all claims.

A trustee who has wrongfully disposed of a trust property may sue, as trustee, for its recovery; Atwood v. Lester, 20 R. I. 660, 40 Atl. 866; Wetmore v. Porter, 92 N. Y. 76; these cases are said to represent the weight of authority on a disputed question; 12 Harv. L. Rev. 359.

An administrator deposited funds in a bank and took the following receipt, "to be held until vouchers are received from heirs, then same to be forwarded by bank draft." On the bank's failure the administrator was allowed to recover the money on the ground that it was a trust fund; Carlson v. Kies, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317.

Where one, by a breach of trust, has obtained an advantage, equity will reach all directly concerned in the wrong and directly and knowingly participate in the fruits thereof; Miller v. Himebaugh, 153 S. W. 338.

See EAR-MARK.

Trust funds held for a charitable object are not liable for the torts of a trustee; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745. See HOSPITAL; CHARITABLE USES.

If a trustee dies, or fails or refuses to execute or accept the trust, or no trustee is named, the trust does not for that reason fail. It is a settled rule that the court of chancery will provide a trustee or attend to the execution of the trust; 10 Sim. 256; Adams, Eq. 36.

Trusts are interpreted by the ordinary rules of law, unless the contrary is expressed in the language of the trust; Cudworth v. Thompson, 3 Des. (S. C.) 256, 4 Am. Dec. 617.

The rules for the devolution of equitable estates are the same as those for the descent of legal titles, and fall under the operation of the various intestate acts; Bisph. Eq. § 60.

The death of a co-trustee vests the title in the survivor; Webster v. Vandeventer, 72 Gray (Mass.) 428.

Apart from statute, on the death of a sole trustee, real estate passes to his heir, and personalty to his personal representatives, subject to the trust; Perry, Trusts § 269 (citing [1891] 2 Ch. 567; State v. Trust Co., 209 Mo. 472, 108 S. W. 97; Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918); the court will appoint a new trustee. The subject is usually regulated by statute. It is said that, if no new trus-

tee is appointed, the heir or personal representative may act as the case may be; Perry, Trusts § 269.

It is the duty of the executors of a deceased trustee to settle an account of the trust estate and to pay the funds over to a successor; they are not bound to execute the trust; Silvers v. Canary, 114 Ind. 129, 16 N. E. 166.

Where a trust deed, upon the death of the trustee, vested the title in the court of chancery as a successor in the trust, this was inoperative, and the title vested in the heirs of the trustee charged with the execution of the trust; Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918.

If the legal title to real estate cannot be taken by an alien, the beneficial ownership cannot be enjoyed by him; Taylor v. Benham, 5 How. (U. S.) 270, 12 L. Ed. 130.

An assignment in trust for the benefit of creditors is valid without assent on the part of the creditors; 25 Wash. L. Rep. 822; *contra*, [1897] 2 Q. B. 19; Widgery v Haskell, 5 Mass. 144, 4 Am. Dec. 41. In [1897] 2 Q. B. 19, it was held that an assignment in trust for particular persons is irrevocable, while one for creditors in general is revocable. See TRUSTEE.

Where railroad stock was held in trust for one for life with remainder over, and the company declared a dividend payable out of surplus, it was apportioned in the proportions which the amount of suplus earned before the decedent's death bore to the whole amount of the surplus. The life tenants should receive all of the income earned after the death of the testator, reserving to the corpus of the estate the amount of the surplus which had accrued at the death of the testator, the essential thing being to find the value of the estate at the time of testator's death and to preserve this value from diminution; Stokes' Estate, 240 Pa. 277, 87 Atl. 971. See DIVIDENDS.

As to combinations of capital now known as "trusts," see RESTRAINT OF TRADE. The origin of this use of the word "trusts" is thus described: Under this form of combination the stockholders of the various constituent companies of the trust place their stock in the hands of a small board of trustees, giving to these trustees an irrevocable power of attorney to vote the stock as they see fit, or in accordance with specific instructions given at the beginning. The title to the stock itself remains in the original holder, with the right to sell or pledge or dispose of it as he sees fit, but without the power of recalling his right to vote. In return for this stock thus deposited with the trustees, the trustees have ordinarily issued trust certificates, which are in themselves negotiable and take the place of the stock. Encycl. Br., by J. W. Jenks. See VOTING TRUST.

A common form of financial securities is known as "car trusts," from the fact that the title to railroad rolling stock was placed, by bailment or sale, in one or more individuals, in trust, who issued certificates of ownership in the property to the persons investing their money on the faith of the property and the promise of the railroad company to pay for it. See ROLLING STOCK.

As to the origin of trusts, see James Barr Ames, in Lect. on Leg. Hist. 243.

See TRUSTEE; TRUST ESTATES AS BUSINESS COMPANIES; SPENDTHRIFT TRUST; RESULTING TRUST; REVOCATION; EAR-MARK; CONFUSION OF GOODS; USES; CHARITABLE USES.

The operation of trusts has been narrowed by statute in some states: New York, Michigan and Louisiana; Bisph. Eq. § 56. The subject has been very fully developed by the Pennsylvania courts.

TRUST COMPANY. The business of such companies consists largely in the administration of trusts of various kinds, and particularly those arising under corporate mortgages. It is a common practice for them to become surety on bonds in legal proceedings and in various other ways, and they usually also transact a safe deposit business. See SAFE DEPOSIT COMPANIES; SURETYSHIP.

TRUST DEED. A deed given to a trustee for the purpose of securing a numerous class of creditors, as the bondholders of a railroad corporation, with power to sell on default in payment of their bonds, notes, or other claims. It is used in some states instead of a bond and mortgage in ordinary loans to an individual or corporation.

TRUST ESTATES AS BUSINESS COMPANIES. A practice in Massachusetts of vesting a business or certain real estate in a group of trustees, who manage it for the benefit of the beneficial owners; the ownership of the latter is evidenced by negotiable (or transferable) shares. The trustees are elected by the shareholders, or, in case of a vacancy, by the board of trustees. Provision is made in the agreement and declaration of trust to the effect that when new trustees are elected, the trust estate shall vest in them without further conveyance. The declaration of trust specifies the powers of the trustees. They have a common seal; the board is organized with the usual officers of a board of trustees; it is governed by by-laws; the officers have the usual powers of like corporate officers; so far as practicable, the trustees in their collective capacity, are to carry on the business under a specified name. The trustees may also hold shares as beneficiaries. Provision may be made for the alteration or amendment of the agreement or declaration in a specified manner. In Eliot v. Freeman, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, it was held that such a trust was not within the corporation tax provisions of the tariff act of Aug. 5, 1909. See also Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428.

See Sears, Trust Estates as Business Companies (1912).

TRUST FUND DOCTRINE. See STOCKHOLDER.

TRUSTEE. A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.

One to whom property has been conveyed to be held or managed for another.

To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees; Hill, Trust. 49.

Trusts are not strictly cognizable at common law, but solely in equity; Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. Ed. 873.

Any reasonable being may be a trustee. The United States or a state may be a trustee; McDonogh v. Murdoch, 15 How. (U. S.) 367, 14 L. Ed. 732; Holland v. State, 15 Fla. 455; State v. R. Co., 15 Fla. 690; Gibson v. R. Co., 37 Fed. 743, 2 L. R. A. 467. So may a corporation; Girard v. Philadelphia, 7 Wall. (U. S.) 1, 19 L. Ed. 53; Perry, Trusts § 42.

"Whoever is capable of taking the legal title or beneficial interest in property may take the same trust for others." Perry, Trusts § 39. Non-resident natural persons are not disqualified from acting as trustee; 4 Am. Ry. Rep. 291; an act which declares such person disqualified is in conflict with the federal constitution; Farmers' Loan & Trust Co. v. Ry. Co., 27 Fed. 146, *arguendo*; Shirk v. La Fayette, 52 Fed. 857; but this constitutional provision does not extend to foreign corporations.

A foreign corporation may be a trustee; Cook, Stock, etc. § 813; it must comply with local statutes; Farmers' Loan & Trust Co. v. R. Co., 68 Ill. App. 666; *contra*, Brown v. Elwell, 17 Wash. 412, 49 Pac. 1068; Garratt Ford Co. v. Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852. See Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316. In Farmers' L. & T. Co. v. R. Co., 68 Fed. 412, where a statute of Illinois declared any trust unlawful when vested in a foreign trust company unless it had complied with certain requirements of the statute, it was held that a trust under a railroad mortgage vested in such a company merely a naked legal title, while the beneficial title was in the bondholders; and that the court would enforce the security by a judicial sale. But a nonresident trust company was removed as trustee under an Illinois railroad mortgage; Farmers' L. & T. Co. v. R. Co., 173 Ill. 439, 51 N. E. 55. A mortgage upon railroad property in Illinois executed to a foreign trust corporation as trustee, to secure bonds made payable outside of the state, is not prohibited by the laws or public policy of that state; Hervey v. R. Co., 28 Fed. 169.

The trustee of a railroad mortgage represents the bondholders who are bound by his assent; Lloyd v. R. Co., 65 Fed. 351. See MORTGAGE; INTERVENTION.

The legislature of a state alone has the power to accept a bequest to the state in trust; State v. Blake, 69 Conn. 64, 36 Atl. 1019.

A trustee after having accepted a trust cannot discharge himself of his trust or responsibility by resignation or a refusal to perform the duties of the trust; but he must procure his discharge either by virtue of the provisions of the instrument of his appointment, or by the consent of all interested, or by an order of a competent court; 4 Kent 311.

When the trustee relation is once established, no subsequent dealing with the trust property can relieve it of the trust; Smith v. Guaranty Co., 162 Fed. 15, 88 C. C. A. 669.

Trustees are not allowed to speculate with the trust property, or to retain any profits made by the use of the same, or to become the purchasers upon its sale. If beneficial to the parties in interest, the purchase by the trustee may be retained or confirmed by the court. And the trustee may be compelled to account for and pay over to the *cestui qui trust* all profits made by any use of the trust property; 4 Kent 438. A trustee cannot become a purchaser at his own sale, without special permission; Allen v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. Ed. 271. A purchase by a trustee of trust property for his own benefit is not absolutely void, but voidable; and may be confirmed by the parties interested either directly or by long acquiescence; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134. See TRUST.

A court of equity never allows a trust to fail for want of a trustee; King v. Donnelly, 5 Paige, Ch. (N. Y.) 46; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 188, 11 L. Ed. 205; Seda v. Huble, 75 Ia. 429, 39 N. W. 685, 9 Am. St. Rep. 495.

Whenever it becomes necessary, the court will appoint a new trustee, and this though the instrument creating the trust contain no power for making such appointment. The power is inherent in the court; Suarez v. Pumpelly, 2 Sandf. Ch. (N. Y.) 336; 1 Beav. 467; In re Inhabitants of Anson, 85 Me. 79, 26 Atl. 996. So the court may create a new trustee on the resignation of a trustee; Cruger v. Halliday, 11 Paige, Ch. (N. Y.) 314; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Hill, Trust. 190. A court will not allow a trust to fail or to be defeated by the refusal or neglect of the trustee to execute a power, if such a power is so given that it is reasonably certain that the donor intended it to be exercised; Atwood v. R. Co., 85 Va. 966, 9 S. E. 748.

The power of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that

trusts are properly executed, and may properly be exercised whenever his continuance in office would be detrimental to the trust, and even if for no other reason than that human infirmity would prevent the co-trustees or their beneficiaries from working in harmony, and although charges against him are either not made out or are greatly exaggerated; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179; and this power is independent of statute or of any provision in the trust instrument; Mazelin v. Rouyer, 8 Ind. App. 27, 35 N. E. 303; St. Louis v. Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561; Williamson v. Suydam, 6 Wall. (U. S.) 723, 18 L. Ed. 967; Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

A trustee may be removed for cause: As for neglect to invest the funds; Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; and using them in his own business; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; for fraud, negligence or willful breach of trust; Thompson v. Thompson, 2 B. Mon. (Ky.) 161; for converting to his own use the profit on a change of stock and the right to purchase new shares; Billings v. Billings, 110 Mass. 225; mingling trust funds with his own funds and refusing information to the beneficiaries; Sparhawk v. Sparhawk, 114 Mass. 356; neglecting to keep the funds invested, but mingling them with his own funds and expending them in an unauthorized manner, though done through ignorance; Deen v. Cozzens, 7 Rob. (N. Y.) 178; for bad faith and gross neglect in failing to sell real estate and invest the proceeds; Haight v. Brisbin, 100 N. Y. 219, 3 N. E. 74; for loaning trust funds on personal securities although approved by some of the beneficiaries; Johnson's Appeal, 9 Pa. 416; for acting adversely to the interest of the beneficiary and resisting his proper demands; Dickerson v. Smith, 17 S. C. 289.

A trustee may be removed where the relations between the trustee and beneficiaries have become hostile; Wilson v. Wilson, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477; where there is antipathy on the part of one of the beneficiaries towards one of the two trustees, deep-seated and destructive of mutual confidence; In re Nathans' Estate, 191 Pa. 404, 43 Atl. 313; where the beneficiary and another were trustees and there was an irreconcilable antagonism between them due to the domineering conduct of the co-trustee; In re Myer's Estate, 205 Pa. 413, 54 Atl. 1093; where the relations between the trustee and the beneficiary had become so acrimonious as to make personal intercourse between them impossible and hinder the transaction of the business; In re Price's Estate, 209 Pa. 210, 58 Atl. 280 (where a charge made by the trustee against the beneficiary that she was the mother of an illegitimate child was held good ground); where the relations between a trustee and his co-trustees were such that they could probably not co-operate, and a majority of the trustees asked a removal; Quackenboss v. Southwick, 41 N. Y. 117; where two of the trustees and the beneficiary prayed the removal of a third trustee, it appearing that questions had arisen among the trustees and the beneficiary sympathized with the two, she being of mature age; In re Morgan, 63 Barb. (N. Y.) 621, affirmed 66 N. Y. 618; where it appeared that by reason of disagreement between trustees their continuance in office would be detrimental to the estate; Russak v. Tobias, 12 Civ. Proc. R. (N. Y.) 390; where the widow was a testamentary trustee with another for her stepdaughter and she had remarried and given up intercourse with her step-daughter and had caused much litigation concerning the estate; Polk v. Linthicum, 100 Md. 615, 60 Atl. 455, 69 L. R. A. 920; where a state of mutual ill-will or hostile feelings exists against a trustee who has discretionary power over the rights of the beneficiary and they are necessarily brought into personal intercourse; McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; where the relations between the trustee and the beneficiary were not cordial and the trust was solely for a married woman of age sufficient to understand her own interest, the trustee was removed, no fault on the trustee's part being shown, on complaint of the beneficiary that his management was improvident; In re Chapman, 2 N. Y. Supp. 218. Whether a trustee who has left the administration of the trust entirely in the hands of an acting trustee is removable or not will depend upon the conduct of the acting trustee; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192.

But removal was *refused* where it appeared that the aversion of the beneficiary to the trustee grew out of the fact of his appointment to the exclusion of herself and her husband, and that her annoyance, alleged ill health and expense of employing counsel were due to her own acts; In re Neafie's Estate, 199 Pa. 307, 49 Atl. 129; where the trustee's duties are merely formal and ministerial, although there was mutual ill-will between the parties; McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; where the mere fact appears that the trustee forbade the beneficiaries to hold social intercourse with himself or his family; Nickels v. Philips, 18 Fla. 732; where there is a mere difference of opinion between the trustee and the beneficiary; In re Price's Estate, 209 Pa. 210, 58 Atl. 280; or for some whim of a beneficiary; In re Price's Estate, 209 Pa. 210, 58 Atl. 280; or for a mere disagreement between the trustee and the beneficiary; Gibbes v. Smith, 2 Rich. Eq. (S. C.) 131.

In the following cases removal was refused: Failure to perform a duty, or an injudicious exercise of discretion, or refusal to exercise a discretionary power; Preston

v. Wilcox, 38 Mich. 578; investing funds in his own business, which was not hazardous, and he supposed the money was safe, and that he would save expense to the fund; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; neglect of duty in investing the fund, if the circumstances do not indicate bad faith and the fund has not been impaired; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 197; incurring losses on apparently judicious loans on real estate by the failure of the borrower, which could not have been anticipated; Dow v. Dow, 63 Hun, 628, 18 N. Y. Supp. 222; an honest mistake; In re Durfee, 4 R. I. 401.

Where authority to manage real estate is given to one of several heirs appointed trustee under a will, a power to the other heirs to remove him by unanimous resolution, with the concurrence of the widow, for good and sufficient cause, and appoint another in his place, will not be controlled by equity except for abuse; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179. A power in a will given to one of two trustees and the beneficiaries to remove the other trustee was held not to be against public policy; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

A trustee is entitled to all reasonable expenses in carrying out the trust and all expenses reasonably necessary for the security, protection, and preservation of the property as well as for the prevention of a failure of the trust; Gisborn v. Ins. Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029.

The mere naming a person trustee does not constitute him such. There must be an acceptance, express or implied; see Armstrong v. Morrill, 14 Wall. (U. S.) 139, 20 L. Ed. 765; as the acceptance is essential to the vesting of title in the trustee; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673. But if the person named trustee does not wish to be held responsible as such, he should, before meddling with the duties of a trustee, formally disclaim the trust; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157.

Ordinarily, no writing is necessary to constitute the acceptance of a trust in writing; Flint v. Clinton Co., 12 N. H. 432. See TRUST.

The duties of trustees have been said, in general terms, to be: "to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust.*" Bisph. Eq. § 138. He must take possession of the trust property, call in debts, and convert such securities as are not legal investments.

Personal securities are not legal investments although the investment was made by the testator himself; King v. Talbot, 40 N. Y. 76; Hemphill's Appeal, 18 Pa. 303; unless, by the terms of the trust, they are allowed; Bisph. Eq. § 139.

He will not be liable for the failure of a bank in which he has deposited trust funds, unless he has permitted them to be there for an unreasonable length of time; 29 Beav. 211; or has deposited them in his own name; Corya v. Corya, 119 Ind. 593, 22 N. E. 3; as he must not mix them with his own funds; Stanley's Appeal, 8 Pa. 431, 49 Am. Dec. 530; De Jarnette v. De Jarnette, 41 Ala. 709.

Investments by executors contrary to the requirements of the will, upon mere personal security, are at their risk; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271. A trustee is personally liable for trust funds invested in personal securities; 2 Con. Sur. 458; and if invested in his own business, or for his own benefit, he becomes an insurer of the fund; City of Bangor v. Beal, 85 Me. 129, 26 Atl. 1112; and is guilty of neglect if he loans money on an unsecured note; Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359. See Dickinson's Appeal, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279.

It is stated as a universal rule that a trustee cannot invest in personal securities, even if he has a discretion under the instrument; Perry, Trusts, § 453; and investment in a manufacturing company is a breach of trust; Warren v. Union Bank, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777. Investments in bank stocks have been held proper; McCoy v. Horwitz, 62 Md. 183; Harvard College v. Amory, 9 Pick. (Mass.) 446 (and in the shares of manufacturing and insurance companies); *contra*, Ackerman v. Emott, 4 Barb. (N. Y.) 626; Perry's Appeal, 22 Pa. 44, 60 Am. Dec. 63. Trustees may use part of their funds in building on land owned in the trust; Stevens v. Melcher, 80 Hun 514, 30 N. Y. Supp. 625. It was said in an early case, Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508, that the only security safe for a trustee is real estate.

An investment in savings bank stock is proper; Fanning v. Main, 77 Conn. 94, 58 Atl. 472; but not in a private banking partnership; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; or in the purchase and opening of a coal mine; Butler v. Butler, 164 Ill. 171, 45 N. E. 426; or in buying a patent right and manufacturing patented articles; Trull v. Trull, 13 Allen (Mass.) 407.

A trustee with absolute power may invest in other securities than those declared by law the proper investments for ordinary trustees; 1 Ky. L. Bull. 786.

Voluntary investments of a speculative nature outside of the state should not be made; In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50; but there is no arbitrary rule that trust funds should not be invested in fixed property in another state; Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074. A trustee should not invest in unincumbered western lands; In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50; or in speculative railroad stocks; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am.

St. Rep. 132; or in the stock of a corporation; Tucker v. State, 72 Ind. 242; or in the debentured stock of a speculative trust combination; In re Hall, 164 N. Y. 196, 58 N. E. 11; or in second mortgage bonds of a railroad; Clark v. Anderson, 13 Bush (Ky.) 111; though such an investment is said not to be inconsistent with sound discretion; Taft v. Smith, 186 Mass. 31, 70 N. E. 1031; Bartol's Estate, 182 Pa. 407, 38 Atl. 527.

An investment in corporate stock is a breach of duty; Tucker v. Hart, 72 Ind. 242; and so is one in encumbered real estate; Shuey v. Latta, 90 Ind. 136; Singleton v. Lowndes, 9 S. C. 465; *contra*, as to a second mortgage; Sherman v. Lanier, 39 N. J. Eq. 249.

A testamentary trustee, who has retained investments made by his testator which have depreciated, will not be surcharged simply because his judgment turned out to be wrong; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; so in Peckham v. Newton, 15 R. I. 321, 4 Atl. 758. So a specific legacy may be kept in the investments made by the testator; Ward v. Kitchen, 30 N. J. Eq. 31. Where a mortgage loan was sufficiently secured when made, the subsequent depreciation of the land will not be chargeable to the trustee; Clark v. Anderson, 13 Bush (Ky.) 111. If a trustee acts in good faith and with diligence and in a way that the court would have approved under the circumstances as the trustee honestly believed them to be, he will not be held responsible; Gilbert v. Kolb, 85 Md. 627, 37 Atl. 423. That a trustee acted under advice of counsel is not an excuse; In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25. When a trustee is wanting in common prudence, and a loss to the trust results, he must bear the loss; Hart's Estate, 203 Pa. 480, 53 Atl. 364; if he so invested funds as to make it possible for him to make a profit himself, this would render him responsible for any loss; Carr's Estate, 24 Pa. Super. Ct. 369. Trustees are not liable if they acted in good faith and in the exercise of a reasonable discretion and as they would have dealt with their own property; Watkins v. Stewart, 78 Va. 111.

If the *cestui que trust* assents, or if an investment is made at his request, he cannot complain; Matter of Hall, 164 N. Y. 196, 58 N. E. 11; but the consent of the *cestui que trust* to an investment in railroad stocks is held to be no protection to the trustee in case of loss; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; nor to an investment forbidden by law; Aydelott v. Breeding, 111 Ky. 847, 64 S. W. 916; nor was the consent of the beneficiary material where it appeared that he was a person greatly dominated by the trustee; Wieters v. Hart, 68 N. J. Eq. 796, 64 Atl. 1135. But in Phillips v. Burton, 107 Ky. 88, 52 S. W. 1064, it was held that the beneficiary could not complain after consenting to an investment and after long acquiescence; also where several life tenants acquiesced in an investment; In re Hall, 164 N. Y. 196, 58 N. E. 11.

Trust funds must be invested within a reasonable time; a year was held to be with "all convenient speed"; 11 Hare 160; six months has been held reasonable; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; three months; Barney v. Saunders, 16 How. (U. S.) 543, 14 L. Ed. 1047; two months; Appeal of Witmer, 87 Pa. 120.

Premiums paid for investments are to be charged to principal and not to income; Boyer's Estate, 8 Pa. Dist. R. 613, per Penrose, J.; to the same effect, Bergen v. Valentine, 63 How. Pr. 221; Hite v. Hite, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *contra*, New York Life Ins. & Trust Co. v. Baker, 165 N. Y. 484, 59 N. E. 257, 53 L. R. A. 544; In re Stevens, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511; New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493, Holmes, J., dissenting, with the concurrence of the Chief Justice and Allen, J.; the case is strongly criticised in 34 Alb. L. J. 144.

A trustee's discretion, if in good faith, will not be interfered with by a court; Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086.

Ordinarily the law will not permit a trustee to contract with his *cestui que trust* for a pecuniary advantage; to do so, he must first dissolve the fiduciary relation; Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657.

A writer has deduced the following rules as to investments by trustees (13 Am. L. Reg. N. S. 210): Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bona fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence are required of the trustee as well as *bona fides*, and it is dangerous to invest trust funds in any other securities than those thus indicated. But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the trustee's duties, the only safe means of changing an insecure investment, left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust. Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected if acting with *bona fides*, even in cases where, if there had been a power of sale and he had neglected to sell, he would have been liable under the first rule laid down above.

A trustee will not be surcharged for a loss

which has occurred to the estate if he has exercised common skill, prudence, and caution, but he will be held responsible for supine negligence or wilful default; In re Bartol's Estate, 182 Pa. 407, 38 Atl. 527. Where a trustee held on to mortgages on agricultural land in hopes that an apparently temporary depression would pass away, it was held that he had committed only an error of judgment and was not liable for loss; [1896] 1 Ch. 323.

An act of 1896 in England provides that if a trustee acts honestly and reasonably, he may be relieved wholly or partly from personal liability for loss through investments; [1897] 1 Ch. 536.

The office and duties of trustees being matters of personal confidence, they are not allowed to delegate these powers unless such a power is expressly given by the authority by which they were created; but a trustee may appoint an agent where it is usual to do so in the ordinary course of business; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Sinclair v. Jackson, 8 Cow. (N. Y.) 543.

A trustee, though remunerated for his services, is not liable to the trust estate for loss caused by the thefts of a servant employed by him, where he has exercised due care in the selection of the servant; [1893] 1 Ch. 71.

Where a trustee has delegated his trust, there is no question of primary and secondary liability in respect of a breach of trust, but all are equally liable; 68 Law T. 18.

While the law allows a person named as trustee to disclaim or renounce, he cannot, if he has by any means accepted and entered upon the trust, rid himself of the duties and responsibilities after such acceptance, except by a legal discharge by competent authority; Shepherd v. McEvers, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; 1 My. & K. 195. Disclaimer of a trust may be established by acts, or by non-action long continued; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673. Where trustees who hold church property have seceded from the church, and also been expelled, they have divested themselves of all control of the church property and cannot maintain a bill to enjoin any one from doing anything which affects the property; Garrett v. Nace, 5 Pa. Super. Ct. 475.

The trustee is in law generally regarded as the owner of the property, whether the same be real or personal; Hill, Trust. 229. Yet this rule is subject to material qualifications when taken in connection with the doctrines of powers and uses, and the legislation of the several states; Bank of United States v. Beverly, 1 How. (U. S.) 134, 11 L. Ed. 75; 4 Kent 321.

The quality and continuance of the estate of a trustee will be determined by the purpose and exigency of the trust, rather than by the phraseology employed in the description of the estate conveyed; and, therefore, if the language be that the estate goes to the trustee and his heirs, it may be limited to a shorter period, if thereby the purposes of the creation of the trust are satisfied; 8 Hare 156; Nicoll v. Walworth, 4 Den. (N. Y.) 385.

Where there are several trustees, they are considered to hold as joint-tenants, and on the death of any one the property remains vested in the survivor or survivors; and on the death of the last, the property, if personal (at common law), went to the heir or personal representative of the last-deceased trustee. But the rule as to trust property going to heirs and executors is changed in most of the states, so that in theory the court of chancery assumes the control, and it appoints a new trustee on the decease of former trustees. If power be committed to two or more trustees, it is regarded as coupled with an interest, and will still exist in the surviving trustee on the death of any or all of his co-trustees. 2 Prob. Rep. Ann. 23. If the power is confided to several trustees, *nominatim*, it imports a personal discretion or confidence of a personal nature, and on the death of one of these donees the power dies with him and cannot be exercised by the survivors; *id.;* 13 Sim. 91; 4 Kent 311.

See TRUST.

Each trustee has equal interest in and control over the trust estate; and hence, as a general rule, they cannot (as executors may) act or bind the trust separately, but must act jointly; 4 Ves. Ch. 97; Ridgeley v. Johnson, 11 Barb. (N. Y.) 527. All the trustees of a single trust must execute the duties of the trust jointly; People v. O'Loughlin, 79 Misc. 650, 140 N. Y. Supp. 488. One of three trustees cannot institute a suit without the knowledge and consent of the others; McGeorge v. Imp. Co., 88 Fed. 599; the joint act of several executors is necessary in any transaction under the will; Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 S. E. 439; though more power is usually given to a single executor than to a single trustee.

A co-trustee is not responsible for the act of his co-trustee where the latter undertook the entire management of the trust; Meldon v. Devlin, 20 Misc. 56, 45 N. Y. Supp. 333; nor does the mere acceptance of commissions render him liable; In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25.

Joint trustees are not responsible for money received by their co-trustees if the receipt be given for the mere purposes of form. But if receipts be given under circumstances purporting that the money, though not received by both, was under the control of both, such a receipt shall charge, and the consent that the other shall misapply the money, particularly where he has it in his power to secure it, renders him responsible; Pim v. Downing, 11 S. & R. (Pa.) 71. In the case of a public trust, the acts of a majority are binding; Bisph. Eq. § 147.

A trustee is, generally, not responsible for the conduct of his co-trustee; see 2 Lead. Cas. Eq. 858; where several trustees join in a receipt, *prima facie*, all will be considered to have received the money, but one of them may show that he did not in fact receive the money, but joined in the receipt for conformity; Bisph. Eq. § 146. A trustee who stands by and sees a fraud on the trust committed by his co-trustee will be held responsible for it; Ducommun's Appeal, 17 Pa. 268. But trustees are not liable for the conversion of money collected by their co-trustee, in course of administration of the trust, without their knowledge or consent; Purdy v. Lynch, 72 Hun, 272, 25 N. Y. Supp. 585.

A trustee who joins in a receipt for conformity is not liable for the misapplication of the money by his co-trustee who receives it; Stowe v. Bowen, 99 Mass. 194; unless guilty of culpable negligence; Irwin's Appeal, 35 Pa. 294 (an executor); but he must show that he did not receive it, as his receipt is *prima facie* evidence against him in equity and conclusive at law. The great preponderance of authority is, that a sale under a power is not different from the execution of a receipt for the trust moneys; but a trustee who joined in receiving the money continues responsible for it until it is invested. Executors are generally held liable only for their own acts, and not for moneys which do not pass into their hands; Perry, Trusts, pp. 416, 420.

The plaintiff allowed the trust fund to be in the hands of defendant, a co-trustee, who entrusted it to a broker, who embezzled part of it; defendant was held entitled to contribution from plaintiff; [1896] 2 Ch. 415

Where one, at the request of another, undertakes a trust for that other's benefit, he has generally been held entitled to be indemnified by the beneficiary personally, if the trust fund was insufficient, for any expenses connected with the execution of the trust; L. R. 7 Ch. 395; L. R. 4 C. P. 36; and so in the case of calls, in liquidation of a company, in excess of the value thereof, if the beneficiary is *sui juris;* [1901] A. C. 118; a trustee who has honestly and faithfully paid out money for the beneficiary's benefit is entitled to indemnity; Perry, Trusts, § 485.

One trustee may be held responsible for losses which he has *enabled* a co-trustee to cause, though there was no actual participation by him; State v. Guilford, 18 Ohio 509; Taylor v. Benham, 5 How. (U. S.) 233, 12 L. Ed. 130. It is the duty of each trustee to carry out the trust, and a trustee cannot relieve himself of the duty by agreement with his co-trustees to look after only certain parts of the trust property; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

A trustee may come into equity to obtain advice and assistance in the execution of his trust; Hill, Trust. 298.

A testamentary trustee may file a bill for instructions by the court in a case involving reasonable grounds of doubt as to the meaning of the trust; Mersman v. Mersman, 136 Mo. 244, 37 S. W. 909; Stephenson v. Norris, 128 Wis. 242, 107 N. W. 343; Jones v. Creamer, 32 Ohio Cir. Ct. 223 (under the Code). Instructions to a trustee will be given only on the present disposition of income when the time for a division of the principal has not arrived; Bailey v. Smith, 214 Mass. 114, 101 N. E. 62.

Where the legal estate is vested in trustees, all actions at law relative to the trust property must be brought in their name, but the trustee must not exercise his legal powers to the prejudice of a *cestui que trust*, and third persons must take notice of this limitation of the legal rights of a trustee; 2 Vern. 197.

The trustee (and also his personal representatives to the extent of any property received from the trustee) is responsible in suit for any breach of trust, and will be compelled to compensate what his negligence has lost of the trust estate. He is not only chargeable with the principal and income of the trust property he has received, but is liable for an amount equal to what, with good management, he might have received; and this includes interest on a sum he has needlessly allowed to remain where it earned no interest; 2 Beav. 430; 4 Russ. 195.

The rule as to the right of a trustee to contribution from his co-trustee for loss by a breach of trust for which both are equally to blame, does not apply where one of the trustees is also a *cestui que trust* and has received an exclusive benefit by the breach of trust; in that case the rule to be applied is that under which the share or interest of a *cestui que trust* who has assented to, and profited by a breach of trust has to bear the whole loss; and the trustee who is a *cestui que trust* must, therefore, indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received; [1896] 1 Ch. D. 685.

A trustee is entitled to reasonable compensation; Jarrett v. Johnson, 116 Ill. App. 592; Urann v. Coates, 117 Mass. 41. The cases are so numerous and vary so much on their facts that no rule can be deduced within present limits. The orphans' court cannot divide commissions as between co-trustees; Greble's Estate (No. 1), 16 Pa. Super. Ct. 42. A trustee is entitled to commissions on income without filing an account; Cook v. Stockwell, 206 N. Y. 481, 100 N. E. 131, Ann. Cas. 1914B, 491, affirming 144 App. Div. 895, 128 N. Y. Supp. 1119.

Commissions upon the corpus of a trust estate are never allowed except when the fund is in course of distribution; Bosler's

Estate, 161 Pa. 457, 29 Atl. 57; except under extraordinary circumstances; *id.*

Trustees in control of real property under a will are liable in tort as individuals for their negligence in its management; O'Malley v. Gerth, 67 N. J. L. 610; 52 Atl. 563; if liable at all, they are liable as individuals; Moniot v. Jackson, 40 Misc. 197, 81 N. Y. Supp. 688. But it is held that they are not in such case liable to a passer-by caused by their servant's negligence in repairing a sidewalk; Parmenter v. Barstow, 22 R. I. 245, 47 Atl. 365, 63 L. R. A. 227.

Where trustees have the power to conduct a business as if absolute owners of the property, and without liability for the misconduct of employés, the estate, and not the trustee, is liable for the negligent act of their driver in charge of a team employed in the business; Prinz v. Lucas, 210 Pa. 620, 60 Atl. 309. Where a trustee carried on the testator's colliery, and, in so doing, let down the surface of the land and injured the building of an adjoining owner, it was held that, as the trustee was entitled to indemnity against the beneficiary, the plaintiff could collect from the estate direct the judgment he obtained against the trustee personally; [1900] 1 Ch. 199.

Notice to a trustee is notice to the *cestui que trust;* Brannon v. May, 42 Ind. 92. The addition of the word "trustee" to the signature of the drawer of a check constitutes such notice of a trust as to put the payee upon inquiry; Marshall v. De Cordova, 26 App. Div. 615, 50 N. Y. Supp. 294.

A constituent or *cestui que trust* may sue, and make his representative or trustee a defendant, when the latter refuses after a reasonable time to sue; Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

TRUSTEE PROCESS. A legal process used in the New England states, and similar to the garnishee process of others.

All goods, effects, and credits so intrusted or deposited in the hands of others that the same cannot be attached by ordinary process of law, may, by an original writ or process, the form of which is given by the statute, be attached in whose hands or possession soever they may be found, and they shall, from the service of the writ, stand bound and be held to satisfy such judgment as the plaintiff may recover against the principal defendant; Cushing, Trustee Pr. 2. It is issued as part of the original writ.

Under the trustee process, in Massachusetts, a plaintiff, without giving bond, can attach substantially any property of a defendant which would be subject to execution at common law or can tie up the "goods, effects and credits," of the defendant deposited with or entrusted to a third person. It does not appear to be settled as to how much of the defendant's property the plaintiff may attach. He is entitled to full protection on his claim. In practice the *ad damnum* clause is the outside limit of his attachment and it is always open to the defendant to move for a reduction of the attachment. The defendant may dissolve the attachment by giving bond.

TUB. A measure containing sixty pounds of tea, and from fifty-six to eighty-six pounds of camphor. Jacob.

TUB-MAN. In Old English Law. A barrister who had a pre-audience in the Court of Exchequer, and also one who had a particular place in court, was so called. So also a "Post-man." These designations came from the places where they sat. See 3 Steph. Com. 318; 7 M. & W. 188.

TUCKER ACT. The act of March 3, 1887, relating to the jurisdiction of the court of claims. Garl. & Ralston, Fed. Pr. 413. See UNITED STATES COURTS.

TUG. A steam vessel built for towing; practically synonymous with *towboat.*

Tugs are subject to the ordinary rules of navigation touching collisions. Where a schooner was being towed by a tug lashed to her port side, the fact that the schooner had a pilot on board did not make the tug the mere servant of the schooner, so as to exempt the tug from responsibility; The Charles Allen, 11 Fed. 319; The Atlas, 93 U. S. 302, 23 L. Ed. 863.

A tug is not a common carrier or insurer, and is bound only to reasonable care and skill; The W. H. Simpson, 80 Fed. 153, 25 C. C. A. 318; Brown v. Clegg, 63 Pa. 51, 3 Am. Rep. 522; The Margaret, 94 U. S. 494, 24 L. Ed. 146.

A tug and tow while being slowly navigated are held not to blame in a collision with a steam ship in a fog, although they do not stop where there are indications of danger. It is not subject to the same rule as two steam ships approaching each other under like circumstances; [1897] P. 28. A contribution in general average cannot be had against a steam tug for casting off the tow of barges in order to save the tug; the tug and barges do not constitute a single maritime adventure; The J. P. Donaldson, 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292. Towage contracts are within admiralty jurisdiction; The W. J. Walsh, 5 Bened. 72, Fed. Cas. No. 17,922.

See TOWAGE.

TUMBREL. An instrument of punishment made use of by the Saxons, chiefly for the correction of scolding women by ducking them in water, consisting of a stool or chair fixed to the end of a long pole.

A chair fixed on a pair of wheels. See CUCKING-STOOL.

It is said to mean a manure cart. Used of vehicles which drew French prisoners to the guillotine; but that was a large, 4-wheel wagon. Cent. Dict.

TUMULTUOUS PETITIONING. Under stat. 13 Car. II. st. 1, c. 5, this was a misdemeanor, and consisted in more than twen-

ty persons signing any petition to the crown or either house of parliament for the alteration of matters established by law in church or state, unless the contents thereof had been approved by three justices, or the majority of the grand jury at assizes or quarter sessions. No petition could be delivered by more than ten persons. 4 Bla. Com. 147. Not more than twenty names could be signed.

TUN. A measure of wine or oil, containing four hogsheads.

TUNGREVE. A reeve or bailiff. Spelman, Gloss.

TUNNAGE. A duty in England anciently due upon all wines imported, over and above the prisage and butlerage. 2 Steph. Com. 628.

TUNNEL. A municipal corporation, authorized by law to improve a street by building on the line thereof a tunnel under a navigable river, incurs no liability for damages unavoidably caused to adjoining property by obstructing the street or river, unless such liability be imposed by statute. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336.

Where a railroad company, having a right of way over a street, built a tunnel through it, it was held that its right to the surface was not impaired; Junction R. Co. v. Boyd, 8 Phila. (Pa.) 224.

TURBARY. In English Law. A right to dig turf; an easement. It cannot be dug for sale; Noy 145. See COMMON.

TURF AND TWIG. A piece of turf, or a twig or a bough, were delivered by the feoffor to the feoffee in making livery of seisin. 2 Bla. Com. 315. See SYMBOLIC DELIVERY; SEISIN.

Turf and Twig and Water. Referred to in Penn's defence of his title to the Three Lower Counties (in Delaware). See Amer. Hist. Soc., 1903, p. 244.

TURN, or TOURN. See SHERIFF'S TOURN.

TURNKEY. A person under the superintendence of a jailor, whose employment is to open and fasten the prison-doors and to prevent the prisoners from escaping.

It is his duty to use due diligence; and he may be punished for gross neglect or wilful misconduct in permitting prisoners to escape.

TURNOUT. A short side-track on a railroad which may be occupied by one train while another is passing on the main track; a siding. Philadelphia v. R. Co., 133 Pa. 134, 19 Atl. 356. See RAILROAD.

Turnouts and switches, in an act providing that a railroad company may build such without altering its charter, relate to tracks in the nature of side tracks, adjacent to and used in connection with another line of track, and do not refer to a track which branches off entirely from the existing line to a distant objective point; Memphis v. R. Co., 183 Fed. 529, 106 C. C. A. 75.

TURNPIKE. See TURNPIKE-ROAD.

TURNPIKE-ROAD. A road or highway over which the public have the right to travel upon payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure its payment. 6 M. & W. 428; Maysville & Mt. S. Turnp. Co. v. Ratliff, 85 Ky. 244, 3 S. W. 148.

A turnpike-road is a public highway; Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa. 583; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; and the obstructing of it is a public nuisance; Com. v. Wilkinson, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; and the posting of a notice that the company could not profitably keep up the road and unless it was bought by the county it would be closed up as private property, was held to be in effect an abandonment of the road and it became a public highway; Craig v. People, 47 Ill. 487.

Turnpike-roads are usually made by corporations under legislative authority; and, the roads being deemed a public use, such corporations are usually armed with the power to take private property for their construction. The title to the soil remains in the owners of the adjoining land; Wright v. Carter, 27 N. J. L. 76; and, after the franchise for the construction of the turnpike has expired, the road reverts to the public; Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa. 583; State v. Toll-Road Co., 10 Nev. 155. The legislature may authorize the conversion of an existing highway into a turnpike-road; Sherwood v. Weston, 18 Conn. 32; without any pecuniary equivalent to the owner of the fee, such road still remaining a public highway; Chagrin, F. & C. P. R. Co. v. Cane, 2 Ohio St. 419; but no matter how bad the condition of a public road, its condition is no justification to a turnpike company for taking it as the line of a turnpike; Groff's Appeal, 128 Pa. 621, 18 Atl. 431. A turnpike-road being a highway, any obstruction placed thereon renders the author of it liable as for a public nuisance; Commonwealth v. Wilkinson, 16 Pick. (Mass.) 175, 26 Am. Dec. 654; Estes v. Kelsey, 8 Wend. (N. Y.) 555.

A turnpike company cannot be deprived of its road or its franchise by the extension of the limits of a municipal corporation to include the road; Fort Wayne L. & I. Co. v. Road Co., 132 Ind. 80, 30 N. E. 880, 15 L. R. A. 651. It is held that municipal authorities may require the grade of a turnpike within its limits to be changed to conform to that of a street; Borough of Chambersburg v. Manko, 39 N. J. L. 500; and the municipality may require the turnpike to be kept in repair, but the city is not liable for a failure to do so; State v. New Brunswick, 32 N. J. L. 548; and a municipality may, by legislative authority, tax itself in aid of a

turnpike company; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520; Douglas v. Chatham, 41 Conn. 211.

A statute attempting to authorize a court, without a jury, to declare a turnpike-road abandoned and its franchise forfeited because the road has been out of repair for six months, violates the constitutional guaranty of trial by jury and against the deprivation of property without due process of law; Salt Creek Turnp. Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769.

Turnpike companies, so long as they continue to take toll, are bound to use ordinary care in keeping their roads in suitable repair, and for any neglect of this duty are liable to action on the case for the damages to any person especially injured thereby; Townsend v. Turnpike Co., 6 Johns. (N. Y.) 90; Pomeroy v. Turnpike Corp., 10 Pick. (Mass.) 35; and to an indictment on the part of the public; State v. Patton, 26 N. C. 16; Moore v. State, 26 Ala. 88; Com. v. Bridge Corp., 2 Gray (Mass.) 58.

Travelers are liable for toll though they avoid the gates; Fitch v. Lothrop, 2 Root (Conn.) 524; Centre Turnpike Co. v. Vandusen, 10 Vt. 197; but not for travel between the gates without passing the same; Elliott, Roads 70; Lexington & G. T. Rd. Co. v. Redd, 2 B. Monr. (Ky.) 30; Buncombe Turnpike Co. v. Mills, 32 N. C. 30; but where the traveler entered upon the turnpike and traveled thereon and when near a toll gate, turned out upon a public highway and thereby passed the toll gate without paying toll, but did not enter again upon the turnpike, he was not liable under a statute for fraudulent evasion of tolls, although he may have had such intention; Centre Turnpike Co. v. Vandusen, 10 Vt. 197.

In an action by a company to enforce the statutory penalty for illegally passing its tollgate, it is no defense that the road was not in good condition; Canal St. Gravel-Road Co. v. Paas, 95 Mich. 372, 54 N. W. 907. Exemptions from toll are construed most liberally in favor of the community; Ang. High. § 359; and are usually created by special statute in relation to different kinds of vehicles; Mahon v. R. Co., 24 N. Y. 658; going to or from mills; Bates v. Sutherland, 15 Johns. (N. Y.) 510; in favor of husbandry; Camden, E. & M. T. Co. v. Fowler, 24 N. J. L. 205; going to church; 2 B. & Ald. 206; ordinary domestic business of family concerns; Centre Turnp. Co. v. Smith, 12 Vt. 212. Mail coaches are subject to toll, but may not be delayed for non-payment; Hopkins v. Stockton, 2 W. & S. (Pa.) 163.

A turnpike company authorized to collect toll from designated carriages, etc., may collect toll from bicycles, although the amount of toll cannot be exactly determined by the method designated for other vehicles; Geiger v. Turnp. Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458; but no charge can be made to the person using bicycles where the statute designates "vehicles drawn by animals"; Murfin v. Plank-Road Co., 113 Mich. 675, 71 N. W. 1108, 38 L. R. A. 198, 67 Am. St. Rep. 489; "or vehicles drawn by one or more beasts;" String v. Turnp. Co., 57 N. J. Eq. 227, 40 Atl. 774.

A "shunpike" is a road or turnpike laid out by an individual or by the selectmen of the town to facilitate the evasion of toll by travellers upon a turnpike road and will entitle the turnpike company to an action on the case for the damages, or to an injunction ordering the same to be closed; Elliott, Roads, 74; Cheshire Turnpike v. Stevens, 10 N. H. 133; Salem & H. Turnpike Co. v. Lyme, 18 Conn. 451; Clarksville & R. Turnpike Co. v. Clarksville (Tenn.) 36 S. W. 979; unless made necessary by the lay of the land and the wants of the community; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773. And such company has been held entitled to compensation for the injury to their franchise by a highway which intersects their road at two distinct points and thereby enables travellers to evade the payment of tolls, though such highway be regularly established by the proper authorities to meet the necessities of public travel; In re Flatbrush Ave., 1 Barb. (N. Y.) 286.

Abutting owners have a right to enter on a turnpike from any part of their premises and they may erect and maintain bridges for that purpose, but cannot so connect it with a private way that it operates as a shunpike, and allow it to be used by the general public; Cincinnati & S. G. Ave. Co. v. Bates, 2 Ohio Cir. Ct. 376; Chestnut Hill & S. H. Turnpike Co. v. Piper, 15 W. N. C. (Pa.) 55; and a turnpike company cannot by building a fence along its road prevent any one from entering thereon from his own property at any point; Saul v. Turnpike Co., 12 Phila. (Pa.) 346.

TURNTABLE CASES. The defendants, who owned waste land, allowed the public to transverse it, and children of all ages played on it. A child was injured by a fall of a stone from a stone pile. Held, that there being neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land, the defendants were not liable; [1913] 1 K. B. 398. See NEGLIGENCE.

TURPIS CAUSA (Lat.). A base or vile consideration, forbidden by law, which makes the contract void: as, a contract the consideration of which is the future illegal cohabitation of the obligee with the obligor.

TURPITUDE. Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude.

TUTELA (Lat.). A power given by the civil law over a free person to defend him when by reason of his age he is unable to

defend himself. Women by the civil law could only be tutors of their own children. A child under the power of his father was not subject to tutelage, because not a free person, *caput liberum*.

Legitima tutela was where the tutor was appointed by the magistrate.

TUTELAGE. See TUTELA.

TUTEUR OFFICIEUX. In French Law. A person whose duties are analogous to those of a guardian in English law; he must, however, be over fifty years of age, and appointed with the consent of the parents, or, in their default, of the *conseil de famille*, and is only appointed for a child over fifteen years of age.

TUTEUR SUBROGÉ. In French Law. The title of a second guardian appointed for an infant under guardianship; his functions are exercised in case the interests of the infant and his principal guardian conflict. Code Nap. 420; Brown, Dict.

TUTOR. In Civil Law. One who has been lawfully appointed to the care of the person and property of a minor.

By the laws of Louisiana, minors under the age of fourteen years, if males, and under the age of twelve years, if females, are, both as to their persons and their estates, placed under the authority of a tutor. Above that age, and until their majority or emancipation, they are placed under the authority of a curator.

TUTOR ALIENUS (Lat.). **In English Law.** The name given to a stranger who enters upon the lands of an infant within the age of fourteen, and takes the profits.

He may be called to an account by the infant and be charged as guardian in socage; Littleton, s. 124; Co. Litt. 89 *b*, 90 *a*.

TUTOR PROPRIUS (Lat.). The name given to one who is rightly a guardian in socage, in contradistinction to a *tutor alienus*.

TUTORSHIP. The power which an individual, *sui juris*, has to take care of the person of one who is unable to take care of himself. Tutorship differs from curatorship. See PROCURATOR; PROTUTOR.

TUTRIX (Lat.). A woman who is appointed to the office of a tutor.

TWELFHINDI. The highest rank of men in the Saxon government, who were valued at 1,200*s*. For any injury done to them, satisfaction was to be made according to their worth. Cowell.

TWELVE-DAY WRIT. A writ for summary procedure on bills of exchange and promissory notes. Whart.

TWELVE TABLES, LAWS OF THE. Laws of ancient Rome. It was formerly supposed that the law of the Twelve Tables belonged to a more archaic type than it really does. Modern students take the view that Roman law was not at any one time a perfect and symmetrical whole. Probably they were regarded as an ultimate source of law for the field they covered, but they did not purport to include the whole of the recognized customary law; they were no mere consolidation, but a reforming code. It is certain that they incorporated Greek materials. The means of information were at hand in the Greek cities of Southern Italy. On the other hand, doubts that have lately been cast upon their antiquity have not met with a favorable reception. It would seem that they went near to stereotype an archaic and formalist procedure and that the Romans of later generations escaped from great inconvenience only by the devices of legal fictions and equity. Pollock's Maine's Anc. L. 19, 25.

It is by no means certain that the extant fragments of them have come down to us in their precise form and expression. The language has probably been somewhat modified by subsequent usage. These laws are not fresh enactments, but merely a written statement of the law as it actually stood. They were substantially a codification, and not merely an incorporation, of the customary law of the people. There were Greek elements in them, but still they were essentially Roman; Hunter, Rom. L. 16. See Stephenson, Hist. Rom. L. 120; Sohm's Inst. Rom. L.

See CODE; Dr. Voight's Twelve Tables (Leipsic, 1883).

TWELVEMONTH, in the singular includes the whole year, but in the plural, twelve months of twenty-eight days each. 6 Co. 62; Bish. Writt. Laws 97. See MONTH.

TWICE IN JEOPARDY. See JEOPARDY.

TWYHINDI. The lower order of Saxons, valued at 200*s*. Cowell. See TWELFHINDI.

TYBURN TICKET. In English Law. A certificate given to the prosecutor of a felon to conviction. By the 10 & 11 Will. III. c. 23, the original proprietor or first assignee of such certificate is exempted from all and all manner of parish and ward offices within the parish or ward where the felony shall have been committed; Bacon, Abr. *Constable* (C).

TYPEWRITING. In the administration of the post-office department type-writing is treated as writing, and letter postage is charged therefor. So in some states where wills are required to be "in writing" a typewritten paper is treated as sufficient. A typewritten memorial presented to the house of commons (1897) was refused. It is expressly legalized by statute in New York, for all state and municipal officers in all records (March 23, 1894); in Connecticut, for taking evidence in courts of common pleas in the same way as stenographers (May 7, 1895); in Oregon for wills (April 17, 1896); while in

Pennsylvania it is more comprehensively declared to be of equal force with writing except for signatures (June 18, 1895).

A carbon copy, typewritten at the same time as the original and signed, will be regarded as an original; Cole v. Power Co., 216 Pa. 283, 65 Atl. 678; *contra*, Harmon v. Territory, 15 Okl. 147, 79 Pac. 765; but a letter wholly typewritten and signed with a stencil was held inadmissible in a criminal case, as a communication from the accused, unless he acknowledged it as his letter, or it was acted upon by him; Sprinkle v. U. S., 150 Fed. 56, 82 C. C. A. 1.

TYRANNY. The violation of those laws which regulate the division and the exercises of the sovereign power of the state. It is a violation of its constitution. See DESPOTISM.

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UBERRIMA FIDES (Lat. most perfect good faith). A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer. 1 Story, Eq. Jur. § 317. See GOOD FAITH.

UBI JUS, IBI REMEDIUM. See MAXIM; REMEDY.

UDAL. Allodial. See ALOD.

UKASE. The name of a law or ordinance emanating from the czar of Russia.

ULNAGE. Alnage. See ALNAGER.

ULTIMATE FACTS. Facts in issue as opposed to probative or evidential facts, the latter being such as serve to establish or disprove the issue. Kahn v. Smelting Co., 2 Utah 379.

ULTIMATUM (Lat.). The last proposition made in making a contract, a treaty, and the like: as, the government of the United States has given its *ultimatum*, has made the last proposition it will make to complete the proposed treaty. The word also means the result of a negotiation, and it comprises the final determination of a party concerned in the matter in dispute.

ULTIMUM SUPPLICIUM (Lat.). The last or extreme punishment; the penalty of death.

ULTIMUS HÆRES (Lat.). The last or remote heir; the lord. So called in contradistinction to the *hæres proximus* and the *hæres remotior*. Dalr. Feud. Pr. 110.

ULTRA MARE. Beyond seas (*q. v.*).

ULTRA VIRES. The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation.

A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted. 13 Am. L. Rev. 632.

An act of a corporation in excess of its powers, with reference to third persons. Holland, Jurisprud. 286. It is also, less properly, applied to a resolution of a majority of the members of a corporation which, being beyond the power of the corporation, will not bind the dissenting majority; L. R. 1 Eq. 593.

This doctrine is of somewhat modern growth; its appearance dates from about the year 1845, being first prominently mentioned in 10 Beav. 1 and 11 C. B. 775. See Green's Brice, *Ultra Vires* 729.

In Chicago, R. I. & P. R. Co. v. R. Co., 47 Fed. 15, Brewer, J., said: "Two propositions are settled. One is that the contract by which a corporation disables itself from performing its functions and duties undertaken by its charter is, unless the state which created it consents, *ultra vires*. The other is that the powers of a corporation are such, and such only, as the charter confers, and an act beyond the measure of those powers, as either expressly stated or fairly implied, is *ultra vires*. Those two propositions embrace the whole doctrine of *ultra vires*."

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforcible by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, these things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*; Union P. Ry. Co. v. Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265.

When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, etc.; Whitney Arms Co. v. Barlow, 63 N. Y. 68, 20 Am. Rep. 504. A corporate act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose; or, with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or, with reference to some specific purpose, when it is not authorized to perform it for that purpose, though fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; McPherson v. Foster, 43 Ia. 48, 22 Am. Rep. 215. See 35 L. J. Ch. 156; National P. Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30.

As a general rule, such acts are void, and impose no obligation upon the corporation although they assume the form of contracts; inasmuch as all persons dealing with a corporation, especially in the state or country in which and under whose laws it was created, are chargeable with notice of the

extent of its chartered powers. It is otherwise as to laws imposing restraints upon it not contained in its charter where the contract is made or the transaction takes place without the limits of the state or country under whose laws the corporation exists; Bank of Chillicothe v. Dodge, 8 Barb. (N. Y.) 233.

The artificial body—the corporation—is liable to be proceeded against by *quo warranto* for the usurpation of powers in its name by its officers and agents, and its charter may be taken away as a penalty for permitting such acts—the defence of a want of power to bind the corporation not being available in such cases, since it would lead to entire corporate irresponsibility; Moraw. Pri. Corp. § 649.

In the United States the defence of *ultra vires* interposed against a contract wholly or in part executed has been said to be very generally looked upon with disfavor. The result has been that in some cases a liberal construction has been applied so as to destroy the foundation of the defence; in others the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases, the doctrine of estoppel *in pais* has been applied to exclude the defence. The courts may be said, generally, to be tending towards the doctrine—certainly so far as business corporations are concerned—that corporations are to be held liable upon executed contracts, where the contracts involved are not expressly or by necessary implication prohibited by their charters or the general law; Brice, *Ultra Vires* 729.

There is said to be a tendency of the courts, based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Assets Realization Co. v. Howard, 70 Misc. 651, 127 N. Y. Supp. 798; Richeson v. Bank, 96 Ark. 594, 132 S. W. 913; Latulippe v. Inv. Co. (N. H.) 86 Atl. 361; and the rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation became insolvent; Tod v. Land Co., 57 Fed. 47; Chicago, R. I. & P. Ry. Co. v. Ry. Co., 47 Fed. 22. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; Bissell v. R. Co., 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504. Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires*. Oil Creek & A. R. R. Co. v. Transp. Co., 83 Pa. 160.

A transaction which is *ultra vires* as to one of two corporations is equally invalid as if beyond the power of both; Anglo-American L., M. & A. Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89.

The defence is not looked upon with favor when a corporation has had the benefit of the contract; it is applicable only when the contract is executory; the corporation is estopped to plead it when it has had the benefit of the contract; Vermont Farm Mach. Co. v. Creamery Co., 145 Ia. 491, 122 N. W. 930; Chapman v. Rheostat Co., 62 N. J. L. 497, 41 Atl. 690; Bobzin v. Valve Co., 140 Ia. 744, 118 N. W. 40; Assets Realization Co. v. Howard, 70 Misc. 651, 127 N. Y. Supp. 798; Presbyterian Board v. Gilbee, 212 Pa. 310, 61 Atl. 925; William R. Bush Const. Co. v. Const. Co., 176 Mo. App. 608, 159 S. W. 738; Crowder State Bank v. Powder Co. (Okl.) 138 Pac. 392; it cannot be set up if it would accomplish a legal wrong; see In re Waterloo Organ Co., 134 Fed. 341, 343, 67 C. C. A. 255; Red Cross Protective Soc. v. Wayte, 171 Fed. 643, 96 C. C. A. 126 (except when public rights are involved); or defeat justice; Kellogg-Mackay Co. v. Hotel Co., 199 Fed. 727, 118 C. C. A. 165.

If a contract not against public policy or a statute has been performed by the other party, the corporation is estopped to set up the defence; Marshalltown S. Co. v. Mfg. Co., 149 Ia. 141, 126 N. W. 190; it is not, however, binding upon the corporation beyond the benefits received by it; Gaston & Ayres v. J. I. Campbell Co. (Tex.) 130 S. W. 222; and it need not return such benefits in order to set up the defence beyond the amount of such benefits; *id.*

Estoppel cannot be set up where the act was against a statute or a declared rule of public policy; Quinby v. Trust Co., 140 Fed. 362.

A fully executed transaction will not be disturbed; Alabama C. C. & I. Co. v. Trust Co., 197 Fed. 347; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188. It is said that this case was decided before that court entertained the views that were afterwards expressed by Gray, J., in delivering the opinion of the court in the Central Transportation Case, and that the reasoning of the two cases is inconsistent. See 24 Harv. L. Rev. 546.

A corporation that has acted as a trustee without authority cannot, after receiving the trust funds, withhold them from the owners;

Central R. & Banking Co. v. Trust Co., 116 Fed. 700. A corporation cannot repudiate a contract as *ultra vires* when the other party has changed his position in reliance upon its validity; Osmer v. Brokerage Co., 155 Mo. App. 211, 134 S. W. 65. A corporation having power to do a thing in a prescribed way, will be estopped as against third persons to deny that it was done in that way; Alabama Consol. C. & I. Co. v. Trust Co., 197 Fed. 347.

Other cases hold that an *ultra vires* contract cannot be validated by estoppel: Nothing which has been done under contracts of a corporation beyond the scope of its powers or the action of the courts can infuse any vitality in them; O'Brien v. Wheelock, 184 U. S. 450, 490, 22 Sup. Ct. 354, 46 L. Ed. 636; such contracts are not voidable, but void, and cannot be validated by estoppel; Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89; no subsequent act can make it valid by estoppel; Traders' M. L. Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 875. Neither the corporation nor the other party can be estopped; Converse v. Talcott & Co., 242 Ill. 619, 90 N. E. 269.

A contract *ultra vires* a corporation is void, and the fact that the company has received the benefit of it and that others have acted thereunder creates no estoppel; Converse v. Talcott & Co., 242 Ill. 619, 90 N. E. 269.

There can be no estoppel when the act is contrary to public policy or a statute; Chicago, I. & L. R. Co. v. R. Co., 88 Ind. App. 234, 70 N. E. 843; or where an act is void *per se* and contrary to public policy; State v. Trust Co., 157 Mo. App. 557, 138 S. W. 669; or against a statute; Kilbourn v. Power Co., 149 Wis. 168, 135 N. W. 499; or against public policy; State v. Trust Co., 157 Mo. App. 557, 138 S. W. 669.

In Central Transp. Co. v. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, a sleeping car company leased all its cars, contracts and property to the Pullman Company for 99 years, and agreed not to engage in the business during the life of the contract; the lessee agreed to pay the lessor's debts and an annual rental. On default in the rental the lessor sued for three-quarters of a year rental; it was held that the contract was invalid, as *ultra vires*, and involving an abandonment of the lessor's duty to the public, and that no action could be maintained upon the contract, or to recover the sums due thereunder, even while the lessee had enjoyed the benefits of the contract. See *infra*.

This case has been much criticised by Prof. Edward H. Warren in 23 Harv. L. Rev. 495; he considers that the reasoning of Mr. Justice Gray in the opinion of the court is "a source of great confusion. It is a revival of an antiquated conception of corporate action. It announces a sweeping rule, and yet a sweeping application of the rule would produce such monstrous results that no court would apply it;" and he thinks that the court ought frankly to discard the doctrine. It has also been criticised in Fidelity Ins. Co. v. Bank, 127 Ia. 591, 103 N. W. 958; Hunt v. Malting Co., 90 Minn. 282, 96 N. W. 85; Security Nat. Bank v. Power Co., 117 Wis. 211, 218, 94 N. W. 74; but its doctrine appears in Chemical Nat. Bank v. Havermale, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206; Leonhardt & Co. v. Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887, 119 Am. St. Rep. 994; Converse v. Emerson, T. & Co., 242 Ill. 619, 90 N. E. 269; McCormick v. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; and approved in Jacksonville, M. P. R. Co. & Nav. Co. v. Hooper, 160 U. S. 524, 16 Sup. Ct. 379, 40 L. Ed. 515. Mr. Justice Gray, when Chief Justice of Massachusetts, delivered the opinion of the court in Davis v. R. Co., 131 Mass. 258, 41 Am. Rep. 221, where it was held *ultra vires* a railroad company to subscribe to the expenses of a musical festival, although it would bring business to the company. The rule in the Central Transportation Case was applied to a municipal contract in Re Waterloo Organ Co., 134 Fed. 347, 67 C. C. A. 327.

An act or contract of a corporation which is beyond the scope of its corporate powers is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is within its general corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only, and is subject to ratification and estoppel; Westerlund v. Min. Co., 203 Fed. 599, 121 C. C. A. 627, per Sanborn, C. J.

If the contract is wholly executory on both sides, the authorities are nearly unanimous that no relief on the contract may be maintained. (But see Harris v. Gas Co., 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. [N. S.] 1171.) The cases in many states follow the rule laid down in the Central Transportation Case, *supra*, that no suit can be maintained on the contract; and it seems to be immaterial whether or not all the stockholders authorized or ratified the contract. Of such cases, see particularly Davis v. R. Co., 131 Mass. 258, 41 Am. Rep. 221, where Gray, C. J., delivered the opinion of the court and reviewed a long line of English cases, reaching the conclusion which was afterwards reached in the Central Transportation Case, where he delivered the opinion of the court. The cases in other states are given in Prof. Edward H. Warren's article in 24 Harv. L. Rev. 534. The English cases are in accord; see Ashbury Railroad Carriage, etc., Co., L. R. 7 H. L. 653; Colman v. Eastern Counties Ry., 10 Beav. 1.

In other states relief may be had on the contract under certain circumstances; thus,

where the corporation has received something of value by reason of the performance of the contract, in whole or in part, the other party may have relief to a corresponding extent; Bissell v. R. Co., 22 N. Y. 258; where a contract is executed by the other party, a corporation is estopped from asserting its own wrong, and cannot be excused from payment by the plea that the payment was beyond its power; Vought v. Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, quoted and adopted in Eastern Bldg. & L. Ass'n v. Williamson, 189 U. S. 122, 128, 23 Sup. Ct. 527, 47 L. Ed. 735, as a satisfactory declaration of the law of New York. Cases in other states will be found in Prof. Warren's article, *supra.*

One who has performed in full or even in part may bring a bill in equity for rescission and restoration in *statu quo;* New Castle N. R. Co. v. Simpson, 21 Fed. 533. The courts, while refusing to maintain an action on the unlawful contract, have permitted property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. This is on an implied contract to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. This is not to affirm, but to disaffirm the contract; Central Transp. Co. v. Pullman's Palace Car Co., *supra.* If there is nothing essentially immoral in the transaction, the courts will strive to do justice between the parties so far as that can be done, without in any wise relying upon the invalid bargain; Alabama Consol. Coal & I. Co. v. Trust Co., 197 Fed. 347, 358.

When the Central Transportation Case was again before the court in Pullman's Palace Car Co. v. Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, it was held that the lessee could recover only the value of the property transferred with interest, and not the value of its railroad contracts nor for the breaking up of its business.

It has been held that where the lessee under a railroad lease for 999 years had been in possession and paid the rent for 17 years, and the lessor had taken no steps to repudiate it, equity would not aid in a rescission of the contract; St. Louis, V. & T. H. R. Co. v. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748.

Where an executory contract is merely *malum prohibitum,* a party may rescind it and recover money by him advanced to the other party, who had performed no part thereof; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347. The granting of quasi-contractual relief in the case of executory *ultra vires* contracts is said to be in accordance with the ordinary principles of the law of contracts; 23 Harv. L. Rev. 627.

It has been held *ultra vires* for a railway company to guarantee to the shareholders of a steam packet company a dividend upon capital; 10 Beav. 1; or to guarantee the bonds of another corporation; Louisville, N. A. & C. Ry. Co. v. Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; to engage in the coal trade; 6 Jur. N. S. 1006; for a company to assume the debt of another; Stark Bank v. Pottery Co., 34 Vt. 144; or to make or indorse accommodation paper; Smead v. R. Co., 11 Ind. 104; or to engage as surety for another in a business in which it has no interest; Morford v. Farmers' Bank, 26 Barb. (N. Y.) 568; or to guaranty, for accommodation, the obligations of another corporation; Tod v. Land Co., 57 Fed. 47; or, if a coal company, to buy the stock and bonds of a railroad company; Hyman v. Real Estate Co., 79 Misc. 439, 140 N. Y. Supp. 138; see STOCK; for one railroad company to unite with another like company, and both conduct their business under one management; Pearce v. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; or to run a line of steamboats in connection with its road; Hoagland v. R. Co., 39 Mo. 451; or for a mutual benefit society to undertake to pay the death losses of another insurance company; Twiss v. Life Ass'n, 87 Ia. 733, 55 N. W. 8, 43 Am. St. Rep. 418; but a railway company may contract to carry beyond its own lines; Baltimore & P. S. S. Co. v. Brown, 54 Pa. 77; Ohio & M. Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; but see Hood v. R. Co., 22 Conn. 502.

Where a corporation is incompetent to take real estate, a conveyance to it is only voidable; Morawetz, Corp., 2d Ed. 678. A railroad company has implied authority to erect a refreshment room; L. R. 7 Eq. 116; a corporation authorized to erect a market has authority to purchase land for that purpose; Dill. Mun. Corp. § 447; where a corporation had authority to keep steam vessels for the purposes of a ferry, they could use these vessels, when otherwise unemployed, for excursion trips; 30 Beav. 40; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326. Corporations generally have authority to borrow money to carry out the objects for which they were created, and to execute their obligations therefor; Field, Corp. § 249; including irredeemable bonds; 21 Am. L. Reg. N. S. 713; they may, generally, by virtue of implied powers, make promissory notes; Police Jury v. Britton, 15 Wall. (U. S.) 566, 21 L. Ed. 251; Mechanic's Banking Ass'n v. Lead Co., 35 N. Y. 505. Where a railroad company, without legislative authority, leased its road to three persons, for twenty years, this was held *ultra vires;* Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950. See LEASE. A railroad company cannot guarantee the expense of a musical festival; Davis v. R. Co., 131 Mass. 258, 41 Am. Rep. 221; the same ruling applies to a company organized to manufacture and sell organs; *id.*

It is said to be now well settled that a

power granted to a corporation to engage in certain business carries with it the authority to act precisely as an individual would act in carrying on such business, and that it would possess for this purpose the usual and ordinary means to accomplish the objects of its creation, in the same manner as though it were a natural person; Field, Corp. § 271. A manufacturing corporation may purchase a large tract of land for the purpose of erecting thereon its factories and residences for its employés, and contribute toward the establishment there of a church, a school, a free library, and a free bath for its employés; Steinway v. Steinway & Sons, 17 Misc. 43, 40 N. Y. Supp. 718. But see People v. Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

Where a railroad company, *ultra vires*, executed a guarantee upon bonds of a blast furnace company, it was held that the former was liable thereon, whether it had power to bind itself or not; Roosevelt v. Ry. Co., 128 Fed. 465 (an executed contract).

Where a railroad company agreed with an employé injured by negligence, on condition of a release of his claim, to employ him for life, and kept the release till the claim was barred, it could not set up *ultra vires;* Usher v. R. Co., 179 N. Y. 544, 71 N. E. 1141.

One who procures the discount of a note by a trust company cannot set up that it was *ultra vires* the trust company; Mutual Trust Co. v. Stern, 235 Pa. 202, 83 Atl. 614.

One contracting with a corporation cannot deny its power to make the contract; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857.

A corporation holding real estate cannot set up as against the state that it is not authorized to deal in real estate; People v. Sohmer, 155 App. Div. 842, 140 N. Y. Supp. 507.

Where a corporation transfers all its property to another corporation, which pays its debts, the former cannot assert that it was *ultra vires* and retake the property; Savings & Trust Co. v. Irr. Co., 112 Fed. 693.

After a corporation has, *ultra vires*, entered into a partnership, its interest cannot for that reason be exempted from partnership liability, nor withdrawn after insolvency, to the prejudice of the general creditors; Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129.

A corporation may pension the family of a deceased employé; 40 Ch. D. 170; Beers v. Ins. Co., 66 Hun 75, 20 N. Y. Supp. 788; or make contributions towards churches, schools, etc., for the benefit of its employés; Steinway v. Steinway & Sons, 17 Misc. 43, 40 N. Y. Supp. 718; though it cannot carry on such institutions; People v. Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366. A railroad company may defray the medical expenses of a person injured in its service; Toledo, W. & W. Ry. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is only voidable; the state alone can object; Reynolds v. First Nat. Bk., 112 U. S. 405, 413, 5 Sup. Ct. 213, 28 L. Ed. 733; Union N. Bk. v. Matthews, 98 U. S. 628, 25 L. Ed. 188; a lessee of a room in a building, when sued for rent, cannot set up that the corporation which owned it had built it *ultra vires;* Rector v. Deposit Co., 190 Ill. 380, 60 N. E. 528; a corporation whose right to incur indebtedness is limited in amount is liable to one who in good faith loaned it money above that amount; Ossipee Hosiery & W. Mfg. Co. v. Canney, 54 N. H. 295.

The doctrine of *ultra vires* ought to be reasonably understood and applied; and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company, ought not, unless expressly prohibited, to be held by judicial construction, to be *ultra vires;* Ellerman v. R. Co., 49 N. J. Eq. 217, 23 Atl. 287.

The result of the English authorities is, that corporations—certainly those for commercial purposes, and probably all corporations to which the doctrine applies—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden, either expressly by their constating instruments or by necessary inference therefrom; Green's Brice, *Ultra Vires* 40. The American decisions seem to be tending towards this doctrine; *id.* note *a*. *Prima facie*, all the contracts of a corporation are valid, and it lies on those who impeach any contract to make out that it is void; Railway Co. v. McCarthy, 96 U. S. 267, 24 L. Ed. 693; 3 Macq. 382; Ellerman v. R. Co., 49 N. J. Eq. 217, 23 Atl. 287; Knapp v. Coal Co., 85 Conn. 147, 81 Atl. 1063.

A court of equity, at the suit of the stockholders of the corporation, will restrain the commission of acts beyond the corporate power, by injunction operating upon the individual officers and directors as well as the corporation. This is now an acknowledged head of equity jurisdiction; Redf. Railw. 400; Davenport v. Dows, 18 Wall. (U. S.) 626, 21 L. Ed. 938; 10 Beav. 1; Osmer v. Brokerage Co., 155 Mo. App. 211, 134 S. W. 65; creditors are said to have the same right in this respect as stockholders; 13 Am. L. Rev. 659. See STOCKHOLDER.

Acquiescence for any considerable time in the exercise of excessive powers, after they come to the knowledge of the stockholders, would, however, be a decisive objection to such a remedy; 19 E. L. & E. 7.

In regard to municipal corporations, the rule is stricter against the validity of *ultra vires* contracts. See Dill. Mun. Corp. § 381. One dealing with a corporation must take notice of its charter rights; Moraw. Pr. Corp. § 591.

It is suggested in 2 Morawetz, Pr. Corp. § 648, that the term *ultra vires* has no proper use with reference to private corporations unless used in the sense of *authority* rather than *power*, and that the term is therefore misleading, except as applied to municipal corporations.

It must be pleaded as a defence; Hough v. Car Co. (Mo.) 165 S. W. 1161; Arizona L. Ins. Co. v. Lindell (Ariz.) 140 Pac. 60; it is not available under a general issue plea; Blackwood v. Chamber of Commerce (Mich.) 144 N. W. 823.

It has been said that a corporation is liable for the negligence and other torts of its agents and servants, even when related to and connected with the acts of the corporation that are *ultra vires;* even if done in the execution of usurped powers and of purposes clearly *ultra vires;* Beach, Pr. Corp. § 444.

UMPIRAGE. The decision of an umpire. Powell v. Ford, 4 Lea (Tenn.) 288.

UMPIRE. A third person appointed to decide between two other judges or referees who differ in opinion. Randel v. Canal, 1 Harr. (Del.) 260. The jurisdiction of the umpire and arbitrators cannot be concurrent; Morse, Arb. & Aw. 241; if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versa;* Rigden v. Martin, 6 Harr. & J. (Md.) 403. He determines the issue submitted to the arbitrators on which they have failed to agree, which is his sole award; and neither of the original arbitrators is required to join in the award; Haven v. Winnisimmet Co., 11 Allen (Mass.) 384, 87 Am. Dec. 723; Ingraham v. Whitmore, 75 Ill. 30. Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; McKinstry v. Solomons, 2 Johns. (N. Y.) 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; Crowell v. Davis, 12 Metc. (Mass.) 293. If an umpire refuse to act, another may be appointed *toties quoties;* 11 East 367.

See ARBITRATION AND AWARD.

UNA VOCE (Lat.). With one voice; unanimously.

UNADJUSTED. Uncertain; not agreed upon. Richardson v. Woodbury, 43 Me. 214.

UNALIENABLE. Incapable of being transferred.

Things which are not in commerce, as, public roads, are in their nature unalienable. Some things are unalienable in consequence of particular provisions in the law forbidding their sale or transfer; as, pensions granted by the government. The natural rights of life and liberty are unalienable.

UNANIMITY (Lat. *unus*, one, *animus*, mind). The agreement of all the persons concerned in a thing, in design and opinion. See JURY; MAJORITY.

UNASCERTAINED DUTIES. Payment in gross on an estimate as to amount. Moke v. Barney, 5 Blatchf. 274, Fed. Cas. No. 9,698.

UNAVOIDABLE ACCIDENT. An inevitable accident, which could not have been foreseen and prevented by using ordinary diligence, and resulting without fault. U. S. v. Ry. Co., 189 Fed. 471.

UNAVOIDABLE CASUALTY. Events or accidents which human prudence, foresight, and sagacity cannot prevent. Crystal Spring Distillery Co. v. Cox, 49 Fed. 555, 1 C. C. A. 365, 6 U. S. App. 42; Welles v. Castles, 3 Gray (Mass.) 325. If by any care, prudence, or foresight a thing could have been guarded against, it is not unavoidable; Central Line of Boats v. Lowe, 50 Ga. 509. An *unavoidable accident* is synonymous with inevitable accident. See INEVITABLE ACCIDENT; ACT OF GOD; FORTUITOUS EVENT.

UNAVOIDABLE CAUSE. A cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate, and whose effects, under similar circumstances, they do not and would not ordinarily avoid. Chicago, B. & Q. R. Co. v. U. S., 194 Fed. 342, 114 C. C. A. 334.

UNAVOIDABLE DELAY. A delay caused by negligence is not unavoidable. Westinghouse Electric & Mfg. Co. v. Brass Co., 186 Fed. 518.

UNBORN CHILD. Where a woman was injured during pregnancy by a highway collision, she was held entitled to damages for mental distress due, before the birth of the child, to her fear that it would be deformed, but not for mental suffering after the birth caused by its then deformity; Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987.

A child cannot bring an action for damages caused by the negligent act of a carrier before its birth; 26 L. R. Ir. 69; Nugent v. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367. Where a pregnant woman was injured by negligence of the employés of a hospital to which she went for her confinement, and this caused permanent deformity of the child, it was held that the child had no right of action; Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176. A woman four or five months advanced in pregnancy fell by reason of a defect in the highway and had a miscarriage; the child was alive when delivered, but died before it was severed from its mother. It was held that no right of action accrued to the administrator of the child; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242. In Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91

Am. St. Rep. 629, and Nugent v. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367, where the premature birth of the child was caused by injury to its mother before its birth, the child living only a short time, it was held that there could be no right of recovery for death by wrongful act; and so in Buel v. Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, where the injury was caused to the unborn child which ultimately caused its death before delivery. Where the father of an unborn child was killed in a railroad accident, the child could recover; Herndon v. R. Co., 37 Okl. 256, 128 Pac. 727.

See EN VENTRE SA MÈRE; TORT.

UNCERTAINTY. That which is unknown or vague. See CERTAINTY, WILL.

UNCIA TERRÆ (Lat.). This phrase often occurs in early charters of the British kings, and denotes some quantity of land. It was twelve *modii*, each *modius* possibly one hundred feet square. Mon. Ang. tom. 3, pp. 198, 205.

UNCIARIUS HÆRES. In Civil Law. An heir to one-twelfth of an estate or inheritance. Calv. Lex.

UNCLE. The brother of a father or mother. See AVUNCULUS; PATRUUS.

UNCONDITIONAL OWNERSHIP. When the quality of the estate is not limited or affected by any condition. Rochester German Ins. Co. v. Schmidt, 162 Fed. 447, 89 C. C. A. 333.

UNCONSCIONABLE BARGAIN. A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. 2 Ves. 125; 4 Bouv. Inst. n. 3848. See USURY; EXPECTANCY; POST OBIT.

UNCONSTITUTIONAL. See CONSTITUTIONAL; STATUTE.

This expression as applied to an act of parliament means simply that it is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the act is either a breach of the law or is void. When applied to a law passed by the French parliament, it means that the law is opposed to the articles of the constitution; it does not necessarily mean that the law in question is void, for it is by no means certain that any French court will refuse to enforce a law because it is unconstitutional. It would probably, though not of necessity, be, when employed by a Frenchman, a term of censure. Dicey, Const. 516.

UNCORE PRIST (L. Fr. still ready). A plea or replication that the party pleading is still ready to do what is required. Used in connection with the words *tout temps prist*, the whole denotes that the party always has been and still is ready to do what is required, thus saving costs where the whole cause is admitted, or preventing delay where it is a replication, if the allegation is made out. 3 Bla. Com. 303.

UNDE NIHIL HABET. See DOWER.

UNDEFENDED. A term sometimes applied to one who is obliged to make his own defence when on trial, or in a civil cause. A cause is said to be undefended when the defendant makes default, in not putting in an appearance to the plaintiff's action; in not putting in his statement of defence; or, in not appearing at the trial either personally or by counsel, after having received due notice. Lush's Prac. 548.

UNDER. The term is sometimes used in its literal sense of "below in position," but more frequently in its secondary meaning of "inferior" or "subordinate." Mills v. Stoddard, 8 How. (U. S.) 356, 12 L. Ed. 1107.

UNDER AND SUBJECT. Words frequently used in conveyances of land which is subject to a mortgage, to show that the grantee takes subject to such mortgage. See MORTGAGE; 27 Am. L. Reg. (N. S.) 337, 401.

UNDER CHAMBERLAINS OF THE EXCHEQUER. Two officers who cleaved the tallies written by the clerk of the tallies and read the same. They also made searches for records in the treasury, and had the custody of the Domesday Book. Cowell.

UNDER WAY. A vessel, though her headway is killed, is considered *under way* and subject to the navigation rules; The Nimrod, 173 Fed. 520. A vessel lying with her nose against the bank of a stream and holding her position against the current by the movement of her wheel is a vessel under way, and not entitled to the rights of an anchored vessel; The Ruth, 186 Fed. 87, 108 C. C. A. 199.

UNDERGROUND WATERS. See SUBTERRANEAN WATERS.

UNDERGROWTH. A term applicable to plants growing under or below other greater plants. Clay v. Telegraph Co., 70 Miss. 411, 11 South. 658.

UNDERLEASE. An alienation by a tenant of a part of his lease, reserving to himself a reversion; it differs from an assignment, which is a transfer of all the tenant's interest in the lease. W. Bla. 766. And even a conveyance of the *whole* estate by the lessee, reserving to himself the rent, with a power of re-entry for non-payment, was held to be not an assignment, but an underlease; 1 Stra. 405; Woodf. L. & T. 731. The transfer of a part only of the lands, though for the whole term, is an underlease; Fulton v. Stuart, 2 Ohio 216, 15 Am. Dec. 542; *contra*, Cox v. Fenwick, 4 Bibb (Ky.) 538. See LEASE; ASSIGNMENT; LANDLORD AND TENANT.

UNDERSTANDING. It may denote an informal agreement or a concurrence as to its terms. Barkow v. Sanger, 47 Wis. 507, 3

N. W. 16. A valid contract engagement of a somewhat informal character. Winslow v. Lumber Co., 32 Minn. 238, 20 N. W. 145. In the law of contracts it is a loose and ambiguous term, unless accompanied by some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound. Camp v. Waring, 25 Conn. 529.

UNDERSTOOD. Agreed. Higginson v. Weld, 14 Gray (Mass.) 165. It falls short of alleging a distinct express contract. Black v. Columbia, 19 S. C. 419, 45 Am. Rep. 785.

UNDERTAKER. An act requiring undertakers to be licensed is unconstitutional; 70 Alb. L. J. 98.

UNDERTAKING. An engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other: a promise. 5 East 17; 4 B. & Ald. 595, followed in Alexander v. State, 28 Tex. App. 186, 12 S. W. 595. It does not necessarily imply a consideration; Thompson v. Blanchard, 3 N. Y. 335.

It is used of large financial and business transactions.

UNDERTOOK. Assumed; promised.

This is a technical word which ought to be inserted in every declaration of assumpsit charging that the defendant undertook to perform the promise which is the foundation of the suit; and this though the promise be founded on a legal liability or would be implied in evidence. Bacon, Abr. *Assumpsit* (F); 1 Chitty, Pl. 88, note p.

UNDERWRITER. The party who agrees to insure another on life or property, in a policy of insurance. He is also called the insurer.

The title is almost exclusively confined to insurers of marine risks, and is derived from the method of obtaining such insurance formerly in vogue, usually as follows: A premium having been agreed upon between the insured and an insurance broker, a statement of such premium and of the ship or cargo, and the voyage or time, was written at the head of a sheet which was laid on the broker's table. Then such merchants as were willing to insure such property on such terms subscribed their names to the statement above mentioned, stating the amount they were willing to insure; and so on until the desired amount of insurance was obtained. 1 Pars. Mar. Ins. 14.

The term is also used of bankers and other financial men who agree together to purchase an entire issue of bonds or other securities, usually at the end of a certain period. By reason of such underwriting, the bonds, etc., obtain a market value or a value as collateral security.

UNDERWRITING. An agreement made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up, the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed for by him. See 42 Ch. D. 1.

Underwriting contract. An agreement to take shares in a company forming, so far as the same are not subscribed to by the public. Palmer, Company Precedents 107.

UNDIVIDED. Held by the same title by two or more persons, whether their rights are equal as to value or quantity, or unequal. See In re Wellington, 16 Pick. (Mass.) 98, 26 Am. Dec. 631.

UNDUE INFLUENCE. The use by one, in whom a confidence is reposed by another who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; or to constrain him to do that which he would not have done without the exercise of such control. Bennett v. Bennett, 50 N. J. Eq. 439, 26 Atl. 573.

That influence which compels one to do that which is against his will from fear, the desire of peace, or some feeling which is tantamount to force or fear. Knox v. Knox, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; Frush v. Green, 86 Md. 494, 39 Atl. 863.

That which compels the testator to do something against his will, from fear, the desire of peace or some feeling which he is unable to resist. Sheppey v. Stevens, 185 Fed. 147.

Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practised, even though it induce one to make an unequal and unjust distribution of his property, if such disposition is voluntarily made; Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; Marx v. McGlynn, 88 N. Y. 357; but the question of the boundary of legitimate influence must be determined by the consideration of the relation between the parties, the character, strength, and condition of each of them, and the application of sound sense to each given case; Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161; Hartman v. Strickler, 82 Va. 225; the mental and physical condition of the testator, the provisions of the will itself; Myers v. Hauger, 98 Mo. 433, 11 S. W. 974; Kimball v. Cuddy, 117 Ill. 214, 7 N. E. 589; In re Beach, 23 App. Div. 411, 48 N. Y. Supp. 437; German Savings & Loan Soc. v. De Lashmutt, 83 Fed. 33; and the conduct of the testator after its execution; Boyd v. Boyd, 66 Pa. 283. The questions of capacity and undue influence are closely connected and must be considered together; Tobin v. Jenkins, 29 Ark. 151.

On principles of public policy, there is a presumption of undue influence in voluntary settlements between parent and child; 1 Ves. 401; 34 Beav. 457; guardian and

ward; 10 L. R. Eq. 405; trustee and *cestui que trust;* 30 Beav. 39; legal adviser and client; 2 Atk. 25; or between one and his spiritual adviser; 2 L. C. Eq. 597, n.; s. c. 14 Ves. 273; and so there is said to be a presumption of undue influence in case of wills made where these relations exist between the parties; Thompson v. Hawks, 14 Fed. 905; Marx v. McGlynn, 88 N. Y. 371; but see In re Bernsee's Will, 71 Hun 27, 24 N. Y. Supp. 504, where it was held that undue influence could not be presumed from the fact that the beneficiary stood in a confidential relation to the testator. See Maddox v. Maddox, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; Bulger v. Ross, 98 Ala. 267, 12 South. 803.

Undue influence will not be established if at the time of making the will the testator's freedom of will was not overcome; Trost v. Dingler, 118 Pa. 259, 12 Atl. 296, 4 Am. St. Rep. 593; Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; but it is held that where it is exercised by any one, even if not a beneficiary, undue influence is ground for setting the will aside; In re Cahill's Estate, 74 Cal. 52, 15 Pac. 364. See DURESS; FRAUD; WILL.

UNFAIR LIST. See BOYCOTT; LIBERTY OF THE PRESS.

UNFAIR TRADE. See TRADE-MARK.

UNGELD. An outlaw. Toml.

UNICA TAXATIO (Lat.). The ancient language of a special award of *venire*, where of several defendants one pleads, and one lets judgment go by default, whereby the jury who are to try and assess damages on the issue are also to assess damages against the defendant suffering judgment by default. Lee, Dict.

UNIFACTORAL OBLIGATION. See CONTRACT.

UNIFORMITY OF LAWS. Commissions have been appointed in all the states, territories, and possessions, and the District of Columbia, who hold annual conferences in connection with the American Bar Association, as a part of whose annual reports their proceedings are published. The Uniform Negotiable Instruments Act has been passed in 46 jurisdictions; the Warehouse Receipts Act in 30; the Sales Act in 11; the Divorce Act in 3; the Stock Transfer Act in 9; the Bills of Lading Act in 11; the Act Relating to Wills Executed without the State in 9; the Family Desertion Act in 6. See the various titles. Acts on the sales of railroad rolling stock (*q. v.*) are substantially uniform in nearly all the states.

UNIFORMITY OF PROCESS ACT. An act providing for uniformity of process in personal actions in the courts of law at Westminster, 23d May, 1832. The improved system thus established was more fully amended by the Procedure Acts of 1852, 1854, and 1860, and by the Judicature Acts of 1873 and 1875.

UNILATERAL CONTRACT. **In Civil Law.** When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral, even in cases where the law attaches certain obligations to his acceptance. La. Civ. Code, art. 1758. A loan of money and a loan for use are of this kind. Pothier, Obl. part 1, c. 1, s. 1, art. 2; *Lec. Elémen.* § 781.

In the Common Law. According to Professor Langdell, every binding promise not in consideration of another promise is a unilateral contract. For example, simple contract debts, bonds, promissory notes, and policies of insurance. A bilateral contract, which consists of two promises to give in exchange for and consideration of each other, becomes a unilateral contract when one of the promises is fully performed; Langdell, Sum. Cont. § 183.

UNINTELLIGIBLE. That which cannot be understood. See CONSTRUCTION.

UNIO PROLIUM (Lat. union of offspring). A species of adoption used among the Germans, which takes place when a widower having children marries a widow who also has children. These parents then agree that the children of both marriages shall have the same rights to their succession as those which may be the fruits of their marriage. *Lec. Elém.* § 187.

UNION. A popular term for the United States of America.

In English Poor Law. Two or more parishes that have been consolidated for the better administration of the poor law therein.

UNION LABEL LAWS. See TRADE-MARK.

UNITED KINGDOM OF GREAT BRITAIN AND IRELAND. The official title of the kingdom composed of England, Scotland, Ireland, and Wales, and including the colonies and possessions beyond the seas. At the time of the union between England and Scotland, in 1707, Great Britain became the official name of the kingdom, and continued to be such until the union with Ireland, in 1801. In the act of union of January 1, 1801, the above title is made the official name of the kingdom.

The government is a hereditary constitutional monarchy, and the sovereign, with a ministry responsible to parliament, constitutes the executive. The legislative power is vested in a parliament composed of a house of lords and a house of commons. The highest appellate judicial power is vested in the house of lords. The Judicial Committee of the Privy Council has appellate jurisdiction in cases arising in India and the colonies and possessions. See COURTS OF ENGLAND; COURTS OF SCOTLAND; COURTS OF IRELAND.

The title of the king is: By the Grace of God King of the United Kingdom of Great Britain and Ireland and of the British Do-

minions beyond the Seas, Defender of the Faith, Emperor of India.

UNITED STATES COMMISSIONERS. Each district (formerly circuit) court of the United States may appoint, in different districts of the circuit of which it is composed, as many discreet persons as it may deem necessary, who shall be called "commissioners of the circuit (now district) court," and shall exercise the powers which are or may be conferred upon them; R. S. § 627. The Judicial Code makes no change.

These officers are authorized to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States; Jud. Code § 270. They have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration, or decree of any consul, vice-consul, or commercial agent, to sit as judges or arbitrators in such differences as may arise between the captains and crews of vessels, application for the exercise of such power being first made by petition of such consul, etc., Jud. Code § 271.

They have also power to take bail and affidavits when required or allowed in any circuit or district court of the United States; R. S. § 945. They may imprison or bail offenders; R. S. § 1010; may discharge poor convicts imprisoned; R. S. § 1042; may administer oaths and take acknowledgments; R. S. § 1778; may institute proceedings under the civil rights laws; R. S. 1 Supp. 68; may issue warrants for the arrest of foreign seamen, in case of dispute or desertion; R. S. § 4079; may summon the master of a vessel in cases of seamen's wages; may apprehend fugitives from justice; R. S. § 5270 (amended June 6, 1900).

The district court of the United States may appoint commissioners before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn; and such oaths so taken are as effectual as if taken before the judge in open court; Jud. Code § 61.

The court of claims has power to appoint commissioners, before whom examinations may be made upon oath of witnesses touching all matters pertaining to claims; R. S. §§ 1071, 1080.

UNITED STATES COURTS. Except in the case of impeachments the judicial power of the United States is vested by the constitution in a supreme court and such other inferior courts as may be from time to time established by congress. All the judges are appointed by the president, with the advice and consent of the senate, to hold office during good behavior, and their compensation cannot be diminished during their terms of office. The judges, other than those of the supreme court, are circuit judges and district judges. The circuit judges compose the circuit courts of appeals and the district judges hold the district courts, and also at times sit in the circuit courts of appeal. See *infra*. For a detailed statement of the territorial boundaries of the several districts and divisions of districts, see the Judicial Code of March 3, 1911, ch. 5; U. S. Comp. St. 1911, p. 156; and various special acts.

Except in a few cases especially provided for, there is a district judge for each district, of which he must be a resident. In Barrett v. U. S., 169 U. S. 218, 18 Sup. Ct. 327, 42 L. Ed. 723, Fuller, C. J., reviews the legislation creating the judicial districts of the United States from the commencement of the government up to that date, 1898. The districts are grouped into nine circuits as follows: 1. Maine, New Hampshire, Massachusetts, Rhode Island. 2. Vermont, Connecticut, New York. 3. Pennsylvania, New Jersey, Delaware. 4. Maryland, Virginia, West Virginia, North Carolina, South Carolina. 5. Georgia, Florida, Alabama, Mississippi, Louisiana, Texas (and including appeals from the Canal Zone). 6. Kentucky, Ohio, Michigan, Tennessee. 7. Indiana, Illinois, Wisconsin. 8. Colorado, Nebraska, Minnesota, Kansas, North Dakota, South Dakota, Wyoming, Utah, Iowa, Missouri, Oklahoma, Arkansas, New Mexico. 9. California, Oregon, Nevada, Idaho, Montana, Washington, Arizona, Hawaii, and Alaska, to which also the United States court in China is assigned for the purpose of appeals. There are four circuit judges in the second, seventh, and eighth, two in the fourth circuit, and three in each of the other circuits. They receive a salary of $7,000 a year, each, and must reside in the circuit. One member of the Supreme Court is allotted to each circuit by order of the supreme court; he is known as the circuit justice, and is competent to sit in the Circuit Court of Appeals of that circuit. When he does so, he shall preside. He has no distinct commission as circuit judge, and none is required; Stuart v. Laird, 1 Cra. (U. S.) 308, 2 L. Ed. 115.

The judicial power under the constitution (art. III, § 2) shall extend to: 1. Cases in law and equity arising under the federal constitution, laws, or treaties. 2. Those affecting ambassadors and other public ministers and consuls. 3. Admiralty and maritime cases. 4. Controversies to which the United States is a party. 5. Those between two or more states. 6. Or between a state and citizens of another state. (By the 11th amendment this grant of power was so limited as not to permit a state to be sued by citizens of another state, but a state may sue citizens of another state.) 7. Or between citizens of different states. 8. Or between citizens of the same state claiming lands under grants of different states. 9. Or between a state or its citizens and foreign states, citizens, or subjects.

This article, conferring jurisdiction on the federal courts, "imports an absolute grant of judicial power"; Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 331, 4 L. Ed. 97.

The nature of the federal government which distributes the functions of government between two powers, each being sovereign within its sphere, but operating within the same territorial jurisdiction and upon the same persons and property, makes necessary the adjustment of two classes of independent tribunals with great care, both in legislation and the administration of justice, to avoid conflicts of jurisdiction. That such have occurred is true, but their rare occurrence in more than a century bears testimony as well to the tact and discretion of

the judiciary, federal and state, as to the perfection of the system which they administer under the constitution.

As respects criminal proceedings, the courts of each jurisdiction generally confine themselves to the administration of the laws of the government which created them. In civil cases, however, as the constitution has conferred jurisdiction upon the federal courts in cases, for example, where a citizen of one state sues a citizen of another state, it is manifest that the court which tries such a case must administer the laws of the state in which the action is brought, subject to the constitution and laws of the United States and treaties in cases which conflict with its provisions.

In the organization of the federal system of courts, there were two objects to be accomplished. The first was to prevent a clashing between the state and United States courts, by imposing restrictions upon the United States courts. The second was to carry out the mandates of the constitution, by clothing the latter with all the powers necessary to execute its provisions. This organization was commenced by the act of 1789, familiarly known as the Judiciary Act.

To accomplish the first object, the right to issue writs of *habeas corpus* was by the fourteenth section limited to cases arising under the federal constitution and laws; R. S. § 753. See HABEAS CORPUS. As it there appears, the right of appeal to the supreme court from the denial of the writ of *habeas corpus* or the discharge of a person imprisoned was absolute and, it being considered that this led to some abuse in the way of frivolous appeals, particularly in cases of persons condemned to death under criminal prosecutions in the state courts, an act was passed March 10, 1908, providing that no appeal to the supreme court should be allowed "unless the United States court by which the final decision was rendered or a justice of the supreme court shall be of the opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance"; 35 Stat. L. 40, U. S. Comp. Stat. (Supp. 1911) 255.

This important restriction was intended to leave to the state authorities the absolute and exclusive administration of the state laws in all cases of imprisonment; and no instance has ever occurred in which this act has been disregarded. On the contrary, its observance has been emphatically enjoined and enforced; Ableman v. Booth, 21 How. (U. S.) 523, 16 L. Ed. 169.

The jurisdiction of the supreme court depends upon the federal constitution, that of the circuit [district] court upon the act of Congress; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. The motive of a citizen who prosecutes a cause of action against another in a federal court, in the absence of fraud and collusion, is immaterial; Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286, 51 L. Ed. 504. And when the circuit court dismisses a case under sec. 1 of the act of Aug. 13, 1888, because not substantially involving the requisite amount in controversy, the order of the court, in this case without a jury, is subject to review in the supreme court in respect to rulings of law and findings of fact upon the evidence; Smithers v. Smith, 204 U. S. 632, 27 Sup. Ct. 297, 51 L. Ed. 656.

The jurisdiction of the federal courts is conferred by the constitution and the laws of Congress and cannot be defeated or impaired by the laws of a state. If a suit, when viewed in the light of recognized principles of jurisprudence, appears to be a suit of a civil nature at common law or in equity, it is immaterial if, by a local statute, exclusive cognizance has been in terms reserved to the courts of the state generally or to some specially designated local tribunal; Spencer v. Watkins, 169 Fed. 379, 94 C. C. A. 659.

The Judicial Code, enacted March 3, 1911, in effect January 1, 1912, divides the United States into districts (§§ 69–115).

By section 1, a district judge is appointed for each district except that in the northern districts of California and Illinois, districts of Minnesota, Nebraska, Maryland, and New Jersey, and in the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there is an additional district judge in each, and in the southern district of New York, three additional judges. In Maryland, upon the death of the senior judge, the vacancy shall not be filled. There is one judge for the eastern and western districts of South Carolina, one for the eastern and middle districts of Tennessee, and one for the northern and southern districts of Mississippi. Every district judge must reside in the district or in one of the districts for which he is appointed; to offend against this provision is made a high misdemeanor. The salary is $6,000 a year.

Sec. 9. The district courts, as courts of admiralty and of equity, are deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, etc., preparatory to a hearing on the merits. A district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, etc., as are not grantable of course.

Sec. 13. If a district judge is prevented by any disability from holding any term of his court, any circuit judge of his circuit or, in

the absence of all the circuit judges, the circuit justice of that circuit, may designate the judge of any other district in the same circuit to hold his court. If it appear impracticable to designate a district judge of the same circuit, the chief justice may designate a judge of any district in another circuit to hold the court. There is a like provision when the accumulation or urgency of business in any district court requires additional judicial force. Provision is made for the designation of a circuit judge of a circuit to hold the district court (sec. 14).

Sec. 22. In case of vacancy, all process, pleading, and proceedings shall, if necessary, be continued by the clerk until a judge shall be appointed or designated to hold the court.

Sec. 24. District courts have original jurisdiction as follows:

1. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

2. Of all crimes and offenses cognizable under the authority of the United States.

3. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

4. Of all suits arising under any law relating to the slave trade.

5. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

6. Of all cases arising under the postal laws.

7. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

8. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

9. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

10. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

11. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

12. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

13. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

14. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

15. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided,* that such jurisdiction shall extend only so far as to determine the rights of the parties

to such office by reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the states.

16. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.

17. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

18. Of all suits against consuls and vice consuls.

19. Of all matters and proceedings in bankruptcy.

20. Concurrent with the court of claims, of all claims not known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March, 1887, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or, as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June, 1898, shall abate or be affected by this provision: *And provided further*, that no suit against the government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, that the claims of married women, first accrued during marriage, of persons under the age of 21 years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

21. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

22. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

23. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

24. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (amendment, December 21, 1911, added certain details).

25. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

Secs. 25–27. They also have appellate jurisdiction of the judgments and orders of United States Commissioners in cases arising under the Chinese Exclusion Act; in the district of Wyoming of felonies committed in the Yellowstone National Park; and appellate jurisdiction in cases of conviction before the commissioners appointed under the act to protect birds and animals in the park, etc.; and in South Dakota over certain criminal offenses in the Indian reservation.

As to the removal of causes from state courts, see that title.

Miscellaneous Proceedings. Sec. 40. The trial of offenses punishable with death shall be had in the county in which the offense was committed where that can be done without inconvenience.

Sec. 41. The trial of offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district shall be in the district when [where] the offender is found or into which he is first brought.

Sec. 42. When any offense is begun in one district and completed in another, it shall be deemed to have been committed in either and may be tried in either.

Sec. 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property is brought and proceedings instituted.

Sec. 48. In suits brought for the infringement of letters patent, the district courts have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and shall have a regular and established place of business. If such suit is

brought in a district of which the defendant is not an inhabitant, but in which such defendant shall have a regular or established place of business, service of process may be made upon the agent or agents engaged in conducting such business in the district.

Sec. 49. All proceedings by any national bank to enjoin the Comptroller of the Currency under the national bank acts must be had in the district where the bank is located.

Sec. 50. When there are several defendants in law or equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district shall not be considered matter of abatement or objection to the suit.

Sec. 51. No person shall be arrested in one district for trial in another, in any civil action, in a district court (except as in the five succeeding sections), and no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant (except as provided in the six succeeding sections); but where the jurisdiction is founded only on diversity of citizenship, suits shall be brought only in the district of the residence of either plaintiff or defendant. The excepted instances are:

Sec. 52. When a state contains more than one district, suits not of a local nature, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but, if there are two or more defendants residing in different districts of the state, it may be brought in either district.

Sec. 53 contains a like provision as to districts having two divisions. All prosecutions for offenses shall be brought in the division of such district where they were committed unless, upon the application of the defendant, the court or the judge thereof shall transfer the case to another division of the district. In all cases of the removal of suits from a state court to a district court, it shall be to the district court of the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the district court in such division.

The above secs. 51–53 refer only to suits not of a local nature.

Sec. 54. In suits of a local nature where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district where he resides.

Sec. 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character, lies partly in more than one district in the same state, may be brought in either district.

Sec. 56. Where a receiver has been appointed over land or other property of a fixed character, and it lies within different states within the same circuit, a receiver may be vested with full jurisdiction over all the property lying in the circuit, subject, however, to the disapproval of an order to that effect by the circuit court of appeals for the circuit or by a circuit judge thereof.

Sec. 57. In a suit commenced in any district to enforce any legal or equitable lien or remove an incumbrance or lien or a cloud on any title in the district, to real or personal property, if any one or more of the defendants shall not be found within the district or voluntarily appear, the court may order the absent defendant to appear, etc., by day certain to be designated, which order may be served upon the defendant, if practicable, wherever found, and also upon the person in possession of the property. If service upon the defendant is not practicable, it may be made by publication, as the court may direct, not less than once a week for six consecutive weeks.

Sec. 58. Civil causes may, by written stipulation of the parties or their attorney of record and upon the order of a judge, be transferred to the court of any other division of the same district.

Sec. 65. When a receiver is appointed, he shall manage and operate the property according to the valid laws of the state where it is situated; any receiver who violates this section is liable to a fine of not more than $3,000 or imprisonment for one year, or both.

Sec. 66. Receivers may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which he was appointed; but such suits shall be subject to the general equity jurisdiction of the court as far as may be necessary to the ends of justice.

Sec. 67. No person shall be appointed in any office or duty of any court who is related within the first degree of affinity or consanguinity to the judge thereof.

Sec. 68. No clerk of a district court or his deputy shall be appointed receiver or master in any case, "except where the judge of the court shall determine that special reasons exist therefor, to be assigned in the order of appointment."

Circuit Court of Appeals. Secs. 116–120. The nine judicial circuits of the United States are referred to above, also the number of circuit judges constituting the court in the different circuits. The chief justice and the

associate justices of the supreme court are allotted among the circuits by an order of the court, and the several district judges in each district may sit in this court. If a member of the supreme court attends a session, he shall preside. Otherwise, the circuit judges in attendance upon the court shall preside in the order of seniority of their commissions. If a full court shall not be made up, one or more district judges within the circuit shall sit according to such provision among the district judges as either by general or particular assignment shall be designated by the court, but no judge before whom a question has been tried or heard in the district court shall sit on the trial of such cause or question in the circuit court of appeals.

Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the supreme court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Sec. 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however*, that the court below may, in its discretion, require as a condition of the appeal an additional bond.

Sec. 130. The court also has appellate and supervisory jurisdiction under the Bankruptcy Act.

Sec. 131. In the ninth circuit the court hears and determines writs of error and appeal from the United States Court for China. See CHINA.

Sec. 134. Provision is made for writs of error and appeals where they do not lie direct to the supreme court under 247, in which the amount in controversy shall exceed $500, and in all criminal cases, from the district court of Alaska to the circuit court of appeals for the ninth circuit, but the court of appeals may certify any question of law to the supreme court if desiring instruction thereon.

By the labor arbitration act of July 15, 1913, the circuit court of appeals has jurisdiction of questions of law under the act.

The Court of Claims. Secs. 136–138. This court, as established by the act of February 24, 1855, is continued by the Judicial Code. It consists of a chief justice and four judges, appointed by the President, by and with the advice and consent of the Senate, to hold office during good behavior. The salary of the chief justice is $6,500 and of the other judges $6,000. It holds one annual session at the city of Washington, beginning on the first Monday of December. Any three of the judges constitute a quorum. The concurrence of three judges is necessary to the decision of any case.

Sec. 143. The clerk of the court is required on the first day of every regular session of Congress to transmit to Congress a complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments and certain other officials.

Sec. 144. Any one being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, who shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in this court, shall be fined not more than $10,000 and imprisoned not more than two years; and shall thereafter be incapable of holding any office of honor, trust, or profit under the government of the United States.

Sec. 145. The court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law,

equity, or admiralty if the United States were suable: *Provided, however*, that nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March 3, 1887, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided*, that no suit against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Sec. 146. In case any set-off, counterclaim, claim for damages, or other demand is set up on the part of the government against any person making claim against the government, the court shall hear both claims and adjudicate finally thereon.

Sec. 148. Claims pending in the executive department and involving controverted questions of fact or law may be transmitted to the court of claims, which reports its finding to the department. If it were so transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court that it has jurisdiction to render judgment, it shall proceed to do so.

Sec. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, the House in which such bill is pending may refer the same to the court of claims, which shall proceed therein and report to said House the facts in the case and the amount, where the same can be liquidated, and any facts bearing upon the question, etc., provided that if it appear to the court upon the facts established that it has jurisdiction to render judgment in the matter, it shall proceed to do so and thereupon report to the House of Congress by which the claim was referred to the court.

Sec. 152. If the government shall put in issue the right of the plaintiff to recover, the court may in its discretion allow costs to the prevailing party from the time of joining such issue. Such costs shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

Sec. 155. Aliens or the subjects of any government which accords to United States citizens the right to prosecute claims against its government in its courts shall have a like privilege in the court of claims.

Sec. 156. Claims are barred unless the petition is filed in the court or transmitted to the court by the Secretary of the Senate or the Clerk of the House within six years after the claim first accrues, with an exception in the case of married women, minors, lunatics, etc., and persons beyond the sea, whose claims are not barred until three years after the disability has ceased, and such disabilities shall not operate cumulatively.

Sec. 162. Jurisdiction is given to hear and determine claims for property taken subsequent to June 1, 1865, under the provisions of the act of March 12, 1863.

Sec. 177. No interest shall be allowed on any claim up to the time of rendition of judgment by the court, unless upon a contract expressly stipulating for the payment of interest.

Sec. 180 provides that any person may present his petition to the court, alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, etc., and that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department for an adjustment and settlement of the account, and that three years have elapsed since said application, without settlement, and no suit has been brought. The court shall proceed to hear the parties, to ascertain the amount due the United States, if any. The judgment of said court, or the supreme court to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, etc., to recover the amount so found due, which may be brought within three years of final judgment.

Sec. 182. Provision is made for appeals in Indian cases.

Court of Customs Appeals. Sec. 188. It consists of a presiding judge and four associate judges appointed by the President and confirmed by the Senate and receiving an an-

nual salary of $7,000 per year. The presiding judge is so designated in his commission and the associates have precedence according to the dates of their commissions. Three members are a quorum and the concurrence of three is necessary to a decision. In case of vacancy or of temporary inability or disqualification, for any reason, of one or two of the judges, the President may, upon request of the presiding judge, designate any qualified United States circuit or district judge to act in his place.

Sec. 189. The court shall always be open. Its sessions may be held in the several judicial circuits and at such places as the court may from time to time designate. The judge attending, at any place other than Washington, shall be paid his expenses and those of one stenographic clerk.

Sec. 194. The court is a court of record.

Sec. 195. It has exclusive appellate jurisdiction to review final decisions by the board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification and the fees and charges connected therewith and all appealable questions as to the jurisdiction of said board and as to the laws and regulations governing the collection of the customs revenues, and its judgment is final.

Sec. 196. No appeal shall be taken or allowed from any board of United States general appraisers to any other court, and no appellate jurisdiction shall be exercised by any other court in cases decided by the said board, and nothing shall be deemed to deprive the supreme court of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on application for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided, provided that application for said writ be made within six months after August 5, 1909; with a further proviso as to cases decided before the last-mentioned date.

Sec. 198. In case an importer, owner, consignee, or agent of any imported merchandise, or the Secretary of the Treasury, shall be dissatisfied with the report of the board of general appraisers, in the matters above referred to, he may within sixty days after the entry of a judgment of the board appeal to the court of customs appeals for a review of the questions of law and fact therein involved. (In Alaska and in the insular and other outside possessions ninety days is allowed for making such application.)

No change was made in this court by the Tariff act of 1913.

The Commerce Court was provided for by the Judicial code. It is a court of record, to consist of five judges assigned by the chief justice of the United States from among the circuit judges, except that in the first instance it is to be composed of five additional circuit judges, authorized by the act of June 18, 1910, and designated by the President to serve one, two, three, four, and five years respectively. Its regular sessions are to be held in Washington. It may exercise its powers and sit in different parts of the United States. Its process runs throughout the United States. Its jurisdiction extends to the jurisdiction possessed by circuit courts immediately prior to June 18, 1910, over all cases of the following kind:

1. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

2. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

3. Such cases as by sec. 3 of the Act of Feb. 19, 1903, to further regulate commerce with foreign nations and among the states, are authorized to be maintained in a circuit court.

4. All such mandamus proceedings as under the provisions of sec. 20 or sec. 23 of the "act to regulate commerce" (Feb. 4, 1887), as amended, are authorized to be maintained in a circuit court.

Nothing contained in the act shall be construed as enlarging the jurisdiction now possessed by the circuit courts that is hereby transferred to the commerce court.

The jurisdiction of the commerce court over cases of the foregoing classes is exclusive; all jurisdiction not in the above classes remains with the district courts as before.

The Commerce Court was abolished by act of October 22, 1913 (in effect December 31, 1913). Its jurisdiction was transferred to the district courts; the act contained the following provisions: The orders and processes of the district courts run throughout the United States. No interlocutory injunction, suspending or restraining the operation of or setting aside an order of the Interstate Commerce Commission, shall be made unless the application shall be heard by three judges, one of whom shall be a circuit judge, and unless a majority thereof shall concur. At least five days' notice of the hearing must be given to the commission, to the attorney general, and the defendants. Where irreparable damage might ensue, a majority of the three judges may, after not less than three days' notice as aforesaid, allow a temporary stay of the order of the commission for not more than sixty days. An appeal lies direct to the supreme court on an order granting an interlocutory injunction, if the appeal be taken within thirty days after the injunction is granted or refused, and a final judgment of the district court

may be reviewed by the supreme court upon an appeal taken within sixty days.

The Supreme Court. Secs. 215–218. It consists of a chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum. The latter shall have precedence according to the dates of their commissions, or, when the commissions of two of them bear the same date, according to their ages. If there is a vacancy in the office of chief justice, or in case of his inability to perform his duties, they devolve upon the associate justice first in precedence. The salary of the chief justice is $15,000 and of the justices $14,500.

Sec. 230. The supreme court shall hold at the seat of government one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary.

Sec. 231. If at any session a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session.

Sec. 232. The justices attending at any session when less than a quorum is present may, within the twenty days mentioned, make all necessary orders touching any suit, proceeding, or process, preparatory to the hearing or decision thereof.

Sec. 233. The court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

Sec. 234. It has power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador, or other public minister, or a consul or vice consul is a party.

Sec. 235. The trial of issues of fact in the supreme court in all actions at law against citizens of the United States shall be by jury.

Sec. 236. The supreme court shall have appellate jurisdiction:

Sec. 237. A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The supreme court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

Sec. 239. In any case within its appellate jurisdiction as defined in sec. 128, the circuit court of appeals may certify to the supreme court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. See CERTIFICATE OF DIVISION.

Sec. 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title, it shall be competent for the supreme court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

Sec. 241. In any case in which the judg-

ment or decree of the circuit court of appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the supreme court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

Sec. 242. There is an appeal on behalf of the United States from judgments of the court of claims adverse to it and on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000 or where his claim is forfeited to the United States by the judgment of said court.

Sec. 243. Such appeal shall be taken in 90 days after judgment.

Sec. 244. Writs of error and appeals may be taken from the supreme court and the United States district court for Porto Rico, in certain cases specified.

Sec. 246. Writs of error and appeals lie from final judgments and decrees of the supreme court of Hawaii under the same regulations and in the same classes of cases as from final judgments of the highest court of a state may be taken to the supreme court under section 237, and in all cases where the amount involved, exclusive of costs, exceeds $5,000.

Sec. 247. Writs of error and appeals lie from the district court of Alaska in certain cases.

Sec. 248. The court has jurisdiction to review, revise, reverse, modify, or affirm final judgments of the supreme court of the Philippine Islands in all cases in which the constitution, or any statute, treaty, etc., of the United States is involved, or in causes in which the value in controversy exceeds $25,000 or in which the title to real estate exceeding in value $25,000 is involved.

Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the supreme court of the United States, upon writ of error or appeal, in the following cases:

1. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said supreme court, then the question of jurisdiction alone shall be certified to said supreme court for decision.

2. In prize cases.

3. In cases involving the construction or application of the constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

4. In cases in which the constitution, or any law of a state, is claimed to be in contravention of the constitution of the United States.

5. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

6. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the supreme court of the United States.

Sec. 251. In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the supreme court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said supreme court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 252. The court has appellate jurisdiction from the courts of bankruptcy from which it has appellate jurisdiction in other cases, and has a like jurisdiction not within any organized circuit of the United States and from the supreme court of the District of Columbia. An appeal may be taken from any final decision of a court of appeals, allowing or rejecting a claim in bankruptcy, under rules to be prescribed by the supreme court, in the following cases and no other:

1. Where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court.

2. Where some justice of the supreme court shall certify that in his opinion the determination of the question involved in the allow-

ance or rejection of such claim is essential to the uniform construction of laws relating to bankruptcy. Controversies may be certified to the supreme court from other federal courts, and the supreme court may exercise jurisdiction thereof and may issue writs of certiorari.

Sec. 255. Any woman who shall have been a member of the bar of the highest court of any state or territory or of the court of appeals of the District of Columbia for three years and maintained a good standing there, and shall be a person of good moral character, shall be admitted to practice before the supreme court.

The Supreme Court may review a judgment of the circuit court of appeals upon certiorari in a case where no appeal lies; City & County of Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101.

Where the jurisdiction of the federal court of a suit brought by a trustee in bankruptcy rests in diverse citizenship alone, the judgment of the circuit court of appeals is final. If, however, the petition also discloses as an additional ground of jurisdiction that the case arises under the laws of the United States, the judgment of the circuit court of appeals is not final, but can be reviewed by this court; Lovell v. Newman, 227 U. S. 412, 33 Sup. Ct. 375, 57 L. Ed. 577. Whether the case is one arising under the laws of the United States must be determined upon the statements in the petition itself, and not upon questions subsequently arising in the progress of the case; *id;* MacFadden v. U. S., 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801.

Provisions common to more than one court. Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

1. Of all crimes and offenses cognizable under the authority of the United States.

2. Of all suits for penalties and forfeitures incurred under the laws of the United States.

3. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

4. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

5. Of all cases arising under the patent-right, or copyright laws of the United States.

6. Of all matters and proceedings in bankruptcy.

7. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

8. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.

Sec. 258. Judges appointed under the authority of the United States are forbidden to exercise the profession of counsel or attorney, or to be engaged in the practice of the law. Disobedience is made a high misdemeanor.

Sec. 260. When any judge of any court of the United States, appointed to hold office during good behavior, resigns his office, after ten years of continuous service and having attained seventy years of age, he shall receive during his natural life the salary which was payable at the time of his retirement.

Sec. 261. Writs of *ne excat* may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any district judge in cases where they might be granted by the district court of which he is a judge. But no writ of *ne excat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made that the defendant designs quickly to depart from the United States.

Sec. 262. The supreme court and the district courts shall have power to issue writs of *scire facias.* The supreme court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sec. 263. Where notice is given of a motion for an injunction in a district court, the court or a judge thereof, if there appears to be danger of irreparable injury from delay, may grant an order restraining the act sought to be enjoined until the decision upon the motion. It may be granted with or without security, in the discretion of the court.

Sec. 264. Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it can not be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

Sec. 265. The writ of injunction shall not be granted by any court of the United States

to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, shall be issued or granted by any justice of the supreme court, or by any district court, or by any judge thereof, or by any circuit judge acting as a district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court, or a circuit judge, and unless a majority of said three judges shall concur. Such application shall not be heard or determined before at least five days' notice has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit; provided that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice. The hearing of a motion for an interlocutory injunction shall be given precedence and shall be in every way expedited. An appeal may be taken direct to the supreme court from the order granting or denying an interlocutory injunction. It is further provided by the amendment of March 4, 1913, that if, before the final hearing of such application, a suit shall have been brought in a state court to enforce such statute or order, accompanied by a stay in the state court of proceedings under such statute, pending a determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of said suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state that the suit in the state court is not being prosecuted with diligence and good faith.

Sec. 267. Suits in equity will not be sustained in any courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Sec. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule,, decree, or command of the said courts.

Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

Sec. 270. The judges of the supreme court, and the circuit and district judges, the United States commissioners, judges and other magistrates of the several states who have authority to make arrests for offenses against the United States, shall have the like authority to hold to the security of the peace and for good behavior, in cases arising under the constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states.

Sec. 272. In all courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys as, by the rules of the said courts respectively, are permitted to manage and conduct causes therein.

By section 289, circuit courts are, on the taking effect of the act, abolished, and whenever in any law not embraced within this act any reference is made to, or any power or duty is conferred upon, the circuit courts, such reference shall be deemed to confer such power, etc., upon the district courts.

The act was approved March 3, 1911, and took effect January 1, 1912.

The Judicial Code did not abolish the district court, but transferred to it cases pending in the circuit court; U. S. v. Mfg. Co., 195 Fed. 778. The new district court is the successor of the formerly existing circuit court and is vested with the duty of hearing and disposing of cases under the Expedition Act of 1903; Ex parte U. S., 226 U. S. 420, 33 Sup. Ct. 170, 57 L. Ed. 281.

The words *inhabitant*, *resident*, and *citizen*, as used in the Judicial Code, §§ 51, 52, contemplate the same condition and all include the idea of domicile; U. S. v. Gronich, 211 Fed. 548.

Under Judicial Code, § 51, where jurisdiction depends on diverse citizenship alone, plaintiff is entitled to sue in the district of his residence, but is not required under § 53 to sue in the division of the district in which he resided; Reich v. Copper Co., 209 Fed. 880.

Under R. S. § 649, and Judicial Code § 291,

issues of fact may by consent be tried in the district court without a jury; such a trial no longer amounts to an arbitration and may be reviewed; Nashville I. Ry. v. Barnum, 212 Fed. 634.

An unsatisfied, justiciable claim of some right involving the jurisdictional amount is a controversy between the parties within the meaning of the statutes defining the jurisdiction of the circuit [district] court, and such jurisdiction does not depend upon the denial by the defendant of the existence of the claim or of its amount or validity; In re Metropolitan Ry. Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. Jurisdiction cannot be given to the federal courts based upon the alleged anticipated defense which may be set up and which is invalid under some law or provision of the constitution of the United States. The jurisdiction must affirmatively appear from the statements of the complainant's case; Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126.

A federal court within its limitations respecting jurisdiction over the subject-matter is a court of general jurisdiction; Toledo, St. L. & W. R. Co. v. Perenchio, 205 Fed. 472, 123 C. C. A. 540.

The Judicial Code does not purport to embody all the law upon the subject to which it relates. Sections 292, 294, and 297 expressly bear upon the extent to which the code affects or repeals prior laws; Street & Smith v. Mfg. Co., 231 U. S. 348, 34 Sup. Ct. 73, 58 L. Ed. —.

The meaning of the phrase "drawn in question," as it occurs in § 250 of the Judicial Code, is the same as in R. S. § 709, § 5 of the Circuit Court of Appeals act, and other statutes regulating territorial appeal; U. S. v. Fisher, 227 U. S. 445, 33 Sup. Ct. 329, 57 L. Ed. 591.

If a case can be taken to the Supreme Court by appeal or writ of error under § 241, it cannot be taken there by certiorari under § 240; U. S. v. Beatty, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. —.

The means of review of rulings in United States courts are prescribed by statute, by ancient English statutes, and the rules and practice of the federal courts, and are not affected by the "Conformity Act" nor the state laws or practice; Boatmen's Bank v. Trower Bros. Co., 181 Fed. 804, 104 C. C. A. 314.

By R. S. § 721, the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. In all cases depending upon the construction of a state statute, federal courts will follow the construction of the court of last resort of the state, when that construction is well settled, without respect to its original soundness; even when, in ignorance of a decision by the state court, the supreme court had construed the statute differently; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; or when, if it were an original question, the federal court would be of a different opinion; Balkam v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953.

While the United States courts follow the interpretation given to the laws of the state by their highest tribunals, yet in case of conflicting decisions, or in the absence of decisions at the time of consideration by the United States courts, the rule is, of course, modified; Rowan v. Runnels, 5 How. (U. S.) 139, 12 L. Ed. 85; Pease v. Peck, 18 How. (U. S.) 599, 15 L. Ed. 518. In the leading case of Burgess v. Seligman the limitations of the doctrine were thus stated by Bradley, J.: "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do

avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, approved Pana v. Bowler, 107 U. S. 541, 2 Sup. Ct. 704, 27 L. Ed. 424. See, also, Gormley v. Clark, 134 U. S. 348, 10 Sup. Ct. 554, 33 L. Ed. 909. Ordinarily, they will follow the latest settled decisions; Green v. Neal, 6 Pet. (U. S.) 291, 8 L. Ed. 402; Leffingwell v. Warren, 2 Black (U. S.) 599, 17 L. Ed. 261. But a change of decision by a state court in regard to the construction of a statute will not be allowed to affect rights acquired under the former decision; Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; German Savings Bk. v. Franklin County, 128 U. S. 538, 9 Sup. Ct. 159, 32 L. Ed. 519. See IMPAIRING THE OBLIGATION OF CONTRACTS, for a discussion of this doctrine, usually called the rule in Gelpcke v. Dubuque. It is otherwise when no rights have been acquired under the former decision; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; Knox County v. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; or where the decision of the state court was made long after the rights in question accrued; Bolles v. Brimfield, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495. The federal courts will not follow the decision of an inferior court; Patapsco Guano Co. v. Morrison, 2 Woods 395, Fed. Cas. No. 10,792.

In controversies concerning the title to real property, the federal court always administers the law as if it were sitting as a local court; Slaughter v. Glenn, 98 U. S. 244, 25 L. Ed. 122; Lowndes v. Huntington, 153 U. S. 17, 14 Sup. Ct. 758, 38 L. Ed. 615. So also of statutes of limitation; Shields v. Coleman, 157 U. S. 177, 15 Sup. Ct. 570, 39 L. Ed. 660.

Questions of international law must be decided as matters of general law, uncontrolled by local decisions; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. Decisions of the state court on questions of local law, affecting solely the internal police of the state or the construction of a municipal ordinance, must control; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759.

Local law or custom, established by repeated decisions of the highest courts of the state, becomes also the law governing courts of the United States sitting in that state; Bucher v. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260. This is particularly true as to decisions which establish a rule of property, and the rule is observed even as to points upon which the states are at variance among themselves; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; May v. Tenney, 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368; and where the same statute receives a different interpretation in different states, each will be followed by the federal courts as the true interpretation for the particular state in question; Chicago, R. I. & P. Ry. Co. v. Stahley, 62 Fed. 363, 11 C. C. A. 88. The supreme court will follow the construction given by the state court to a state statute of limitations, even in a case decided the other way by the circuit court before the decision of the state court; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; and the lower federal courts will reverse their decision holding a state statute unconstitutional, when the state subsequently decides that it is constitutional, if a final decree had not been entered in the federal court; Western Union Tel. Co. v. Poe, 64 Fed. 9. In Forsyth v. City of Hammond, 71 Fed. 443, 18 C. C. A. 175, however, the circuit court of appeals declined to follow the the supreme court of Indiana where the decision of the latter was rendered after argument and before decision in the federal court.

Federal courts follow territorial decisions. The construction of a territorial statute by the local courts is of great, if not controlling weight in the supreme court; Lewis v. Herrera, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506; which in considering the provisions of an ambiguous territorial statute will lean to the construction given to it by the territorial supreme court; Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. Ed. 588; and generally the construction of a territorial statute by the local court is very persuasive upon the supreme court; Crary v. Dye, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595; and will ordinarily be followed by it; English v. Arizona, 214 U. S. 359, 29 Sup. Ct. 658, 53 L. Ed. 1030; and will not ordinarily be reviewed; Santa Fé County Com'rs v. New Mexico, 215 U. S. 296, 30 Sup. Ct. 111, 54 L. Ed. 202. Following this rule the supreme court has followed the construction given by the Hawaiian courts to a statute legitimating children born out of wedlock; Kealoha v. Castle, 210 U. S. 149, 28 Sup. Ct. 684, 52 L. Ed. 998; or a decision upon the effect of a judgment of a land commission respecting the title to land; Lewers v. Atcherly, 222 U. S. 285, 32 Sup. Ct. 94, 56 L. Ed. 202.

As to questions of state law upon which the decisions of the state courts are controlling in cases originating in or removed to federal courts, see note in 40 L. R. A. (N. S.) 415. It is only the highest state court which

they follow; decisions of inferior courts are merely persuasive; Westerlund v. Mining Co., 203 Fed. 599, 609, 121 C. C. A. 627.

The provision of R. S. § 721, making the state law the rule of decision, embraces state rules of evidence in civil cases at common law; Vance v. Campbell, 1 Black (U. S.) 427, 17 L. Ed. 168; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; but not in equity cases; Segee v. Thomas, 3 Blatch. 11, Fed. Cas. No. 12,633.

Some authorities treat decisions of the highest state court as equally binding with state statutes; Stewart v. Morris, 89 Fed. 290, 32 C. C. A. 203; see Nashua Savings Bank v. Anglo-American L. M. & A. Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; but these cases are based upon *dicta* or are cases dealing solely with statutory rules of evidence; see Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117. The federal courts have not considered the state decisions as controlling in the consideration of questions of evidence on appeal; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. It is said in Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560, that the point whether state decisions touching a general common-law rule of evidence are binding upon the federal court has never been directly decided, but many cases are enumerated as to matters in which the question arises of the scope of the rule that the federal courts are bound by the state law and practice. The decision of the highest court of Massachusetts upon the construction of the Sunday law was held binding; Bucher v. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; as was also provisions of the New York Civil Code, that a physician should not be allowed to disclose as a witness any information which he acquired in a professional capacity; Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708.

A New York statute permitting a party to be examined by his adversary as a witness at any time previous to the trial of an action at law is not binding because in conflict with the method of proof provided in the United States; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; nor is the question whether the engineer and fireman of a locomotive were fellow servants: Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; where it was said:

"The question as to what is a matter of local, and what of general law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. The unvarying rule is, that in matters of the latter class this court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment; and as unvarying has been the course of decision, that the question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law. In the case of Swift v. Tyson, 16 Pet. (U. S.) 1 [10 L. Ed. 865], the first proposition was considered at length. On page 18 it is thus stated: 'But admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.'" Baltimore & O. R. Co. v. Baugh, 149 U. S. 370, 13 Sup. Ct. 914, 37 L. Ed. 772.

So the supreme court has said: "The laws of the several states with respect to evidence within the meaning of this section (721) apply not only to the statutes but to the decisions of their highest courts." Nashua Sav. Bk. v. Anglo-American L. M. & A. Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782. The opinion of the circuit court of appeals in Chicago & N. W. Ry. Co. v. Kendall, 167

Fed. 62, 67, 93 C. C. A. 422, 16 Ann. Cas. 560, stated: "The question is not otherwise considered in the case and the decisions cited to support the statement all involved statutes of the states in which the actions arose. The language just quoted was not necessary to the determination of the question before the court." And it has been held in the circuit court of appeals upon careful consideration that "the decisions of the courts of a state construing the common law rules of evidence are not obligatory on the federal courts." Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553; *contra*, Stewart v. Morris, 89 Fed. 290, 32 C. C. A. 203. The whole subject is very thoroughly discussed with a copious citation of authorities in the opinion of the circuit court of appeals in Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; where it is argued that common-law rules of evidence are the creation of the courts rather than "laws" within § 721, and that, in the absence of statutes, federal courts should be independent in this respect.

Under R. S. § 858, as amended January 29, 1906, it is provided that "the competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." U. S. Comp. Stat. (Supp.) 1911, 271.

It does not apply to questions of general jurisprudence; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; or of general commercial law; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Oates v. Bank, 100 U. S. 239, 25 L. Ed. 580; see COMMERCIAL LAW (but they should have due weight given to them; Farmers' Nat. Bank v. Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595); or to the general principles of equity; Neves v. Scott, 13 How. (U. S.) 271, 14 L. Ed. 140; or to criminal cases; *id.;* or questions of a general nature, not based upon a local statute; Hough v. R. Co., 100 U. S. 213, 25 L. Ed. 612; Myrick v. R. Co., 107 U. S. 109, 1 Sup. Ct. 425, 27 L. Ed. 325. It is said, somewhat vaguely, that questions of general law are to be uncontrolled by decisions of the state courts, except to give them such weight as may be deemed proper, with due respect to their character as co-ordinate tribunals. It is difficult to deduce from the cases any general rule or principle, but among cases thus held to be questions of general law are: What is or is not a navigable stream; Chisolm v. Caines, 67 Fed. 285; whether a carrier may stipulate for exemption from liability for its own negligence; Eells v. Ry. Co., 52 Fed. 903; whether two employés of the same master are fellow-servants; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. In the section last referred to, the word "laws" does not include the decisions of the local tribunals, for these are only evidence of what the laws are; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865. This generalization of Judge Story is the subject of forcible comment by Betts, J., in his opinion in the case of In re Barry, 42 Fed. 132, and reprinted in 136 U. S. 597, 34 L. Ed. 503, note.

The decisions of the state appellate courts are treated as being as obligatory as statutes; Swift v. Tyson is also cited in Coleman v. Newby, 7 Kan. 92, to the proposition that courts could never, in any manner, make laws; in Phelps v. City of Panama, 1 Wash. Ter. 523, it was held that "laws of the United States" embraced all rules of property and conduct; and in Lycoming I. Co. v. Wright, 60 Vt. 523, 12 Atl. 108, it is held that the expression "laws of the state" includes both statute and common law; and Ex parte Waddell, Fed. Cas. No. 17,027, did not include judicial decisions or rules of courts but only local statutes and local usages of a fixed and permanent operation; but the statutes are to be read in connection with the constructions of the highest local courts; such judicial exposition being regarded as becoming part of the acts by defining their true meaning, following in this view, Bank of U. S. v. Daniel, 12 Pet. (U. S.) 32, 53, 9 L. Ed. 989. It is to be observed that while the opinion in Swift v. Tyson uses precisely the expression quoted which has been frequently the subject of comment, it is claimed that this language is intended to apply to questions of a general nature and that the word "laws" in the Judiciary Act does include the construction of statutes by local tribunals and their decisions as to those having a permanent locality. This understanding of Judge Story's opinion is frequently expressed by the courts; Pabst Brewing Co. v. Thorley, 145 Fed. 117, 76 C. C. A. 87; In re Hopper-Morgan Co., 154 Fed. 249.

Where contracts are based upon laws then believed to be constitutional, there being at the time no adjudication on such laws in the state courts declaring them invalid, the federal courts will not follow subsequent decisions of state courts thereon, but will construe such statute for themselves; Township of Pine Grove v. Talcott, 19 Wall. (U. S.) 666, 22 L. Ed. 227.

And while the rule is thoroughly settled that remedies in the courts of the United States are, at common law or in equity, according to the essential nature of the case, uncontrolled in that particular by the practice of the state courts; New Orleans v. Construction Co., 129 U. S. 45, 46, 9 Sup. Ct. 223, 32 L. Ed. 607; yet an enlargement of equitable rights by the state statute may be administered by federal courts as well as by the courts of the state; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction; In re Broderick's Will, 21 Wall. (U. S.) 503, 520, 22 L. Ed. 599; Holland v. Challen, 110

U. S. 15, 25, 3 Sup. Ct. 495, 28 L. Ed. 52; Frost v. Spitley, 121 U. S. 552, 557, 7 Sup. Ct. 1129, 30 L. Ed. 1010.

It is frequently asserted that there is no common law of the United States in the sense that it is recognized as a rule of decision in the federal courts. This idea, which is found in varying forms of expression in opinions of the United States supreme court, seems to have had its origin in what has been characterized as a dictum of McLean, J., in Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055, where he said: "It is clear there can be no common law of the United States, the said government is composed of 24 sovereign and independent states; each of which may have its local usage, customs, and common law; there is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption." This was repeated in Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181. But in Bucher v. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, it is said that the common law of the United States rests on the principles derived from the common law of England. Of course this explanation might apply simply to the United States as a territorial explanation, and indeed that case referred to the common law as prevailing in the District of Columbia, as did also Ex parte Watkins, 7 Pet. (U. S.) 568, 8 L. Ed. 786. In Murray v. Ry. Co., 62 Fed. 24, Shiras, J., said: "To me it seems clear, beyond question, that neither in the constitution, nor in the statutes enacted by Congress nor in the judgments of the Supreme Court of the United States can there be found any substantial support for the proposition that, since the adoption of the constitution, the principles of the common law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the national government."

To the same effect, Kansas v. Colorado, 206 U. S. 46, 96, 27 Sup. Ct. 655, 51 L. Ed. 956.

And in an interesting article by Alton B. Parker on "The Common Law Jurisdiction of United States Courts," in 17 Yale L. J. 1, it is urged that the common law is recognized as a rule of decision in a majority of cases and that the contention to the contrary is due entirely to the unfortunate *obiter dictum* of Mr. Justice McLean, above quoted.

See COMMON LAW.

The original jurisdiction of the district court in certain cases, and the appellate jurisdiction of the supreme court to review the decisions of state courts, depend upon the existence in the case of what is termed a *federal question.* This is a question arising in a litigated case, and necessary to its decision, involving the construction of the constitution, or a law or treaty of the United States. See FEDERAL QUESTION.

Where such questions are clearly presented by the answer in that court, and the decree rendered could not have been made without adversely deciding them, and they are substantial as involving the jurisdiction of the circuit court over property in its possession and the effect to be given to its decree, the writ of error will not be dismissed; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379.

Where the federal jurisdiction rests upon the fact that a federal question is involved, the right of the defendant to be sued in the district of which he is an inhabitant may be waived. The fact of residence is not jurisdictional; Logan & Bryan v. Postal Telegraph & Cable Co., 157 Fed. 570.

The jurisdiction over appeals and writs of error from state courts depends on whether a federal question is involved. See that title.

Decedents' Estates. Federal equity jurisdiction extends to the administration of decedents' estates, where it concerns citizens and residents of different states; but they will be governed and controlled by the statutory rules and regulations of the particular state; Newberry v. Wilkinson, 199 Fed. 673, 118 C. C. A. 111, citing Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130.

Matters of pure probate, in the strict sense of the words, are not within the jurisdiction of the federal courts. Where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question or assail probate, at law or in equity, the federal courts, on behalf of citizens of other states, will enforce such remedies; but such suit must relate to independent controversies, and not to those arising on an application to probate, or a mere method of procedure ancillary to the original procedure; Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

See FEDERAL QUESTION; POLITICAL QUESTION; MOOT CASES; JUDICIAL POWER; JURISDICTION; APPEAL AND ERROR; CONFLICT OF LAWS; IMPAIRING THE OBLIGATION OF CONTRACTS; BANKRUPT LAWS; CONSULAR COURTS.

UNITED STATES OF AMERICA. The republic whose organic law is the constitution adopted by the people of the thirteen states which declared their independence of the government of Great Britain on the fourth day of July, 1776.

When they are said to constitute one nation, this must be understood with proper qualifications. Our motto, *E pluribus unum,* expresses the true nature of that composite body which foreign nations regard and treat with in all their communications with our people. No state can enter into a treaty, nor make a compact with any foreign nation. To foreigners we present a compact unity, an undivided sovereignty. No state can do a national act nor legally commit the faith of the Union.

In our interstate and domestic relations we are for some purposes one. We are, so far as our constitution makes us, one, and no further; and under this we are so far a unity that one state is not for-

eign to another. Art. 4, § 2. A constitution, according to the original meaning of the word, is an organic law. It includes the organization of the government, the grant of powers, the distribution of these powers into legislative, executive, and judicial, and the names of the officers by whom these are exercised. And with these provisions a constitution, properly so-called, terminates. But ours goes further. It contains restrictions on the powers of the government which it organizes.

The writ of *habeas corpus*, the great instrument in defence of personal liberty against the encroachment of the government, shall not be suspended but in case of rebellion or invasion, and when the public safety requires it. No bill of attainder or *ex post facto* law shall be passed; no money shall be drawn from the treasury where there is not a regular appropriation; no title of nobility shall be granted; and no person holding office shall receive a present from any foreign government. Art. 1, § 9. To these, which are in the original constitution, may be added the *eleven* first amendments. These, as their character clearly shows, had their origin in a jealousy of the powers of the general government. All are designed more effectually to guard the rights of the people, and would properly, together with the restrictions in the original constitution, have a place in a bill of rights. Any act or law of the United States in violation of these, with whatever formality enacted, would be null and void, as an *excess* of power.

The restrictions on state sovereignty, besides those which relate to foreign nations, are that no state shall coin money, emit bills of credit, make anything but gold and silver a tender in the payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. These prohibitions are absolute. In addition to these restrictions, the results of the War of Secession of 1861-1865 caused the adoption of the 13th, 14th, and 15th amendments, which lay still further restrictions upon the power of the states, so far as relates to slavery and the regulation of the right of suffrage. The 13th amendment provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to its jurisdiction, and confers power upon congress to enforce this article by appropriate legislation; the 14th amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and defines who shall be so considered; the 15th amendment specifically provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude. See CONSTITUTION OF UNITED STATES; FOURTEENTH AMENDMENT.

Without the consent of congress no state shall lay any duties on imports or exports, or any duty on tonnage, or keep troops or ships of war in time of peace, or enter into any agreement or compact with another state, or engage in war unless actually invaded, or in imminent danger of being so.

What constitutes a duty on exports or imports has been a matter of frequent litigation in the supreme court. It has been finally decided that the term "import" as used in the constitution does not refer to articles imported from one state to another, but only to articles imported from foreign states; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; but the prohibition contained in those provisions of the constitution which ordain that congress shall have power to regulate commerce with foreign nations and among the several states; that no state shall levy any imposts or duties on imports or exports; that the citizens of each state shall be entitled to all the immunities and privileges of citizens of the several states, have been construed together by the supreme court; and various statutes of the different states have been declared unconstitutional because they violated them. Thus a statute allowing an additional fee to port-wardens for every vessel entering a port; Southern S. S. Co. v. Port-Wardens, 6 Wall. (U. S.) 31, 18 L. Ed. 749; a tax on passengers introduced from foreign countries; Smith v. Turner, 7 How. (U. S.) 286, 12 L. Ed. 702; a tax on passengers going out of a state; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745; a tax levied upon freight brought into or through one state into another; State Freight Tax Case, 15 Wall. (U. S.) 232, 21 L. Ed. 146; a tonnage tax on vessels entering the harbors of a state, either from foreign or domestic ports; State Tonnage Tax Cases, 12 Wall. (U. S.) 204, 20 L. Ed. 370; Peete v. Morgan, 19 Wall. (U. S.) 581, 22 L. Ed. 201; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743; have all been so decided. It is said that wherever subjects, in regard to which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of congress. But the mere grant of the commercial power to congress does not forbid the states from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon which there should be some uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not so in the latter class; Achison v. Huddleson, 12 How. (U. S.) 297, 13 L. Ed. 993. See COMMERCE.

Whatever these restrictions are, they operate on all states alike, and if any state laws violate them, the laws are void; and without any legislation of congress the supreme court has declared them so; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; cases *supra;* Cooley, Const. Lim. 729.

The United States have certain powers, the principal of which are enumerated in art. 1, § 8, running into seventeen specific powers. Others are granted to particular branches of the government: as, the treaty-making power to the president and senate. These have an equal effect in all the states, and so far as an authority is vested in the government of the Union or in any department of it, and so far as the states are prohibited from the exercise of certain powers, so far in our domestic affairs we are a unity.

The United States is a sovereign and independent nation vested with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; and see Chae Chan Ping v. U. S., 130 U. S. 606, 9 Sup. Ct. 623, 32 L. Ed. 1068.

Within these granted powers the sovereignty of the United States is supreme. The constitution, and the laws made in pursuance of it, and all treaties, are the supreme law of the land. Art. 6. And they not only govern in their words, but in their meaning. If the sense is ambiguous or doubtful, the United States, through their courts, in all cases where the rights of an individual are concerned, are the rightful expositors. For without the authority of explaining this meaning, the United States would not be sovereign.

In these matters, particularly in the limitation put on the sovereignty of the states, it has been sometimes said that the constitution executes itself. This expression may be allowed; but with as much propriety these may be said to be laws which the people have enacted themselves, and no laws of congress can either take from, add to, or confirm them. They are rights, privileges, or immunities which are granted by the people, and are beyond the power of congress or state legislatures; and they require no law to give them force or efficiency. The members of congress are exempted from arrest, except for treason, felony, and breach of the peace, in going to and returning from the seat of government. Art. 1, § 6. It is obvious that no law can affect this immunity. On these subjects all laws are purely nugatory, because if they go beyond or fall short of the provisions of the constitution, that may always be appealed to. An individual has just what

that gives him,—no less and no more. It may be laid down as a universal rule, admitting of no exception, that when the constitution has established a disability or immunity, a privilege or a right, these are precisely as that instrument has fixed them, and can be *neither augmented nor curtailed* by any act or law either of congress or a state legislature.

It has been justly thought a matter of importance to determine from what source the United States derive their authority. McCulloch v. Maryland, 4 Wheat. (U. S.) 402, 4 L. Ed. 579. When the constitution was framed, the people of this country were not an unformed mass of individuals. They were united into regular communities under state governments, and to these had confided the whole mass of sovereign power which they chose to intrust out of their own hands. The question here proposed is whether our bond of union is a compact entered into by the states, or the constitution is an organic law established by the people. To this question the preamble gives a decisive answer: *We, the people,* ordain and establish this constitution. The members of the convention which formed it were indeed appointed by the states. But the government of the states had only a *delegated power,* and, if they had an inclination, had no authority to transfer the allegiance of the people from one sovereign to another. The great men who formed the constitution were sensible of this want of power, and recommended it to the people themselves. They assembled in their own conventions and adopted it, acting in their original capacity as individuals, and not as representing states. The state governments are passed by in silence. They had no part in making it, and, though they have certain duties to perform, as, the appointment of senators [now by popular vote under the 17th amendment], are properly not parties to it. The people in their capacity as sovereign made and adopted it; and it binds the state governments without their consent. The United States as a whole, therefore, emanates from the people, and not from the states, and the constitution and laws of the states, whether made before or since the adoption of that of the United States, are subordinate to it and the laws made in pursuance of it. See Fisher, Evolution of Const.

It has very truly been said that out of the mass of sovereignty intrusted to the states was carved a part and deposited with the United States. But this was taken by the people, and not by the states as organized communities. The people are the fountain of sovereignty. The whole was originally with them as their own. The state governments were but trustees acting under a derived authority, and had no power to delegate what was delegated to them. But the people, as the original fountain, might take away what they had lent and intrust it to whom they pleased. They had the whole title, and, as absolute proprietors, had the right of using or abusing, —*jus utendi et abutendi.*

A consequence of great importance flows from this fact. The laws of the United States act directly on individuals, and they are directly responsible and not mediately through the state governments. This is the most important improvement made by our constitution over all previous confederacies. As a corollary from this, if not more properly a part of it, the laws act only on states through individuals. They are supreme over persons and cases, but do not touch the state: they act through them; Martin v. Hunter, 1 Wheat. (U. S.) 368, 4 L. Ed. 97. If a state passes an *ex post facto* law, or passes a law impairing the obligation of contracts, or makes anything but gold or silver a tender in payment of debts, congress passes no law which touches the state: it is sufficient that these laws are void, and when a case is brought before the court, it, without any law of congress, will declare them void. They give no person an immunity, nor deprive any of a right. Again: should a state pass a law declaring war against a foreign nation, grant letters of marque and reprisal, arm troops or keep ships of war in time of peace, individuals acting under such laws would be responsible to the United States. They might be treated and punished as traitors or pirates. But congress would and could pass no law against the state; and for this simple reason, because the state is sovereign. And it is a maxim consecrated in public law as well as common sense and the necessity of the case, that a sovereign is answerable for his acts only to his God and to his own conscience.

The constitution and laws made in pursuance of it,—that is, laws within their granted powers,—and all treaties, are the supreme law of the land, art. 6; and the judicial power, art. 3, § 1, gives to the supreme court the right of interpreting them. But this court is but another name for the United States, and this power necessarily results from their sovereignty; for the United States would not be truly sovereign unless their interpretation as well as the letter of the law governed. But this power of the court is confined to cases brought before them, and does not embrace principles independent of these cases. They have no power analogous to that of the Roman prætor of declaring the meaning of the constitution by edicts. Any opinion, however strongly expressed, has no authority beyond the reasoning by which it is supported, and binds no one. But the point embraced in the case is as much a part of the law as though embraced in the letter of the law or constitution, and it binds public functionaries, whether of the states or United States, as well as private persons; and this of necessity, as there is no authority above a sovereign to which an appeal can be made.

Another question of great practical importance arose at an early period of our government. The natural tendency of all concentrated power is to augment itself. Limitations of authority are not to be expected from those to whom power is intrusted; and such is the infirmity of human nature that those who are most jealous when out of power and seeking office are quite as ready practically to usurp it as any other. A general abrogation commonly precedes a real usurpation, to lull suspicion if for no other purpose. When the constitution was new, and before it had been fully considered, this diversity of opinion was not unnatural, and was the subject of earnest argument, but is, we think, now settled, and rightly, both on technical reasoning and on that of expediency. The question is between incidental and constructive or implied powers. The government of the United States is one of delegated power. No general words are used from which a general power can be inferred. Incidental and implied are sometimes used as synonymous; but in accurate reasoning there is a plain distinction between them, and the latter, in common use, comes nearer to constructive than to incidental.

The interpretation of powers is familiar to courts of justice, as a great part of landed property in England and much in this country is held under powers. A more frequent example is that of common agency, as every agent is created by a power. Courts whose professed object is to carry into effect the intentions of parties have, on this subject, established general rules. Among these no one is more immovably fixed than this, that the interpretation is strict and not liberal. 2 Kent 617; 4 *id.* 330. But this strictness does not exclude incidental powers. These are included in a general and express power, both in the common and technical use of language. To take a familiar example. A merchant of Philadelphia or Boston has a cargo of tea arrive at New York, and by letter authorizes his correspondent to sell it. This is the whole extent of the power. But it necessarily and properly includes that of advertising, of removing and exhibiting the goods, etc. But it would not authorize the sale of sugar, a horse, and much less a store or real estate. These powers are not incidental to the general power, nor included in it. Or we may take an example directly from the constitution itself. The United States has power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." This includes the power to create and appoint all inferior officers and to do all subordinate acts necessary and proper to execute the general power: as, to appoint assessors, collectors, keepers, and disbursers of the public treasures. Without the subordinate powers the general power could not be executed. And when there is more than one mode by which this general power may be executed, it includes all. The agent is not confined to any one, unless a particular mode is pointed out. Mc-

Culloch v. Maryland, 4 Wheat. (U. S.) 410, 4 L. Ed. 579. All that the constitution requires is that it should be necessary and proper. One consequence of this doctrine is that there must be a power expressly granted as a stock to bear this incidental power, or otherwise it would be ingrafted on nothing.

A constructive power is one that is inferred, not from an express power, but from the general objects to be obtained from the grant, and, perhaps, in private powers sometimes from the general language in which they are granted. The broad distinction between them may be illustrated by two cases that came before the United States Court. The first is McCulloch v. Maryland, 4 Wheat. (U. S.) 317, 4 L. Ed. 579. The question in that case was whether the act incorporating the Bank of the United States was constitutional, or whether it lay beyond the limits of the delegated powers and was, therefore, merely void as usurped or an excess of power. The authority to create a corporation is nowhere expressly given, and if it exists it must be sought as incidental to some power that is specifically granted. The court decided that it was incidental to that of laying taxes as a keeper and disburser of the public treasure. This power could be executed only by the appointment of agents; and the United States might as well create an agent for receiving, keeping, and disbursing the public money as appoint a natural person or an artificial one already created. In the case of Osborn v. Bank, 9 Wheat. (U. S.) 859, 6 L. Ed. 204, the general question was presented again, and reargued, and the court reaffirmed their former decision, but, more distinctly than before, adding an important qualification. They might not only create an artificial person, but clothe it with such powers and qualities as would enable it with reasonable convenience to perform its specific duties. The taxes are collected at one end of the country and paid out at another, and the bank instead of removing the specie might pay it where collected, and repay themselves by purchasing a bill of exchange in another place, and this could be conveniently and economically done only by a power of dealing in exchange generally, which when reduced to its last analysis is merely buying specie at one place and paying for it at another. It is in this way, and this only, that the bank got its general power of dealing in exchange,—that it is essential and proper to enable it to perform its principal duty, that of transferring the funds of the United States. Thus, the authority to create a bank is incidental to that of receiving, keeping, and paying out the taxes, and is comprehended under the specific power. The argument is principally derived from Hamilton's report on a bank, which proved satisfactory to Washington, as that of Chief-Justice Marshall has to the public at large.

This is very different from a constructive power which is inferred not as included in any special grant, but from the general tenor of the power and the general objects to be obtained. The objects of the constitution are stated in the preamble; and they are to promote the common weal. But this is followed by the grant of specific powers. And it is the dictate of common sense as well as technical reasoning that this object is to be obtained by the due exercise of these powers. Where these fall short, none are granted; and if they are inadequate, the same consequence follows. No one would infer from a power to sell a ship one to sell a store, though the interest of the principal would thereby be promoted. The general power to regulate commerce is useful, and it is given, and it may be carried to its whole extent by having incidental powers ingrafted upon it. A general power to regulate the descent and distribution of intestate estates and the execution and proof of wills would be on many accounts useful, but it is not granted. The utility of a power is never a question. It must be expressly granted, or incidental to an express power,—that is necessary and proper to carry into execution one expressly granted,—*or it does not exist.*

The other illustrative case is that of Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060. It will be found on a careful examination that in this a constructive power only is claimed. The only point involved in the case was the constitutionality of the statute of Pennsylvania under which Prigg was indicted as a kidnapper. The court decided this to be unconstitutional; and here its judicial functions properly terminated. But to arrive at this conclusion it was deemed necessary to determine that the general power of arresting and returning fugitives from labor and service was intrusted to the United States. It was not pretended that this power was expressly given, nor that it was incidental to any that was expressly given,—that is, conducive or proper to the execution of such a power. The court say that "in the exposition of this part of the constitution we shall limit ourselves to the considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature." Prigg v. Pennsylvania, 16 Pet. (U. S.) 610, 10 L. Ed. 1060. They do not, as in McCulloch's case, quote the express authority to which this is incidental; but a general argument is offered to prove that this power is most safely lodged with the United States, and that, therefore, it has been placed there *exclusively.* If the canon of criticism which we have endeavored to establish, and which is generally admitted, is correct, the existence of such a power cannot be inferred from its utility.

It will be seen, also, that this case stands in strong contrast with that of Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 304, 4 L. Ed. 97, in which the opinion was delivered by the same judge. This was on the validity of the twenty-fifth section of the Judiciary Act, authorizing an appeal from a final judgment of a state court to the supreme court of the United States; and perhaps in no case has the extent of the powers granted by the constitution been more fully and profoundly examined. In this case the court say that "the government of the United States can claim no powers which are not granted by the constitution; and the powers actually granted must be such as are *expressly given, or given by necessary implication;*" that is to say, as the reasoning of the court in the whole opinion proves, such as are included in the express powers, and are necessary and proper to carry them into execution. Such was the uniform language of the court whenever the question was presented previously to the rebellion. The doctrine as now held, however, is somewhat broader, finding its exposition in the decision of the supreme court in the Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. Ed. 287. It is there said that it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantial powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Before any act of congress can be held to be unconstitutional, the court must be convinced that the means adopted were not appropriate or conducive to the execution of any or all of the powers of congress, or of the government,—not appropriate in any degree; and of the degree, the court is not to judge, but congress.

We have seen that the constitution and the laws and treaties made in pursuance of it are the supreme law of the land, and that of the true meaning of these the supreme court is the rightful expositor. This necessarily results from their sovereignty. But the United States government is one of delegated powers; and nothing is better established, both by technical reasoning and common sense, than this,—that a delegate can exercise only that power which is delegated to him. All acts beyond are simply void, and create no obligation. It is a maxim also of constitutional law that the powers of sovereignty not delegated to the United States are reserved to the states. But in so complex an affair as that of government, controversies will arise as to what is given and what is reserved,—doubts as to the dividing line. When this is the case, who is to decide? This is a difficulty which the convention did not undertake to settle.

To avoid all controversy as far as possible, the plainest words in granting powers to the United States were used which the language affords. Still further to preclude doubts, the convention added, at the close of the seventeen powers expressly given, this clause: "To make all laws which shall be necessary and proper for carrying into execution the

foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Art. 1, § 8. This clause contains no grant of power. But in the Articles of Confederation, which was a compact between the states as independent sovereigntics, the word EXPRESSLY was used; and a doubt troubled congress how far incidental powers were included. Articles of Confederation, art. 2. This clause was introduced to remove that doubt. It covered incidental, but not constructive, powers.

Strange as it may appear, both those who wished larger powers granted to the United States, and, in the language of that day, thought that things must be worse before they could be better, and those who honestly feared that too much power was granted, fixed their eyes on this clause; and perhaps no part of the constitution gave greater warmth to the controversy than this. To disarm the designing and counteract the fears of the timid, the tenth amendment was offered by the friends of the constitution. But so jealous were parties of each other that it was offered in the convention of Massachusetts by Governor Hancock, who favored and had the confidence of the opposition, though it was in the handwriting of Mr. Parsons, afterwards chief justice. Life of Chief Justice Parsons. That amendment is in these words: "The powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively, or the people." Were the words of the original constitution and the amendment both stricken out, it would leave the true construction unaltered. Story, Const. § 1232. Both are equally nugatory in fact; but they have an important popular use. The amendment formally admits that certain rights are reserved to states, and these rights must be sovereign.

In Kansas v. Colorado, 206 U. S. 46, 89, 96, 97, 27 Sup. Ct. 655, 51 L. Ed. 956, it was said (Brewer, J., delivering the opinion): "The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the constitution, independently of the amendment, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the wide-spread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act." It reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the constitution declares who framed it, "we, the people of the United States," not the people of one state, but the people of all the states, and article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the constitution are reserved to the people of the United States."

We have seen that, within their limited powers, the United States are the natural expositors of the constitution and laws; that when a case affecting individual rights arises, the supreme court stands for the United States, and that they have the sole right to explain and enforce the laws and constitution. But their power is confined to the facts before them, and they have no power to explain them in the form of an edict to effect other rights and cases. Beyond these powers the states are sovereign, and their acts are equally unexaminable. Of the separating line between the powers granted and the powers withheld, the constitution provides no judge. Between sovereigns there can be no common judge, but an arbiter mutually agreed upon. If that power is given to one party, that may draw all power to itself, and it establishes a relation not of equal sovereignties, but of sovereign and subject. On this subject the constitution is silent. The great men who formed it did not undertake to solve a question that in its own nature could not be solved. Between equals it made neither superior, but trusted to the mutual forebearance of both parties. A larger confidence was placed in an enlightened public opinion as the final umpire; and not until the war of the rebellion was this conflict between the two sovereignties finally settled by the *ultima ratio regum*. The status of the states and their political rights under the constitution have been considered at large by the supreme court in the case of Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227. It is there held that authority to suppress rebellion is found in the constitutional power to suppress insurrection, and carry on war; authority to provide for the restoration of state governments under the constitution when suspended and overthrown is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The unity of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual; and when these articles were found to be inadequate to the exigencies of the country, the constitution was ordained "to form a more perfect union." But the perpetuity and indissolubility of the Union by no means imply the loss of distinct and and individual existence, or of the right of self-government by the states. On the contrary, it may, not unnecessarily, be said that the preservation of the states and the maintenance of their government are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states. See SECESSION.

"There is no body of federal common law separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law as so defined, and are subject to no rule except that to be found in the statutes of congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment." Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 101, 102, 21 Sup. Ct. 561, 45 L. Ed. 765, quoted in Kansas v. Colorado, 206 U. S. 46, 96, 27 Sup. Ct. 655, 51 L. Ed. 956.

In Kansas v. Colorado, 206 U. S. 97, 27 Sup. Ct. 655, 51 L. Ed. 956, it was said: "International law is no alien in this tribunal. In The Habana, 175 U. S. 677, 700, 20 Sup. Ct. 290, 44 L. Ed. 320, Mr. Justice Gray declared: 'International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.' And in de-

livering the opinion on the demurrer in this case Chief Justice Fuller said (Kansas v. Colorado, 185 U. S. 146, 22 Sup. Ct. 552, 46 L. Ed. 838): 'Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand.' "

In a qualified sense and to a limited extent the separate states are sovereign and independent, and the relations between them partake something of the nature of international law; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

Where wrongs affect the public at large and are in respect of matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes a duty to all its citizens of securing to them their common rights, the nation may take measures to discharge those constitutional duties, though it has no pecuniary interest in the controversy; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, cited in Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347.

The government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and no imaginary barrier shuts that government off from exercising the power which inherently belongs to it by reason of its sovereignty; U. S. v. Bennett, 232 U. S. 299, 34 Sup. Ct. 433 (here a foreign-built yacht which was never, during the tax year, used within United States territory).

Territories are instrumentalities created by congress for the government of the people within their respective borders, with authority to subdelegate the governmental power to the municipal corporations therein, and the latter are therefore instrumentalities of the federal government; Farmers' Bank v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. —.

The United States is not, under the New York statutes, a corporation in the sense that it will be exempted from an inheritance tax on personal property bequeathed to it by will; U. S. v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287.

If the nation comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals therein. It assumes the position of an ordinary citizen and it cannot recede from the fulfilment of its obligations; U. S. v. Commercial Co., 74 Fed. 145, following Cooke v. U. S., 91 U. S. 398, 23 L. Ed. 237.

For analysis of the structure of a federal government, see Dicey, Constitution.

See SOVEREIGNTY; ARTICLES OF CONFEDERATION; STATE; TERRITORY; COMMERCE; SOVEREIGN; CONSTITUTIONAL; CONSTITUTION OF THE UNITED STATES; FOURTEENTH AMENDMENT; EXECUTIVE POWER; JUDICIAL POWER; LEGISLATIVE POWER; SECESSION.

UNITY. An agreement or coincidence of certain qualities in the title of a joint-estate or an estate in common.

In a joint-estate there must exist four unities: that of *interest*, that of *title*, and, therefore, their estates must be created by one and the same act; that of *time*, for their estates must be vested at one and the same period; and, lastly, the unity of *possession:* hence joint-tenants are seised *per my et per tout*, or by the *half* or *moiety* and by *all:* that is, each of them has an entire possession as well of every *parcel* as of the *whole;* 2 Bla. Com. 170. Coparceners must have the unities of interest, title, and possession. In tenancies in common, the unity of possession is alone required; 2 Bla. Com. 192. See ESTATE IN COMMON; ESTATE IN COPARCENARY; ESTATE OF JOINT-TENANCY; TENANT.

UNITY OF POSSESSION. This term is used to designate the possession by one person of several estates or rights. For example, a right to an estate to which an easement is attached, or the dominant estate, and to an estate which an easement incumbers, or the servient estate, in such case the easement is extinguished; see Cro. Jac. 121. But a distinction has been made between a thing that has its being by prescription, and one that has its being *ex jure naturæ:* in the former case unity of possession will extinguish the easement; in the latter, for example, the case of a watercourse, the unity will not extinguish it; Pothier, Contr. 166.

UNIVERSAL AGENT. One appointed to do all the acts which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an agency may potentially exist; but it is difficult to conceive of its practical existence, since it puts the agent completely in the place of the principal; Story, Ag. § 21.

UNIVERSAL LEGACY. In Civil Law. A testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease. La. Civ. Code, art. 1606.

UNIVERSAL PARTNERSHIP. The name of a species of partnership by which all the partners agree to put in common all their property, *universorum bonorum*, not only what they then have, but also what they shall acquire. Pothier, *Du Contr. de Société*, n. 29. See PARTNERSHIP.

UNIVERSAL SUCCESSION. "A succession to a *universitas juris*. It occurs when one man is vested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights." Maine, Anc. L. 179.

UNIVERSITAS. In Civil Law. A *universitas* or corporate body existed when a number of persons were so united that the law takes no notice of their separate existence, but recognizes them only under a common name. Hunter, Rom. L. 314.

UNIVERSITAS JURIS (Lat.). **In Civil Law.** A quantity of things of various kinds, corporeal and incorporeal, taken together as a whole, *e. g.* an estate. It is used in contradistinction to *universitas facti*, which is a whole made up of *corporeal* units. Mackeldey, Civ. Law § 149.

A collection of rights and duties united by

the single circumstance of their having belonged at one time to some one person. It is, as it were, the legal clothing of some given individual. Maine, Anc. L. 178.

UNIVERSITAS RERUM (Lat.). **In Civil Law.** Several things not mechanically united, but which, taken together, in some legal respects are regarded as one whole. Mackeldey, Civ. Law § 149.

UNIVERSITY. The name given to certain societies or corporations which are seminaries of learning where youth are sent to finish their education. Among the civilians, by this term is understood a corporation. See CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES; COLLEGE; STUDENTS.

UNJUST. That which is done against the perfect rights of another; that which is against the established law; that which is opposed to a law which is the test of right and wrong. Hein. *Lec. El.* § 1080.

UNJUST ENRICHMENT. A phrase much used by Prof. James Barr Ames to designate a principle which lies at the foundation of the great bulk of *quasi*-contracts—that one shall not unjustly enrich himself at the expense of another. An instance is to be found in the early law in the action of account. One who received money from another to be applied in a particular way was bound to give account of his stewardship. If he fulfilled his commission, that was a valid discharge. If he failed to do so, the plaintiff would have a judgment for its recovery. See Ames, Lectures on Leg. Hist. 162.

UNKNOWN. When goods have been stolen from some person unknown, they may be so described in the indictment; but if the owner be really known, an indictment alleging the property to belong to some person unknown is improper. 8 C. & P. 773; Com. v. Manley, 12 Pick. (Mass.) 174.

In an indictment, where the name of the defendant is unknown, and he refuses to disclose it, he may be described as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison. State v. Angel, 29 N. C. 27; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, will be insufficient; R. & R. 489. The practice is to indict the defendant by a specific name, as, John No-name, and if he pleads in abatement, to send in a new bill, inserting the real name, which he then discloses, by which he is bound. This course is in some states prescribed by statute; Geiger v. State, 5 Ia. 484.

UNLAGE (Sax.). An unjust law. Cowell.

UNLAWFUL. That which is contrary to law.

See CONDITION; VOID.

UNLAWFUL ASSEMBLY. A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature, with force and violence.

An assembly of three or more persons:—1. With intent to commit a crime by open force. 2. With intent to carry out a common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. Steph. Dig. Cr. Law, art. 75. If they move forward towards its execution, it is then a rout; and if they actually execute their design, it amounts to a riot; 4 Bla. Com. 140.

In England public meetings held for political purposes are not unlawful as such, but may, by their conduct when assembled, become unlawful, and will be so from the outset if held for purposes of sedition. In such cases all those who use seditious words or openly applaud those who use them will be participators in the unlawful assembly, but not those who attend a meeting which they suppose to be lawful and who take no part in the unlawful conduct. Magistrates and the police may use whatever force is necessary to disperse an unlawful assembly. The degree of force to be exercised will depend on the circumstances of each case; 9 C. & P. 431.

See RIOT; ROUT; PUBLIC MEETING; SEDITION.

UNLAWFUL IMPRISONMENT. Unlawful deprival of an alien's right to enter the country constitutes unlawful imprisonment, to obtain freedom from which *habeas corpus* lies; U. S. v. Williams, 193 Fed. 228. See TROOPS, FOREIGN; HABEAS CORPUS.

UNLAWFULLY. Illegally; wrongfully. Dickinson v. New York, 92 N. Y. 584. See State v. Massey, 97 N. C. 465, 2 S. E. 445. This word is frequently used in indictments in the description of the offence: it is necessary when the crime did not exist at common law, and when a statute, in describing an offence which it creates, uses the word; 1 Mood. C. C. 339; but is unnecessary whenever the crime existed at common law and is manifestly illegal; 1 Chit. Cr. L. *241.

UNLIQUIDATED DAMAGES. Such damages as are unascertained. In general, such damages cannot be set off. No interest will be allowed on unliquidated damages. See LIQUIDATED DAMAGES.

UNMARRIED. Its primary meaning is "never having been married"; but it is a word of flexible meaning and it may be construed as not having a husband or wife at the time in question. 9 H. L. Cas. 601. A divorced woman has been held an unmarried woman; In re Giles, 158 Fed. 596, 85 C. C. A. 418.

UNQUES (L. Fr.). Still; yet. A word frequently used in pleas; as, *Ne unques* executor, *Ne unques* guardian, *Ne unques* accouple, and the like.

UNSEATED LAND. A phrase used in Pennsylvania to designate uncultivated land subject to taxation. A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent residence; Wallace v. Scott, 7 W. & S. (Pa.) 248.

UNSEAWORTHY SHIP. See SEAWORTHINESS.

UNSHIPMENT. Throwing goods overboard protected in such manner that they may be recovered, may constitute unshipment. U. S. v. Hutchinson, 1 Hask. 146, Fed. Cas. No. 15,431.

UNSOLEMN WAR. That war which is not carried on by the highest power in the states between which it exists, and which lacks the formality of a declaration. Grotius, *de Jure Bel. ac Pac.* l. 1, c. 3, § 4.

UNSOLEMN WILL. In the Civil Law. One in which an executor is not appointed. Swinb. Wills 29.

UNSOUND MIND, UNSOUND MEMORY. See INSANITY.

UNSOUNDNESS. See SOUNDNESS.

UNTIL. When a charter continues the incorporation of a company until a day named, *until* is exclusive in its meaning, unless the context show that the contrary is intended; People v. Walker, 17 N. Y. 502; Kendall v. Kingsley, 120 Mass. 94. That it is inclusive of the date see Houghwout v. Boisaubin, 18 N. J. Eq. 315; Rogers v. R. Co., 70 Ga. 717.

UNTRUE. *Prima facie* inaccurate, but not necessarily wilfully false. 3 B. & S. 929.

UNVALUED POLICY. One in which the value of the interest at risk is not fixed in the policy but is estimated by a certain standard, and, in case of loss, is made out by proof. Peninsular & O. S. S. Co. v. Ins. Co., 185 Fed. 172.

UNWHOLESOME FOOD. Food not fit to be eaten; food which if eaten would be injurious. See ADULTERATION; HEALTH; FOOD AND DRUG LAWS.

UNWRITTEN LAW. See LEX NON SCRIPTA.

A popular expression to designate a supposed rule of law that a man who takes the life of his wife's paramour or daughter's seducer is not guilty of a criminal offence. A trial judge is said to have expressed to a jury his approval of a verdict based upon such a theory; see 43 Canada L. J. 764; it is said to have received recognition in California; see 19 Green Bag 721, an article from the London L. J.; see also 12 Law Notes 224. The rule was much urged upon a jury in the common pleas of Philadelphia: Biddle, J., said to counsel: "In this court the 'unwritten law' is not worth the paper it *isn't* written on."

In Knights of Pythias v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307, on a policy of life insurance which provided that "the death of the insured at the hands of justice, either punitive or preventive," or "in violation of or attempt to violate any criminal law," should avoid the policy (in the latter instance *pro tanto*), it was held that the killing of the insured by an injured husband was not within the policy.

UPLIFTED HAND. When a man accused of a crime is arraigned, he is required to raise his hand, probably in order to identify the person who pleads. Perhaps for the same reason when a witness adopts a particular mode of taking an oath, as when he does not swear upon the Gospel, but by Almighty God, he is to hold up his hand.

UPPER BENCH. The king's bench was so called during Cromwell's protectorate, when Rolle was chief-justice. 3 Bla. Com. 202.

UPSET PRICE. The price at which any subject, as lands or goods, is exposed to sale by auction, below which it is not to be sold. In a final decree in foreclosure, the decree should name an upset price large enough to cover costs and all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale; Blair v. R. Co., 25 Fed. 232.

URBAN SERVITUDES. All servitudes are established either for the use of houses or for the use of lands. Those of the first kind are called urban servitudes, whether the buildings to which they are due be situated in the city or in the country. Those of the second kind are called rural servitudes.

The principal kinds of urban servitudes are the following: the right of support; that of drip; that of drain, or of preventing the drain; that of view or lights, or of preventing the view or lights from being obstructed; that of raising buildings or walls, or of preventing them from being raised; that of passage; and that of drawing water. See 3 Toullier 441.

URBS (Lat.). A walled city. Often used for *civitas*. Ainsworth, Dict. It is the same as *oppidum*, only larger. *Urbs*, or *urbs aurea*, meant Rome. Du Cange. In the case of Rome, *urbs* included the suburbs. Dig. 50. 16. 2. pr. It is derived from *urbum*, a part of the plough by which the walls of a city are first marked out. Ainsworth, Dict.

USAGE. Uniform practice.

Usage and custom are now used interchangeably, though custom seems to have been originally confined to local usages immemorially existing; Browne, Us. & Cust. 13.

A usage must be established; that is, it must be known, certain, uniform, reasonable, and not contrary to law; but it may be of very recent origin; 4 B. & Ald. 210; McMas-

ters v. R. Co., 69 Pa. 374, 8 Am. Rep. 264; Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Power v. Bowdle, 3 N. Dak. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511; and no usage is good which conflicts with an established principle of law; East B. L. Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Pickering v. Weld, 159 Mass. 522, 34 N. E. 1081. Parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568.

The usages of trade afford ground upon which a proper construction may be given to contracts. By their aid the indeterminate intention of parties and the nature and extent of their contracts arising from mere implications or presumptions, and acts of an equivocal character may be ascertained; and the meaning of words and doubtful expressions may become known; McComber v. Parker, 13 Pick. (Mass.) 182; 2 C. & P. 525; Mechanics' Bank v. Bank, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; Nordaas v. Hubbard, 48 Fed. 921. Among commercial and business men in a locality, it need not be so ancient "that the memory of man runneth not to the contrary," nor that it should contain all the other elements of a common-law custom, as defined in the books; Lane v. Bank, 3 Ind. App. 299, 29 N. E. 613. One seeking to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it: Robertson v. S. S. Co., 139 N. Y. 416, 34 N. E. 1053.

General usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. It cannot make a contract where there is one, nor prevent the effect of settled rules of law; First N. Bk. v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766, followed in Moore v. U. S., 196 U. S. 166, 25 Sup. Ct. 202, 49 L. Ed. 428; Adams v. Goddard, 48 Me. 212; Home Ins. Co. v. Ins. Co., 180 N. Y. 389, 73 N. E. 65, 105 Am. St. Rep. 772; evidence of an established custom among men in the same line of work is not admissible to justify negligence *per se;* Larson v. Ring, 43 Minn. 88, 44 N. W. 1078; evidence is admissible in a suit on a fire policy to show whether the parties intended standard or solar time, as fixing the expiration of the policy; Globe & Rutgers F. Ins. Co. v. David Moffat Co., 154 Fed. 13, 83 C. C. A. 91.

A local usage must be one known to both contracting parties; Chateaugay O. & I. Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510. See East Tennessee, V. & G. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489; Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609; Park v. Viernow, 16 Mo. App. 383.

Modern English cases incline to extend the functions of usages, but in America the authorities vary greatly; Lawson, Us. & Cust. 25; 7 E. & B. 266; Van Horn v. Gilbough, 10 Wkly. Notes Cas. (Pa.) 347.

See CUSTOM; Lawson; Browne, Us. & Cust.

USAGE OF TRADE. A course of dealing; a mode of conducting transactions of a particular kind; Haskins v. Warren, 115 Mass. 535.

USANCE. In Commercial Law. The time which, by usage or custom, is allowed in certain countries for the payment of a bill of exchange. Pothier, *Contr. du Change,* n. 15.

The time of *one, two,* or *three* months after the date of the bill, according to the custom of the places between which the exchanges run.

Double or treble is double or treble the usual time, and half usance is half the time. Where it is necessary to divide a month upon a half usance (which is the case when the usance is for one month or three), the division, notwithstanding the difference in the length of the months, contains fifteen days. Byles, Bills *80, *205.

The practice is not now recognized.

USE. A confidence reposed in another, who was made tenant of the land, or terre-tenant, that he would dispose of the land according to the intention of the *cestui que use,* or him to whose use it was granted, and suffer him to take the profits. Plowd. 352; Gilb. Uses 1; Saund. Uses 2; 2 Bla. Com. 328.

A right in one person, called the *cestui que use,* to take the profits of land of which another has the legal title and possession, together with the duty of defending the same and of making estates thereof according to the direction of the *cestui que use.*

Uses have been said to have been derived from the *fidei commissa* of the Roman law; but see TRUST. It was the duty of a Roman magistrate, the *prætor fidei commissarius,* whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence. Inst. 2. 23. 2. They were introduced into England by the ecclesiastics in the reign of Edward III., before 1377, for the purpose of avoiding the statutes of mortmain; and the clerical chancellors of those times held them to be *fidei commissa,* and binding in conscience. To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the Statute of 27 Henry VIII. c. 10, commonly called the Statute of Uses, or, in conveyances and pleadings, the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estate as they have in the use, trust, or confidence; and that the estates of the persons so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use,—that is, it conveys the possession to the use, and transfers the use to the possession, and, in this manner, making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity; 2 Bla. Com. 333.

A modern use is an estate of right which is acquired through the operation of the statute of 27 Henry VIII. c. 10; and which, when it may take effect according to the rules of the common law, is called the legal estate, and when it may not is denominated a use, with a term descriptive of its modification; Cornish, Uses 35.

The common-law judges decided, in the construction of this statute, that a use could not be raised upon a use; Dy. 155 (A); and that on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as were *seised* to the use of others, it did not extend to a term of years, or other chattel interests, of which a termer is not seised but only possessed; 2 Bla. Com. 336. The rigid literal construction of the statute by the courts of law again opened the doors of the chancery courts; 1 Madd. Ch. Pr. 448.

Uses and trusts are often spoken of together by the older and some modern writers, the distinction being those trusts which were of a permanent nature and required no active duty of the trustee being called uses; those in which the trustee had an active duty to perform, as, the payment of debts, raising portions, and the like, being called *special* or *active* trusts, or simply trusts; 1 Spence, Eq. Jur. 448.

For the creation of a use, a consideration either *valuable*, as, money, or *good*, as relationship in certain degrees, was necessary; 3 Swanst. 591; 7 Co. 40; Shephard v. Little, 14 Johns. (N. Y.) 210. See RESULTING USE. The property must have been *in esse*, and such that seisin could be given; Cro. Eliz. 401. Uses were alienable, although in many respects resembling choses in action, which were not assignable at common law; 2 Bla. Com. 331; when once raised, it might be granted or devised in fee, in tail, for life, or for years; 1 Spence, Eq. Jur. 455.

The effect of the statues of uses was much restricted by the construction adopted by the courts: it practically resulted, it has been said, in the addition of these words, *to the use*, to every conveyance; Will. R. P. 133. The intention of the statute was to destroy the estate of the feoffee to use, and to transfer it by the very act which created it to the *cestui que use*, as if the seisin or estate of the feoffee, together with the use, had, *uno flatu*, passed from the feoffor to the *cestui que use*. A very full and clear account of the history and present condition of the law of uses is given in 2 Wash. R. P. 91, 156. See, as to a use upon a use, Tud. L. Cas. R. Pr. 335. Consult Spence, Eq. Jur.; Bisph. Eq.

The statute executed the use and vested the title in the *cestui que use* when the feoffee to use had no active duty to perform; if he had he was a feoffee to trusts and not to uses; and this might occur even if the word "use" were employed. The employment of the word "use" is not essential to bring the limitation within the statute; it is a question of the intent of the parties; Jenks, Mod. Land L. 127; [1897] A. C. 658.

It was said in Symson v. Turner, 1 Eq. Cas. Ab. 383, that a use or trust can be created which will not be executed by the statute; 1. By limiting it upon a term of years; 2. By limiting it to A to the use of or in trust for B to the use of or in trust for C; 3. By limiting it to trustees with active duties.

A corporation cannot be seised to a use; see Jenks, Mod. Land L. 127. They are bound by equitable interests, at least when those interests are limited in favor of charities; *id.*, citing 10 Rep. 23.

It is said that the word used is not derived from the Latin *usus* but comes from the Latin *opus;* through an Anglo-French form *oeps*. Pollock, Contracts 5; 3 L. Quart. Rev. 115.

See CHARITABLE USES; TRUSTS; The Origin of Uses, by James Barr Ames, Lect. on Leg. Hist. 233.

In its untechnical sense, the word use has been variously constructed; Heaston v. Randolph Co., 20 Ind. 398; Cannell v. Ins. Co., 59 Me. 582; Stockbridge I. Co. v. Iron Co., 107 Mass. 324; thus, "to use a port" means to enter it, so as to derive advantage from its protection; Snow v. Ins. Co., 48 N. Y. 624, 8 Am. Rep. 578. The "use of liquors to excess" in a life insurance application means habitual, and not occasional, use to excess; Provident S. L. A. Soc. v. Bank, 126 Fed. 360, 61 C. C. A. 310.

In Civil Law. A right of receiving so much of the natural profits of a thing as is necessary to daily sustenance. It differs from usufruct, which is a right not only to use, but to enjoy. 1 Bro. Civ. Law 184.

USE AND OCCUPATION. When a contract has been made, either by express or implied agreement, for the use of a house or other real estate, where there was no amount of rent fixed and ascertained, the landlord can recover a reasonable rent in an action of assumpsit for use and occupation; Gunn v. Scovil, 4 Day (Conn.) 228, 4 Am. Dec. 208; Abeel v. Radcliff, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; Fitchburg Cotton Manufactory Corp. v. Melven, 15 Mass. 270; McGunnagle v. Thornton, 10 S. & R. (Pa.) 251. This is under the Stat. of Westm. 2. See 2 Harv. L. Rev. 377.

The action for use and occupation is founded not on a privity of estate, but on a privity of contract; Wood, L. & T. 1332; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; therefore it will not lie where the possession is tortious; Ryan v. Marsh, 2 N. & McC. (S. C.) 156; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; or where the party is in possession by the license of the owner; Reed v. Lammel, 40 Minn. 397, 42 N. W. 202. It will lie for the occupation of land in another state; Henwood v. Cheeseman, 3 S. & R. (Pa.) 502.

USEFUL. That which may be put into beneficial practice. See PATENT.

USEFULNESS. Capabilities for use. The word pertains to the future as well as to the past. Chesapeake, O. & S. W. R. Co. v. Dyer Co., 87 Tenn. 712, 11 S. W. 943.

USER. The enjoyment of a thing.

USES, STATUTE OF. See TRUSTS; USE.

USHER. This word is said to be derived from the French *huissier*, and is the name of an inferior officer in some English courts of law. Archb. Pr. 25. The office of usher of the court of chancery was abolished in 1852.

USQUE AD MEDIUM FILUM VIÆ (Lat.). To the middle thread of the way. See AD MEDIUM FILUM.

USUAL TERMS. A phrase in the common-law practice, which meant pleading issuably, rejoining gratis, and taking short notice of trial. When a defendant obtained further time to plead, these were the terms usually imposed. Wharton.

USUCAPION, or USUCAPTION. In Civil Law. The manner of acquiring property in things by the lapse of time required by law.

It differs from prescription, which has the same sense, and means, in addition, the manner of acquiring and losing, by the effect of time regulated by law, all sorts of rights and actions. Merlin, *Répert. Prescription.* See PRESCRIPTION.

USUFRUCT. In Civil Law. The right of enjoying a thing the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. Heintzen v. Binninger, 79 Cal. 6, 21 Pac. 377.

Perfect usufruct is of things which the usufructuary can enjoy without altering their substance, though their substance may be diminished or deteriorated naturally by time or by the use to which they are applied; as, a house, a piece of land, animals, furniture, and other movable effects.

Imperfect or quasi usufruct is of things which would be useless to the usufructuary if he did not consume and expend them or change the substance of them; as, money, grain, liquors. In this case the alteration may take place; Pothier, *Tr. du Douaire*, n. 194.

USUFRUCTUARY. In Civil Law. One who has the right and enjoyment of a usufruct.

Domat points out the duties of the usufructuary, which are—to *make an inventory* of the things subject to the usufruct, in the presence of those having an interest in them; to *give security* for their restitution when the usufruct shall be at an end; *to take good care* of the things subject to the usufruct; *to pay all taxes* and claims which arise while the thing is in his possession as a ground rent; and to keep the thing in repair at his own expense.

USURA MARITIMA. See FŒNUS NAUTICUM.

USURIOUS CONTRACT. See USURY.

USURPATION. The unlawful assumption of the use of property which belongs to another; an interruption or the disturbing a man in his right and possession. Toml.

There are two kinds of usurpation: *first*, when a stranger, without right, presents to a church and his clerk is admitted; and, *second*, when a subject uses a franchise of the king without lawful authority. Co. Litt. 277 *b*.

In Governmental Law. The tyrannical assumption of the government by force, contrary to and in violation of the constitution of the country.

USURPED POWER. In Insurance. An invasion from abroad, or an internal rebellion, where armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable. These words cannot mean the power of a common mob; 2 Marsh. Ins. 390. By an article of the printed proposals which are considered as making a part of the contract of insurance, it is provided that "no loss of damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

It is in use in the standard policy; Richards, Ins. 368. The clause was considered in Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395.

USURPER. One who assumes the right of government by force, contrary to and in violation of the constitution of the country. Toul. *Droit. Civ*, n. 32.

One who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; his acts are void in every respect; McCraw v. Williams, 33 Gratt. (Va.) 513; Hooper v. Goodwin, 48 Me. 80.

USURY. The excess over the legal rate charged to a borrower for the use of money.

Taking an illegal profit for the use of money. MacRackan v. Bank, 164 N. C. 24, 80 S. E. 184, 49 L. R. A. (N. S.) 1043.

Originally, the word was applied to all interest reserved for the use of money; and in the early ages taking such interest was not allowed. In the later Roman law, usury was sanctioned; and it is said that taking usury was not an offence at common law; Tyler, Usury 64; but see Ord. Usury 17.

Unless there is a law limiting the rate of interest that can be charged for money, there can be no usury; Newton v. Wilson, 31 Ark. 484; Reynolds v. Neal, 91 Ga. 609, 18 S. E. 530; Lamprey v. Mason, 148 Mass. 231, 19 N. E. 350. The enactment of a usury law cannot affect prior contracts; Swint v. Carr, 76 Ga. 322, 2 Am. St. Rep. 44; Richardson v. Campbell, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633. If a contract is usurious, no cus-

tom can legalize it; Harmon v. Lehman, Durr & Co., 85 Ala. 379, 5 South. 197, 2 L. R. A. 589. A note void for usury in its inception cannot be enforced by an innocent purchaser for value; Littauer v. Rodecker, 59 Fed. 857, 8 C. C. A. 320, 19 U. S. App. 455.

"The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties and giving effect to the statute." Quackenbos v. Sayer, 62 N. Y. 346.

There must be a loan in contemplation of the parties; Nichols v. Fearson, 7 Pet. (U. S.) 109, 8 L. Ed. 623; Schermerhorn v. Talman, 14 N. Y. 93; and if there be a loan, however disguised, the contract will be usurious, if it be so in other respects. Where a loan was made of depreciated bank-notes, to be repaid in sound funds, to enable the borrower to pay a debt he owed, dollar for dollar, it was considered as not being usurious; Burton v. School Com'rs, 1 Meigs (Tenn.) 585. The *bona fide* sale of a note, bond, or other security at a greater discount than would amount to legal interest is not *per se* a loan, although the note may be indorsed by the seller and he remains responsible; Corcoran v. Powers, 6 Ohio St. 19; Newman v. Williams, 29 Miss. 212. But if a note, bond, or other security be made with a view to evade the laws of usury, and afterwards sold for a less amount than the interest, the transaction will be considered a loan; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; Turner v. Calvert, 12 S. & R. (Pa.) 46; Corcoran v. Powers, 6 Ohio St. 19; and a sale of a man's own note indorsed by himself will be considered a loan. Usury cannot arise from the purchase from brokers of a note at a discount; Chase Nat. Bank v. Faurot, 72 Hun 373, 25 N. Y. Supp. 447. Nor is there usury in a transaction for the sale and repurchase of securities, where there is no loan; Struthers v. Drexel, 122 U. S. 487, 7 Sup. Ct. 1293, 30 L. Ed. 1216. It is a general rule that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction; Nichols v. Fearson, 7 Pet. (U. S.) 109, 8 L. Ed. 623; Williams v. Reynolds, 10 Md. 57. On the other hand, when the contract was originally usurious, and there is a substitution by a new contract, the latter will generally be considered usurious; Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86; but a note or other contract for the payment of money is not usurious and void for providing for the payment of more than the statutory interest after maturity; Green v. Brown, 22 Misc. 279, 49 N. Y. Supp. 163.

There must be a contract for the return of the money at all events; for if the return of the principal with interest, or the principal only, depend upon a contingency, there can be no usury; Spain v. Brent, 1 Wall. (U. S.) 604, 17 L. Ed. 619; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law. Where the principal is put to hazard in insurances, annuities, and bottomry, the parties may charge and receive greater interest than is allowed by law in common cases, and the transaction will not be usurious; U. S. Bank v. Owens, 2 Pet. (U. S.) 537, 7 L. Ed. 508. See Tiffany v. Boatman's Institution, 18 Wall. (U. S.) 375, 21 L. Ed. 868.

To constitute usury, the borrower must not only be obliged to return the principal at all events, but more than lawful interest; this part of the agreement must be made with full consent and knowledge of the contracting parties; 3 B. & P. 154. The fact that the usurious interest is paid in notes of another party, instead of money, is immaterial; Pritchard v. Meekins, 98 N. C. 244, 3 S. E. 484; Savannah Sav. Bank v. Logan, 99 Ga. 291, 25 S. E. 692.

When the contract is made in a foreign country, the rate of interest allowed by the laws of that country may be charged, and it will not be usurious, although greater than the amount fixed by law in this; Story, Confl. of Laws § 292. Parties may contract for interest according to the place of the contract or the place of performance; Miller v. Tiffany, 1 Wall. (U. S.) 298, 17 L. Ed. 540; Houston v. Potts, 64 N. C. 33. Where there is no agreement made, the law of the place of the contract governs, in the absence of any intent to evade the usury laws; Merchants' Bank v. Griswold, 72 N. Y. 472, 28 Am. Rep. 159. A note made, dated, and payable in New York, without intent of maker that it should be elsewhere discounted, if negotiated in another state at a rate of interest lawful there, but excessive in New York, is usurious; Rorer, Int. St. Law 112; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671. See CONFLICT OF LAWS.

To constitute usury both parties must be cognizant of the facts which make the transaction usurious; Powell v. Jones, 44 Barb. (N. Y.) 521; but a mistake in law will not protect the parties; Maine Bank v. Butts, 9 Mass. 49; though a miscalculation will, it seems; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526. If a contract be usurious in itself it must be taken to have been so intended; Burwell v. Burgwyn, 100 N. C. 389, 6 S. E. 409. An agreement by a mortgagor to pay taxes on the mortgage debt is not necessarily usurious; Banks v. McClellan, 24 Md. 62, 87 Am. Dec. 594; nor is a clause in a bill of exchange, providing attorney fees for collection; First Nat. Bank v. Canatsey, 34 Ind. 149; and so of a mortgage, or of a note;

Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99.

Where the statute declares that the penalty of usury shall be the forfeiture of all interest contracted to be paid, the lender may in an action on the contract recover the sum actually loaned or paid, but no interest; Carter v. Carusi, 112 U. S. 478, 5 Sup. Ct. 281, 28 L. Ed. 820; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Fletcher v. Alpena Cir. Judge, 136 Mich. 511, 99 N. W. 748; Citizens' Nat. Bank v. Donnell, 195 Mo. 564, 94 S. W. 516; Leipziger v. Van Saun, 64 N. J. Eq. 37, 53 Atl. 1; Erwin v. Morris, 137 N. C. 48, 49 S. E. 53.

In some states statutes have been enacted which adopt the equitable rule and permit the usurious lender to recover the principal sum actually loaned with legal interest thereon; Noble v. Walker, 32 Ala. 456; Phila. Loan Co. v. Towner, 13 Conn. 249; Harrell v. Blount, 112 Ga. 711, 38 S. E. 56; Tuxbury v. Abbott, 59 Me. 466; Van Auken v. Dunning, 81 Pa. 464; Crim v. Post, 41 W. Va. 397, 23 S. E. 613. It is generally provided, further, that in an action brought by the lender on the usurious contract, any usurious payments already made shall be credited on the sum otherwise recoverable; Rogers v. Buckingham, 33 Conn. 81; Haas v. Flint, 8 Blackf. (Ind.) 67; Lombard v. Gregory, 81 Ia. 569, 47 N. W. 298; Cadiz Bank v. Slemmons, 34 Ohio, 142, 32 Am. Rep. 364; Jones v. Rider, 60 N. H. 452.

A *bona fide* sale by one person of a bond of another, at an exorbitant rate of discount, is not illegal; Donnington v. Meeker, 3 N. J. Eq. 362. A sale of a note or mortgage for less than its face, with a guarantee of payment in full, is not usurious; Goldsmith v. Brown, 35 Barb. (N. Y.) 484; nor is a contract to pay a bushel and a half of corn within a year, for the loan of a bushel; Morrison v. McKinnon, 12 Fla. 552. An agreement to pay interest on accrued interest is not invalid; Quimby v. Cook, 10 Allen (Mass.) 32; Stewart v. Petree, 55 N. Y. 621, 14 Am. Rep. 352; but it has been held that compounding interest on a note is usurious; Cox v. Brookshire, 76 N. C. 314; but see Bowman v. Neely, 46 Ill. App. 139.

Interest may be collected on coupons; Richardson v. Campbell, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633.

The ordinary commissions allowed by the usages of trade may be charged without tainting a contract with usury; but it must plainly appear that the commissions are charged for other services, and are not merely a device to evade the law; Hopkins v. Baker's Adm'r, 2 Pat. & H. (Va.) 110. A bonus paid to an agent in addition to legal interest renders the loan usurious, when it enures to the benefit of the principal under the agent's contract; McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852, 38 L. Ed. 729. Commission may be charged by a merchant for accepting a bill; Jones v. McLean, 18 Ark. 456; but a commission charged in addition to interest for advancing money is usurious; Haven v. Hudson, 12 La. Ann. 660. Where a banker discounts a bill payable in a distant place, he may charge the usual rate of exchange on that place; but if such charge be an excess of the usual rate, it will be considered a device to cover usurious interest; State Bank v. Rodgers, 3 Ind. 53. See Cockle v. Flack, 93 U. S. 344, 33 L. Ed. 949, where it was properly left as a question of fact for the jury to decide whether or not there was a device to cover usury.

Where a gratuity is given to influence the making of a loan, it will be considered usurious; Lockwood v. Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78. The fact that an agent, authorized to lend money for lawful interest, exacts for his own benefit and without his principal's knowledge, more than the lawful rate, does not render the loan usurious; Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559. The burden of proof is on the person pleading usury; Holland v. Chambers, 22 Ga. 193; Holt v. Kirby, 57 Ark. 251, 21 S. W. 432; and where the contract is valid on its face, affirmative proof must be made that the agreement was corruptly made to evade the law; Omaha Hotel v. Wade, 97 U. S. 13, 24 L. Ed. 917. Where parties exchange their notes for mutual accommodation, and both or either are sold at a higher than the legal rate, they are usurious; Blodgett v. Wadhams, Labor's Supp. (N. Y.) 65.

The common practice of reserving the interest on negotiable paper at the time of making the loan is very ancient, and is sanctioned by law; Sewell, Banking. An agreement to pay annually in advance is not usurious; Rose v. Munford, 36 Neb. 148, 54 N. W. 129; Maxwell v. Willett, 49 Ill. App. 564.

The offence of taking usury is not condoned by the absence of *intent* to violate the statute; Fiedler v. Darrin, 50 N. Y. 437; but see Fay v. Lovejoy, 20 Wis. 407.

The one who has contracted to pay usury may set up the defence; Studabaker v. Marquardt, 55 Ind. 341; Pritchett v. Mitchell, 17 Kan. 355, 22 Am. Rep. 287; and so may his privies; Merchants Exch. N. Bk. v. Warehouse Co., 49 N. Y. 636; Lehman, Durr & Co. v. Marshall, 47 Ala. 362; and his legal representatives; Moses v. Loan Ass'n, 100 Ala. 465, 14 South. 412; and his surety; Stockton v. Coleman, 39 Ind. 106 (but see Lamoille County Bank v. Bingham, 50 Vt. 105, 28 Am. Rep. 490; Freese v. Brownell, 35 N. J. L. 285); or a guarantor; Huntress v. Patten, 20 Me. 28; but one who buys an equity of redemption cannot set up the defence against the mortgage; Conover v. Hobart, 24 N. J. Eq. 120; nor can a second mortgagee set up usury as a defence to a prior mortgage; Pritchett v. Mitchell, 17 Kan. 355, 22 Am. Rep. 287 (but see Cole v. Bausemer, 26 Ind. 94; Carow v. Kelly, 59 Barb. [N. Y.] 239).

It has been held that the maker of a note may be estopped to set up the defence of usury; Hungerford B. & C. Co. v. Brigham, 47 Misc. 240, 95 N. Y. Supp. 867. It is said that the defence of usury is personal to the borrower; Thomas v. Security Co., 156 Ky. 260, 160 S. W. 1037.

The defence of usury must be supported by clear proof; Frank v. Morris, 57 Ill. 138, 11 Am. Rep. 4; Grant v. Merrill, 36 Wis. 390; White v. Benjamin, 138 N. Y. 623, 33 N. E. 1037; which may be extrinsic to the contract; Scott v. Lloyd, 9 Pet. (U. S.) 418, 9 L. Ed. 178; an express agreement for usury need not be proved; Train v. Collins, 2 Pick. (Mass.) 145. Where a state law makes usury a crime, the burden is strongly on one who would avoid a debt on that ground; Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780.

Usurious interest does not render a mortgage void; Holliday v. Banking Co., 92 Ga. 675, 19 S. E. 28; where a loan is originally usurious, the defence of usury applies to all renewals; and when action is brought on any renewal note, no matter how remote, all payments of interest on such usurious loan may be applied on the principal; Exeter N. Bk. v. Orchard, 39 Neb. 485, 58 N. W. 144; Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; and a second note renewing a former one, but including an additional sum, is usurious; Webb v. Bishop, 101 N. C. 99, 7 S. E. 698.

National banks may charge interest at the rate allowed by the laws of the state where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, they may charge such rate. When no rate is fixed by the laws of the state, the bank may charge a rate not exceeding seven per centum, and such interest may be taken in advance. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as usurious; R. S. § 5197. The charging a rate of interest greater than is allowed when knowingly done shall be deemed a forfeiture of the entire interest. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, provided such action is commenced within two years from the time the usurious action occurred; R. S. § 5198. It is now conclusively settled that the penalty declared in R. S. § 5198 is superior to and exclusive of any state penalty; Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258; Brown v. Bank, 72 Pa. 209; Wiley v. Starbuck, 44 Ind. 298.

A national bank is not justified in charging a usurious rate of interest because the statutes of the state permit usurious interest to be taken only by certain specified banks; 11 Bank. Mag. 787. National banks are prohibited from making usurious contracts. When sued on such a contract, the debtor may plead the usury. There is no statute of limitations as to this defence; but it runs against the debtor, when suing, from the time of payment. If the bank deducts usurious interest in advance, the debtor may plead usury, but may not recover double the amount paid; there is no *locus pœnitentiæ*, except when the bank, having charged usury, refuses to accept it; McCarthy v. Bank, 223 U. S. 493, 32 Sup. Ct. 240, 56 L. Ed. 523.

See INTEREST; 9 L. R. A. 292.

UTAH. One of the states of the United States; it was admitted to the Union July 4, 1896, under the act of January 16, 1894: The constitution was adopted Nov. 5, 1895; it was amended in 1900 (initiative and referendum), and again in 1906 and 1908.

UTERINE (Lat. *uterus*). Born of the same mother.

UTFANGENETHEF, UTFANGTHEF. The right of a lord to punish a thief dwelling out of his liberty, and committing theft without the same, if taken within the jurisdiction of the manor. Cowell.

The right of the lord of a manor to hang a thief caught with the stolen goods, whether or not the capture was made on the manor. 1 Holdsw. Hist. E. L. 11.

See INFANGENETHEF.

UTI POSSIDETIS (Lat. as you possess). A phrase used to signify that the parties to a treaty are to retain possession of what they have acquired by force during the war. Boyd's Wheat. Int. Law § 545.

A treaty which terminates a war may adopt this principle or that of the *status quo ante bellum* (*q. v.*), or a combination of the two. In default of any treaty stipulation, the former doctrine prevails. See TREATY OF PEACE.

An interdict in the Roman law. See Hunter, Rom. L. 367.

UTLAGATUM. See OUTLAW.

UTTER. In Criminal Law. To offer; to publish.

To utter and publish a counterfeit note is to assert and declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be *passed* in order to complete the offence of uttering; Com. v. Searle, 2 Binn. (Pa.) 338, 4 Am. Dec. 446; Cl. Cr. L. 301.

It seems that reading out a document, although the party refuses to show it, is a sufficient uttering; Jebb, Cr. Cas. 282. The merely showing a false instrument with intent to gain a credit, when there was no intention or attempt made to pass it, it seems,

would not amount to an uttering; Russ. & R. 200. Using a forged instrument in some way, in order to get money or credit upon it, *or by means of it*, is sufficient to constitute an uttering; 2 Den. Cr. Cas. 475.

The word *uttering*, used of notes, does not necessarily import that they are transferred as genuine; it includes any delivery of a note for value (as by a *sale* of the notes as spurious) with the intent that they should be passed upon the public as genuine; 1 Abb. U. S. 135.

The offence is complete when a forged instrument is offered; it need not be accepted; 2 Bish. Cr. L. § 605. Recording a forged deed is uttering it; Perkins v. People, 27 Mich. 386; so is bringing suit on a forged paper; Chahoon v. Com., 20 Gratt. (Va.) 733. The legal meaning of the word *utter* is in substance to *offer;* Bish. Cr. L. § 607.

UTTER BARRISTER. See BARRISTER.

UXOR (Lat.). **In Civil Law.** A woman lawfully married.

UXORICIDE. The killing of a wife by her husband; one who murders his wife. It is not a technical term of the law. Black, L. Dict.

V

VACANCY. A place which is empty. The term is principally applied to cases where the office is not filled. As applied to an office, it has no technical meaning; People v. Edwards, 93 Cal. 153, 28 Pac. 831; State v. Bemenderfer, 96 Ind. 374.

By the constitution of the United States, the president has the power to fill vacancies that may happen during the recess of the senate. See TENURE OF OFFICE; OFFICER; RESIGNATION.

VACANT. Public lands are vacant and open to settlement, and therefore not subject to selection in lieu of relinquished forest reserve lands, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character; Cosmos Exploration Co. v. Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. Land was held not vacant and open to settlement and subject to selection where, at the time of the application, it was in the actual occupancy of others engaged in exploring it for oil; *id.*

See OFFICER.

VACANT POSSESSION. A term applied to an estate which has been abandoned by the tenant: the abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered. 2 Chitty, Bail. 177; 2 Stra. 1064.

A dwelling-house furnished throughout, from which the owner has removed for a season, intending to return and resume possession, was held not vacant, within the meaning of a policy of insurance; Herrman v. Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488. See INSURANCE.

VACANT SUCCESSION. An inheritance for which the heirs are unknown.

VACANTIA BONA. In Civil Law. Goods without an owner. Such goods escheat.

VACATE. To annul; to render an act void: as, to vacate an entry which has been made on a record when the court has been imposed upon by fraud or taken by surprise.

A street is vacated when its character as such is destroyed, and it is thereafter held in private ownership the same as the adjacent lots to which it has accreted; Atchison, T. & S. F. R. Co. v. Shawnee, 183 Fed. 85, 105 C. C. A. 377.

VACATION. That period of time between the end of one term and beginning of another. During vacation, rules and orders are made in such cases as are urgent, by a judge at his chambers. See TERM.

VACATION BARRISTER. See BARRISTER.

VACCINATION. State-supported facilities for vaccination began in England in 1808 with the national vaccine establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law. In 1867 an act was passed rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 an act was passed which compelled the board of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practice medicine, and whose duty it is to vaccinate any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate and to certify to the vaccination officer the fact of vaccination or of insusceptibility.

The parent of any child born in England must have it vaccinated within six months, except in the case of a parent who within four months of birth makes and files a statutory declaration that he conscientiously believes that vaccination would be prejudicial to the health of his child.

Vaccination was made compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Württemberg, Hesse and other German states, 1818; Prussia, 1835; Roumania, 1874; Hungary, 1876; and Servia, 1881.

It is required by some acts that a child shall be vaccinated as a condition to his being admitted to or attending public schools; Com. v. Smith, 24 Pa. Co. Ct. R. 129; although small-pox is not prevalent or apprehended in the community. Under other statutes the rule is held to apply only where there is a reasonably well-founded belief that small-pox is prevalent in the community or is approaching thereto; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; State v. Hay, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691. It has been held in such a case that an unvaccinated pupil may be excluded from the school, even if he is not a fit subject for vaccination; Hammond v. Hyde Park, 195 Mass. 29, 80 N. E. 650. It is provided in some acts that, before a pupil may attend the public schools, he must present a certificate of a reputable physician that he has been successfully vaccinated; Com. v. Rowe, 218 Pa. 168, 67 Atl. 56; or has had small-pox; Field v. Robinson, 198 Pa. 638, 48 Atl. 873; or one excusing him from vaccination; State v. Board of Education of Barbertown, 76 Ohio St. 297, 81 N. E. 568, 10 Ann. Cas. 879; such as a certificate that by repeated trials he has been shown to be immune from vaccination; Anten v. School Bd., 83 Ark. 431, 104 S. W. 130.

Statutes requiring or authorizing a school-board to require the vaccination of pupils as

a condition to their being admitted to or attending schools have been held to be a valid exercise of the police power; Stull v. Reber, 215 Pa. 156, 64 Atl. 419, 7 Ann. Cas. 415; and have also been held not to be in contravention of the provision of the federal constitution that no person shall be deprived of any right without due process of law; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; or of a provision of a state constitution relating to the maintenance of public schools wherein all children of eligible age may receive an education; Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

An adult is not deprived of the liberty secured by the 14th amendment, by the enforcement against him of a compulsory vaccination law; at least where he does not show, with reasonable certainty, that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, will seriously impair his health, or possibly cause his death; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; this case gives much historical information, as well as a full consideration of the various statutory provisions on the subject.

The report of the Pennsylvania State Vaccination Commission, Emil Rosenberger, Chairman, is that the "protective power of vaccination against smallpox has been conclusively established and that vaccination is a relatively harmless procedure" (two members dissenting). It refers to the vaccination requirements of all European nations except Austria and Russia and states that, except in respect of the conscientious objection provision in England (*supra*), the rigor of the requirements in the two last decades has increased.

VADIMONIUM. *In Civil Law.* An ancient form of suretyship. Hunter, Rom. L. 526.

VADIUM MORTUUM (Lat.). A mortgage or *dead pledge;* it is a security given by the borrower of a sum of money, by which he grants to the lender an estate in fee, on condition that if the money be not repaid at the time appointed, the estate so put in pledge shall continue to the lender as dead or gone from the mortgagor. 2 Bla. Com. 257. See Gage of Land, 3 Sel. Essays, Anglo-Amer. L. H.

VADIUM PONERE. To take bail for the appearance of a person in a court of justice. Toml.

VADIUM VIVUM (Lat.). A species of security by which the borrower of a sum of money made over his estate to the lender until he had received that sum out of the issues and profits of the land; it was so called because neither the money nor the lands were lost, and were not left in dead pledge, but this was a *living* pledge, for the profits of the land were constantly paying off the debt. Littleton § 206; 1 Powell, Mortg. 3.

VAGABOND. One who wanders about idly, who has no certain dwelling. It is not synonymous with vagrant. Johnson v. State, 28 Tex. App. 562, 13 S. W. 1005.

VAGRANCY. When not defined by a statute, it must be considered such a vagabondage as fairly comes within the common-law meaning of the word. In matter of Sarah Way, 41 Mich. 299, 1 N. W. 1021; In re Jordan, 90 Mich. 3, 50 N. W. 1087.

VAGRANT. A person who lives idly, without any settled home. A person who refuses to work, or goes about begging. This latter meaning is the common one in statutes punishing vagrancy. See In re Jordan, 90 Mich. 3, 50 N. W. 1087.

One who came within the statutory definition of a vagrant is such, though he had $40 on his person; Branch v. State, 165 S. W. 605.

See TRAMP.

VAGRANT ACT. **In English Law.** The statute 5 Geo. IV, c. 83, which is an act for the punishment of idle and disorderly persons. 2 Chit. Stat. 145.

The act of 17 Geo. II divided vagrants into *idle and disorderly persons* (those who threatened to run away and leave their wives and children on the parish, or refuse to work for the usual wages, or begged from door to door in the streets). They were committed to the house of correction at hard labor for not to exceed a month. *Rogues and vagabonds* (including those who gathered alms on pretense of fire, etc., or as collectors for prisons, etc., common players, minstrels, jugglers, pretended gypsies, those who practice palmistry, or tell fortunes, or bet on any unlawful games, or who desert their wives and children, peddlers not duly licensed, persons wandering about and not giving a good account of themselves, or pretending to be soldiers, etc.). These were publicly whipped or sent to the house of correction at hard labor for not exceeding six months. *Incorrigible rogues* (including all persons apprehended as rogues and vagabonds and escaping, etc., or giving a false account of themselves, and those who had been punished before as rogues and vagabonds). They were punished by not to exceed two years at hard labor in the House of Correction and to be whipped during confinement. If a male and above 12 years, he might be put into the army or navy, and if he escaped from the house of correction, he might be transported.

Other statutes were passed as late as 32 Geo. III bearing on this subject. A full account of this will be found in Jacob's Law Dict. *s. v. Vagrant.*

VAGUENESS. Uncertainty.

Certainty is required in contracts, wills, pleadings, judgments, and, indeed, in all the

acts on which courts have to give a judgment, and if they be vague so as not to be understood, they are, in general, invalid; 5 B. & C. 583. A charge of frequent intemperance and habitual indolence is vague and too general; State v. Winthrop, 2 Mart. N. S. (La.) 530. See 36 Ch. Div. 348; CERTAINTY; NONSENSE; UNCERTAINTY.

VALESHERIA. See ENGLESHIRE.

VALID. Having force, of binding force; legally sufficient or efficacious; authorized by law. Anderson, L. Dict.

VALIDITY. Legal sufficiency in contradistinction to mere regularity. An official sale, an order, judgment, or decree may be regular; the whole practice in reference to its entry may be correct, but it may still be invalid for reasons going behind the regularity of its forms. Sharpleigh v. Surdam, 1 Flipp. 487, Fed. Cas. No. 12,711.

"The term 'validity,' as applied to treaties, admits of two descriptions—necessary and voluntary. By the former is meant that which results from the treaties having been made by persons authorized by, and for purposes consistent with, the constitution. By voluntary validity is meant that validity which a treaty, voidable by reason of violation by the other party, still continues to retain by the silent acquiescence and will of the nation. It is voluntary, because it is at the will of the nation to let it remain or to extinguish it. The principles which govern and decide the necessary validity of a treaty are of a judicial nature, while those on which its voluntary validity depends are of a political nature." 2 Paine 688, as paraphrased in 5 Moore, Int. L. Dig. 183.

VALLEY. The common understanding of the word *valley*, as applied to a mountainous country, is as meaning lowlands in contradistinction to mountain slopes and ridges; Whaley v. R. Co., 167 Fed. 664.

VALOR BENEFICIORUM (Lat.). The value of every ecclesiastical benefice and preferment, according to which the first-fruits and tenths are collected and paid. The valuation by which the clergy are at present rated was made 26 Hen. VIII., and is commonly called The King's Books. 1 Sharsw. Bla. Com. *284.

VALOR MARITAGII (Lat.). The amount forfeited under the ancient tenures by a ward to a guardian who had offered her a marriage without disparagement, which she refused. It was so much as a jury would assess, or as any one would give *bona fide*, for the value of the marriage. Littleton 110. A writ which lay against the ward, on coming of full age, for that he was not married by his guardian, for the *value of the marriage*, and this though no convenient marriage had been offered. *Termes de la Ley.*

VALUABLE CONSIDERATION. See CONSIDERATION.

VALUABLE SECURITY. Every valuable security is a valuable thing, but many valuable things are not valuable securities. The words "other valuable things" include everything of value; State v. Thatcher, 35 N. J. L. 452; as a promissory note; State v. Tomlin, 29 N. J. L. 13. Ice has been held a *valuable article;* State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224. *Valuable papers* are not papers having a money value, but only such as are kept and considered worthy of being taken care of by the particular person; Marr v. Marr, 2 Head (Tenn.) 306. They have been defined to be such as are regarded by a testator as worthy of preservation: in his estimation, of some value. The term is not confined to deeds for lands or slaves, obligations for money or certificates of stock; Hooper v. McQuary, 5 Coldw. (Tenn.) 129.

VALUABLE THING. A month's lodging is a valuable thing within the meaning of a statute providing against the obtaining of any valuable thing by personating a United States officer. U. S. v. Ballard, 118 Fed. 757.

VALUATION. The act of ascertaining the worth of a thing.[1] The estimated worth of a thing. State v. R. Co., 7 Nev. 99. See VALUE.

VALUATION LIST. In English Law. A list of all the ratable hereditaments in a parish.

VALUE. The utility of an object. The worth of an object in purchasing other goods. The first may be called value in use; the latter, value in exchange.

When applied without qualification to property of any description, necessarily means the price which it will command in the market; Fox v. Phelps, 17 Wend. (N. Y.) 399. In an indictment, it has been held to be a synonym of "effect" or "import." Chidester v. State, 25 Ohio St. 438.

Value differs from price, *q. v.* The latter is applied to live cattle and animals; in a declaration, therefore, for taking cattle, they ought to be said to be of such a price: and in a declaration for taking dead chattels, or those which never had life, it ought to lay them to be of such a value; 2 Lilly, Abr. 629. See Lawrence v. Boston, 119 Mass. 126.

It is also distinguished from income when applied to property; Troy I. & N. Factory v. Corning, 45 Barb. (N. Y.) 247. As used in reference to lands taken under eminent domain, it is a relative term, depending on the circumstances. Salable value, actual value, and cash value all mean the same thing and are designed to effect the same purpose; Burr. Tax. 227. See Cummings v. Bank, 101 U. S. 162, 25 L. Ed. 903. See INTRINSIC VALUE. Upon the question of the value of an article evidence of its original cost is relevant; Burke v. Pierce, 83 Fed. 95, 27 C. C. A. 462.

VALUE RECEIVED. A phrase usually employed in a bill of exchange or promissory note, to denote that a consideration has been given for it. These words are not necessary; 11 A. & E. 702; Mehlberg v. Tisher, 24 Wis. 607; though it is otherwise in some states if the bill or note be not negotiable; Bristol v. Warner, 19 Conn. 7; Hoyt v. Jaffray, 29 Ill. 104; extrinsic evidence is admissible between immediate parties to prove absence, failure, or illegality of consideration; Green v. Shepherd, 5 Allen (Mass.) 589; Aldrich v. Stockwell, 9 Allen (Mass.) 45.

The expression *value received*, when put in a bill of exchange, will bear two interpretations; the drawer of the bill may be presumed to acknowledge the fact that he has received value from the payee; 3 Maule & S. 351; Benjamin v. Tillman, 2 McLean 213, Fed. Cas. No. 1,304; or when the bill has been made payable to the order of the drawer and accepted, it implies that value has been received by the acceptor; 5 Maule & S. 65; Thurman v. Van Brunt, 19 Barb. (N. Y.) 409. In a promissory note, the expression imports value received from the payee; 5 B. & C. 360; and sufficiently expresses a consideration; Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743; although not necessarily in money; Osgood v. Bringolf, 32 Ia. 265.

The words are not required by the Uniform Negotiable Instruments Act.

See BILL OF EXCHANGE.

VALUED POLICY. See POLICY.

VARA. A measure used in Mexican land grants equal to 32.9927 inches. Ainsa v. U. S., 161 U. S. 219, 16 Sup. Ct. 544, 40 L. Ed. 673.

VARIANCE. A disagreement or difference between two parts of the same legal proceeding which ought to agree together. Variances are between the writ and the declaration, and between the declaration, or bill in equity, and the evidence.

Variance in matter of substance is fatal to the action; Stephenson v. Mansony, 4 Ala. 319; Lawrence v. Knies, 10 Johns. (N. Y.) 141; and is ground for demurrer or arrest of judgment; Wilbur v. Brown, 3 Den. (N. Y.) 356; Christian Bank v. Greenfield, 7 T. B. Monr. (Ky.) 290; but if in matter of form merely, must be pleaded in abatement; Humphreys v. Collier, Breese (Ill.) 298; How v. McKinney, 1 McLean 319, Fed. Cas. No. 6,749; or special demurrer; Sargent v. Hayne, 2 Hill (S. C.) 585; and a variance between the allegations and evidence upon *some material* points only is as fatal as if upon all; 7 Taunt. 385; but, if it be merely formal or immaterial matter, will be disregarded; Ferguson v. Harwood, 7 Cra. (U. S.) 408, 3 L. Ed. 386. The court may allow a technical variance between the pleadings and proofs to be cured by an amendment not introducing any other cause of action or affecting the merits of the case between the parties; Gormley v. Bunyan, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086. Slight variance from the terms of a written instrument which is professedly set out in the words themselves is fatal; Hampst. 294.

It is too late after plea to take advantage of a variance between the description in the writ and the declaration of property replevied; Reeder v. Moore, 95 Mich. 594, 55 N. W. 436.

Where, in an action on a contract, the pleader did not set out the exact words of the contract, and a different contract expressed in different words was proved, there is no real variance, as the difference between the declaration and the proofs must be real and tangible to constitute a variance; Beckwith v. Thompson, 63 Fed. 232, 11 C. C. A. 149, 25 U. S. App. 58. Where the plaintiff declared that his cattle died of "Texas cattle fever," and that it was contagious, and the court found that the cattle died of "Texas fever," and it was infectious, held that the variance was immaterial; Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230. So where in an indictment the name of the "National State Bank," "carrying on a national banking business at the city of Exeter," was used instead of "The National Granite State Bank of Exeter;" Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118.

A variance between proof and declaration should be called to the attention of the court when the declaration can be amended; George A. Fuller Co. v. McCloskey, 228 U. S. 194, 33 Sup. Ct. 471, 57 L. Ed. 795.

VASECTOMY. A comparatively simple and painless operation, consisting of the removal of a small part of each *vas deferens* through which the semen flows from the testicles to the seminal vesicles, or a tying off or ligaturing of the same. It effectively sterilizes the male, but does not impair his health or take away his sexual instincts.

Several states have passed statutes providing for compulsory asexualization of inmates of insane asylums and prisons, by which the advisability of the operation is commonly referred to a board composed of the chief physician of such institution, one or more surgeons specially appointed, and such other health officers as seem necessary, and the opinion of a majority of the board is sufficient for a decision. It is apparently an exercise of the police power, for the protection of society by preventing further procreation of undesirable citizens, or for partial protection of women in cases of escape.

Indiana provides for sterilizing confirmed criminals, idiots, rapists and imbeciles; Laws 1907, c. 215. Connecticut provides in explicit terms for both vasectomy and oophorectomy, where it is probable that the chil-

dren of inmates would inherit a tendency to crime, insanity, feeble-mindedness, idiocy or imbecility; Acts 1909, c. 209; the attorney-general has declared it not to be unconstitutional. California regards the beneficial effect of the operation on the subject himself, and further provides that it shall not be performed on a criminal unless he has been committed twice for some sexual offense, or at least three times for any other crime, and gives evidence of being a moral and sexual pervert; life convicts are included in the last provision; Stat. 1909, c. 720. Iowa substantially follows California, with the addition of drunkards, persons addicted to drugs, epileptics and syphilitics, and makes it a punishment for prostitution and detaining females for prostitution; Laws 1911, c. 129. Washington prescribes it as a punishment for rape, statutory rape, and habitual criminality, to be imposed by the court in its discretion, with other punishment; Rem. & Bal. Code § 2287.

Michigan has passed an act applicable to mentally defective or insane persons.

It is held not to be a cruel punishment; State v. Feilen, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, Ann. Cas. 1914B, 512.

See 27 Med. Leg. Journ. 134.

A statute to prevent procreation by a surgical operation, in order to be valid, must not deny the equal protection of the law; Smith v. Bd. of Examiners (N. J.) 88 Atl. 963, declaring invalid an act for sterilizing idiots, imbeciles, epileptics, rapists, certain criminals and other defectives, as based upon a classification which bears no reasonable relation to the object sought.

The Iowa act has been declared void in the federal district court (not yet reported), and an injunction was granted to an inmate of the penitentiary.

It is interesting to notice that, in Roman law, castrating any person, slave or free, even with his consent, was punishable; Hunter, Rom. Law 1069.

VASSAL. **In Feudal Law.** The name given to the holder of a fief bound to perform feudal service: this word was then always correlative to that of lord, entitled to such service.

The vassal himself might be lord of some other vassal.

In after-times, this word was used to signify a species of slave who owed servitude and was in a state of dependency on a superior lord. 2 Bla. Com. 53.

VASSAL STATES are states which are supposed to possess only those rights and privileges which have been expressly granted to them, but actually they seem to be well-nigh independent. Hershey, Int. L. 106. Egypt was such; also Crete.

VAVASOUR (diminutive from *vasalus*, or, according to Bracton, from *vas sortitus ad valitudinem*). One who was in dignity next to a baron. Britton 109; Bracton, lib. 1, c. 8. One who held of a baron. Encyc. Brit.

VECTIGALIA. **In Roman Law.** Duties which were paid to the prince for the importation and exportation of certain merchandise. They differed from tribute, which was a tax paid by each individual. Code 4. 61. 5. 13.

Rent from state lands. Hunter, Rom. L. 901.

VEHICLE. The word includes every description of carriage or other artificial contrivance used or capable of being used as a means of transportation on land; U. S. Rev. Stat. § 4; a street sprinkler is a vehicle; St. Louis v. Woodruff, 71 Mo. 92; but not a street car; Monongahela Bridge Co. v. R. Co., 114 Pa. 484, 8 Atl. 233; or a ferry boat; Duckwall v. Albany, 25 Ind. 286. See BICYCLE; TEAM.

VEIN. See LODE.

VENAL. Something that is bought. The term is generally applied in a bad sense; as, a venal office is an office which has been purchased.

VENDEE. A purchaser; a buyer.

VENDITION. A sale; the act of selling.

VENDITIONI EXPONAS (Lat.). That you expose to sale.

In Practice. The name of a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states, lands, which he has taken in execution by virtue of a *fieri facias*, and which remain unsold.

Under this writ the sheriff is bound to sell the property in his hands, and he cannot return a second time that he can get no buyers; Cowp. 406.

VENDITOR REGIS (Lat.). The king's salesman, or person who exposes to sale goods or chattels seized or distrained to answer any debt due to the king. Cowell. This office was granted by Edw. I. to Philip de Lordiner, but was seized into the king's hands for abuse thereof. 2 Edw. II.

VENDOR. A seller; one who disposes of a thing in consideration of money.

VENDOR'S LIEN. An equitable lien allowed the vendor of land sold for the unpaid purchase-money. 3 Pom. Eq. Jur. § 1260. See LIEN.

VENIRE FACIAS (Lat.). That you cause to come. According to the English law, the proper process to be issued on an indictment for any petit misdemeanor, on a penal statute, is a writ called *venire facias*.

It is in the nature of a summons to cause the party to appear; 4 Bla. Com. 18, 351. See Thomp. & M. Juries 62.

VENIRE FACIAS DE NOVO (Lat.). The name of a new writ of *venire facias;* this is

awarded when, by reason of some irregularity or defect in the proceeding on the first venire, or the trial, the proper effect of the venire has been frustrated, or the verdict become void in law; as, for example, when the jury has been improperly chosen, or an uncertain, ambiguous, or defective verdict has been rendered. Steph. Pl. 120; or when a judgment is reversed on a writ of error.

A motion for a *venire facias de novo* is properly denied, where there is no defect, ambiguity, or uncertainty in the verdict; Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456. Upon reversal of a judgment, the awarding the writ is controlled by the character of the case and the sound discretion of the appellate court; Fries v. R. Co., 98 Pa. 142.

But federal courts, in reversing a judgment for plaintiff at law, cannot direct a judgment for defendant, but must order a *venire facias de novo;* Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. As to a distinction between *venire facias de novo* and *venire de novo,* see 1 Wils. 48. See also 47 Am. L. Rev. 377.

VENIRE FACIAS JURATORES (Lat.). (Frequently called *venire* simply.)

The name of a writ directed to the sheriff, commanding him to cause to *come* from the body of the county, before the court from which it issued, on some day certain and therein specified, a certain number of qualified citizens who are to act as jurors in the said court. Steph. Pl. 104. See Cridland v. Floyd, 6 S. & R. (Pa.) 414; 3 Chitty, Pr. 797; JURY.

VENTE (Fr.). A sale.

Vente a réméré. A sale made, reserving a right in the seller to repurchase the property sold by returning the price paid for it.

The term is used in Canada and Louisiana. The time during which a repurchase may be made cannot exceed ten years, and, if by the agreement it so exceed, it shall be reduced to ten years.

Vente aleatoire. A sale subject to an uncertain event.

Vente aux enchères. An auction.

VENTER, VENTRE (Lat. the belly). The wife; for example, a man has three children by the first and one by the second venter. A child is said to be *en ventre sa mere* before it is born; while it is a fœtus. See UNBORN CHILD.

VENTRE INSPICIENDO. See DE VENTRE INSPICIENDO; JURY OF WOMEN; PHYSICAL EXAMINATION.

VENUE (L. Lat. *visnetum,* neighborhood. The word was formerly spelled *visne.* Co. Litt. 125 *a*).

The county in which the facts are alleged to have occurred, and from which the jury are to come to try the issue. Gould, Pl. c. 3, § 102; McKenna v. Fisk, 1 How. (U. S.) 241, 11 L. Ed. 117. Some certain place must be alleged as the place of occurrence for each traversable fact; Com. Dig. *Pleader* (C. 20). Generally, in modern pleading, in civil practice, no special allegation is needed in the body of the declaration, the venue in the margin being understood to be the place of occurrence till the contrary is shown; Cocke v. Kendall, Hempst. 236, Fed. Cas. No. 2,929 *b*.

In local actions the true venue must be laid; that is, the action must be brought in the county where the cause of action arose, where the property is situated, in actions affecting real property; Deacon v. Shreve, 23 N. J. L. 204. Thus, where an action is brought on a lease at common law, founded on privity of contract, as debt or covenant by lessor or lessee; 1 Saund. 241 *b*; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; venue is transitory, but when founded in privity of estate, as in case of assignment, the venue is local; 1 Saund. 257. By various early statutes, however, actions on leases have become generally transitory. In such action, some particular place, as, a town, village, or parish, must formerly have been designated; Co. Litt. 125. But it is said to be no longer necessary except in replevin; 2 East 503; 1 Chitty, Pl. 251. As to where the venue is to be laid in case of a change of county lines, see Murphy v. Winter Co., 18 Ga. 690; People v. Stokes, 102 Cal. 501, 36 Pac. 834.

In transitory actions the venue may be laid in any county the plaintiff chooses; that is, he may bring suit wherever he may find the defendant, and lay his cause of action to have arisen there, even though the cause of action arose in a foreign jurisdiction; Steph. Pl. 306; Murphy v. Winter, 18 Ga. 690; McKenna v. Fisk, 1 How. (U. S.) 241, 11 L. Ed. 117. In case the cause was to be tried in a different county from that in which the matter actually arose, the venue was anciently laid by giving the place of occurrence, with a scilicet giving the place of trial; McKenna v. Fisk, 1 How. (U. S.) 241, 11 L. Ed. 117; Duyckinck v. Ins. Co., 23 N. J. L. 279. In some cases, however, by statutes, the venue in transitory actions must be laid in the county where the matter occurred or where certain parties reside; 3 Bla. Com. 294.

An action against a municipal corporation must be brought in the county where it is situated; Jones v. Statesville, 97 N. C. 86, 2 S. E. 346; even though it is brought on a trespass committed in another county; Heckscher v. Philadelphia, 20 Wkly. Notes Cas. (Pa.) 52. In Phillips v. Baltimore, 110 Md. 431, 72 Atl. 902, 25 L. R. A. (N. S.) 711, it was held that transitory actions for personal injuries must be brought in the courts of the municipality; but if the action be for trespass to real property, it must be brought in the county where the trespass occurred; Baltimore v. Turnpike Co., 104 Md. 35, 65 Atl. 35, 10 Ann. Cas. 35.

A township cannot be sued in another county than the one of which it forms a part; Pack v. Greenbush Tp., 62 Mich. 122, 28 N. W. 746; but it has been held that where the action is against a town for an injury caused by a defective road, it can be brought in the county of either party; Hunt v. Pownal, 9 Vt. 411.

In criminal proceedings the venue must be laid in the county where the occurrence actually took place; 4 C. & P. 363; and the act must be proved to have occurred in that jurisdiction; Heikes v. Com., 26 Pa. 513; Searcy v. State, 4 Tex. 450; People v. Lafuente, 6 Cal. 202. Where the offence is committed by letter, the sender may be tried at the place where the letter is received by the person to whom it is addressed; In re Palliser, 136 U. S. 256, 10 Sup. Ct. 1034, 34 L. Ed. 514. See In re Cook, 49 Fed. 843. An indictment for murder charging that an offence was committed on board of an American vessel on the high seas within the jurisdiction of the court and within the admiralty jurisdiction of the United States, sufficiently avers the locality of the offence; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. One who obtains goods from a salesman under false pretences may be tried in the county from which the goods were shipped; Com. v. Karpowski, 167 Pa. 225, 31 Atl. 572.

An offence committed at any inappreciable distance from a county line may be tried in either county; Buckrice v. People, 110 Ill. 29; Bayliss v. People, 46 Mich. 221, 9 N. W. 257; so of a distance of 500 yards; People v. Davis, 36 N. Y. 77; and (by statute) of a distance of 100 rods; Bayliss v. People, 46 Mich. 221, 9 N. W. 257. Statutory provisions are usually made. Where the blow was struck in one county and the person dies in another county, the trial must be in the former; State v. Blunt, 110 Mo. 322, 19 N. W. 650; Riley v. State, 9 Humph. (Tenn.) 646; Moran v. Territory, 14 Okl. 544, 78 Pac. 111; *contra*, Nash v. State, 2 G. Greene (Ia.) 286; Com. v. Jones, 118 Ky. 889, 82 S. W. 643, 4 Ann. Cas. 1192 (where the accused was in the latter county). It is held that the trial may in such case be in either; State v. Jones, 38 La. Ann. 792.

One stealing a horse may be tried in the county into which he takes it; Rex v. Peas, 1 Root (Conn.) 69; Whizenant v. State, 71 Ala. 383; so of a steer; State v. Williams, 147 Mo. 14, 47 S. W. 891; Hurlburt v. State, 52 Neb. 428, 72 N. W. 471; Rose v. State (Tex.) 65 S. W. 911. That he can be tried in either county, see Green v. State, 114 Ga. 918, 41 S. E. 55.

Where a murder is planned and preparations are made, including control of the victim, but the actual killing takes place in another county, the courts of either county have jurisdiction; People v. Thorn, 12 N. Y. Cr. R. 236, 47 N. Y. Supp. 46. Where one in California prepared there a poisonous article and sent it to another in Delaware, who was killed by it, this was an offence committed in California; People v. Botkin, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39.

The sixth amendment to the federal constitution provides for the right of trial of a criminal offence in a district where it is committed; there is no constitutional provision for a trial in the place of residence of the accused; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The trial of any crime committed on the high seas, or elsewhere out of the jurisdiction of any state or district, shall be in the district where the offender is found or into which he is just brought; U. S. R. S. § 730 (now Jud. Code § 41).

Where a continuing crime runs through several jurisdictions, the offence is committed in each; Armour Packing Co. v. U. S., 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

Where the place of the act and of an unlawful combination under the U. S. R. S. § 5440 were in different federal districts, the provisions of section 731 (now Jud. Code § 42) apply and create a jurisdiction in either district; Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

The offense of importing an alien woman for prostitution is complete the moment she is landed in the United States and is triable at the place where she is landed; Ex parte Lair, 177 Fed. 789.

The federal court at the place where the agreement was made for compensation to perform services forbidden by U. S. R. S. § 1782, has jurisdiction to try the offense, even if the agreement was negotiated or tentatively accepted at another place, and although the defendant may not, at that time, have been at that place; Burton v. U. S., 202 U. S. 345, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

Statement of venue in the margin and reference thereto in the body of an indictment is a sufficient statement of venue; State v. Conley, 39 Me. 78; McDonald v. State, 8 Mo. 283; and the venue need not be stated in the margin if it appears from the indictment; Com. v. Quin, 5 Gray (Mass.) 478; State v. Powers, 25 Conn. 48.

A state statute providing for a change of venue upon the application of the state does not violate the right of trial by jury at common law; Barry v. Traux, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; State v. Miller, 15 Minn. 344 (Gil. 277); Com. v. Davidson, 91 Ky. 162, 15 S. W. 53; People v. Harris, 4 Denio (N. Y.) 150; Price v. State, 8 Gill (Md.) 295; and this view seems to have the weight of authority, although other cases hold that the constitutional right includes that of having a jury of the county in which the offence was committed; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L.

R. A. 75; Kirk v. State, 1 Cold. (Tenn.) 344; although this right was held to be one which the accused could waive as well as insist upon; State v. Potter, 16 Kan. 80.

Want of any venue is a cause for demurrer; Briggs v. Bank, 5 Mass. 94; or abatement; Archb. Civ. Pl. 78; or arrest of judgment; Searcy v. State, 4 Tex. 450. So defendant may plead or demur to a wrong venue; Blake v. Freeman, 13 Me. 130. *Change* of venue may be made by the court to prevent, and not to cause, a defeat of justice; 3 Bla. Com. 294; Hungerford v. Cushing, 2 Wis. 397; Curran v. Beach, 20 Ill. 259; both in civil; Witter v. Taylor, 7 Ind. 110; Weeks v. State, 31 Miss. 490; and criminal cases; Ex parte Banks, 28 Ala. 28; State v. Windsor, 5 Har. (Del.) 512; and such change is a matter of right on compliance with the requirements of the law; Baldwin v. Marygold, 2 Wis. 419; Brennan v. People, 15 Ill. 511; Freleigh v. State, 8 Mo. 606. That such change is a matter of discretion with the court below, see Weeks v. State, 31 Miss. 490; Vaughn v. Hixon, 50 Kan. 773, 32 Pac. 358; Thorp v. Bradley, 75 Ia. 50, 39 N. W. 177; King v. State, 91 Tenn. 617, 20 S. W. 169; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.

See JURISDICTION; VISNE; TRANSITORY ACTIONS.

VERAY. An ancient manner of spelling *vrai*, true. In the English law there are three kinds of tenants: *veray*, or true *tenant*, who is one who holds in fee-simple; *tenant by the manner* (see TENANT); and *veray tenant by the manner*, who is the same as tenant by the manner, with this difference only, that the fee-simple, instead of remaining in the lord, is given by him or by the law to another. Hamm. N. P. 394.

VERBAL. Parol; by word of mouth: as verbal agreement; verbal evidence. Sometimes incorrectly used for oral.

VERBAL NOTE. In diplomatic language, a memorandum or note, not signed, sent when an affair has continued a long time, without any reply, in order to avoid the appearance of an urgency which perhaps the affair does not require, and, on the other hand, not to afford any ground for supposing that it is forgotten, or that there is no intention of prosecuting it any further, is called a *verbal note*.

VERBAL PROCESS. In Louisiana. A written account of any proceeding or operation required by law, signed by the person commissioned to perform the duty, and attested by the signature of witnesses. See PROCES VERBAL.

VERDERER (fr. French *verdeur*, fr. *vert* or *verd*, green; Law L. *viridarius*). An officer in the king's forest, whose office is properly to look after the *vert*, for food and shelter for the deer. He is also sworn to keep the assizes of the forest, and receive and enrol the attachments and presentments of trespasses within the forest, and certify them to the swanimote or justice-seat; Cowell; Manwood, For. Law 332.

VERDICT. The decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause.

A *general* verdict is one by which the jury pronounce at the same time on the facts and the law, either in favor of the plaintiff or defendant. Co. Litt. 228; 4 Bla. Com. 461.

A general verdict is a finding by the jury in the terms of the issue referred to them. Settle v. Alison, 8 Ga. 208, 52 Am. Dec. 393; Tidd, Pr. 798.

A general verdict must be regarded as affirming the truth of every fact necessary to support the general conclusion arrived at, and every reasonable presumption arises in its favor, while nothing will be presumed in aid of the special findings as against the general verdict; Chicago & E. I. R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530. If there is any reasonable hypothesis whereby a general verdict and the special finding can be reconciled, judgment must follow the general verdict; Grand Rapids & I. R. Co. v. Ellison, 117 Ind. 234, 20 N. E. 135; and a general verdict on an indictment is sufficient if supported by any one of the counts; State v. Dalton, 101 N. C. 680, 8 S. E. 154; May v. State, 85 Ala. 14, 5 South. 14; Babcock v. U. S., 34 Fed. 873.

The jury may find such a verdict whenever they think fit to do so.

A *partial* verdict in a criminal case is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue.

A *privy* verdict is one delivered privily to a judge out of court. A verdict of this kind is delivered to the judge after the jury have agreed, for the convenience of the jury, who, after having given it, separate. This verdict is of no force whatever; and this practice, being exceedingly liable to abuse, is seldom, if ever, allowed in the United States. The jury, however, are allowed in some states, in certain cases, to seal their verdict and return it into court, as, for example, where a verdict is agreed upon during the adjournment of the court for the day. When this is done in criminal cases it is usually the right of the defendant to have the jury present in court when the verdict is opened; Doyle v. U. S., 10 Fed. 269. See PRESENCE; SEALING A VERDICT.

A *private* verdict must afterwards be given publicly in order to give it any effect.

A *public* verdict is one delivered in open court.

A *special* verdict is one by which the facts are found, and the law is submitted to the judges. Brown v. Ralston, 4 Rand. (Va.) 504; Bellows v. Bank, 2 Mason, 31, Fed. Cas.

No. 1,279. The jury may find a special verdict in criminal cases, but they are not obliged in any case to do so; Cooley, Const. Lim. 393. The special verdict or findings of a jury in order to sustain a judgment, must pass upon all the material issues made in the pleadings so as to enable the court to say upon the pleadings and verdict, without looking at the evidence, which party is entitled to judgment; Lane v. Lenfest, 40 Minn. 375, 42 N. W. 84; Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. A special verdict need only find such facts as are alleged in the pleadings upon one side and denied upon the other; Cole v. Crawford, 69 Tex. 124, 5 S. W. 646.

The jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed by the evidence before them, and, after so setting them forth, to conclude to the following effect: That they are ignorant, in point of law, on which side they ought upon those facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, they find for defendant. This form of finding is called a *special verdict*. In practice they have nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled under the correction of the judge, by the counsel on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and, with respect to other particulars, according to the state of facts which it is agreed that they ought to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered on record; and the question of law, arising on the facts found, is argued before the court in banc; 3 Bla. Com. 377.

There is another method of finding a special verdict: this is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judges or the court above on a *special case*, stated by the counsel on both sides, with regard to a matter of law; 3 Bla. Com. 378. See Porter v. Rummery, 10 Mass. 64.

A juror may dissent at any time from a verdict to which he had before agreed until the same is recorded; 15 Am. L. Rev. 423. A mistake in the verdict may be corrected before it is recorded and the jury discharged; State v. Shelly, 98 N. C. 673, 4 S. E. 530.

Where a jury being equally divided in opinion come to an agreement by *lot*, it was formerly held that its verdict was legitimate; 1 Keble 811; but such verdicts are now held to be illegal, and will be set aside. The "quotient" verdict is so called from the fact that the jurors, having agreed to find for the plaintiff, further agree that their verdict shall be in such sum as is ascertained by each juror privately marking down the sum of money to which he thinks the plaintiff entitled, the total of these sums being divided by twelve. This method is almost universally condemned, the ground of the objection being that such an agreement cuts off all deliberation on the part of the jurors, and places it in the power of one of their number by naming a sum extravagantly high or ridiculously low to make the quotient unreasonably large or small; Goodman v. Cody, 1 Wash. Ty. 329, 34 Am. Rep. 808; Chicago & I. Coal R. Co. v. McDaniel, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; so of a verdict in a criminal case fixing the term of imprisonment; Pruitt v. State, 30 Tex. App. 156, 16 S. W. 773; *contra*, in the case of a fine in a criminal case for libel; Smith v. Com., 98 Ky. 437, 33 S. W. 419. But where the calculation is purely informal, for the purpose of ascertaining the sense of the jury, the objection is obviated, and the verdict will stand; Cochlin v. People, 93 Ill. 410; Sullens v. R. Co., 74 Ia. 659, 38 N. W. 545, 7 Am. St. Rep. 501; Ponca v. Crawford, 23 Neb. 662, 37 N. W. 609, 8 Am. St. Rep. 144; Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; Kinsley v. Morse, 40 Kan. 588, 20 Pac. 222. A verdict obtained by taking one-twelfth of the aggregate amount of the several estimates of the jurors is not objectionable when there was no antecedent agreement to be bound by the result, and when each juror deliberately accepted the amount thus ascertained; Consolidated Ice-Mach. Co. v. Ice Co., 57 Fed. 898; Cortelyou v. McCarthy, 37 Neb. 742, 56 N. W. 620; but if in pursuance of an agreement to be bound by the result, the verdict must be set aside; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 246, 1 S. W. 790; Roy v. Goings, 112 Ill. 656; Congdon v. Winsor, 17 R. I. 240, 21 Atl. 540. So where two of the jurors agree that if one places a coin and the other guesses heads or tails, and the guess is right, they will agree with the majority; Donner v. Palmer, 23 Cal. 47; or where a verdict is reached by drawing lots it will be set aside; Obear v. Gray, 68 Ga. 182; Wright v. Abbott, 160 Mass. 395, 36 N. E. 62, 39 Am. St. Rep. 499. See JURY.

A verdict allowing a larger sum than is claimed in the petition must be set aside; Harwick v. Weddington, 73 Ia. 300, 34 N. W. 868. Where a verdict in an action for breach of covenant is larger than the plaintiff's claim a remittitur is properly allowed; Tarbell v. Tarbell, 60 Vt. 486, 15 Atl. 104; and a remission of a part of the verdict, followed by a judgment for the remaining sum, as a condition of the denial of a new trial, does

not deprive the defendant of his constitutional right to have the question of damages tried by a jury, or constitute a re-examination of the facts tried by the jury in violation of the 7th amendment of the United States constitution; Arkansas Val. L. & C. Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854.

A verdict received on Sunday is valid; Stone v. U. S., 64 Fed. 667, 12 C. C. A. 451, 29 U. S. App. 32; a third successive verdict was set aside in Brown v. U. S., 164 U. S. 225, 17 Sup. Ct. 33, 41 L. Ed. 410.

A verdict of "no cause of action" is a verdict for defendant; Felter v. Mulliner, 2 Johns. 181; a verdict is good if the court can understand it; Jones v. Julian, 12 Ind. 274.

Where a verdict allows interest, but does not compute it, the court may compute it, if it can be done by a mathematical calculation; Miller v. Steele, 153 Fed. 714, 82 C. C. A. 572; Martin v. Silliman, 53 N. Y. 615. Where a master states an account between partners, but without adding interest, the court may add interest from the filing of the bill; Young v. Winkley, 191 Mass. 575, 78 N. E. 377. Where there is a verdict on a note, but without interest, the court may add interest in entering judgment; Fletcher v. Nelson, 6 N. D. 94, 69 N. W. 53; otherwise where the jury did not include interest and interest was not a legal incident of the debt; Akin v. Jefferson, 65 Tex. 137; the court cannot add it in entering judgment; Butler v. Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52. Where, on the day after the verdict, all the jury made affidavit that they had intended to add interest, the court added it in entering judgment; Elliott v. Gilmore, 145 Fed. 964. But where the jury were directed to find for the debt, interest and attorney fees, and failed to find interest, the court refused to add the interest; McCrary v. Gano, 115 Ga. 295, 41 S. E. 580. So in the case of an action on a foreign judgment; Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477.

In eminent domain proceedings, if the jury find a lump sum, the court cannot add interest, though the jury were instructed to do it; Butte Electric Ry. Co. v. Mathews, 34 Mont. 487, 87 Pac. 460.

See NEW TRIAL; TRIAL; AFFORCE THE ASSIZE; JURY; AIDER BY VERDICT.

VERGE. An uncertain quantity of land, from fifteen to thirty acres. Toml. A space within 12 miles around the place where the king was actually residing was called the *verge*. 1 Holdsw. Hist. E. L. 80.

See COURT OF THE MARSHALSEA; VIRGA.

VERIFICATION. An averment by the party making a pleading that he is prepared to establish the truth of the facts which he has pleaded.

Whenever new matter is introduced on either side, the plea must conclude with a verification, in order that the other party may have an opportunity of answering it; 1 Saund. 103, n. 1. This applies only to pleas.

In one instance, however, new matter need not conclude with a verification, and then the pleader may pray judgment without it: for example, when the matter pleaded is merely negative; Lawes, Pl. 145. The reason of it is evident: a negative requires no proof; and it would, therefore, be impertinent or nugatory for the pleader, who pleads a negative matter, to declare his readiness to prove it.

The usual form of verification of a plea containing matter of fact is, "*And this he is ready to verify*," etc. See 3 Bla. Com. 309.

It is not error to permit a proctor to sign and verify a libel in admiralty, where a large number of persons join and they are out of the jurisdiction, but the practice is not to be commended; The Oregon, 133 Fed. 609, 68 C. C. A. 603.

See BILL; INJUNCTION.

In Practice. The examination of the truth of a writing; the certificate that the writing is true. See AUTHENTICATION.

VERIFY. The swearing to an affidavit. To confirm and substantiate by oath. It is used of substantiating by argument. De Witt v. Swift, 3 How. Pr. (N. Y.) 284.

VERMONT. One of the United States.

At the outbreak of the Revolution the people of Vermont joined their brethren in the contest, though independent of the federal government. In 1777 they declared their territory to be "a free independent jurisdiction," and adopted a constitution which with subsequent amendments is still the constitution of the state. Under this constitution the state maintained its government and its independence for fourteen years, until its admission to the Union in 1791. The institutions of Vermont were modelled in large part from those of Connecticut (Art. 25).

The constitution was amended in 1786, 1793, 1828, 1836, 1850, 1870, and other years to 1913.

VERSUS (Lat.). Against; as, A B *versus* C D. This is usually abbreviated *v.* or *vs.* *Vs.* and *versus* have become ingrafted upon the English language; their meaning is as well understood and their use quite as appropriate as the word *against* could be; Smith v. Butler, 25 N. H. 523. See TITLE.

VERT. Everything bearing green leaves in a forest. Manwood, For. Law 146.

VERY LORD AND VERY TENANT. They that are immediate lord and tenant one to another. Cowell.

VESSEL. A ship, brig, sloop, or other craft used in navigation. 1 Boulay-Paty, tit. 1, p. 100. The term is rarely applied to any watercraft without a deck; U. S. v. Open Boat, 5 Mas. 120, Fed. Cas. No. 15967; but has been used to include everything capable of being used as a means of transportation by water; Chaffee v. Ludeling, 27 La. Ann. 607.

By U. S. R. S. § 3, "the word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation

on water." See The Annie S. Cooper, 48 Fed. 703.

A floating elevator towed from place to place, and used to transfer grain, is a vessel; The Hezekiah Baldwin, 8 Bened. 556, Fed. Cas. No. 6,449. So of a scow adapted only for use in port in carrying ballast to and from vessels, having neither steam power nor sails nor rudder, and moving by steam tugs; Endner v. Greco, 3 Fed. 411; so of canal boats; *id.* (*contra*, Farmers' Delight v. Lawrence, 5 Wend. [N. Y.] 564); so of a scow built for carrying a steam shovel worked by the steam engine of the scow; The Pioneer, 30 Fed. 206; and a barge having no sails, masts, or rudders and used only for the transportation of bricks, suitable only to be towed by a tug; Disbrow v. Walsh Bros., 36 Fed. 607; so of a floating scow fitted with steam appliances for deepening channels; Aitcheson v. Chain Dredge, 40 Fed. 253; a steam dredge; The Atlantic, 53 Fed. 607; The International, 83 Fed. 840; a barge and scow; The Starbuck, 61 Fed. 502; Saylor v. Taylor, 77 Fed. 476, 23 C. C. A. 343. The means of propulsion makes no difference; The Devonshire, 13 Fed. 39, 8 Sawy. 209.

Vessel includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water; U. S. v. Holmes, 104 Fed. 884; a barge with a pile driver thereon and moved from place to place by tugs; In re P. Sanford Ross, Inc., 196 Fed. 921; a structure intended for the transportation of a permanent cargo as a scow, carrying a pile driver and engine, which has to be towed in order to navigate; The Raithmoor, 186 Fed. 849; a derrick hoist; The Sallie, 167 Fed. 880, and a pump-boat, which consists of a floating structure equipped with engines and pumps for pumping out coal barges, moved by poles or ropes, or towed; Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895. Rafts are included in the general term of vessels; The Mary, 123 Fed. 609; but, *quære*, The Annie S. Cooper, 48 Fed. 703.

Vessel is broad enough to include a vessel's tackle, apparel, furniture, chronometer and appurtenances; The Frolic, 148 Fed. 921.

A vessel, although wrecked and abandoned by owners and underwriters and her register closed, but which still retains her hull, though damaged, and her machinery, remains a vessel in a maritime sense, and is subject to dry dock charges while undergoing repairs after she has been raised, and to a maritime lien for such charges; The George W. Elder, 196 Fed. 137; so of a "foreign-built" yacht which burned and sunk and was repaired, but remained a "foreign-built" yacht; U. S. v. Blair, 190 Fed. 372. A steamer which has been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceedcd so far as to render her wholly incapable of being navigated as a tow or otherwise, continues to be a vessel; The C. H. Northam, 181 Fed. 983. That a vessel is not enrolled or licensed does not affect the question of jurisdiction to enforce a maritime lien against her, nor does it make any difference whether she is unfit for sea when a contract is made on her behalf; if the object and effect of it be to enable her to pursue her business upon the sea, it is in its nature maritime; The George W. Elder, 196 Fed. 138.

An open boat is not a vessel; U. S. v. Open Boat, 5 Mas. 120, Fed. Cas. No. 15,967; nor a raft; Moores v. Underwriters, 14 Fed. 236. An open clinker-built gasoline launch about 18 feet long, arriving at Seattle from a port of British Columbia and not shown to be a foreign vessel or to contain merchandise, is not required to report to the customs officer of the port; U. S. v. One Gasoline Launch, 133 Fed. 42, 66 C. C. A. 148.

A vessel is built to navigate the seas and not to stay in a port, and does not acquire a *situs* in one port rather than another by reason of frequently visiting it; Southern Pac. Co. v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. Ed. 96.

An American vessel, outside the jurisdiction of a foreign power, is, for some purposes at least, a part of the American territory; The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822.

Foreign-built vessels registered under the act of August 24, 1912, are not permitted to engage in coastwise trade.

Vessels navigated to a port are subject to distinct duties and obligations, and are not dutiable as imported merchandise; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937.

Vessels must have their names marked on them; 2 Supp. R. S. 541.

By proclamation of November 21, 1913, the president promulgated certain rules for the measurement of vessels for the Panama Canal, applying to vessels, all commercial, army and navy, supply, and hospital ships, and rules applicable to vessels of war.

By act of Aug. 18, 1914, the words "not more than five years old at the time they apply for registry" were stricken from section five of the Panama Canal Act, and the president was authorized to suspend the provision of law that all watch officers of all United States vessels registered for foreign trade shall be citizens of the United States, and those requiring survey, inspection and measurement by officers of the United States of foreign-built vessels admitted to registry under the act.

The Convention for the Safety of Life at Sea, which was signed at London, January 20, 1914, but which the United States Senate has not yet ratified, provides: "At no moment of its voyage may a ship have on board a total number of persons greater than that for whom accommodation is provided in the

lifeboats and the pontoon life-rafts on board." The number and arrangement of the boats, and (where they are allowed) of the pontoon rafts, depend upon the total number of persons which the ship is intended to carry; provided the total capacity is greater than that necessary to accommodate all the persons on board. Each boat must be of sufficient strength to enable it to be safely lowered with its full complement of persons and equipment. Suitable arrangements shall be made for embarking passengers in the boats. The davits shall be of sufficient strength to lower the boats with their full complement, the ship being assumed to have a list of 15 degrees. The davits must be fitted with a gear of sufficient power to ensure that the boat can be turned out against the maximum list under which the lowering of the boats is possible.

A life jacket of an approved type, or other appliance of equal buoyancy and capable of being fitted on the body, shall be carried for every person on board, and in addition a sufficient number of life jackets or equivalent appliances suitable for children.

Each boat or raft is required to have a minimum number of certificated lifeboatmen, by which is meant a member of the crew who holds a certificate of efficiency issued under the authority of the administration concerned, in accordance with the regulations of the Convention. Special duties for emergencies shall be allotted to each member of the crew and the muster list must show these special duties and indicate each man's station and his duties.

The carriage, either as cargo or ballast, of goods which by reason of their nature, quantity, or mode of stowage, are, either singly or collectively, likely to endanger the lives of the passengers or the safety of the ship, is forbidden.

Limitation of Liability of Vessel Owners. While the civil as well as the common law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew; Davies 175; 9 East 432; under the maritime law of modern Europe the owner's liability was merely coextensive with his interest in the vessel and its freight, and ceased by his abandonment and surrender of these to the parties sustaining loss.

As said by Brown, J., in The Main v. Williams, 152 U. S. 126, 14 Sup. Ct. 486, 38 L. Ed. 381, this rule is stated in the code known as Consolato del Mare, but there is no reference to it in the Laws of Oleron, or of Wisby, or of the Hanse towns, which were the maritime codes followed in Northern Europe (see CODE). The earliest legislation in England was in 1734.

The whole subject is now covered in England by the Merchants Shipping Act of 1894, which provides for limiting the liability of the shipowners in the case of loss of life or personal injury to an aggregate amount not exceeding £15 for each ton of the ship's tonnage, and in respect to loss or damage to vessels, goods, merchandise or other things, to an aggregate amount not exceeding £8 for each ton of the ship's tonnage. See Maclachlan, Merchant Shipping (5th Ed.) p. 129.

U. S. R. S. § 4282 (Act March 3, 1851), provides that the liability of the owner of any vessel for embezzlement, loss or destruction, etc., of any person or any property, etc., on board a vessel, or for any loss or damage by collision or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred "without the privity or knowledge of such owner or owners, shall in no case exceed the amount of value of the interest of such owner in such vessel or her freight then pending." Section 4284 provides for apportionment of losses between the owners. The act of February 18, 1875, excepted from section 4282 the owner of any canal-boat, barge or lighter or vessel of any description used in rivers or inland navigation. The act of June 26, 1884, provided that the individual liability of the shipowner shall be limited to the proportion of the debts and liabilities that his individual share of the vessel bears to the whole; "and the aggregate liabilities of all the owners of the vessel on account of the same shall not exceed the value of such vessel and freight pending," provided that this provision shall not prevent any claimant from joining all the owners in one action, and shall not apply to wages.

The act of June 19, 1886, extended the provisions of the act of 1884 to all sea-going vessels and all vessels used on lakes or rivers and all inland navigation, including canal-boats, barges and lighters which had been exempted by the above act of 1875.

The act of 1884 extended the provisions of the act of 1851 (which applied only to cases *ex delicto*) to liability against contractual obligations incurred on account of the ownership in the vessel; Hughes, Adm. 308. See The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; Gokey v. Fort, 44 Fed. 364.

These acts were held constitutional; Lord v. S. S. Co., 102 U. S. 541, 26 L. Ed. 224; Craig v. Ins. Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

Proceedings under U. S. R. S. § 4283 *et seq.*, are exclusive of any separate suit against an owner on account of the ship. Every person may assert his claim in those proceedings; The San Pedro, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221, where it was left undecided whether a highly meritorious salvage service is entitled to preference.

The benefits of the acts may be claimed by any part owner who had no "privity or knowledge" of the fault which gave rise to the liability; The S. A. McCaulley, 90 Fed.

302. This means the personal privity or knowledge of the owners, and not the mere privity or knowledge of their agents, except in the case of a corporation, where the privity or knowledge of the president or other high officer above the grade of an employee is the privity or knowledge of the corporation, and would defeat the right of the corporation to the exemption; In re Meyer, 74 Fed. 881; Kimball S. S. Co. v. Weisshaar, 194 U. S. 638, 24 Sup. Ct. 859, 48 L. Ed. 1162; Lord v. S. S. Co., 102 U. S. 541, 26 L. Ed. 224; The Colima, 82 Fed. 665; In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391.

The end of the voyage is the time as of which the exemption can be claimed, the voyage being taken as the unit. If the voyage is broken up by a disaster, as, for example, when the vessel is totally lost, that is taken as the time; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. The part owners are liable each to the extent of their proportionate interest in the vessel, except that a part owner personally negligent, cannot claim the exemption at all; Whitcomb v. Emerson, 50 Fed. 128. The value of the vessel and pending freight is taken just after the accident, or end of the voyage, if the voyage is not broken up by the accident; The Scotland, 105 U. S. 24, 26 L. Ed. 1001.

The owner must also surrender damages recovered from another vessel; O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140; 42 L. Ed. 469; as well as pending freight; The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; but salvage and insurance need not be surrendered; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; In re Meyer, 74 Fed. 881. Under the express provisions of the statute, all claims filed, whether they have an admiralty lien attached or are mere personal claims against the owner, are paid *pro rata*; The Catskill, 95 Fed. 700.

A claim for damages under a Delaware statute for death caused by tort extends to the case of a citizen of that state wrongfully killed while on the high seas in a vessel belonging to a Delaware corporation by the negligence of another vessel belonging to a Delaware corporation, and this can be enforced against the owner of one of the vessels in admiralty, brought by such owner to limit his liability; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.

In a proceeding to limit liability instituted by the owners of a foreign vessel lost on the high seas, the right to exemption must be determined by the law as administered in the courts of the United States; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973, where it was held that the fault of the officers and crew of that vessel resulting in the collision and loss of that vessel was not with the privity and knowledge of the owner, so as to deprive the owner of the right to limited liability under the act of 1851 (distinguishing The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381). It was held that the pending freight does not include the freight earned on the outward trip or any part of an annual subsidy contract from a foreign government for carrying the mails; also, that in determining whether claims for wrongful death are enforceable in limited liability proceedings, though based on a right of action given by the country to which the vessel belongs, the question of whether the vessel was in fault or the fund liable must be determined by the law of the United States.

The case of The Titanic, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. —, was held to fall within the general provision that a foreign ship may resort to the courts of the United States for limitation of liability; following The Scotland, 105 U. S. 24, 26 L. Ed. 1001. It was also held that the owner of such foreign vessel can maintain such proceedings where it appears that the law of the foreign country to which the vessel belongs makes provision for the vessel owner's liability upon terms and conditions different from those prescribed by the statutes of this country. This case settled only the jurisdictional question. In the same proceedings it will be open for claimants to prove that the fault was committed with the privity and knowledge of the owner.

In Ryan et al. v. Oceanic Steam & Navigation Co., 30 T. L. R. 302, a case brought under Lord Campbell's act for loss of life on the Titanic, a judgment based upon a verdict that her loss was due to negligent navigation, was sustained in the Court of Appeal in England.

Where, in a collision, both vessels belong to the same owner, and both are in fault, both must be surrendered; The San Rafael, 141 Fed. 270, 72 C. C. A. 388.

The Harter Act is an act limiting the liability of owners. This, however, regulates not so much the question of their liability in amount as the question whether they are responsible at all or not. For the text of that act and its application, see HARTER ACT.

See SAFETY AT SEA; TONNAGE; WIRELESS TELEGRAPHY; YACHT; CONVEYANCE OF VESSELS; SHIP; PART-OWNERS.

VEST. To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment. Fearne, Cont. Rem. 2.

VESTED ESTATE. A vested estate, whether present or future, may be absolutely or defeasibly vested. L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310.

VESTED INTEREST. See next title.

VESTED REMAINDER. An estate by which a present interest passes to the party,

though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. 2 Bouvier, Inst. n. 1831. It imports, *ex vi termini*, a present title in the remainderman; Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598. See REMAINDER; Tudor, L. Cas. R. P. 820.

VESTED RIGHT. It is interesting to note that in Pearsall v. R. Co., 161 U. S. 668, 16 Sup. Ct. 705, 40 L. Ed. 838, it was said in the opinion of the court by Brown, J.: "I have epitomized these cases (explaining the meaning of the words 'vested rights,' when used in the charters of railroads and other similar corporations) not because they have any decisive bearing upon the question at issue, but for the purpose of showing the general trend of opinion in this court on the subject of corporate charters and vested rights."

See RIGHT.

VESTIGIAL WORDS. Those contained in a statute which by reason of a succession of statutes on the same subject-matter, amending or modifying previous provisions of the same, are rendered useless or meaningless by such amendments. They should not be permitted to defeat the fair meaning of the statute; Saltonstall v. Birtwell, 164 U. S. 70, 17 Sup. Ct. 19, 41 L. Ed. 348.

VESTING ORDER. An order which may be granted by the chancery division of the high court of justice (and formerly by chancery) passing the legal estate in lieu of a conveyance.

VESTRY. The place in a church where the priest's vestments are kept. Also an assembly of the minister, church wardens, and parishioners, held in the vestry of the church. There was formerly no separate body known as a vestry, except in a few parishes, especially in the city of London, where there existed by custom a representative body called a "Select Vestry." White, Church Law 306.

In America, from an early date, a body elected by a church congregation to administer the affairs of the church. They were provided for in New York by the Duke of York's laws of 1664; and in Maryland by an act of 1692. They can act only when assembled; People's Bank v. Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408; United Brethren Church v. Vandusen, 37 Wis. 54; they may preserve order; Beckett v. Lawrence, 7 Abb. Prac. N. S. (N. Y.) 403.

VESTURE OF LAND. A phrase including all things, trees excepted, which grow upon the surface of the land and clothe it externally.

He who has the vesture of land has a right, generally, to exclude others from entering upon the superficies of the soil. Co. Litt. 4 *b*; Hamm. N. P. 151. See 7 East 200.

VETERA STATUTA (Lat.). The name of *vetera statuta*—ancient statutes—has been given to the statutes commencing with Magna Carta and ending with those of Edward II. Crabb, Eng. Law 222. See NOVA STATUTA.

VETERINARY SURGEON. One who treats domestic animals for injuries or diseases. The same rules are applicable to the case of a veterinary surgeon bringing an action to recover for the value of his services as are applicable to other surgeons; Boom v. Reed, 69 Hun 428, 23 N. Y. Supp. 421. He must possess and exercise a reasonable degree of learning and skill, and use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge; Boom v. Reed, 69 Hun 428, 23 N. Y. Supp. 421; Barney v. Pinkham, 29 Neb. 352, 45 N. W. 694, 26 Am. St. Rep. 389; Hathorn v. Richmond, 48 Vt. 557. See PHYSICIAN.

VETITUM NAMIUM (Law Lat. *vetitum*, forbidden, *namium*, taking). Where the bailiff of a lord distrains beasts or goods of another, and the lord forbids the bailiff to deliver them when the sheriff comes to make replevin, the owner of the cattle may demand satisfaction in *placitum de vetito namio*. Co. 2d Inst. 140; 2 Bla. Com. 148. See WITHERNAM; 2 Poll. & Maitl. 575.

VETO (Lat. I forbid). A term including the refusal of the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body, and the message which is usually sent to such body by the executive, stating such refusal and the reasons therefor. See EXECUTIVE POWER.

By the constitution of the United States (art. 1, § 7), the president has a power to prevent the enactment of any law, by refusing to sign the same after its passage, unless it be subsequently enacted by a vote of two-thirds of each house. When a bill is engrossed, and has received the sanction of both houses, it is transmitted to the president for his approbation. If he approves it, he signs it. If he does not, he sends it, with his objections, to the house in which it originated, and that house enters the objections on the journal and may proceed to reconsider the bill. If passed by that house by a two-thirds (yea and nay vote) it is sent, with the objections, to the other house: if it pass that house by a like vote, it becomes a law. If not returned by the president in ten days (Sundays excepted) it becomes a law, unless congress by adjournment prevents its return. Kent. Similar powers are possessed by the governors of many of the states. See STATUTE.

The veto power of the British sovereign has not been exercised for two centuries. It was exercised once during the reign of Queen Anne. 10 Edinburgh Rev. 411; Parks, Lect. 126. But anciently the king frequently replied, *Le roi s'avisera*, (the king will consider it), which was in effect withholding his assent. "The king must assent to, or (as it is inaccurately expressed) cannot veto, any bill passed by parliament." Dicey, Constit. 25. See Hearn, Govt. of England; Encycl. Br. *s. v. Veto.*

VEXATION. The injury or damage which is suffered in consequence of the tricks of another.

VEXATIOUS ACTIONS ACT. An act of parliament of 1896, authorizing the High Court to make an order, on the application of the attorney-general, that a person shown

to be habitually and vexatiously litigious, without reasonable ground, shall not institute legal proceedings in that or any other court, without leave of the High Court judge thereof, upon satisfactory proof that such legal proceedings are not an abuse of the process of the court and that there is a *prima facie* ground therefor. The order when made is published in the Gazette. See 76 L. T. 351; [1913] W. N. 274 (Div. Ct.).

VEXATIOUS SUIT. A suit which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant.

The *suit* is either a criminal prosecution, a conviction before a magistrate, or a civil action. The suit need not be altogether without foundation: if the part which is groundless has subjected the party to an inconvenience to which he would not have been exposed had the valid cause of complaint alone been insisted on, it is injurious; 4 Co. 14; Ray v. Law, 1 Pet. C. C. 210, Fed. Cas. No. 11,592; Sommer v. Wilt, 4 S. & R. (Pa.) 19, 23.

To make it vexatious the suit must have been instituted maliciously. See MALICIOUS PROSECUTION; FALSE IMPRISONMENT.

VEXED QUESTION. A question or point of law often discussed or agitated, but not determined or settled.

VI ET ARMIS (Lat.). With force and arms. See TRESPASS.

VIA (Lat.). A cart-way,—which also includes a foot-way and a horse-way. See WAY.

VIABILITY (from the French *vie*). Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence; a power not acquired as a rule before the sixth or seventh month of intra-uterine life.

That a child may be viable, it is not only necessary that its organs should be in a normal state, but also that all the physiological and pathological conditions which are capable of opposing the establishment or prolongation of its life should be absent.

Although a child may be born with every appearance of health, yet, from some malformation, it may not possess the physical power to maintain life. Under these circumstances, it can only be said to have existed temporarily or only so long indeed as was necessary to prove that it was not viable.

It is important to make a distinction between a viable and a non-viable child, although the latter may outlive the former. The viable child may die of some disease on the day of its birth, while a non-viable child may live a fortnight. The former possesses the organs essential to life, in their integrity; while the latter has some imperfection which prevents the complete establishment of life.

As it is no evidence of non-viability that a child dies within a few hours of its birth, neither is it a proof of viability if a child appears to be well and the function of respiration be fully established.

The question of viability presents itself to the medical jurist under two aspects: *first*, with respect to infanticide, and *second*, with respect to testamentary gifts and inheritances. Billard on Infants, translation by James Stewart, M. D., Appendix; Briand, *Méd. Lég. 1ère partie*, c. 6, art. 2. See 2 Savigny, *Dr. Rom.* Append. III., for a learned discussion of this subject; also 2 Taylor, Med. Jurispr.

VICARAGE. In Ecclesiastical Law. The living or benefice of a vicar: usually consisting of the small tithes. 1 Burn, Eccl. Law 75, 79.

VICARIUS APOSTOLICUS. An officer through whom the Pope exercises authority in parts remote, and who is sometimes sent with episcopal functions into provinces where there is no bishop resident or there has been a long vacancy in the see, or into infidel or heretical countries. 2 Phill. Int. L. 529.

VICE. A term used in the civil law and in Louisiana, by which is meant a defect in a thing; an imperfection. For example, epilepsy in a slave, roaring and crib-biting in a horse. Redhibitory vices are those for which the seller will be compelled to annul a sale and take back the thing sold. Pothier, *Vente* 203; La. Civ. Code, art. 2498.

VICE-ADMIRAL. The title of a naval officer next in rank after an admiral.

Under R. S. § 1362 it was provided that the grades of admiral and vice-admiral in the United States navy should not be filled and that when a vacancy occured the grades should cease to exist.

VICE-ADMIRAL OF THE COAST. A county officer in England appointed by the admiral "to be answerable to the high admiral for all the coasts of the sea, when need and occasion shall be." He also had power to arrest ships, when found within a certain district, for the use of the king. His office was judicial as well as ministerial. The appointment to the office is still made for a few countries of England. For a detailed account of this office and its functions, see "The Office of Vice-Admiral of the Coast," by Sir G. Sherston Baker.

VICE-CHANCELLOR. A judge, assistant to the chancellor.

He held a separate court, and his decrees were subject to be reviewed by the chancellor. He was first appointed 53 Geo. III. In 1841 two additional vice-chancellors were appointed; and there were then three vice-chancellors' courts. 3 Sharsw. Bla. Com. 54, n. There is a vice-chancellor of the county palatine of Lancaster; 3 Steph. Com. 331. By the Judicature Act of 1873, the vice-chancellors were transferred to the high court of justice and appointed judges of the chancery division, and on their death or retirement their successors were styled judges of her majesty's high court of justice Sir L. Shadwell was the last of the vice-chancellors. The office exists in New Jersey. See CHANCELLOR; CHANCELLOR'S COURTS IN THE TWO UNIVERSITIES.

VICE-CONSUL. An officer who performs the duties of a consul within a part of the district of a consul, or who acts in the place of a consul. He is not a deputy, but an acting consul; In re Herris, 33 Fed. 165. The president (R. S. §§ 1695, 1703) can appoint vice-consuls and fix their compensation; U. S. v. Eaton, 169 U. S. 331, 18 Sup. Ct. 374, 42 L. Ed. 767.

See CONSUL.

VICE-PRESIDENT OF THE UNITED STATES. The title of the second officer, in point of rank, in the government of the United States.

As to his election, see PRESIDENT OF THE UNITED STATES. His office in point of duration is coextensive with that of the president. The constitution of the United States, art. i. s. 3, clause 4, directs that "the vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided." And by article 2, s. 1, clause 6, it is provided that "in case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

When the vice-president exercises the office of president, he is called the President of the United States.

VICE-PRINCIPAL. See MASTER AND SERVANT.

VICE VERSA (Lat.). On the contrary; on opposite sides.

VICECOMES. The sheriff.

VICECOMES NON MISIT BREVE (Lat. the sheriff did not send the writ). An entry made on the record when nothing has been done by virtue of a writ which has been directed to the sheriff.

VICINAGE. The neighborhood; the venue. See Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831; JURY.

VICINETUM (Lat.). The neighborhood; vicinage; the venue. Co. Litt. 158 *b*. See VISNE.

VICINITY. Etymologically, by common understanding, it admits of a wider latitude than proximity or contiguity, and may embrace a more extended space than that lying contiguous to the place in question; and, as applied to towns and other territorial divisions, may embrace those not adjacent; Haley v. Ins. Co., 12 Gray (Mass.) 545; Langley v. Barnstead, 63 N. H. 246. In a statute authorizing the extension of the street and an appointment of benefits upon lots in the vicinity the term is a relative one and does not denote any particular definite distance from the extension of the street but must be construed according to the circumstances of each case; Hancock St. Extension, 18 Pa. 26. The meaning of vicinity of a city must depend upon the size of the city, etc., and its particular surroundings; Timmerman v. Dever, 52 Mich. 36, 17 N. W. 230, 50 Am. Rep. 240. See NEIGHBORHOOD.

VICONTIEL. Belonging to the sheriff.

VIDELICET. A Latin adverb, signifying to wit, that is to say, namely; *scilicet*. This word is usually abbreviated *viz*.

The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is not required to prove them; Steph. Pl. 309; Gleason v. McVickar, 7 Cow. (N. Y.) 42; Dicken v. Smith, 1 Litt. (Ky.) 209. See Yelv. 94; 3 Saund. 291 *a*; 4 B. & P. 465; Brown v. Berry, 47 Ill. 175. See SS.; SCILICET.

VIDUITY. Widowhood.

VIEW. Inspection; a prospect.

See ANCIENT LIGHTS; NUISANCE; VIEWERS; 16 Am. L. Rev. 628; Wakefield v. R. R., 63 Me. 385.

VIEW, DEMAND OF. In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view* of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues. Com. Dig. *View*; 2 Saund. 45 *b*.

This right, however, is confined to real or mixed actions; for in personal actions the view does not lie. In the action of dower *unde nihil habet*, it has been much questioned whether the view be demandable or not; 2 Saund. 44, n. 4; and there are other real and mixed actions in which it is not allowed. The view being granted, the course of proceeding was to issue a writ commanding the sheriff to cause the defendant to have a view of the land. The duty of suing out the writ lies upon the demandant; and when the sheriff causes view to be made, the demandant is to show to the tenant in all ways possible, the thing in demand, with its metes and bounds. On the return of the writ into court, the demandant must count *de novo*—that is, declare again; Com. Dig. *Pleader* (2 Y 3); and the pleadings proceed to issue. This proceeding of demanding view is, in the present rarity of real actions, unknown in practice. It is said in Union P. R. Co. v. Botsford, 141 U. S. 251, 11 Sup. Ct. 1000, 35 L. Ed. 734, that there are only two cases in the books (1 Arn. 214; 8 Dowl. Pr. C. 201) where orders to inspect a building were requested. Both were refused.

The right to grant an application for the jury to view the premises during the trial of a case rests in the discretion of the trial judge; Andrews v. Youmans, 82 Wis. 81, 52 N. W. 23; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. Rep. 320; Jenkins v. R. Co., 110 N. C. 438, 15 S. E. 193; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367. Where the facts are such that they can be accurately described to the jury the court may properly deny a request to view the premises; Ohio & M. R. Co. v. Wrape, 4 Ind. App. 100, 30 N. E. 428; Roberts v. Com., 94 Ky. 499, 22 S. W. 845; Mise v. Com. (Ky.) 80 S. W. 457, where a careful survey had been made and the place was 15 miles distant over mountain roads; also where a motion is made to have the jury view the scene of an accident several years after it happened, and where the condition of the premises had changed in the meanwhile; Stewart v. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539.

In an action of nuisance against a fertilizer company, it was held that an inspection of the premises was discretionary; Jones v. Royster Guano Co., 6 Ga. App. 506, 65 S. E. 361. A request for a view of the place of an accident should not be made before the jury; Hearn v. R. Co., 1 Boyce (Del.) 271, 76 Atl. 629. The trial judge may accompany the jury to the place of view; Lee v. R. Co., 84 S. C. 125, 65 S. E. 1031.

It is error to tell the jury that the verdict may be based on what they saw, and not on the evidence; Payson v. Milan, 144 Ill. App. 204; Keller v. Harrison, 151 Ia. 320, 128 N.

W. 851, 131 N. W. 53, Ann. Cas. 1913A, 300; but it is held that what they saw may be applied in determining the credibility of the testimony; American States Security Co. v. Ry. Co., 139 Wis. 199, 120 N. W. 844.

The practice of directing a view should be exercised with caution, and a view not allowed unless the jury cannot otherwise reach a just conclusion. Refusal to view the locality of a fire is proper; Illinois Cent. R. Co. v. Frost (Ky.) 124 S. W. 821.

In a controversy over the price of a cow, it was error to permit an inspection of the cow, if she were not shown to be in the same condition as at the sale; Mitchell v. Rowley, 63 Misc. 643, 118 N. Y. Supp. 751; but it was held a proper exercise of discretion in an action for deceit in selling a mule, to permit the jury to see the mule; Sulser v. Sayre, 4 Ala. App. 452, 58 South. 758; and in an action for death by wrongful act, the widow's expectancy of life may be reckoned by the jury upon a personal inspection of her, in the absence of other proof; Helena Gas Co. v. Rogers, 104 Ark. 59, 147 S. W. 473.

A view is not a right of the accused; State v. Hancock, 148 Mo. 488, 50 S. W. 112. The jury may not measure distances at the place in order to verify the evidence; State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633; a denial of a request for a view, made after the jury had retired, and with notice to the district attorney, was proper; State v. Sirmay, 40 Utah, 525, 122 Pac. 748 (where there was a statute).

In Pennsylvania (act of 1895), in proceedings under eminent domain, either party may require a view of the premises.

Where, on a trial for murder, the jury viewed the *locus* of the crime, but the accused, at his special request, did not accompany them, the court held that the view was not a part of the trial, and a conviction was affirmed; People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 (on the ground that the view was not part of the trial). Authority and reason are said to be the other way; 12 Harv. L. Rev. 212, citing People v. Palmer, 43 Hun 401; People v. Bush, 68 Cal. 623, 10 Pac. 169.

See PHYSICAL EXAMINATION; JURY.

VIEW OF FRANKPLEDGE. An examination to see if every freeman within the district had taken the oath of allegiance, and found nine freemen pledges for his peaceable demeanor. 1 Reeve, Hist. Eng. Law 7. It took place originally, once in each year, after Michaelmas, and subsequently twice, after Easter and Michaelmas, at the sheriff's tourn or court-leet at that season held. See COURT-LEET; SHERIFF'S TOURN.

VIEWERS. Persons appointed by the courts to see and examine certain matters and make a report of the facts, together with their opinion, to the court. In practice, they are usually appointed to lay out roads, and the like.

VIFGAGE. See VADIUM VIVUM.

VIGILANCE. Proper attention in proper time.

The law requires a man who has a claim to enforce it in proper time, while the adverse party has it in his power to defend himself; and if by his neglect to do so he cannot afterwards establish such claim, the maxim *vigilantibus non dormientibus leges subveniunt* acquires full force in such case. See LACHES.

VILL. In England this word was used to signify the parts into which a hundred or wapentake was divided. Fortescue, *de Laud.* c. 24. See Co. Litt. 115 *b*. It also signified a town or city. Barrington, Stat. 133.

The proper English word for the village community, and the only one for which there is ancient authority, is "township," afterwards latinized as "vill." Pollock, English Manor, in Oxford Lectures 124. See VILLAGE; TOWNSHIP.

VILLAGE. Any small assemblage of houses for dwellings or business, or both, in the country, whether they are situated upon regularly laid out streets and alleys, or not. Toledo, W. & W. R. Co. v. Spangler, 71 Ill. 569. See Russell v. Ins. Co., 80 Mich. 410, 45 N. W. 356, 35 L. R. A. 396, n.

The fabric of the village community, or, to speak more generally and correctly, of the township community, is substantially organic. It grows, and is not based on agreement, people cannot accede to it or recede from it without being admitted, by some natural process, birth, marriage, adoption, to the union of the holdings, and, theoretically, it is the holdings in their unconscious and unwilling combination which form the group and define its aims. External forces—the action of the king, the intrusion of foreign conquerors, the misdeeds of a magnate may cut through this customary combination and modify it; it may grow and send out offshoots, but all these facts will not be the results of any artificial agreement binding only those who have entered in under certain conditions: the reclaiming of new fields, the extension of the original unit and its shrinking through colonization are events which proceed from the organic whole or from outward pressure and not from passing agreements of certain joint owners. Vinogradoff, Growth of the Manor 325.

See HAMLET; TOWN; TOWNSHIP; VILL.

VILLAIN. An epithet used to cast contempt and contumely on the person to whom it is applied. To call a man a villain in a letter written to a third person will entitle him to an action without proof of special damages. 1 B. & P. 331.

VILLANUS. See VILLEIN.

VILLEIN. The villeins are a composite class. They are made up of those slaves which were known to the Anglo-Saxon law

and of those free yet dependent cultivators of the soil whose tenure was defined by the Norman lawyers to be unfree. These diverse classes were thrown together by the Norman and Angevin lawyers and classed as villeins; and under the influence of conceptions borrowed from Roman law many of the rules and maxims of the Roman conception of slavery were applied to them. Their lord has absolute power over their bodies and their goods. He can sell them and treat them as he pleases; for they are his chattels. They are all equally things—"there are no degrees of personal unfreedom." Subsequently the general theory of the law was modified in every direction, and the status of the villein became one of the greatest curiosities of the mediæval common law.

The villein held a plot of land and made a living out of it; while the lord might change his tenement, it appears that sales of villeins were infrequent. There came to be a great gulf between the villein and the slave. While the lord might imprison and beat his villein, the criminal law protected him against grosser forms of violence. While he was, as against his lord, rightless, or nearly so, as against the rest of the world he was regarded as free. It was purely a relation of a person to his lord. It came to be a very relative kind of prædial serfdom, tempered by custom of the manor and by communal life. In the last phase, the chief profit to be made from villeins is from manumissions. At the end of the sixteenth century, both villein tenure and villein status were obsolete. 3 Holdsw. Hist. E. L. 376–395. See also A. M. Eaton in 1902 Rept. Am. Bar Assoc. 299.

See SERF.

VILLEIN SOCAGE (Sax. *soc*, free, or Lat. *soca*, a plough). The villeins, from living on one piece of land, came at last to be allowed to hold it by tenure of *villeinage*, *e. g.* uncertain menial services. These services at last became fixed; the tenure was then called *villein socage*. 1 Washb. R. P. 26.

VILLEINAGE. See VILLEIN.

VILLENOUS JUDGMENT. In Old English Law. A judgment given by the common law in attaint, or in cases of conspiracy. Its effects were to make the object of it lose his *liberam legem* and become infamous. He forfeited his goods and chattels, and his lands during life; and this barbarous judgment further required that his lands should be wasted, his houses razed, his trees rooted up, and that his body should be cast into prison. He could not be a juror or witness. 4 Bla. Com. 136.

VINCULO MATRIMONII. See A VINCULO MATRIMONII; DIVORCE.

VINCULUM JURIS. In Civil Law. The tying of two persons together in an obligation. It is implied in the old contract of *nexum*. Hunter, Rom. L. 453.

VINDICATIO REI. See CONVICTIO.

VINDICTIVE DAMAGES. See DAMAGES; EXEMPLARY DAMAGES.

VINTNER. One who sells wine. A covenant prohibiting the trade of a vintner includes a person selling wines not to be drunk on the premises. 25 L. T. N. S. 312.

VIOLATION. The result of an act done unlawfully and with force. In the English statute of 25 Edw. III. st. 5, c. 2, it is declared to be high treason in any person who shall violate the king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bacon, Abr. *Treason* (E).

VIOLENCE. The abuse of force. That force which is employed against common right, against the laws, and against public liberty. Merl. *Répert.*

Violence is synonymous with physical force, and the two are used interchangeably, in relation to assaults, by elementary writers on criminal law. State v. Wells, 31 Conn. 212. See ASSAULT; ROBBERY.

VIOLENT. Not natural or spontaneous, not intentional, voluntary, expected or usual. Bacon v. Acc. Ass'n, 44 Hun 606.

VIOLENTLY. In Pleading. This word was formerly supposed to be necessary in an indictment, in order to charge a robbery from the person; but it has been holden unnecessary; 1 Chitty, Crim. Law *244. The words "feloniously and against the will," usually introduced in such indictments, seem to be sufficient. It is usual, also, to aver a *putting in fear;* though this does not seem to be requisite.

VIRGA. An obsolete word, which signifies a rod or staff, such as sheriffs, bailiffs, and constables carry as a badge or ensign of their office. More commonly, spelled verge, *q. v.* Hence *verger*, one who carried a white wand before the judges. Toml. A verger now commonly signifies an inferior officer in a cathedral or parish church. Moz. & W.

The stick or wand with which persons are in England admitted as tenants.

VIRGATA. A quarter of an acre of land. It might also be used to express a quarter of a hide of land.

Acres did not always contain the same quantity of land. The acre was usually, but not always, estimated by a day's work, as a man might in a day plow a strip that is four rods wide and forty long. But the rods employed in two neighboring villages were not strictly, or even approximately, equal. When an acre was divided, it was always by a line that was parallel, not to its short ends, but to its long sides, for convenience in plowing, and so when men thought of dividing it, they spoke only of its breadth. Hence it follows that the quarter of an acre is a "rood" or "yard," or *virga* or *virgata* of

land. Its width is a rod or land-yard. The typical tenement is a hide. If a man is given a quarter of a hide (an equitable quarter, equal in value as well as in extent to every remaining quarter), he is given a quarter of every acre in the hide. The virgate is not a primary unit like the hide, the rod or the acre. It is derivative; it is compound. In its origin it is a rod's breadth in every acre of a hide. Maitl. Domesday Book 384.

The hide was divided into virgates and acres. Each acre generally consisted of four rods or furrows lying side by side. Hence the *virga* or rod meant the quarter of an acre. But by reckoning in hides and not in acres, "virgate," which means one-fourth of an acre, is used to signify one-fourth of a hide, i. e., a holding of about thirty acres in the common fields. 2 Holdsw. Hist. E. L. 56.

VIRGINIA. One of the thirteen original United States.

The name was given to the colony in honor of Queen Elizabeth. In 1606, James I. granted letters patent for planting colonies in Virginia. The government prescribed was that each should have a council, consisting of thirteen persons, appointed by the king, to govern and order all matters according to laws and instructions given them by the king. There was also a council in England, of thirteen persons, appointed by the crown to have the supervising, managing, and direction of all matters that should concern the government of the colonies. This charter was followed by royal instructions dated the 20th November, 1606. See 1 Hening, Va. Stat. 76, 571. Under this charter a settlement was made at Jamestown in 1607, by the first colony. Upon the petition of the company, a new charter was granted by king James, on the 23d May, 1609, to the treasurer and company of the first (or southern) colony for the further enlargement and explanation of the privileges of that company. 1 Hening, Stat. 80.

This charter granted to the company in absolute property the lands extending from Cape or Point Comfort (at the mouth of James River) along the sea-coast two hundred miles to the northward, and from the same point along the sea-coast two hundred miles to the southward, and up into the land throughout, from sea to sea, west and northwest, and, also, all islands lying within one hundred miles of the coast of both seas of the precinct aforesaid. A new council in England was established, with power to the company to fill all vacancies therein by election.

On the 12th of March, $16^{11}/_{12}$, king James granted a third charter to the first company, enlarging its domain so as to include all islands within three hundred leagues from its borders on the coast of either sea. In 1612, a considerable proportion of lands previously held and cultivated in common was divided into three-acre lots and a lot appropriated in absolute right to each individual. Not long afterwards, fifty acres were surveyed and delivered to each of the colonists. In 1618, by a change of the constitution of the colony, burgesses elected by the people were made a branch of the legislature. Up to this time the settlement had been gradually increasing in number, and in 1624, upon a writ of *quo warranto*, a judgment was obtained dissolving the company and revesting its power in the crown. In 1651 the plantation of Virginia came, by formal act, under the obedience and government of the commonwealth of England, the colony, however, still retaining its former constitution. A new charter was to be granted, and many important privileges were secured. In 1680 a change was made in the colonial government, divesting the burgesses of the exercise of judicial power in the last resort, as had before that time been practised by that body and allowing appeals from judgments of the general courts, composed of the governor and council, to the king in council, where the matter in controversy exceeded the value of £300 sterling. Marshall, Col. 163; 1 Campb. 337.

By the treaty of 1763, all the conquests made by the French in North America, including the territory east of the Mississippi, were ceded to Great Britain.

The constitution of the colonial government of Virginia seems never to have been precisely fixed and accurately adjusted in any written memorials that are now accessible. The powers exercised by the burgesses varied at different periods. The periods of their election and the length of time they continued in office it is difficult to ascertain from the records of colonial history, and the qualifications of voters to elect them varied much at different periods. See Rev. Code 38, Leigh's note; 2 Burk, App. 1. On the 12th of June, 1776, a declaration of rights pertaining to the people, as a basis and foundation of government, was adopted by the convention. This declaration still remains a part of the Virginia Code. On the 29th of June, 1776, Virginia adopted a constitution by a unanimous vote of the convention. The Articles of Confederation were not finally adopted by congress until the 15th of November, 1777, and were adopted, subject to the ratification of the states. These articles were laid before the Virginia Assembly on the 9th of December, 1777, and on the 15th unanimously assented to. In compliance with the recommendation of congress, by a resolution of September 6, 1780, Virginia, by an act passed the 2d of January, 1781, proffered a cession of her western lands. The cession was finally completed and accepted in 1784. Virginia as early as 1785 prepared to erect Kentucky into a state, and this was finally effected in June, 1792.

The state constitution framed and adopted by Virginia in 1776 gave way to a second that was framed in convention, adopted by the people, and went into operation in 1830. This second constitution was superseded by a third, which was framed in convention of 1851, and, being adopted by the people, took effect in 1852.

A convention assembled at Alexandria February 13, 1864, composed of delegates from such portions of Virginia as were then within the lines of the Union army and had not been included in the recently formed state of West Virginia. This convention adopted a constitution April 11, 1864, but it was not submitted to the people for ratification. A constitution of the state was framed by a convention called under the reconstruction act of congress which met at Richmond and completed its labors in 1868. Under the authority of an act of congress approved April 10, 1869, the instrument was submitted to the vote of the people and adopted. The present constitution was adopted in 1902.

As to litigation between Virginia and West Virginia, see WEST VIRGINIA.

VIRILIA (Lat.). The privy members of a man, to cut off which was felony at common law, though the party consented to it. Bract. lib. 3, p. 144.

VIRTUTE OFFICII (Lat.). By virtue of his office.

VIS (Lat. force). Any kind of force, violence, or disturbance relating to a man's person or his property.

A person does anything by force (*vis*) when he does what he is forbidden to do by the owner. Hunter, Rom. L. 252.

VIS IMPRESSA (Lat.). Immediate force; original force. This phrase is applied to cases of trespass when a question arises whether an injury has been caused by a direct force or one which is indirect. When the original force, or *vis impressa*, had ceased to act before the injury commenced, then there is no force, the effect is mediate, and the proper remedy is trespass on the case.

When the injury is immediate consequence of the force, or *vis proxima*, trespass *vi et armis* lies; 3 Bouvier, Inst. n. 3483.

VIS MAJOR (Lat.). A superior force. In law it signifies inevitable accident.

This term is used in the civil law in nearly the same way that the words *act of God* (*q. v.*) are used in the common law, but for some purposes it is a wider phrase; 1 C. P. Div. 429. Generally, no one is responsible for an accident which arises from the *vis major;* but a man may be so where he has stipulated that he would, and when he has been guilty of a fraud or deceit; 2 Kent 448.

A loss by *vis major* is one that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. The George Shiras, 61 Fed. 300, 9 C. C. A. 511, 17 U. S. App. 528. See ACT OF GOD; PERIL OF THE SEA.

VISA. **In Civil Law.** The formula put upon an act, a register, a commercial book, in order to approve of it and authenticate it.

VISCOUNT (Lat. *vice-comes*). Used as an arbitrary title of honor, without any office pertaining to it, by Henry VI. for the first time. The sheriff or earl's deputy holds the office of *vice-comes*, of which viscount is a translation, but used, as we have just seen, in a different sense. The dignity of a viscount is next to and below that of an earl. 1 Bla. Com. 397.

VISÉ (Fr.). Countersigned; accepted; approved; *e. g.* in connection with a passport, and the approval or acceptance by an official of the nation in which it is being used.

VISIGOTHORUM, LEX ROMANA. See BREVIARIUM ALARICIANUM. The Code is being translated and published under the auspices of the Comparative Law Bureau of the American Bar Association.

VISINETUM. See VISNE.

VISIT, RIGHT OF. **In International Law.** The right of a public vessel to stop and board a private vessel on the high seas for the purpose of inspecting its papers and determining its character. The right of visit is determined by the right of search which accompanies it. See SEARCH, RIGHT OF.

VISITATION. The act of examining into the affairs of a corporation.

The power of visitation is applicable only to ecclesiastical and eleemosynary corporations. 1 Bla. Com. 480. The visitation of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent 240. In the United States, the legislature is the visitor of all corporations founded by it for public purposes; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

All of the above was quoted in Guthrie v. Harkness, 199 U. S. 148, 157, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433.

See ELEEMOSYNARY CORPORATION.

All eleemosynary corporations who are to receive the charity of the founder have visitors if they are ecclesiastical corporations; and if a particular visitor is not provided by the founder, then the Ordinary of the place is the visitor; if they are lay corporations, the founder and his heirs are perpetual visitors; 5 Mod. 404. It is a necessary incident of an eleemosynary corporation; 1 Mod. 82; "a power to correct abuses and to enforce due observance of the statutes of the charity, but not a power to revoke the gifts, to change uses or divest rights;" Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229, per Story, J.

A visitor has the right of inspecting the affairs of the corporation, and superintending all officers who have charge of them according to the statutes of the founder, without any control or revision of any other person or body, except the judicial tribunals, by whose authority and jurisdiction he may be restrained and kept within the limits of the granted powers, and made to regard the general laws of the land; In re Murdock, 24 Mass. 303. No appeal lay from a visitor unless he visits *qua* Ordinary, when an appeal lay to the Crown in Chancery. It was said by Lord Camden that visitation is despotism uncontrolled and without appeal; Grant, Corp. 534. See, generally, Tudor, Charitable Trusts; Stephens, Statutes Relating to Ecclesiastical, etc., Institutions; Report of Oxford Commission (1852); 7 Com. Dig. 545; 21 Viner, Abr. 587. See 34 L. Mag. & Rev. 40, as to Oxford and Cambridge Universities.

In Massachusetts it is held that the visitation of eleemosynary corporations according to the common law is in force except as altered by statute; In re Murdock, 24 Mass. 303; such statutes may vest visitatorial power in the courts, in the absence of a personal visitor, or even where there is one; In re Taylor Orphan Asylum, 36 Wis. 534; but where visitatorial power is conferred on certain public officers, the courts may not interfere unless such visitors should act contrary to law; Nelson v. Cushing, 2 Cush. (56 Mass.) 519.

Even where a testator, in founding a hospital, directed that the trustees should annually report their acts to the court and give bonds, it was held that the court had no visitatorial power or other supervision; Jenkins v. Berry, 119 Ky. 350, 83 S. W. 594.

The visitatorial power of a court over a cemetery association does not authorize it to substitute its own business judgment for that of the association; Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769.

Under the visitatorial powers of a state over corporations doing business within its borders, it is competent for it to compel such corporations to produce their books and papers for investigation and to require the testimony of their officers and employees to ascertain whether its laws have been complied with, and this power extends to the production of books and papers kept outside of the state, and a statute requiring such production does not amount to an unreasonable search or seizure or a denial of due process

of law; Consolidated R. Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; Hammond P. Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645. A corporation, being the creature of the state, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the state, and an officer of a corporation charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. A corporation is bound to furnish information when called for by the state, so far as reasonably possible, and state the facts which excuse them from answering more fully; State v. Express Co., 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667, 83 Am. St. Rep. 366; by statute the right exists in Kansas; see Western U. Tel. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

It may be considered that, to a certain extent, railroad commissions are the machinery created by law for the exercise of visitatorial power.

This power does not include the common law right of the shareholder to inspect the books of the corporation; Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433.

VISITATION BOOKS. Compilations made out or collected by the heralds in the circuits which their commissions authorized them to make, for the purpose of inquiring into the state of families and registering marriages and descents which were verified to them by oath. They are good evidence of pedigree. 3 Bla. Com. 105.

VISITOR. An inspector of the government, of corporations, or bodies politic. 1 Bla. Com. 482.

VISNE, VISINETUM. The neighborhood; a neighboring place; a place near at hand; the venue.

The district from which juries were drawn at common law. Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831.

Formerly the visne was confined to the immediate neighborhood where the cause of action arose, and many verdicts were disturbed because the visne was too large, which becoming a great grievance, several statutes were passed to remedy the evil. The 21 James I. c. 13, gives aid after verdict, where the visne is partly wrong,—that is, where it is warded out of too many or too few places in the county named. The 16 & 17 Charles II. c. 8, goes further, and cures defects of the visne wholly, so that the cause is tried by a jury of the proper county. See VENUE.

VITAL STATISTICS. Public records kept by a state, city or other governmental subdivision, under a statutory provision, of births, marriages and deaths, and disease.

Certificates required by statute to be made by officers may, as a rule, be introduced in evidence; Marlow v. School Dist. No. 4, 29 Okl. 304, 116 Pac. 797. Duly authenticated copies of official registers of births &c., are admissible in evidence; Succession of Derigny, 128 La. 853, 55 South. 552; to show the cause of death; Healy v. Hoy, 115 Minn. 321, 132 N. W. 208; National Council of K. & L. of Security v. O'Brien, 112 Ill. App. 40, McKinstry v. Collins, 74 Vt. 147, 52 Atl. 438; so of a physician's certificate, filed in the health commissioner's office according to law and properly authenticated; Ohmeyer v. Woodmen Circle, 91 Mo. App. 189; *contra*, Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb. 39, 89 N. W. 448; and of an unsigned and undated death certificate, not certified to be a part of the records of the office; Lucas v. Cattle Co., 186 Mo. 448, 85 S. W. 359. See WEATHER BUREAU.

An act requiring physicians and midwives to investigate and certify whether the birth was or was not legitimate, the name, residence, color or race, birthplace, age and occupation of the parents, the number of children the mother has borne, her maiden name, etc., for use in the bureau of vital statistics, and which provides no compensation for the collection of such information, is unconstitutional; State v. Boone, 84 Ohio St. 346, 95 N. E. 924, 39 L. R. A. (N. S.) 1015, Ann. Cas. 1912C, 883; *contra*, Com. v. McConnell, 116 Ky. 358, 76 S. W. 41.

The Census Act of 1902 provides for collecting data of vital statistics.

VIVA VOCE (Lat. with living voice). Verbally. It is said a witness delivers his evidence *viva voce* when he does so in open court: the term is opposed to deposition. It is sometimes opposed to ballot: as, the people vote by ballot, but their representatives in the legislature vote *viva voce*.

VIVARY. A place where *living* things are kept: as, a park on land; or, in the water, as a pond.

VIVISECTION. It is permitted in England only upon license from the Home Office, and in some cases the place must be registered. The experiments must be performed with the object of advancing knowledge, which will be useful for saving or prolonging life, or for alleviating suffering, and not for the purpose of attaining manual skill, nor as illustrations to accompany lectures, unless it is certified that the illustrations are absolutely necessary for due instruction. The animal must, during the whole of the experiment, be under the influence of some anæsthetic, sufficiently strong to prevent it from feeling pain. In some cases the animal must be killed before recovering consciousness.

In Massachusetts, by the act of March 22, 1894, vivisection in the public schools is prohibited, and dissection is confined to certain classes, under penalty of a fine.

In a case against a physician for violating the act against cruelty to animals in vivisecting dogs by way of experimental research,

the trial judge charged that the law of Pennsylvania does not allow any one to inflict suffering on a dog for the purpose of obtaining scientific information; see 71 Leg. Int. Phila. 508.

VIVUM VADIUM. See VADIUM VIVUM.

VOCATIO IN JUS (Lat.). **In Roman Law.** According to the practice in the *legis actiones* of the Roman law, a person having a demand against another verbally cited him to go with him to the prætor: *in jus eamus; in jus te voco.* This was denominated *vocatio in jus.* If a person thus summoned refused to go, he could be compelled by force to do so, unless he found a *vindex*,—that is, *procurator*, or a person to undertake his cause. When the parties appeared before the prætor, they went through the particular formalities required by the action applicable to the cause. If the cause was not ended the same day, the parties promised to appear again at another day, which was called *vadimonium.*

VOCIFEROUS. In a statute forbidding the use of loud and vociferous language, making a loud outcry; clamorous; noisy. Webst.; Anderson v. State (Tex.) 20 S. W. 359.

VOID. That which has no force or effect. This word is often used as in effect meaning "voidable" only; Bennett v. Mattingly, 110 Ind. 202, 10 N. E. 299, 11 N. E. 792; and is seldom, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in a legal sense, subject to a large qualification in view of all the circumstances calling for its application and the rights and interest to be affected in a given case; Brown v. Brown, 50 N. H. 552. See Kearney v. Vaughan, 50 Mo. 287.

The term "void" can only accurately be applied to those contracts that have no effect whatsoever and which are mere nullities, such as those which are against law, illegal, criminal, or in contravention of law and incapable of confirmation or ratification; hence a married woman's deed defectively acknowledged is not void; Downs v. Blount, 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until confirmed; Toy Toy v. Hopkins, 212 U. S. 542, 29 Sup. Ct. 416, 53 L. Ed. 644.

In formal instruments it has been held to mean voidable; 4 B. & Ald. 401; 4 Bing. N. C. 395; and in contracts of infants; 14 Ir. C. L. 61.

When a condition of forfeiture in a contract of sale of real estate, declaring it to be null and void in case of failure on the part of the vendee to perform, is plainly for the benefit of the vendor, void means voidable, with an election in the vendor to waive or to insist upon the condition; Stewart v. Griffith, 217 U. S. 323, 30 Sup. Ct. 528, 54 L. Ed. 782, 19 Ann. Cas. 639.

The distinction between void and voidable transactions is a fundamental one, though it is often obscured by carelessness of language. An act or agreement void from the beginning has no legal effect at all except so far as any party to it incurs penal consequences. A voidable act on the contrary takes its full and proper legal effect unless, and until it is disputed, and set aside by some tribunal entitled so to do; Pollock, Contr. 9. A voidable contract has been defined to be such an agreement as that one of the parties is entitled at his option to treat as never having been binding on him; *id.* 9. As applied to contracts, the distinction between the terms void and voidable is often one of great practical importance, and wherever technical accuracy is required, the term void can only be properly applied to such contracts as are a mere nullity and incapable of ratification or confirmation; Allis v. Billings, 6 Metc. (Mass.) 417, 39 Am. Dec. 744. Agreements to hinder, delay, and defraud creditors are not void but merely voidable against the creditors, while valid between the parties; Pom. Contr. § 282.

The distinction between contracts which are illegal and those which are void has never been precisely worked out, but where a contract is merely void, its defect in this respect cannot affect collateral transactions otherwise in themselves valid, while an unlawful purpose taints collateral and innocent transactions; 7 L. Quart. Rev. 339. The general rule of law is that a contract made in violation of a statute is void; Miller v. Ammon, 145 U. S. 426, 12 Sup. Ct. 884, 36 L. Ed. 759, and cases cited; Lingle v. Snyder, 160 Fed. 627, 87 C. C. A. 529. Contracts which are void at common law, because they are against public policy, like contracts prohibited by statute, are illegal as well as void; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. See ULTRA VIRES.

Among the contracts made illegal by statute are: those relating to usury; Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283; gaming contracts (see GAMING); wager contracts (see WAGER); those which tend to promote champerty and maintenance (*q. v.*), or those compounding felonies or suppressing public prosecution of criminals; 3 P. Wms. 276; those in restraint of trade (*q. v.*); Mobile & O. R. Co. v. Cable Co., 76 Miss. 731, 26 South. 370, 45 L. R. A. 223.

A contract binding the maker to do something opposed to the public policy of the state or nation, or which conflicts with the wants, interest, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void, however solemnly the same may be

made; Greenh. Pub. Pol. Rule II., citing Jones v. Knowles, 30 Me. 402; and see Standard Lumber Co. v. Ice Co., 146 Fed. 359, 76 C. C. A. 639, 7 L. R. A. (N. S.) 467; and though made in another country where its validity is undoubted; L. R. 14 Ch. D. 351; Logan & Bryan v. Cable Co., 157 Fed. 570 (see LEX LOCI). The assignor of a contract has no better rights therein than the party to it, even if he had no notice of its illegality; Stevens v. Wood, 127 Mass. 123.

Among those contrary to public policy and illegal at common law are contracts in restraint of marriage or of trade, or of bidding at public auctions, or relating to marriage brokerage, to hinder legislation, whether public or private (see LOBBYING), or to promote the appointment of a party to an office, to influence public elections to office, or to remunerate officers in addition to their lawful fees for acts which they are bound to do by virtue of their office or to assign fees and profits of official positions requiring personal supervision (see OFFICER); or any contract involving the sale of personal influence; Oscanyan v. Arms Co., 103 U. S. 276, 26 L. Ed. 539; Findlay v. Pertz, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; or to defraud the government; Fisher Electric Co. v. Iron Works, 116 Mich. 293, 74 N. W. 493; a contract between two contractors submitting separate bids for municipal work by which they agree to share the profits therefrom, should either of their bids be accepted; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117 (the parties were held to have committed a fraud in combining their interests and concealing the fact); a contract by which one public officer contracts to perform the duties of another; Moore v. Cassily, 16 Ohio Cir. Ct. 708; a contract for services in securing contracts by favoritism from state officers by reason of social and political relations with such officers; Drake v. Lauer, 182 N. Y. 533, 75 N. E. 1129; a contract by a mother surrendering her child to a charitable institution; In re Sleep, 6 Pa. Dist. Rep. 256; contracts where the consideration is the commission of some crime or some flagrantly immoral act (see CONSIDERATION); Pom. Contr. § 282. So of a promise to marry after the death of a wife, the plaintiff knowing at the time that defendant had a wife; [1908] 1 K. B. 729; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Noice v. Brown, 38 N. J. L. 228, 20 Am. Rep. 388; but not so of a promise to marry on the death of a divorced wife; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914. A promise of marriage in consideration of illicit sexual intercourse is void; Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283.

Contracts to locate and maintain railroad stations at specified points, or not to maintain them at other points, are void; Beasley v. R. Co., 115 Fed. 952, 53 C. C. A. 434; Florida C. & P. R. Co. v. State, 31 Fla. 509, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; Holladay v. Patterson, 5 Or. 177; Currie v. R. Co., 61 Miss. 725; and to maintain forever a terminus, shops and offices at a particular place; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385. A contract by which a stockholder is to receive the par value of his stock before the corporate debts are paid is void; Guaranty Trust Co. v. R. Co., 107 Fed. 311, 46 C. C. A. 305. So is a contract between a county and a bidder for an issue of its bonds, by which the latter agrees to prosecute a feigned suit to test their validity, the county to pay the expenses of the suit; Van Horn v. Kittitas County, 112 Fed. 1. A contract to furnish evidence to establish that a certain person was heir of a mining property, to sue, if necessary, and in such event to control the suit and pay the expenses, receiving two-thirds of the value recovered, is voidable and will not be specifically enforced; Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212.

Where an invalid contract has been performed, its invalidity is not important; St. Louis H. & G. Co. v. U. S., 191 U. S. 163, 24 Sup. Ct. 47, 48 L. Ed. 130.

Property delivered under an executed illegal sale cannot be recovered back by any party *in pari delicto;* Harriman v. Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739. But where a great swindle had been perpetrated, it was held that a victim might sue for his money, though he was *in pari delicto;* Falkenberg v. Allen, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494.

As to the effect of war upon contracts, see WAR. As to particular cases, see the several titles upon the subjects involved.

VOIDABLE. See VOID.

VOIR DIRE. A preliminary examination of a witness to ascertain whether he is competent.

When a witness was supposed to have an interest in the cause, and was thereby excluded from testifying, the party against whom he was called had the choice to prove such interest by calling another witness to that fact, or he might require the witness produced to be sworn on his *voir dire* as to whether he had an interest in the cause or not; but the party against whom he was called was not allowed to have recourse to both methods to prove the witness's interest. If the witness answered that he had no interest, he was competent, his oath being conclusive; if he swore he had an interest, he was rejected.

The witness was sworn on his *voir dire* to ascertain whether he had an interest which would disqualify him, because he would be tempted to perjure himself if he testified when interested. But when he was asked whether he had such an interest, if he was dishonest and anxious to be sworn in the case, he would swear falsely he had none,

and his answer being conclusive, he was admitted as competent; if, on the contrary, he swore truly he had an interest, when he knew that would exclude him, he was told that for being thus honest he must be rejected.

A suitable inquiry is permissible in order to ascertain whether a juror has any bias, and this must be conducted under the supervision of the court and be largely left to its sound discretion. There is no objection in not allowing a juror to be asked as to his political affiliations and whether they would bias his judgment, in the absence of any statement tending to show a special reason for asking; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; a juror may be asked whether he is a member of certain secret societies; Burgess v. Mfg. Co. (Tex.) 30 S. W. 1110; or has ever belonged to "the committee of 100"; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033. The court may assume an exclusive examination of jurors, though it is the better practice to allow counsel to examine; Jones v. State, 35 Fla. 289, 17 South. 284.

See INTEREST; JURY.

VOLENTI NON FIT INJURIA. A maxim meaning literally: No one can enforce a right arising out of a transaction which he has voluntarily assented to. It applies to intentional acts which would otherwise be tortious; consent, for example, to an entry on land which would otherwise be a trespass, or consent to a physical harm which would otherwise be an assault, as in the case of a boxing match or a surgical operation. However, such consent does not exclude criminal liability. No person can lawfully consent to his own death, so that killing a man in a duel is murder. Nor can one lawfully consent to grievous bodily harm, save for some reasonable purpose; for example, a proper surgical operation; 8 Q. B. D. 534.

A master is under a legal duty to his servant to take care that the premises, plant, and machinery are reasonably safe; but where the servant expressly or impliedly agrees to exempt his master from this obligation, in whole or in part and to take the risk upon himself, the maxim applies; [1891] A. C. 325.

Mere knowledge of an impending wrongful act or of the existence of a wrongfully caused danger does not of itself amount to consent, even though no attempt is made by the plaintiff to prevent or avoid the act or danger. Knowledge may, however, be evidence of consent; [1891] A. C. 325; and even if it does not prove an agreement to take the risk, it may nevertheless be a bar to the plaintiff's action, in that it may negative the existence of any negligence on the part of the defendant in causing the danger, or it may establish the existence of contributory negligence on the part of the plaintiff.

See CONSENT; CRIME; ASSAULT; MASTER AND SERVANT.

VOLUNTARY. Willingly; done with one's consent; negligently. Wolff § 5.

To render an act criminal or tortious, it must be voluntary. If a man, therefore, kill another without a will on his part while engaged in the performance of a lawful act, and having taken proper care to prevent it, he is not guilty of any crime. And if he commit an injury to the person or property of another, he is not liable for damages, unless the act has been voluntary or through negligence; as, when a collision takes place between two ships without any fault in either. 2 Dods. Adm. 83; 3 Hagg. Adm. 320, 414.

When the crime or injury happens in the performance of an unlawful act, the party will be considered as having acted voluntarily.

VOLUNTARY ASSIGNMENT. See VOLUNTARY CONVEYANCE; Bonns v. Carter, 22 Neb. 514, 35 N. W. 394.

VOLUNTARY CONVEYANCE. A conveyance without any valuable consideration.

Voluntary conveyances are discussed most frequently with reference to the statutes 13 Eliz. c. 5 (for the protection of creditors) and 27 Eliz. c. 4 (for the protection of subsequent purchasers). A voluntary conveyance, however, is not within these statutes unless it is fraudulent; Cowp. 434. And, as between the parties, a voluntary conveyance is generally good.

In determining whether a voluntary conveyance is fraudulent and within the stat. 13 Eliz. c. 5, a distinction is made between existing (or previous) and subsequent creditors. An *existing* creditor, so called, is one who is a creditor at the time of the conveyance; and it was at one time held that, as against him, every voluntary conveyance by the debtor is fraudulent; Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; without regard to the amount of the debts, the extent of the property in settlement, or the circumstances of the debtor; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 500, 8 Am. Dec. 520; but this rule is now subject to great modifications both in England and in the United States; see 1 Am. L. Cas. 37–40; and the conclusion to be drawn from the more recent cases is that the whole question depends in great measure on the ratio of the debts, not so much to the property the debtor parts with, as to that which he retains; Breil's Appeal, 24 Pa. 511; 2 Beav. 344; 4 Drew. 632. A *subsequent* creditor is one who becomes a creditor after the conveyance, and, as against him, a voluntary conveyance is not void unless actually fraudulent; 1 Am. L. Cas. 40; but there is great diversity in the definition of the fraud of which he may avail himself; see 3 De G. J. & S. 293; L. R. 5 Ch. Ap. 518; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 501, 8 Am. Dec. 520; Snyder v. Christ, 39 Pa. 499.

Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon

the statute of 27 Eliz. c. 4, which presumption may be repelled by showing that the transaction on which the conveyance was founded virtually contained some conventional stipulations, some compromise of interests, or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a subsequent negotiation for sale, is conclusive evidence of statutory fraud.

The principles of these statutes, though they may not have been substantially reenacted, prevail throughout the United States.

See May, Stats. of Eliz.; Bump, Fraud. Conv.; Note to Twyne's Case, 1 Sm. L. Cas. (cases to 1879 discussed in 18 Am. L. Reg. N. S. 137); Note to Sexton v. Wheaton, 1 Am. L. Cas.; Story, Eq. Jurisp. §§ 350–436; FRAUDULENT CONVEYANCE.

VOLUNTARY ESCAPE. See ESCAPE.

VOLUNTARY EXPOSURE TO UNNECESSARY DANGER. Where the insured was shot when unarmed, in the course of an altercation, it was held that there could be a recovery, though the insured may have been the aggressor, if he had no reason to believe that his opponent was armed. The court held that the test was whether the assured "had voluntarily or intentionally done some act which reasonable prudence would have pronounced dangerous and in which death had followed as a consequence;" Union C. & S. Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873. Where a party going home at night voluntarily left other and safe paths of travel and used a dangerous railway trestle; Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; and where the assured sat down on a railway track when an engine moving toward him was only 25 feet away; or crossed dangerous railroad tracks merely to save time; Glass v. Accident Ass'n, 112 Fed. 495; Williams v. Acc. Ass'n, 133 N. Y. 366, 31 N. E. 222; and where the assured jumped in the dark from a freight train in rapid motion; Shevlin v. Acc. Ass'n, 94 Wis. 180; the exception in the policy was held to apply. But it must be shown that there is on the part of the insured some degree of consciousness of the danger which results in the accidental death of the insured; Miller v. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; Lovelace v. Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638.

A voluntary exposure to unnecessary danger implies a conscious, intentional exposure, something of which one is conscious but willing to take the risk. By taking a policy against accident one naturally understands that he is to be protected against accident resulting in whole or in part from his own inadvertence. The phrase means something more than contributory negligence or want of ordinary care on the part of the assured; Follis v. Acc. Ass'n, 94 Ia. 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408. The phrase is not the entire equivalent of ordinary negligence; a degree of consciousness of danger is necessary; Miller v. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. See INSURANCE.

VOLUNTARY JURISDICTION. In Ecclesiastical Law. That kind of jurisdiction which requires no judicial proceedings: as, the granting letters of administration and receiving the probate of wills.

VOLUNTARY MANSLAUGHTER. See MURDER; MANSLAUGHTER; HOMICIDE.

VOLUNTARY NONSUIT. In Practice. The abandonment of his cause by a plaintiff, and an agreement that a judgment for costs be entered against him. See NONSUIT.

VOLUNTARY PAYMENT. One which implies that he who makes it intends to waive any right which he may have to resist it. Rumford Chemical Works v. Ray, 19 R. I. 456, 34 Atl. 814.

VOLUNTARY WASTE. See WASTE.

VOLUNTEER. One who receives a voluntary conveyance.

It is a general rule of equity that they will not assist a mere volunteer who has a defective conveyance. Fonbl. Eq. b. 1, c. 5, s. 2; and see the note there for some exceptions to this rule. See, generally, 1 Madd. 271; 1 Supp. to Ves. Ch. 320; 2 *id.* 321; Powell, Mortg.

One who takes from a trustee by voluntary conveyance, though without notice, will not be protected; 2 P. Wms. 678. So of a voluntary conveyance by a lunatic, even in the absence of notice; 7 De G., M. & G. 475.

In Military Law. Persons who, in time of war, offer their services to their country and march in its defence.

One who freely enlists in the place of another, and becomes his substitute of his own free will and accord, is a volunteer within the spirit and intent of the statutes. Magee v. Cutler, 43 Barb. (N. Y.) 239. See MILITIA.

VOTE. Suffrage; the voice of an individual in making a choice by many. The total number of voices given at an election; as, the presidential vote.

In a *viva voce* election for a public officer, a voter cannot change his vote, once made, after subsequent votes have been made and recorded; Hopkins v. Swift, 100 Ky. 14, 37 S. W. 155.

In cumulative voting the voter must put opposite the name of the candidate on whom he intends to cumulate something to indicate the number of votes he intends to cast for him, in default of which he will be taken to have cast but a single vote for the candidate

against whom he has made a mark, although he has marked but a few names or only one; [1897] 1 Q. B. 449.

See ELECTION; BALLOT; SUFFRAGE; VOTER; WOMAN; VOTING MACHINE.

VOTER. One entitled to a vote; an elector. The right to fix the qualifications of voters is in the states, except so far as it is limited by the 15th amendment to the constitution of the United States, which provides that the right of the citizens to vote shall not be denied or abridged by the United States or any state, on account of race, color, or previous condition of servitude. The qualifications of voters are similar in all the states, but not uniform. They have been summarized as follows: 1. Citizenship, either by birth or naturalization; 2. Residence for a given period of time in the state, county, and voting precinct; 3. Age, the limit is twenty-one years in all the states; 4. The payment of taxes, in some states, and in many states, registration; 5. Freedom from having committed an infamous crime; 6. Freedom from idiocy or lunacy; McCrary, Elect. § 4. Residence means actual settlement within the state; Sharp v. McIntire, 23 Colo. 99, 46 Pac. 115. The legislature cannot require a longer residence for voters at primary elections than the constitution prescribes for voters at elections "authorized by law," which term includes primary elections; Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196. A person who is capable of transacting the ordinary business of life, even though laboring under some hallucination or delusion, unless it be shown to extend to political matters, cannot be denied the privilege of voting on the ground of want of mental capacity; Clark v. Robinson, 88 Ill. 499.

VOTING MACHINE. In Rhode Island, upon the application of the governor, the justices gave an opinion that a statute authorizing the use of a voting machine would be constitutional. In re Voting Machine, 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 547. Existing legislation authorizing the use of voting machines does not contravene the constitution. Such acts are constitutional; People v. Taylor, 257 Ill. 192, 100 N. E. 534; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; State v. Carroll (Wash.) 138 Pac. 306 (if secrecy is secured); they do not contravene a state constitution which requires that all elections shall be by ballot; Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 Ann. Cas. 837 (*contra*, State v. Board of Elections, 80 Ohio St. 471, 89 N. E. 33, 24 L. R. A. [N. S.] 188); even if the voter cannot see that his vote is correctly recorded and counted; Henderson v. Board of Election, 160 Mich. 36, 124 N. W. 1105; voting by an efficient and secret machine is voting by ballot within a state constitution; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270.

See In re Opinion of the Justices, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430. See In re Taylor, 150 N. Y. 242.

VOTING TRUST. A term applied to the accumulation in a single hand or in a few hands of shares of corporate stock, belonging to several or many owners, in order, thereby, to control the business of the company. In some instances the certificates are placed in the hands of a single holder or of a committee, accompanied by irrevocable proxies to vote on them. In other instances the stock is placed in the name of such committee. Certificates are usually issued to the beneficial owners of the stock, and these certificates are bought and sold in the market. It has been held that all agreements to tie up stocks by irrevocable proxies or by placing them in the hands of trustees are illegal, and any beneficial owner may withdraw his stock from them at pleasure: Fisher v. Bush, 35 Hun (N. Y.) 641; Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; Moses v. Scott, 84 Ala. 608, 4 South. 742; whether he be a party to the agreement or an assignee of the stock of such party; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32; In re Germicide Co., 65 Hun 606, 20 N. Y. Supp. 495; White v. Tire Co., 52 N. J. Eq. 178, 28 Atl. 75.

An agreement not to sell stock except by consent of all parties to the agreement is held to be in restraint of trade and void; Fisher v. Bush, 35 Hun (N. Y.) 641. It has, however, been held that an agreement among the stockholders to hold the stock together and to sell it together is valid; Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 507.

Where stock is transferred to a trustee under a contract by which he agrees to hold and vote it for the benefit of two other persons and himself jointly, to dispose of it when and as agreed upon by himself and one of the other parties, the other parties have no such title or right of possession thereof as would give either of them a right of action against the trustee for conversion upon his refusal to transfer to such party one-third of the stock; Louisville T. Co. v. Stockton, 75 Fed. 62, 21 C. C. A. 225.

Where a statute forbade a consolidation of competing lines, the purchase by a railroad company of the stock of a competing line which was then vested in a third party as trustee, was held void and the trustee was enjoined from voting thereon; Clarke v. Banking Co., 50 Fed. 338, 15 L. R. A. 683.

See RESTRAINT OF TRADE, for other cases; see also TRUST, for the use of voting trusts in combinations of capital known as trusts.

Where stock was vested in a trustee under an agreement that it was to remain with such trustee for four years, certain stockholders agreeing not to sell their holdings

without first offering them to the remaining parties to the agreement, and the trustee holding an irrevocable power of attorney to vote the stock, it was held that the trust agreement was not void *per se*, and that as long as the beneficial owners did not make any effort to withdraw from the trust there was no reason why the trustee should not vote upon it; Brown v. S. S. Co., 5 Blatch. 525, Fed. Cas. No. 2,025.

The holders of a majority of the stock of a railroad company agreed that it should be vested in the name of the president of another railroad company, who should deliver to an appointee of the directors of the company in question an irrevocable proxy to vote upon such stock; certificates were issued to the stockholders who were parties to the agreement. Certain parties purchased a minority of the trust certificates and requested the return of the stock, which was refused. The court enjoined the trustee from voting on the stock and compelled a transfer to the beneficial owners thereof, holding that the right was vested in the latter and the trustee could not lawfully refuse it to them; 14 Wkly. L. Bull. (Ohio) 68. See 15 *id.* 419, 423. See also Woodruff v. R. Co., 30 Fed. 91, substantially to the same effect.

In the Reading railroad trust (Shelmerdine v. Welsh, 8 Pa. Co. Ct. R. 330), on the reorganization of the company, certain securities and stock were vested in a reconstruction board under a voting trust, by which certificates of beneficial interest were issued. On a bill by a stockholder to restrain the trustees from voting upon the stock held by them at an election soon to occur, a preliminary injunction was refused because the interests were too complicated to permit of interference upon such short notice. The court (Hare, P. J.) was of opinion that the voting trust was necessary to sustain and carry out the provisions of the reorganization and that the voting trustees represented not only the stock but the other securities and liens on the property, under the reorganization.

It seems to be settled that if an agreement be made between creditors of a corporation and the stockholders, whereby the creditors forbear to proceed against the corporation, or for the purposes of obtaining further credit that stock be placed in the hands of trustees for the purposes of voting, such a voting trust is good. Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723; Greene v. Nash, 85 Me. 148, 26 Atl. 1114.

In Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 South. 723, the court was of opinion that the cases in which voting trusts were considered illegal were based rather upon the ground of the unlawful purpose for which they were created than upon their intrinsic illegality, and it reached substantially the same result as the Reading railroad case cited above.

A contract to place the stock in the hands of one of the parties, to be voted as a unit, is not void, where the purpose was to vest the control for a fixed period in the persons who originally promoted the company; Gray v. Ry., 120 Ill. App. 159; so of a voting trust vested in the directors for five years, in order to continue the policy of the company; Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890; and of a voting trust for twenty-five years, the trustees to vote as a majority should direct; Carnegie Trust Co. v. Ins. Co., 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287; and an agreement among stockholders that their stock shall be voted in a block, the vote to be determined by ballot among them; Smith v. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; and an agreement to pool stock for three years, to be voted by a committee of five; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; and a mere voting trust in which the stockholders holding participating shares chose a managing committee with power to direct the trustees in the voting of the stock and management of the company, its object being the benefit of all the stockholders equally and not tending to eliminate competition; Venner v. Ry. Co., 258 Ill. 523, 101 N. E. 949. *Contra*, an agreement to take from the stockholders the right to vote for three years; Sheppard v. Power Co., 150 N. C. 776, 64 S. E. 894; and any agreement to separate the beneficial and legal title to stock; *id.*; and an agreement between a majority of the stockholders of a national bank which gave to voting trustees uncontrolled power to manage the bank for fifteen years; Bridgers v. Bank, 152 N. C. 293, 67 S. E. 770, 31 L. R. A. (N. S.) 1199; is void.

There must be some further consideration than the mutual concurrent acts of the stockholders in depositing their stock; 2 Railw. & Corp. L. J. 409 (Vanderbilt v. Bennett); if there be none, then the right to vote will be revocable; Harvey v. Imp. Co., 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; Smith v. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

There has been a distinction drawn between combinations to control the voting power permanently and those to control it for a fixed, definite and reasonable period; Hey v. Dolphin, 92 Hun 230, 36 N. Y. Supp. 627; Brown v. Britton, 41 App. Div. 57, 58 N. Y. Supp. 353; and between a voting trust formed for the carrying out of a certain policy and one where the management is left to the trustee; Kreissl v. Distilling Co., 61 N. J. Eq. 5, 47 Atl. 471; Ohio & M. R. Co. v. State, 49 Ohio St. 668, 32 N. E. 933; and between an agreement by which several agree that stock shall be voted as one may direct, and an agreement that it shall be voted as a stranger may direct; Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345.

An agreement between stockholders that

they will, for five years, vote their aggregate shares as one body, to be determined by ballot between them, is a proxy to vote as a majority directs; Smith v. R. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

It has been assumed that a voting trust is in the nature of a proxy, and as such revocable; Vanderbilt v. Bennett, 6 Pa. Co. Ct. R. 193; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32. And statutes limiting the creation of proxies have been construed as applying to the creation of trusts; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

It has been held that the power to vote is inseparable from the ownership of each share; Harvey v. Improvement Co., 118 N. C. 699, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32; Griffith v. Jewett, 15 Wkly. L. Bull. (Ohio) 419; but in Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890, it was held that this might be justified where there was some proper interest to conserve.

The Pennsylvania act of May 26, 1893, disqualifies the holder of the bare legal title to stock from voting thereon, if challenged, and enables the beneficial owner, upon proper proof at the meeting, to vote his stock. A holder's right to vote such stock is revocable by the real owner; Com. v. Roydhouse, 233 Pa. 234, 82 Atl. 74; but a voting trust has been upheld in Pennsylvania; see cases cited herein.

It has been held that an attempt to dissolve a voting trust by one whose shares are not in the trust cannot be successful; Zimmermann v. Jewett, 19 Abb. N. C. (N. Y.) 459.

One holding a voting trust certificate in a corporation is a proper person to apply for a receiver, the statute authorizing "any creditor or shareholder" to bring a bill; U. P. Independent Tel. Co. v. O'Grady, 75 N. J. Eq. 301, 71 Atl. 1040.

See 44 Am. L. Reg. & Rev. 413, where a form of certificate is given and the cases are collected by Charles H. Burr, Jr., who finds a definite formulation of conclusions to be impossible. See Smith v. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Morel v. Hoge, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935; 42 Am. L. Rev. 133; STOCKHOLDER; RESTRAINT OF TRADE.

VOUCHEE. In common recoveries, the person who is called to warrant or defend the title is called the vouchee. 2 Bouvier, Inst. n. 2093.

VOUCHER. In Accounts. An account-book in which are entered the acquittances or warrants for the accountant's discharge. Any acquittance or receipt which is evidence of payment or of the debtor's being discharged. See State v. Hickman, 8 N. J. L. 299; Whitwell v. Willard, 1 Metc. (Mass.) 218. A merchant's books are the vouchers of the correctness of his accounts and a receipt is voucher of payment, but neither is conclusive. People v. Haws, 12 Abb. Prac. (N. Y.) 202.

When used in connection with the disbursement of money, voucher means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. State v. Moore, 36 Neb. 579, 54 N. W. 866; People v. Swigert, 107 Ill. 495.

Vouching a claim merely means that it has been investigated and approved; First T. & S. Bank v. Ry. Co., 195 Fed. 330.

In Old Conveyancing. The person on whom the tenant to the *præcipe* calls to defend the title to the land, because he is supposed to have warranted the title to him at the time of the original purchase.

The person usually employed for this purpose is the crier of the court, who is therefore called the common voucher. See Cruise, Dig. tit. 36, c. 3, s. 1; 22 Viner, Abr. 26; RECOVERY.

VOUCHING TO WARRANTY. The calling of one who has warranted lands, by the party warranted, to come and defend the suit for him. Co. Litt. 101 *b*; 3 Bla. Com. 300. But see 19 L. Q. R. 349. See WARRANTY, VOUCHING TO.

VOYAGE. In Maritime Law. The passage of a ship upon the seas from one port to another, or to several ports. The term includes the enterprise entered upon and not merely the route. Friend v. Ins. Co., 113 Mass. 326. The actual transit of a vessel from port to port. The Mary Adelaide Randall, 93 Fed. 222. Each trip constitutes a voyage; The Rose Culkin, 52 Fed. 332.

Where a steamship is engaged in making regular trips from Havre to New York and return, each trip in one direction constitutes a voyage within the meaning of the statute providing for limitation of liability of owners to their interest in the vessel and "her freight for the voyage"; In re La Bourgogne, 117 Fed. 261.

Where a loss was occasioned whilst loading the cargo, it was held to be during the voyage; L. R. 15 P. D. 203.

Every voyage must have a *terminus a quo* and a *terminus ad quem*. When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured both outward and homeward, for one entire *premium*, this, with reference to the insurance, is considered but one voyage, and the *terminus a quo* is also the *terminus ad quem;* Marsh. Ins. b. 1, c. 7, s. 1–5.

As to the commencement and ending of the voyage, see RISK.

The voyage, with reference to the legality of it, is sometimes confounded with the traffic in which the ship is engaged, and is frequently said to be illegal only because the trade is so; but a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful; Marsh. Ins. b. 1, c. 6, s. 1. See DEVIATION; SAILING.

Justice Miller, in Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, used the word in relation to the transportation of goods by railroad through more than one state.

In the French Law, the *voyage de conserve* is the name given to designate an agreement made between two or more sea-captains that they will not separate in their voyage, will lend aid to each other, and will defend themselves against a common enemy or the enemy of one of them in case of attack. This agreement is said to be a partnership. 3 Pardessus, *Dr. Com.* n. 656; *4 id.* 984; 20 Toullier, n. 17.

VOYAGE CHARTER. One in which there is an agreement for a defined voyage.

VULGO CONCEPTI (Lat.). **In Civil Law.** Bastards whose father was unknown. Leg. 53, ff. *de statu hominum.* Those, also, whose fathers, though known, could not lawfully be recognized as such: viz., the offspring of incest and adultery. Code Civ. 3. 7. 1.

W

WADIA. A pledge. See VADIUM; FIDES FACTA.

WADSET. In Scotch Law. The old term for a mortgage. A right by which lands or other heritable subjects are impignorated by the proprietor to his creditor in security of his debt. Like other heritable rights, it is protected by seisin.

WAGE. To give a pledge or security for the performance of anything: as, to wage or gage deliverance, to wage law, etc. Co. Litt. 294. This word is but little used.

WAGE-EARNER. In the bankrupt act, an individual working for wages at a rate not exceeding $1,500 per year. In re Wakefield, 182 Fed. 247.

The act does not fix the time when the status of the individual as a wage-earner is to be determined. In many of the cases it has been determined by the vocation of the individual when the act of bankruptcy was committed; In re Crenshaw, 156 Fed. 638; Flickinger v. Bank, 145 Fed. 162, 76 C. C. A. 132. It has been held that the status of the alleged bankrupt is to be determined as of the period when he contracted the debt to be proved, and acquired the property to be administered; and if he was at that time engaged in mercantile pursuits, he cannot defeat the operation of the law by thereafter engaging in an exempt occupation; In re Burgin, 173 Fed. 726; Tiffany v. Milk Co., 141 Fed. 444; Bollinger v. Bank, 177 Fed. 609, 101 C. C. A. 235.

One engaged in manufacturing and trading does not become a wage-earner and exempt from adjudication as a bankrupt because, while working as a manufacturer and trader, he also earns wages by working for another in a different occupation; and if debts are contracted while he is engaged as a manufacturer and trader, he is not exempt from involuntary bankruptcy because he subsequently becomes a wage-earner; In re Naroma Chocolate Co., 178 Fed. 383.

WAGER. A bet; a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event. See Merchants' S., L. & T. Co. v. Goodrich, 75 Ill. 560.

A contract upon a contingency by which one may lose but cannot gain, or the other can gain but cannot lose, is a wager; Shumate v. Com., 15 Gratt. (Va.) 653; but there must be a risk by both parties; Quarles v. State, 5 Humph. (Tenn.) 561. In Cassard v. Hinman, 1 Bosw. (N. Y.) 207, it was said: "A wager is something hazarded on the issue of some uncertain event; a bet is a wager, though a wager is not necessarily a bet."

At common law, wagers were not, *per se*, void; Johnston v. Russell, 37 Cal. 670; Monroe v. Smelley, 25 Tex. 586, 78 Am. Dec. 541; but if they were foolish, or tended to annoy others or outrage decency, they were discountenanced; Odger, C. L. 727. See [1907] 1 K. B. 758, for the history of the law of gaming contracts, in the judgment of Fletcher Moulton, L. J.

By an English statute passed in 1845, wagers were prohibited, and similar statutes have been passed in many of the states. See Dos Passos, St. Br. 409; Margins.

Where a contract is a mere device to avoid the statute, it is illegal, but the burden of proving its illegality is upon the defendant; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 573; and the intention of the parties is for the jury; 20 E. L. & E. 290; Kirkpatrick v. Bonsall, 72 Pa. 155.

Where both parties to contracts for the sale and purchase of stocks intend that no stocks shall be delivered and that "differences" only shall be accounted for, the mere fact that the contracts provide that either party may require completion of the purchase and delivery or receipt (as the case may be) of stocks, does not prevent them from being contracts by way of gaming and wagering within Gaming Act 1845, and therefore void; [1896] A. C. 166; [1905] 1 Ch. 307; [1911] 1 K. B. 70. The true test of the validity of a contract for future delivery is whether it could be settled in money or whether the party selling could tender and compel acceptance of the particular commodity; Sampson v. Cotton Mills, 82 Fed. 833; and a contract for the sale of a commodity for future delivery is valid if the parties intend a future delivery, but invalid if none is contemplated, but only a payment of the difference between the contract and the market price; Board of Trade v. Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Edgerton & Son v. J. T. Edgerton & Bro., 153 N. C. 167, 69 S. E. 53; Raymond v. Parker, 84 Conn. 694, 81 Atl. 1030. Where the parties contemplate an actual delivery of the commodity, the contract is not a gambling contract, though it provides it may be settled by a money payment upon failure to deliver actual cotton; Daniel v. Reeves, 139 Ga. 646, 77 S. E. 1067; even where the principals may not be able to enforce the contract and the broker through whom the transaction is made is ignorant of their intention, he cannot recover for money paid out in commissions; Ware v. Pearsons, 173 Fed. 878, 98 C. C. A. 364; Connor v. Black, 119 Mo. 126, 24 S. W. 184; *contra*, 29 T. L. R. 479; the same principle applies to contracts for the

sale and delivery of grain; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; and indeed to any contract for the sale or purchase of any personal property to be delivered at a future date, which is intended by both parties as a wager on the rise and fall of prices and to be settled by payment of differences; Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; but an agreement to sell grain for future delivery is not necessarily a gambling transaction; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. The legality of purchases and sales of grain on exchanges is governed by the law of the state where the exchange is located; Wilhite v. Houston, 200 Fed. 390, 118 C. C. A. 542.

A purchase, with an option to the seller to deliver on a certain day, is not a wager; Pixley v. Boynton, 79 Ill. 351; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; and the usage allowing merchants to settle such contracts by "differences" does not necessarily render such contracts void; Boyd v. Hanson, 41 Fed. 174. Margins advanced to brokers on contracts made to be settled on differences may be recovered; Elder v. Talcott, 43 Ill. App. 439; Weld v. Cable Co., 199 N. Y. 88, 92 N. E. 415. Where purchases and sales are actually completed by delivery to the holder, who obtained the money to pay advances by hypothecating the stock, the transactions are valid; [1895] A. C. 318. See a note in 33 Am. L. Reg. N. S. 436. A case varying from the general rule that where accounts are to be settled by differences, the transaction is a gambling one, confines it to cases where neither party expects any delivery at any time and holds the transaction valid if the final balance is to be by delivery, though intermediate balances were otherwise settled; Dillaway v. Alden, 88 Me. 230, 33 Atl. 981. The law looks at the intention of the parties, which is a fact for the jury, and oral evidence may be given of the circumstances, without respect to the form of the transaction; Younkin v. Collier, 47 Fed. 574; but a transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show that this understanding was mutual; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. See Dos Passos, St. Br. 47. See also OPTION; FUTURES; MARGIN.

It has been held that contracts between the purchaser of futures and a broker, made without the state, though valid where made, could not be enforced in the state where it was invalid by statute; Lemonius v. Mayer, 71 Miss. 514, 14 South. 33; the same principle applies to notes given in settlement of gambling transactions; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568. Where a note which was delivered to a broker to secure him against loss in stock transactions was transferred to an innocent purchaser without notice, equity would not compel its return, because given for a gambling debt; Albertson v. Laughlin, 173 Pa. 525, 34 Atl. 216, 51 Am. St. Rep. 777; and a mortgage securing advances for margins on a contract for future delivery was held valid where the advances were made in good faith to save loss; Sampson v. Cotton Mills, 82 Fed. 833; but the original payee cannot recover on a note, for money advanced upon or in execution of a contract of wager, to which he is a party or direct participant in the name of or on behalf of the parties; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172. See Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337.

The English statute prohibiting the recovery of money, etc., deposited to abide the event of a wager, applies only to a deposit as the stake to abide the event of a wager and not to deposits as security for the observance by the loser, of the terms of the wagering contract, and the authority to return the latter may be revoked and the securities recovered at any time before their appropriation; [1891] 2 Q. B. 329.

If all options were prohibited, all conditional contracts would have to be prohibited. See Dr. Wharton's note to Melchert v. Tel. Co., 11 Fed. 193; also Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 573.

When one loses a wager and gets another to pay the money for him, an action lies for the recovery of the money; 15 C. B. N. S. 316; but see Dickson's Ex'r v. Thomas, 97 Pa. 278. So it is said that where an agent advances money to his principal to pay losses incurred in an illegal transaction, the contract between them, made after the illegal contract is closed, is binding; Lehman v. Strassberger, 2 Woods, 554, Fed. Cas. No. 8,216. See Durant v. Burt, 98 Mass. 161. Where a broker sued his principal for advances and commissions on the purchase of property, it was held that the fact that persons from whom the broker bought the property for his principal had not the goods on hand when the contract was made, and that they had no reasonable expectation of acquiring them except by purchase, did not defeat the broker's right to recover; Sawyer v. Taggart, 14 Bush (Ky.) 727. See, also, 5 M. & W. 462.

See Biddle, Stock Brokers; Lewis, Stocks; article by Dr. Wharton in 3 Cr. L. Mag. 1, on Political Economy and Criminal Law.

Wagers on the event of an election laid before the poll is open; 1 Term 56; Bunn v. Riker, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; Wroth v. Johnson, 4 H. & McH. (Md.) 284; or after it is closed; McCullum v. Gourlay, 8 Johns. (N. Y.) 147; Lansing v. Lansing, *id.* 454; are unlawful. See McCrary, Elect. § 149. And wagers are against public policy if they are in restraint of marriage;

10 East 22; if made as to the mode of playing an illegal game; 2 H. Bla. 43; Wootan v. Hasket, 1 N. & McC. (S. C.) 180; or on an abstract speculative question of law or judicial practice, not arising out of circumstances in which the parties have a real interest; 12 East 247. But see 1 Cowp. 37.

Wagers, though on indifferent subjects, are inconsistent with good morals, and as such, are void, as against public policy; Bernard v. Taylor, 23 Or. 419, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693.

Wagers as to the sex of an individual; Cowp. 729; or whether an unmarried woman had borne or would have a child; 4 Camp. 152; are illegal, as necessarily leading to painful and indecent considerations. Every bet about the age, or height, or weight, or wealth, or circumstances, or situation of any person, is illegal; and this, whether the subject of the bet be man, woman, or child, married or single, native or foreigner, in this country or abroad; Phillips v. Ives, 1 Rawle (Pa.) 42. And it seems that a wager between two coach-proprietors, whether or not a particular person would go by one of their coaches, is illegal, as exposing that person to inconvenience; 1 B. & Ald. 683.

In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event happens. And if after his authority has been countermanded and the stake has been demanded, he refuse to deliver it, trover or assumpsit for money had and received is maintainable; 1 B. & Ald. 683. And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has been paid over; 4 Taunt. 474. But see Yates v. Foot, 12 Johns. (N. Y.) 1; Deaver v. Bennett, 29 Neb. 812, 46 N. W. 161, 26 Am. St. Rep. 415; Corson v. Neatheny, 9 Colo. 212, 11 Pac. 82. Where the stakeholder of a wager void as between the parties is notified by one of them not to pay over the money to his adversary, even after the result of the event has become known, but before payment has been made, he cannot defeat an action by such party for its recovery; Lewy v. Crawford, 5 Tex. Civ. App. 293, 23 S. W. 1041; Weaver v. Harlan, 48 Mo. App. 319. See STAKEHOLDER; MARGIN; HORSE RACE; INSURABLE INTEREST.

WAGER OF BATTLE. A mode of trial which existed among almost all the German people and was introduced into England by William the Conqueror.

It was resorted to in three cases only: in the court martial or court of chivalry; in appeals of felony and upon approvements; and upon issue joined in a writ of right. Co. Litt. § 294. On appeals parties fought in their own proper persons, on a writ of right by their champions. But if the appellant or approval were a woman, a priest, an infant, or of the age of sixty, or lame or blind, or a peer of the realm, or a citizen of London; or if the crime were notorious; in such cases wager of battle might be declined by the appellant or approver. But where the wager of battle was allowed, the appellee pleaded not guilty, and threw down his glove, declaring he would defend the same with his body. The appellant took up the glove, replying that he was ready to make good his appeal, body for body. Thereupon the appellee, taking the Bible in his right hand, and in his left the right hand of his antagonist, swore to this effect: "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am anywise guilty of the said felony; so help me God and the saints; and this I will defend against thee by my body, as this court shall award." The appellant replied with a like oath, declaring also that the appellee had perjured himself. Then followed oaths by both parties against amulets and sorcery as follows: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me neither bones, stones, nor grass, nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted; so help me God and his saints." The battle was then begun; and if the appellee were so far vanquished as not to be able or willing to fight any longer he was adjudged to be hanged immediately; but if he killed the appellant, or could maintain the fight from sunrising till the stars appeared in the evening, he was acquitted. Also if the appellant became recreant, and pronounced the word *craven*, he lost his *liberam legem*, and became infamous (see CRAVEN), and the appellee recovered his damages, and was forever quit of any further proceedings for the same offence. The proceedings in wager of battle in a writ of right were similar to the above except that the battle was by champions. It was the only mode of determining a writ of right until Henry II. introduced the *grand assize*, *q. v.* The prevalence of judicial combats in the Middle Ages is attributed by Mr. Hallam to systematic perjury in witnesses, and want of legal discrimination on the parts of judges. Moz. & W. It was not abolished in England till the enactment of stat. 59 Geo. III. c. 46. See 1 B. & Ald. 405; 3 Bla. Com. 339; 4 *id.* 347; APPEAL. This mode of trial was not peculiar in England. The emperor Otho, 983, held a diet at Verona, at which several sovereigns and great lords of Italy, Germany, and France were present. In order to put a stop to the frequent perjuries in judicial trials, this diet substituted in all cases, even in those which followed the course of the Roman law, proof by combat for proof by oath. Henrion de Pansey, *Auth. Judic.* Introd. c. 3. And for a detailed account of this mode of trial see Herbert, Inns of Court, 119. The last case in which the right was asserted was Ashton vs. Thornton, 1 B. & Ald. 405, where Lord Ellenborough declared that it was part of the general law of the realm and must be enforced, no matter how much disapproved. See Wills, Circ. Ev. 290, for a detailed statement of the facts. At the next session of the British parliament an act was passed to abolish appeals of murder, treason, felony, or other offences, and wager of battle, or joining issue or trial by battle, in writs of right. 59 Geo. III. c. 46. In the Statutes of South Carolina, Edition of 1857, it is said to be in existence in that state. For the history of this species of trial, see 3 Bla. Com. 337; 4 *id.* 347; *Encyclopedie, Gage de Bataille;* Steph. Pl. 122, and App. note 35. The Laws Lumber Room, by Francis Watt; Taswell-Langmead, Engl. Constit. Hist.

WAGER OF LAW. In Old Practice. An oath taken by a defendant in an action of debt that he does not owe the claim, supported by the oaths of eleven neighbors.

When an action of *debt* is brought against a man upon a simple contract, and the defendant pleads *nil debet*, and concludes his plea with this formula, "And this he is ready to defend against him the said A B and his suit, as the court of our lord the king here shall consider," etc., he is then put in sureties (*vadios*) *to wage his law* on a day appointed by the

judge. The *wager of law* consists in an oath taken by the defendant on the appointed day, and confirmed by the oaths of *compurgators* (which see). This oath had the effect of a verdict in favor of the defendant, and was only allowed in the actions of debt on simple contract, detinue and account; nor was it allowed to any one not of good character, nor in criminal cases or cases in the Exchequer, nor when trespass, deceit or any forcible injury was alleged. In consequence of this privilege of the defendant, *assumpsit* displaces debt as a form of action on simple contracts, and instead of detinue, trover was used. But in England wager of law was abolished by 3 & 4 Will. IV. c. 42, § 13. And even before its abolition it had fallen into disuse. It was last used as a method of defence in 2 B. & C. 538, where the defendant offered to wage his law, but the plaintiff abandoned the case. This was in 1824. If it ever had any existence in the United States, it is now completely abolished; Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. Ed. 705.

The name (in law Latin, *vadiatio legis*) comes from the defendant's being put in pledges (*vadia*) to appear on a given day with his "oath-helpers." Jenks, Hist. E. L. 46; to make his oath on the appointed day. It was very early in use in England, as Glanville distinctly describes it. Glanville, lib. 1, c. 9, 12. See Steph. Pl. 124, 250; Co. 2d Inst. 119; 8 Chitty, Pl. 497; 13 Viner, Abr. 58; Bac. Abr. 1 Holdsw. Hist. E. L. 138; Thayer, Evid. 25; Pike, Y. B. 16 Edw. III (II) (R. S.) XVIII. For the origin of this form of trial, see Steph. Plead. notes xxxix.; Co. Litt. 394, 395; 3 Bla. Com. 341.

See OATH DECISORY; COMPURGATOR; GOD AND MY COUNTRY.

WAGER POLICY. One made when the insured has no insurable interest. See INSURABLE INTEREST; POLICY.

WAGES. A compensation given to a hired person for his or her services.

Agreed compensation for services by workmen, clerks or servants—those who have served an employer in a subordinate or menial capacity and who are supposed to be dependent upon their earnings to pay for their present support, whether they are to be paid by the hour, the day, the week, the month, the job, or the piece. In re Gurewitz, 121 Fed. 982, 58 C. C. A. 320.

Commissions paid to a travelling salesman for his services are wages within the meaning of the bankruptcy act; In re Dexter, 158 Fed. 788, 89 C. C. A. 285.

See MASTER AND SERVANT; SEAMEN; STORE ORDERS; WAGE-EARNER; ASSIGNMENT.

WAGON. A common vehicle for the transportation of goods, wares, and merchandise of all descriptions. The term does not include a hackney coach; Quigley v. Gorham, 5 Cal. 418, 63 Am. Dec. 139; but a "buggy" is a wagon; Gordon v. Shields, 7 Kan. 325; *contra*, Dingman v. Raymond, 27 Minn. 507, 8 N. W. 597; as is a hearse, within the meaning of an exemption law; Spikes v. Burgess, 65 Wis. 431, 27 N. W. 184.

WAIFS. Stolen goods waived or scattered by a thief in his flight in order to effect his escape. Jacob.

Such goods, by the English common law, belong to the king; 1 Bla. Com. 296; 5 Co. 109; Cro. Eliz. 694. It did not apply to the goods of foreign merchants, as they are ignorant of the usages and laws of England. Jacob. This prerogative has never been adopted here against the true owner, and never put in practice against the finder, though against him there would be better reason for adopting it; 2 Kent 292.

WAINAGIUM (Sax. *woeg*, Lat. *vagina*). That which is necessary to the farmer for the cultivation of his land. Barrington, Stat. 12; Magna Carta, c. 14. Instruments of husbandry. 1 Poll. & Maitl. 399. According to Selden and Lord Bacon, it is not the same as *contenementum*, used in the same chapter of Magna Carta, meaning the power of entertaining guests or, countenance, as common people say.

WAITING CLERKS IN CHANCERY. It was the duty of these officers to wait in attendance on the court of chancery. The office was abolished in 1842.

WAIVE. A term applied to a woman as *outlaw* is applied to a man. A man is an outlaw; a woman is a waive. Crabb, Tech. Dict.

To abandon or forsake a right.

To abandon without right: as, "if the felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do,—he forfeits them, whether they be his own goods, or goods stolen by him." Bac. Abr. *Forfeiture* (B).

WAIVER. The relinquishment or refusal to accept of a right. Cited Hecht v. Brandus, 4 Misc. 58, 23 N. Y. Supp. 1004.

The intentional relinquishment of a known right. Lehigh Val. R. Co. v. Ins. Co., 172 Fed. 364, 97 C. C. A. 62.

The intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. Portland & F. R. Co. v. Spillman, 23 Or. 587, 32 Pac. 689. See Holdsworth v. Tucker, 143 Mass. 374, 9 N. E. 764; Montague's Adm'r v. Massey, 76 Va. 314; Bennecke v. Ins. Co., 105 U. S. 359, 26 L. Ed. 990.

In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement; for his plea amounts to a waiver. Failure of counsel, either in brief or oral argument, to allude to an assignment of error, is a waiver thereof; American Fibre-Chamois Co. v. Fibre Co., 72 Fed. 508, 18 C. C. A. 662.

In seeking for a remedy, the party injured may, in some instances, waive a part of his right and sue for another: for example, when the defendant has committed a trespass on the property of the plaintiff by taking it away, and afterwards he sells it, the injured party may waive the trespass and bring an action

of assumpsit for the recovery of the money thus received by the defendant; 1 Chitty, Pl. 90. A delay of two years in bringing an action *in rem* on a maritime lien, the vessel meantime having passed into other hands, is a waiver of the lien; The Asher W. Parker, 84 Fed. 832, 28 C. C. A. 224; but when objections are seasonably and appropriately made there can be no waiver; Lake Shore & M. S. Ry. Co. v. Ry Co., 116 Ind. 578, 19 N. E. 440; and mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked; *id.*

In contracts, if, after knowledge of a supposed fraud, surprise, or mistake, a party performs the agreement in part, he will be considered as having waived the objection; 1 Bro. P. C. 289.

When a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will; Cooley, Const. Lim. 219. In criminal cases this doctrine can be true only to a very limited extent; Cooley, Const. Lim. 220. See JURY.

The right of a waiver, while extending to almost all descriptions of contractual, statutory, and constitutional privileges, is nevertheless subject to the control of public policy, which cannot be contravened by any conduct or agreement of the parties. Accordingly, all agreements will be held void which seek to waive objections to acts or defenses illegal at law; Boutelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152; Bosler v. Rheem, 72 Pa. 54; or which are forbidden on the ground of public policy or morality; Green v. Watson, 75 Ga. 471, 473, 45 Am. Rep. 479; Moxley v. Ragan, 10 Bush (Ky.) 156, 159, 19 Am. Rep. 61; Crump v. Com., 75 Va. 922, 924.

Waiver is distinguishable from ratification. Ratification is an adoption of a contract made on one's behalf by some one whom we did not authorize, which relates back to the execution of the contract and renders it obligatory from the outset. Waiver is the renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure; Reid v. Field, 83 Va. 26, 29, 1 S. E. 395.

While the term "acquiescence" is sometimes used in the opinions to denote that species of waiver which arises by tacit consent or by failure of a person for an unreasonable length of time to act upon rights of which he has full knowledge, nevertheless it is a species of waiver and differs in meaning only in that the term is limited in its application to one manner of waiver; Alabama C. Co. v. Equipment Co., 131 Ga. 365, 371, 62 S. E. 160. Waiver is distinguished however from election; *id.*; modification; Clark v. West, 125 App. Div. 654, 110 N. Y. Supp. 110; release; *id.*; and estoppel; Shaw v. Spencer, 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115.

In the absence of conduct creating an estoppel, a waiver should be supported by an agreement founded upon a valuable consideration; United Firemen's Ins. Co. v. Thomas, 82 Fed. 406, 409, 27 C. C. A. 42, 47 L. R. A. 450; although a consideration, such as is necessary to support a contract, is not always essential; Pabst Brewing Co. v. Milwaukee, 126 Wis. 110, 105 N. W. 563.

Waiver is a mixed question of law and fact. It is the duty of the court to define the law applicable to waiver, but it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the court; Nickerson v. Nickerson, 80 Me. 100, 105, 12 Atl. 880.

WANTON AND FURIOUS DRIVING. An offence against public health, which under the stat. 24 & 25 Vict. c. 100, s. 56, is punishable as a misdemeanor by fine or imprisonment. In this country the offence is usually provided for by state, county, or municipal legislation.

WANTON NEGLIGENCE. A heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to another. Hazle v. R. Co., 173 Fed. 431.

WANTONLY. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice. State v. Morgan, 98 N. C. 641, 3 S. E. 927; North Carolina v. Vanderford, 35 Fed. 282.

WANTONNESS. A licentious act by one man towards the person of another, without regard to his rights; as, for example, if a man should attempt to pull off another's hat against his will, in order to expose him to ridicule, the offence would be an assault, and if he touched him it would amount to a *battery*. See State v. Brigman, 94 N. C. 888.

WAPENTAKE. In Saxon Law. A subdivision of a country, used in Yorkshire, Lincolnshire, Derbyshire and Nottinghamshire. 1 Poll. & Maitl. 543.

It was called a *wapentake* from *wapon*, arms, and *tac*, to touch; because when the chief of the hundred entered upon his office he appeared in the field on a certain day, on horseback, with a pike in his hand, and all the principal men met him with lances. Upon this he alighted, and they all touched his pike with their lances, in token of their submission to his authority. In this court causes of great moment were heard and determined, as Mr. Dugdale has shown from several records. Besides which it took cognizance of theft, trials by ordeal, view of frankpledge, and the like; whence after the conquest it was called the sheriff's tourn, and as regarded the examination of the pledges, the court of the view of frankpledge. These pledges were no other than the freemen within the liberty, who, according to an institution of King Alfred, were mutually pledged for the good behavior of each other. Fortescue, *de Laud.* c. 24; Dugdale, Orig. Jur.

27; 4 Bla. Com. 273. Sir Thomas Smith derives it from the custom of taking away the arms at the muster of each hundred, from those who could not find sureties for good behavior. Rep. Angl. lib. 2, c. 16.

WAR. An armed contest between nations. Grotius, *de Jur. Bell.* l. 1, c. 1. The state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign. 1 Kent *61.

An armed contest to maintain the rights of a nation or to bring about a settlement of its disputes with other nations. It is also defined as a hostile contest with armies between two or more states claiming sufficient rights. Snow, Lect. Int. L. 82.

A civil war is one confined to a single nation. It is public on the part of the established government, and private on the part of the people resisting its authority, but both the parties are entitled to all the rights of war as against each other, and even as respects neutral nations; Wheat. Int. L. § 296.

The right of making war belongs in every civilized nation to the supreme power of the state. The exercise of this right is regulated by the fundamental laws in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation. A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. The Romans declared war with religious ceremony; and an invasion without a declaration was unlawful; 1 Kent *53. The present usage is to publish a manifesto within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them, usually to warn neutral states; Snow, Lect. Int. L. 82. A civil war is never declared; Boyd's Wheat. Int. L. § 294. It dates from the time the insurgents are declared belligerents; Snow, Lect. Int. L. 82. Even where there is a formal declaration of war, there is said to be strong tendency to date the war from the first act of hostility; *id.* That the recent tendency is to consider a declaration of war desirable and necessary, see 28 Am. L. Rev. 754. Since the time of Bynkershoek it has been the settled practice in Europe that war may lawfully exist by a declaration which is unilateral, or without a declaration on either side; it may begin by mutual hostilities; 1 Kent 54; at least as to subjects of a belligerent state; L. R. 3 Adm. & Ecc. 300; but some public act should be done to announce to the people a state of war, and to apprise neutrals of its existence; 1 Halleck, Int. Law, Baker's ed. 542. A state of war may exist without any formal declaration of it by either party, and this is true of both civil and foreign war; Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459. A state of civil war exists whenever the regular course of justice is interrupted by insurrection; *id.*

The war between Great Britain and the United States was a civil war until the declaration of independence, when it became a public war between independent governments; Ware v. Hylton, 3 Dall. (U. S.) 199, 224, 1 L. Ed. 568. So the war of secession in this country was a civil war after the president's proclamation of August 16, 1861. See Mayer v. Reed, 37 Ga. 482; 23 Am. L. Reg. 129; SECESSION. The general doctrines applicable to the subjects of belligerent nations have been held to be applicable to the hostile parties in that war; Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459. In a civil war the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at his discretion; Mrs. Alexander's Cotton, 2 Wall. (U. S.) 419, 17 L. Ed. 915; Kershaw v. Kelsey, 100 Mass. 576, 97 Am. Dec. 124, 1 Am. Rep. 142.

The constitution of the United States (art. 1, sec. 8) provides that congress shall have power to declare war. See Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404, 17 L. Ed. 915; Miller v. U. S., 11 Wall. (U. S.) 268, 20 L. Ed. 135; Tyler v. Defrees, 11 Wall. (U. S.) 331, 20 L. Ed. 161. An act of congress is necessary to the commencement of a foreign war and is in itself a declaration; 1 Kent 55. It fixes the date of the war; Thayer, Const. Cas. 2352. After congress has acted, it is not necessary to communicate the action to the enemy; 1 Kent 55; but an Indian war may exist without act of congress; Marks v. U. S., 28 Ct. Cl. 147. Actual hostilities may determine the date of the commencement of a war; a formal proclamation is unnecessary; The Buena Ventura, 87 Fed. 927.

Belligerent states not infrequently adopt the rule of reciprocity in the conduct of war, but this usage has not yet assumed the character of a positive law. Frequently an opposing belligerent applies the rule of reciprocity and metes out to his adversary the same measure of justice that he receives from him. But it is said that where one belligerent exceeds his extreme rights and becomes barbarous and cruel in his conduct, the other should not, as a general thing, follow and retort upon its subjects by treating them in like manner; 2 Halleck, Int. Law 35.

Under the regulations of the United States, the army is not allowed to use the enemy's flag or uniform for purposes of deceit, but the navy may use a foreign flag to deceive the enemy if it is hauled down before a gun is fired; Snow, Lect. Int. Law 82. See WEAPONS; FLAG.

When war exists between two nations, every individual of the one is theoretically at war with every individual of the other; though modern international law has at-

tempted, with some success, to confine the contest to the armies of the contesting powers and relieve non-combatants from loss and suffering as much as possible; Snow, Lect. Int. Law 82.

War gives this government full right to take the persons and confiscate the property of the enemy wherever found in the United States, and while the humane policy of modern times may have mitigated this rigid rule, it cannot impair the right itself; Brown v. U. S., 8 Cra. (U. S.) 110, 3 L. Ed. 504. The right to take enemy's property found in the United States requires an act of congress; *id.*, Story, J., diss. This rule applies to the property of a neutral within the enemy's lines; Young v. U. S., 97 U. S. 60, 24 L. Ed. 992; but it was held in Mrs. Alexander's Cotton, 2 Wall. 419, 17 L. Ed. 915, that the right to take the property of an enemy on land is substantially restricted "to special cases dictated by the necessary operations of the war;" "the seizure of private property of pacific persons for the sake of gain is excluded." See Briggs v. U. S., 143 U. S. 356, 12 Sup. Ct. 391, 36 L. Ed. 180.

A belligerent may, by express law or edict, confiscate the property or even the land of an alien enemy, within its territory or occupation; Union Ins. Co. v. U. S., 6 Wall. (U. S.) 759, 18 L. Ed. 879; Kershaw v. Kelsey, 100 Mass. 574, 97 Am. Dec. 124, 1 Am. Rep. 142.

The right of a belligerent to confiscate debts due by its subjects to enemy's subjects is usually recognized, but seldom exercised; 1 Kent *62; and this is more especially true in relation to the public debt of a belligerent state to an enemy's subject; 1 Halleck, Int. L. 535. The seizure by the United States of enemy's property on land cannot be authorized by the law of nations; it can be upheld only by an act of congress; U. S. v. Shares of Capital Stock, 5 Blatch. 231, Fed. Cas. No. 15,961. Vessels and cargo belonging to trading concerns in the enemy's country, or corporations organized under its laws, are subject to capture, regardless of the domicil of the partners or stockholders; The Buena Ventura, 87 Fed. 927.

A belligerent has a right to seize and retain as prisoners of war all subjects of an enemy state found within its territory; but this right has usually been modified by treaty, usage, or municipal regulations, and is seldom enforced; 1 Halleck, Int. L., Baker's ed. 530.

Territory conquered during a war is part of the domain of the conqueror for all commercial and belligerent purposes, so long as he continues in possession; Thirty Hogsheads of Sugar v. Boyle, 9 Cra. 191, 3 L. Ed. 701; but it is not incorporated into the domain of the conqueror except by a treaty of peace under which the former owner renounces it, or by long possession; U. S. v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336.

It is a general practice to permit alien residents to remain in the country during a war and to protect their property from seizure, or, if they return to their own state, to allow them to take it with them. Even property of the enemy found afloat in ports at the breaking out of the war is usually allowed safe conduct to a home port with time to finish loading cargo. The president's proclamation of April 26, 1898, fixed April 21 as the beginning of the Spanish war, and gave Spanish merchant vessels found in United States ports till May 21, inclusive, to load and depart with safe conduct to their destination, except vessels carrying military or naval officers, or coal in excess of their own needs, or contraband, or despatches; and permitted any such vessels which, prior to April 21, had sailed from any foreign port to any United States port, to reach their destination, unload, and return to any port not blockaded.

Congress, in a resolution approved by the President on April 20, 1898, declared that the people of Cuba are, and of right, ought to be, free and independent. Diplomatic relations were terminated on the same day. On April 22, a blockade of a part of the Cuban coast was instituted. On April 23, the queen of Spain, and on the 26th, the president, declared war. See The Pedro, 175 U. S. 354, 20 Sup. Ct. 138, 44 L. Ed. 195. Congress declared on April 25 that a state of war had existed from and after April 21. *Id.* See, also, The Rita, 87 Fed. 925.

The Boxer uprising in China in June, 1900, constituted a state of war within the 58th Article of War; Hamilton v. McClaughry, 136 Fed. 445.

War suspends all commercial intercourse between the citizens of belligerent states, except so far as may be allowed by the sovereign authority. The only exceptions are contracts for ransom and other matters of absolute necessity and the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor; but even such payments to an agent of an alien enemy must not be done with a view of transmitting the funds to the principal during the continuance of war; New York L. Ins. Co. v. Davis, 95 U. S. 429, 24 L. Ed. 453.

The doctrine of the renewal of contracts suspended by a war is based on considerations of equity and justice and cannot be invoked to revive a contract which it would be inequitable to revive, as where time is of the essence of the contract or the parties cannot be made equal; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789. In a learned opinion by Gray, J., in Kershaw v. Kelsey, 100 Mass. 572, 97 Am. Dec. 124, 1 Am. Rep. 142 (quoted with approval in New York L. Ins. Co. v. Davis, 95 U. S. 429, 24 L. Ed. 453, and Williams v. Paine, 169 U.

S. 72, 18 Sup. Ct. 279, 42 L. Ed. 658), it was said:

"The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries, and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The trading or transmission of property or money which is prohibited by international law during war, is from or to one of the countries at war. An alien enemy residing in this country may contract and sue as a citizen can; Kershaw v. Kelsey, 100 Mass. 573, 97 Am. Dec. 124, 1 Am. Rep. 142. Where a creditor, though the subject of the enemy, remains in the country of the debtor, or has an agent there, payment to the creditor or his agent is not a violation of the duties imposed by a state of war upon the debtor; *id.*

The breaking out of a war does not necessarily and as a matter of law revoke every agency; it depends upon the circumstances and the nature of the agency; Williams v. Paine, 169 U. S. 73, 18 Sup. Ct. 279, 42 L. Ed. 658. A contract of agency of an insurance company is revoked; New York L Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453, citing New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789. In order to the subsistence of an agency during the war, it must have the assent of the parties; New York L. Ins. Co. v. Davis, 95 U. S. 429, 24 L. Ed. 453.

War suspends the capacity of an alien enemy to sue in our courts; Fairfax v. Hunters, 7 Cra. (U. S.) 603, 3 L. Ed. 453; Johnson v. Thirteen Bales, 2 Paine 639, Fed. Cas. No. 7,415. But see 4 Am. L. T. 68. An assignee of an alien enemy cannot sustain a claim in a prize court; The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; but an alien enemy may come into admiralty and defend his property seized as prize on the high seas; U. S. v. Shares of Capital Stock, 5 Blatchf. 231, Fed. Cas. No. 15,961. The right to proceed in an action begun before the war is only suspended; Elgee's Adm'r v. Lovell, Woolw. 102, Fed. Cas. No. 4,344. Neither interest nor the statute of limitations run during a war.

As to the effect of war on life insurance contracts, the authorities vary; that the failure to pay premiums avoids the policy, see New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789; New York L. Ins. Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453; that the contract is not annulled by war, but only suspended, see New York L. Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290; Mutual B. L. Ins. Co. v. Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218; Hamilton v. Ins. Co., 9 Blatchf. 234, Fed. Cas. 5,986; Statham v. Ins. Co., 45 Miss. 581, 7 Am. Rep. 737. In most of the latter cases either the insured had made a tender of the premiums or the company's agent had removed during the war; 1 Biddle, Ins. § 489. There seems to be authority that a fire insurance policy is not annulled by war; see Mahler v. Ins. Co., 9 Heisk. (Tenn.) 399; as to a marine policy, see Cohen v. Ins. Co., 50 N. Y. 619, 10 Am. Rep. 522.

In time of war it is lawful to pull down or injure the property of a private person; *salus populi suprema lex;* 4 Term 796.

An American corporation doing business in Cuba was, during the war with Spain, an enemy of the United States with respect to its property found and then used in Cuba, and such property would be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war; Juragua I. Co. v. U. S., 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520. All persons residing in Cuba during the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States; Herrera v. U. S., 222 U. S. 558, 32 Sup. Ct. 179, 56 L. Ed. 316.

No civil liability attached to officers or soldiers for an act done in accordance with the usages of civilized warfare, in the late rebellion under and by military authority of either party; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193. The legal condition of a Confederate soldier was that of a soldier serving against the United States under a hostile power. His legal condition subsequently to May, 1865, was that of a prisoner of war upon parole; Carter v. U. S., 23 Ct. Cl. 326.

In cases arising out of the Spanish-American war, it is held that vessels of war have the right, in the absence of any declaration

of exemption by the political power, to capture enemy's property wherever found afloat, and the burden is on the claimant to show that it comes within the exemption of any such proclamation. Cargo shipped from this country in an enemy's vessel to residents of a neutral country is presumably neutral cargo; but if so shipped to the enemy's country it is presumptively enemy's property, but the latter presumption may be overcome; The Buena Ventura, 87 Fed. 927.

At the Hague Peace Conference of 1899 two conventions were adopted relating to the rights and duties of belligerents in time of war; and at the Hague Peace Conference of 1907, the above conventions were revised and seven other conventions adopted regulating the law upon other questions of land and maritime warfare.

The Convention Relative to the Commencement of Hostilities (1907) provides that hostilities must not commence without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war. Moreover, the state of war must be notified to neutral powers without delay.

The Conventions Concerning the Laws and Customs of War on Land (1899–1907) define the law upon the following subjects:

Qualifications of Belligerents. The laws, rights and duties of war apply not only to the army of a belligerent, but also to militia and corps of volunteers, provided certain conditions be fulfilled by the latter. Likewise the population of a territory who, without organization, rise up against an invader, have the rights of belligerents if they respect the laws and customs of war.

Prisoners of War (*q. v.*).

The Sick and Wounded. See Geneva Convention below.

Hostilities. Under this head restrictions are laid down as to the means which may be employed to injure the enemy, and the conditions are stated under which seizures and bombardments may be undertaken.

Spies. See SPY.

Flags of Truce (*q. v.*).

Capitulations. The obligation to observe them scrupulously is affirmed.

Armistices. See ARMISTICE; TRUCE.

Military Authority over the Territory of the Hostile State. See MILITARY OCCUPATION.

The Convention Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities (1907) provides that merchant-ships in the ports of a belligerent at the commencement of hostilities should be allowed to depart freely with a passport to their port of destination. Moreover, enemy merchant-ships, which have left their last port of departure in ignorance of the commencement of hostilities, cannot be confiscated. In both cases enemy cargo is given the same rights as enemy ships.

The Convention Relative to the Conversion of Merchant-Ships into Warships (1907) defines the conditions subject to which such conversion may take place in time of war. See PRIVATEER.

The Convention Relative to the Laying of Automatic Submarine Contact Mines (1907), while not forbidding their employment, restricts it by forbidding the laying of unanchored mines, and of anchored mines which do not become harmless as soon as they have broken loose from their moorings. Moreover, it is forbidden to lay automatic contact mines off the coasts of the enemy with the sole object of intercepting commercial navigation. Other rules are laid down to insure the safety of merchant-ships, for the destruction of which the mines are not intended.

The Convention Respecting Bombardment by Naval Forces in Time of War (1907) lays down rules safeguarding the rights of non-combatant inhabitants and public buildings not used in the defense of the city. It is forbidden to bombard undefended ports or towns unless the latter refuse to comply with requisitions for supplies for the immediate use of the naval forces, and then only after due notice has been given. But bombardment for non-payment of money contributions is forbidden. Buildings devoted to public worship, art, science, or charitable purposes, historic monuments, and hospitals must be spared as far as possible.

The Conventions for the Adaptation of the Principles of the Geneva Convention to Maritime War (1899 and 1907) lay down rules providing for the protection from hostilities of military hospital ships, together with their religious and medical staff, provided such ships are not used for military purposes and keep aloof from the combat.

The Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War (1907) provides that the postal correspondence of neutrals or belligerents found on board a neutral or enemy ship at sea is inviolable; an exception, however, is made in case of violation of blockade. Vessels employed in coast fisheries are exempt from capture provided they take no part in hostilities. See The Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. The officers and crew of captured merchant-ships, if neutral citizens, are not to be made prisoners of war, and if enemy citizens, are to be released upon written promise not to engage in the operations of war.

The Convention Relative to the Establishment of an International Prize Court (1907). See PRIZE COURT.

The following declarations were also adopted:

Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (1899 and 1907). The term of the declaration of 1907 expires at the close of the third Peace Conference.

The Declaration Ratifying the Declaration of St. Petersburg of 1868 (1899) is an agreement to abstain from the use of projectiles the sole object of which is the defusion of asphyxiating or deleterious gases.

The Declaration Prohibiting the Use of Bullets with a Hard Envelope (1899) is in accordance with the Declaration of St. Petersburg of 1868.

See AMBUSH; APPROACH; ARMED; ARMISTICE; BELLIGERENCY; BLOCKADE; BOOTY; CAPTURE; CARTELS; COMMERCIA BELLI; CONDEMNATION; CONFISCATION; CONQUEST; CONTRABAND; DECLARATION OF WAR; ENEMY; FLAG OF TRUCE; GUERRILLA TROOPS; MANIFESTO; MEDIATION; MILITARY OCCUPATION; NEUTRALITY; PAROLE; PARTIES; PEACE; POSTLIMINIUM; PRISONER OF WAR; PRIVATEER; PRIZE; PRIZE COURT; PUBLIC ENEMY; QUARTER; RANSOM; RECAPTURE; REPRISAL; RESCUE; RETORSION; SAFE-CONDUCT; SAFEGUARD; SEARCH; SHIPS OF WAR; SPY; TREATY OF PEACE; TRUCE; UTI POSSIDETIS; VISIT; WEAPONS.

WAR CLAIMS. As to federal legislation on this subject, see U. S. v. R. Co., 163 U. S. 244, 16 Sup. Ct. 993, 41 L. Ed. 145. The act of 1875, Feb. 18, provided that the court of claims should have no jurisdiction over claims growing out of the destruction of property during the civil war; and the act of March 3, 1887, excludes such claims from the jurisdiction of the said court and of the district and circuit courts. Decisions under the act of 1864 will be found in U. S. v. R. Co., 163 U. S. 253, 16 Sup. Ct. 993, 41 L. Ed. 145, which holds that the court of claims has no jurisdiction over a claim for railroad iron appropriated by the army "while suppressing the rebellion." The United States is not responsible for the destruction of private property by their military operations during the civil war, committed by either army; nor, where they rebuilt the property (a railroad bridge), can it recover from the owner for the cost; U. S. v. R. Co., 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634. See WIAR.

Under the prohibitions of the Tucker act of congress, March 3, 1887, the court of claims has no jurisdiction of claims for seizures made in Santiago, Cuba, after its capitulation, in violation of the president's proclamation of July 13, 1898, or of the laws of war. Rights of Spanish subjects against the United States for illegal seizures, etc., were taken away by the treaty of peace; Herrera v. U. S., 222 U. S. 558, 32 Sup. Ct. 179, 56 L. Ed. 316.

WAR OFFICE. **In England.** A term applied to the Department of State for War.

WARD. An infant placed by authority of law under the care of a guardian.

See GUARDIAN.

A subdivision of a city to watch in the daytime, for the purpose of preventing violations of the law. It is the duty of all police officers and constables to keep ward in their respective districts. It now indicates a subdivision of a city.

WARD IN CHANCERY. An infant who is under the superintendence of the chancellor.

WARDEN. A guardian; a keeper. This is the name given to various officers; as, the warden of a prison, the port warden of the port of Philadelphia, church-wardens. As to the latter, see Baum, Church Law.

Officials over forests. They were the executive officers of the crown, to whom its writs were addressed, and were somewhat analogous the sheriff. Holdsw. Hist. E. L. 341. Abolished in 1817.

WARDEN OF THE CINQUE PORTS. See CINQUE PORTS.

WARDMOTE (from *ward*, and Sax. *mote*, or *gemote*, a meeting). **In English Law.** A court held in every ward in London, with power to inquire into and present all defaults concerning the watch and police doing their duty, that engines, etc., are provided against fire, that persons selling ale and beer be honest and suffer no disorders, nor permit gaming, etc., that they sell in lawful measures, and searches are to be made for beggars, vagrants, and idle persons, etc., who shall be punished. Chart. Hen. II.; Cunningham; Wharton.

WARDS AND LIVERIES, COURT OF. A court established in England in the sixteenth century. 3 Holdsw. Hist. E. L. 59.

WARDSHIP AND MARRIAGE. **In English Law.** The right of the lord over the person and estate of the tenant when the latter was under a certain age.

Wardship was incident to a tenure by knight's service (see FEUDAL LAW), and to a tenure in socage; by the latter the nearest relation to whom the inheritance could not descend was entitled to the custody of the person and estate of the heir till he attained the age of fourteen years; at which period the wardship ceased, and the guardian was bound to account. Wardship in copyhold estates partook of that in chivalry and that in socage. Like the former, the lord was the guardian; like the latter, he was required to account. 2 Bla. Com. 67, 87, 97; Glanville, lib. 7, c. 9; Grand Cout. c. 33; Reg. Maj. c. 42.

In the feudal law, after the Conquest, the rights of wardship and marriage became definite rights of great pecuniary value both to the king and the mesne lords. The king arranged the marriage of a female heiress. Until majority he had the custody of the sons and heirs of his tenants who had died and of their estates, as also of the estates of his female wards. These were rights which could be bought and sold. Magna Carta recognized them and provided that the guardian must

not waste his ward's lands nor compel a marriage to one of lower rank. If the ward married without a license, double the value of the marriage could be exacted and the land held till it was paid. Though the lord could not compel a marriage, he could, upon the ward's refusal, exact the value of the marriage. By the 16th century these rights were almost exclusively vested in the king.

They were confined to tenures by military service and grand serjeanty and did not (or did not ordinarily; Jenks, Mod. Land L. 18) extend to socage tenures. By Statute of Marlborough (1267), the heir, on reaching his majority, became entitled to an account, and the marriage of the heir could not be given or sold "but to the advantage of the foresaid heir"; 3 Holdsw. Hist. E. L. 55.

The infancy of an heir in socage ceased at 14 years; of an heir in chivalry, at 21. The guardian in socage was strictly accountable for the profits of the land; the guardian in chivalry might, subject to certain restrictions on waste, make his profit out of it. The guardianship in socage went to the next of kin who could not inherit; Jenks Mod. Land L. 18.

See RAVISHMENT OF WARD.

WAREHOUSE. A place adapted to the reception and storage of goods and merchandise. Owen v. Boyle, 22 Me. 47.

A radical change was made in the revenue laws of the United States by the establishment, under the act of congress of Aug. 6, 1846, of the warehousing system. This statute is commonly called the Warehousing Act. Its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties until he is ready to bring his goods into market; Tremlett v. Adams, 13 How. (U. S.) 295, 14 L. Ed. 152. Previous to the passage of that act, no goods chargeable with cash duties could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had been passed through the custom-house. Before that act, the only provisions existing in relation to the warehousing of goods were merely applicable to special cases, such as where the vessel in which the goods were imported was subject to quarantine regulations, or where the entry might have been incomplete, or the goods had received damage, or where a landing was compelled at a port other than the one to which the vessel was destined, on account of distress of weather or other necessity, or in case of the importation of wines, etc.

The warehousing system was extended by the establishment of private bonded warehouses. Act of March 28, 1854, R. S. §§ 2964, 2965.

Merchandise arriving at certain ports, destined for certain other ports, may be shipped to destination in bond without appraisement and liquidation of duties. See 2 Supp. R. S. 3, note.

Where warehouses are situated in a state, and their business carried on therein exclusively, a state statute prescribing regulations for their governance is not unconstitutional, it being a matter of purely domestic concern, and even where their business affects interstate as well as state commerce, such a statute can be enforced until congress acts in reference to their interstate relations; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

Goods stored in a United States bonded warehouse on which duties remain unpaid are in possession of the United States, and an order directing a warehouseman to deliver them to a vendee, even though accepted by the warehouseman, does not constitute a constructive or symbolical delivery, or a receipt or an acceptance of the goods sufficient to satisfy the statute of frauds; In re Clifford, 2 Sawy. 428, Fed. Cas. No. 2,893.

Every distiller of spirits shall provide a warehouse on his distillery premises to be used only for storage of distilled spirits of his own manufacture under an internal revenue storekeeper and to be considered a bonded warehouse of the United States; R. S. § 3271 *et seq.*

The word "warehouse," when used alone, means a bonded warehouse; Constable v. S. S. Co., 154 U. S. 51, 87, 14 Sup. Ct. 1062, 38 L. Ed. 903.

See POLICE POWER; RATES; WAREHOUSEMAN.

WAREHOUSEMAN. A person who receives goods and merchandise to be stored in his warehouse for hire. He is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable; Mechanics' & T. Ins. Co. v. Kiger, 103 U. S. 352, 26 L. Ed. 433.

He is bound to use ordinary care in preserving such goods and merchandise, and his neglect to do so will render him liable to the owner; 1 Esp. 315; Story, Bailm. § 444; Backus v. Start, 13 Fed. 69; Nichols v. Smith, 115 Mass. 332; Buckingham v. Fisher, 70 Ill. 121; Reamer v. Davis, 85 Ind. 201. The warehouseman's liability commences as soon as the goods arrive and the crane of the warehouse is applied to raise them into the warehouse; 4 Esp. 262. See Farrell & Co. v. R. R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760; Titsworth v. Winnegar, 51 Barb. (N. Y.) 148. He cannot have possession of another man's property, with its accompanying duties and responsibilities forced upon him against his will; Delaware, L. & W. R. Co. v. Transit Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

Warehousemen have a lien on property left in their custody, for their hire, labor, and services; 1 Esp. 109; Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254; Jones, Liens § 967; being due on all goods stored

under a single contract; Devereux v. Fleming, 53 Fed. 401; though in some cases this lien has been looked upon only as specific, and not general; Scott v. Jester, 13 Ark. 446. See Story, Bailm. 452; 3 Kent § 635. A warehouseman cannot recover storage for property stored for a certain time for a definite sum, where it is destroyed within the time, without his negligence; Archer v. McDonald, 36 Hun (N. Y.) 194; but under a custom to collect charges when the goods are ordered out, their accidentally burning will not release the owner from paying storage; Jones v. Chaffin, 102 Ala. 382, 15 South. 143. Grain delivered to a warehouseman upon the agreement that it may be mixed with other of like grade, and held for the owner is a bailment not a sale; Ardinger v. Wright, 38 Ill. App. 98.

A statute requiring warehousemen operating public elevators to insure grain at their own expense is valid; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. See WHARFINGER; RATES.

Warehouse Receipts. Receipts given by a warehouseman for chattels placed in his possession for storage purposes. Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350. They are not in a technical sense negotiable instruments; 2 Ames, Bills & N. 782. It has been held, that, even where no statute has been enacted on this subject, inasmuch as these instruments have come to be considered the representatives of property, and an assignment is equivalent to the delivery of property, the warehouseman is estopped, as against an assignee for value without notice, to set up facts or agreements contradictory to their terms; Stewart v. Ins. Co., 9 Lea (Tenn.) 104.

Defendant is estopped from denying the validity of a warehouse receipt for grain fraudulently issued by its agent and transferred to the plaintiff for value without notice; Fletcher v. Elevator Co., 12 S. D. 643, 82 N. W. 184. Other cases holding the same view are Armour v. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Sioux City & P. R. Co. v. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *contra*, Grant v. Norway, 10 C. B. 665; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; National Bank of Commerce v. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.

The Warehouse Receipts Act has been enacted in California, Colorado, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, Alaska, District of Columbia and the Philippines.

A warehouse receipt must embody within its terms: (a) The location of the warehouse where the goods are stored; (b) the date of the issue of the receipt; (c) the consecutive number of the receipt; (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order; (e) the rate of storage charges; (f) a description of the goods or of the packages containing them; (g) the signature of the warehouseman; (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly, or in common with others, the fact of such ownership; and (i) a statement of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable for all damage caused by the omission from a receipt of any of the terms.

Receipts are negotiable or non-negotiable, the latter when it is stated that the goods received will be delivered to the depositor or any other specified person; and it shall have plainly placed on its face "non-negotiable" or "not negotiable." Such words, however, if placed on a negotiable receipt, shall be of no effect.

The warehouseman is obliged to deliver the goods upon a demand made by the holder of the receipt or by the depositor, if accompanied with (a) an offer to satisfy the warehouseman's lien, (b) to surrender the receipt properly indorsed, (c) and to give, when the goods are delivered, an acknowledgment that they have been delivered.

He may deliver the goods (a) to the person entitled to delivery by the terms of a non-negotiable receipt, (b) or to the holder of a negotiable receipt, if properly indorsed or if the goods are deliverable to bearer; but if the warehouseman had knowledge that delivery about to be made was to one not lawfully entitled to the possession of the goods, then he will be liable as for conversion if he so delivers them.

Negotiable receipts must be cancelled when the goods are delivered; when part only of the goods have been delivered, they must be cancelled (and a new receipt issued) or marked. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was immaterial, authorized, or made without fraudulent intent, but he shall be liable according to the terms of the receipt as originally issued.

Where a negotiable receipt has been lost or destroyed, a court may order delivery of the goods upon satisfactory proof and the giving of a bond, but the delivery shall not relieve the warehouseman from liability to the holder of the receipt, for value and without notice of the delivery. A warehouseman can-

not set up title in himself, and if more than one person claims title, he may require all known claimants to interplead. The warehouseman has reasonable time to determine the validity of claims.

He is liable for non-existence of goods, or misdescription, unless the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, and such statements are true.

As a rule, goods must be kept separate, but fungible goods may be commingled if the warehouseman is authorized by agreement or custom.

In case of negotiable receipts, the creditor's remedies are to reach the receipts.

The warehouseman has a lien for storage and preservation of the goods, for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperage, and also all reasonable charges for notice and advertisements of sale, and for the sale of goods where default has been made in satisfying the warehouseman's lien. The lien may be lost by a surrender of the goods or by refusing to deliver when a proper tender has been made. In case of a negotiable receipt, it must state on its face charges for which lien is claimed. The goods need not be delivered until the lien is satisfied. The lien does not preclude the other remedies to which a warehouseman, as a creditor, is entitled. The lien may be satisfied, by giving notice with a brief description of the goods, with the demand and statement that unless claims be paid within a specified time the goods will be advertised for sale and sold by auction at a specified time and place. After a sale, the warehouseman shall not be liable for failure to deliver the goods.

Receipts may be negotiated the same as bills of lading.

See BILLS OF LADING; WARRANTY; NEGOTIABLE INSTRUMENTS.

This act substantially follows the common law (except perhaps in broadening negotiability) and its rules are largely in force in states which have not enacted it.

The issue of a receipt for goods not received; or containing false statements; or the issue of duplicate receipts not so marked; or the issue for warehouseman's goods of receipts which do not state that fact; or the delivery of the goods without surrender of the negotiable receipt; or the depositing of goods by one who has no title and taking a negotiable receipt which he negotiates; all of these acts are criminal offenses and punishable as such.

Under the Illinois constitution, which declares all elevators where grain is stored for a compensation to be "public warehouses," the owners of elevator companies were enjoined from mixing their own grain with other grain stored in their elevators; Hannah v. People, 198 Ill. 77, 64 N. E. 776.

See LIEN; BILL OF LADING; RATES; IMPAIRING THE OBLIGATION OF CONTRACTS; PRINCIPAL AND AGENT; NEGOTIABLE INSTRUMENTS; SALES. The Uniform Act and the acts of all the states are set forth and the cases considered in Mohun, Warehousemen (2d ed. 1914).

WARRANT. A writ issued by a justice of the peace or other authorized officer, directed to a constable or other proper person, requiring him to arrest a person therein named, charged with committing some offence, and to bring him before that or some other justice of the peace.

Warrant and commission, outside of naval technicality, are synonymous words. There is no difference in force between a commission and a warrant as used in the navy, except that one recites that the appointment is made by and with the advice and consent of the senate, and the other does not. Both are signed by the president; Brown v. U. S., 18 Ct. Cl. 543.

A *bench-warrant* is a process granted by a court, authorizing a proper officer to apprehend and bring before it some one charged with some contempt, crime, or misdemeanor See BENCH-WARRANT.

A *search-warrant* is a process issued by a competent court or officer authorizing an officer therein named or described to examine a house or other place for the purpose of finding goods which it is alleged have been stolen. See SEARCH-WARRANT.

Under the English Extradition Act of 1870, 33 & 34 Vict. c. 52, § 26, a warrant is defined as "any judicial document authorizing the arrest of a person accused or convicted of crime." 9 Q. B. D. 93.

A warrant should regularly bear the hand and seal of the justice, and be dated. It should contain a command to the officer to make a return thereof and of his doings thereon. But the want of such a command does not excuse him from the obligation of making a proper return; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744. And it is no ground for discharging a defendant that the warrant does not contain such a command; Com. v. Boon, 2 Gray (Mass.) 74. No warrant ought to be issued except upon the oath or affirmation of the witness charging the defendant with the offence; Conner v. Com., 3 Binn. (Pa.) 38. A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his; West v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643. It is competent to show that the affidavit was not filed until after the arrest; Smith v. Clausmeier, 136 Ind. 105, 35 N. E. 904, 43 Am. St. Rep. 311. Under a statute authorizing a writ of *habeas corpus* to determine the identity of the person arrested, the inquiry may embrace the sufficiency of the papers; People v. Conlin, 15 Misc. 303, 36 N. Y. Supp. 888. In England a person riding a bicycle without

a light at night cannot be arrested or even stopped to ascertain his name and address, without a warrant; [1897] 2 Q. B. 452.

The reprehensible practice of issuing blank warrants, which once prevailed in England, was never adopted here. 2 Russ. Cr. 512; Ld. Raym. 546; 1 H. Bla. 13. See SEARCHES AND SEIZURES; ARREST.

WARRANT OF ATTORNEY. An instrument in writing, addressed to one or more attorneys therein named, authorizing them, generally, to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him.

An instrument authorizing an attorney at law to appear in behalf of its maker, or confess judgment against him. Treat v. Tolman, 113 Fed. 892, 51 C. C. A. 522.

This general authority is usually qualified by reciting a bond which commonly acccompanies it, together with the condition annexed to it, or by a written defeasance stating the terms upon which it was given and restraining the creditor from making immediate use of it. In *form*, it is, generally, by deed; but it seems it need not necessarily be so; 5 Taunt. 264. This instrument is given to the creditor as a security. Possessing it, he may sign judgment, without its being necessary to wait the termination of an action. See 14 East 576; 2 Term 100.

A warrant of attorney given to confess a judgment is not revocable, and notwithstanding a revocation, judgment may be entered upon it; 2 Ld. Raym. 766, 850. The death of the debtor is, however, generally speaking, a revocation; Co. Litt. 52 *b*. In Pennsylvania, judgment may be entered by the prothonotary on such a warrant without the intervention of an attorney; 4 Sm. L. 278; the instrument must show on its face the amount due, unless it can be rendered certain by mere calculation; Connay v. Halstead, 73 Pa. 354. The general power ceases with the entry of judgment; Jackson v. Bartlett, 8 Johns. (N. Y.) 361; Hinkley v. Water Power Co., 9 Minn. 55 (Gil. 44); *contra*, Gray v. Wass, 1 Greenl. (Me.) 257; Flanders v. Sherman, 18 Wis. 575. The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular; Martin *v.* Rex, 6 S. & R. (Pa.) 296; Fairchild v Camac, 3 Wash. C. C. 558, Fed. Cas. No. 4,610. The judgment is as much the act of the court as if it were pronounced on *nil dicit* or a *cognovit*, and has the conclusive effect of a judgment on a verdict; Safe-Deposit & T. Co. v. Wright, 105 Fed 158, 44 C. C. A. 421; Appeal of Lennig, 93 Pa. 307.

A party to a suit may in certain cases require the attorney who appears for the opponent to file of record a warrant of attorney.

See POWER OF ATTORNEY.

Under the Pennsylvania practice, a motion for a rule on the plaintiff's attorney to file his warrant of attorney must be made by the defendant before he pleads; Mercier v. Mercier, 2 Dall. (Pa.) 142, 1 L. Ed. 324; Campbell v. Galbreath, 5 Watts (Pa.) 423; see Doe v. Abbott, 152 Ala. 246, 44 South. 637, 126 Am. St. Rep. 30. If the plaintiff raises the question, the burden of proof is on him; Aaron v. U. S., 155 Fed. 836, 84 C. C. A. 67. The entry of appearance for defendant is proof of authority and no additional evidence has ever been required; Osborn v. Bank, 9 Wheat. (U. S.) 830, 831, 6 L. Ed. 204. The plaintiff cannot question the authority of the defendant's solicitor. The plaintiff has brought the defendant into court; 1 Exch. 16.

WARRANTEE. One to whom a warranty is made. Sheppard, Touchst. 181.

WARRANTIA CHARTÆ. An ancient and now obsolete writ which was issued when a man was enfeoffed of land with warranty and then he was sued or impleaded in assize or other action, in which he could not vouch or call to warranty.

It was brought by the feoffer pending the first suit against him, and had this valuable incident, that when the warrantor was vouched, and judgment passed against the tenant, the latter obtained judgment simultaneously against the warrantor, to recover other lands of equal value. Funk v. Voneida, 11 S. & R. (Pa.) 115, 14 Am. Dec. 617. See Maitland in 2 Sel. Essays in Anglo-Amer. L. H. 577.

WARRANTOR. One who makes a warranty. Shepp. Touchst. 181.

In Anglo-Saxon times, a person who sold property—land or movables—was obliged to have a warrantor. 2 Holdsw. Hist. E. L. 72.

WARRANTY. In Insurance. A stipulation or agreement on the part of the insured party, in the nature of a condition.

An *express* warranty is a particular stipulation introduced into the written contract by the agreement of the parties.

An *implied* warranty is an agreement which necessarily results from the nature of the contract: as, that the ship shall be seaworthy when she sails on the voyage insured.

An express warranty usually appears in the form of a condition, expressed or directly implied in the phraseology of the policy, stipulating that certain facts are or shall be true, or certain acts are or shall be done by the assured, who by accepting the insurance ratifies the stipulation.

Where the stipulation relates wholly to the future, it is a promissory condition or warranty; 1 Phill. Ins. § 754.

An express warranty must be strictly com-

plied with; and the assured is not permitted to allege, in excuse for non-compliance, that the risk was not thereby affected, since the parties have agreed that the stipulated fact or act shall be the basis of the contract; 1 Phill. Ins. § 755; unless compliance is rendered illegal by a subsequent statute; *id.* § 769. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the assured; Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835; Anders v. Knights of Honor, 51 N. J. L. 175, 17 Atl. 119. When the application is by the express terms of the policy made a part of the contract, a breach of any warranty in the application invalidates the entire contract; Mut. Life Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; but where a provision merely says that all statements are warranted to be full, complete and true, they amount to representations; Reppond v. Ins. Co., 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

A breach of warranty vitiates the insurance, though the insured made the warranty without knowledge of its falsity; Clemans v. Soc. of Good Fellows, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; Holloway v. Ins. Co., 48 Mo. App. 1; 9 L. R. Q. B. 328. Breach of warranty in an insurance policy does not avoid the policy when the insured is an infant; O'Rourke v. Ins. Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

Questions of warranty in insurance have been much litigated:

In fire policies, with reference to assignments of the insured property, or the policy; Hooper v. Fire Ins. Co., 17 N. Y. 424; Birdsey v. Ins. Co., 26 Conn. 165; conformity to charter; Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375; condition of the premises, including construction, locality, and manner of using; Townsend v. Ins. Co., 18 N. Y. 168; Frisbie v. Ins. Co., 27 Pa. 325; Wilson v. Ins. Co., 4 R. I. 141; distance of other buildings; Hall v. Ins. Co., 6 Gray (Mass.) 185; Davis v. Ins. Co., 81 Ia. 496, 46 N. W. 1073, 10 L. R. A. 359, 25 Am. St. Rep. 509; frauds; Grigsby v. Ins. Co., 40 Mo. App. 276; kind of risk; Burbank v. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300; Frost's D. L. & W. W. Works v. Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846; smoking on premises; Hosford v. Ins. Co., 127 U. S. 399, 8 Sup. Ct. 1199, 32 L. Ed. 196; limiting right of action; Haskins v. Ins. Co., 5 Gray (Mass.) 432; Brown v. Ins. Co., 5 R. I. 394; notice and demand; First Baptist Church v. Ins. Co., 18 Barb. (N. Y.) 69; and proof of loss; Trask v. Ins. Co., 29 Pa. 198, 72 Am. Dec. 622; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553; Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; Cleaver v. Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Sugg v. Ins. Co., 98 N. C. 143, 3 S. E. 732; payment of premium; Buckbee v. Trust Co., 18 Barb. (N. Y.) 541; title; Loehner v. Ins. Co., 17 Mo. 247; Howard F. Ins. Co. v. Bruner, 23 Pa. 50; Ames v. Ins. Co., 14 N. Y. 253; value; Lee v. Ins. Co., 11 Cush. (Mass.) 324; concealment of facts as to title; Diffenbaugh v. Ins. Co., 150 Pa. 270, 24 Atl. 745, 30 Am. St. Rep. 805.

In life policies, with reference to assignment; Mutual P. Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269; representation, or other stipulations; Miles v. Ins. Co., 3 Gray (Mass.) 580; Boland v. Ben. Ass'n, 74 Hun, 385, 26 N. Y. Supp. 433; Brady v. Ins. Ass'n, 60 Fed. 727, 9 C. C. A. 252; McGurk v. Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; that the insured is alive and in sound health; Bernard v. Ins. Ass'n, 14 App. Div. 142, 43 N. Y. Supp. 527. Where an application for life insurance is to be treated as a warranty it is to that extent a part of the policy; Kelley v. Ins. Co., 75 Fed. 637. A warranty that the insured will not die by his own hand is valid; *id.*

In marine policies, with reference to assignments; Marigny v. Ins. Co., 13 La. Ann. 338, 71 Am. Dec. 511; contraband trade; Decrow v. Ins. Co., 43 Me. 460; other insurance; Buffalo S. E. Works v. Ins. Co., 17 N. Y. 401; seaworthiness; Garrigues v. Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493; Brooks v. Ins. Co., 7 Pick. (Mass.) 259; 5 M. & W. 414; Roccus, n. 22; Dodge v. Ins. Co., 85 Me. 215, 27 Atl. 105; Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; suspension of risk; Bowditch Mut. Fire Ins. Co. v. Winslow, 3 Gray (Mass.) 415; title; Bidwell v. Ins. Co., 19 N. Y. 179.

Waiver of the right to insist upon the performance of a condition may occur under a policy of this description; as, of the condition relative to assignment; Hale v. Ins. Co., 32 N. H. 295, 64 Am. Dec. 370; or answers to questions; Liberty Hall Ass'n v. Ins. Co., 7 Gray (Mass.) 261; or distance of buildings; Nute v. Ins. Co., 6 Gray 175; going out of limits; Bevin v. Ins. Co., 23 Conn. 244; additional insurance; Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633; limitation of action; Ames v. Ins. Co., 14 N. Y. 253; Everett v. Ins. Co., 142 Pa. 332, 21 Atl. 819, 24 Am. St. Rep. 499; offer of arbitration; Cobb v. Ins. Co., 6 Gray (Mass.) 192; payment of premium or assessment; Bouton v. Ins. Co., 25 Conn. 542; proof of loss; Noonan v. Ins. Co., 21 Mo. 81; title; Trott v. Ins. Co., 83 Me. 362, 22 Atl. 245. An insurance company cannot set up a forfeiture for a condition broken, against one whom its conduct has induced to believe that such provision would not be insisted upon; Penn Mut. Life Ins. Co. v. Keach, 134 Ill. 583, 26 N. E. 106; so an insurer is estopped to set up a breach of a warranty written by its agent for an illiterate person; O'Brien v. Society, 117 N. Y. 310, 22 N. E. 954; or made by the error of

the agent; Phœnix Ins. Co. v. Warttemberg, 79 Fed. 245, 24 C. C. A. 547.

A clause in a policy of insurance against fire that nothing but a distinct specific agreement clearly expressed and indorsed on the policy shall operate as a waiver of any printed or written condition, warranty, or restriction thereon, is construed to refer to those conditions which enter into and form a part of the contract of insurance, and not to these stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proof of loss; May, Ins. § 505.

See DEVIATION; POLICY; REPRESENTATION; SEAWORTHINESS; INSURANCE; WAIVER.

In Sales of Personal Property. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it.* Benj. Sales § 600.

An *express* warranty is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is or is not as there mentioned: as, that a horse is sound; that he is not five years old.

To create an express warranty, the word "warrant" need not be used, nor are any particular words necessary; McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687.

The Uniform Sales Act defines express warranty as any affirmation of fact or any promise by the seller relating to the goods, if the natural tendency is to induce the buyer to purchase the goods. Affirmation of value or statements of opinion are not warranties.

An *implied* warranty is one which, not being expressly made, the law implies by the facts of the sale. Cro. Jac. 197.

In general, there is no implied warranty of the *quality* of the goods sold; 2 Kent 374; Co. Litt. 102 *a*; Defreeze v. Trumper, 1 Johns. (N. Y.) 274, 3 Am. Dec. 329; Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162; Winsor v. Lombard, 18 Pick. (Mass.) 59; especially in cases of a specific chattel already existing which the buyer has inspected; 4 M. & W. 64; Deming v. Foster, 42 N. H. 165.

By the Uniform Sales Act the implied warranties of quality are: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. 2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality. 3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. 4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. 5. An implied warranty of fitness for a particular purpose may be annexed by the usage of trade. 6. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is fit for the purpose for which it is ordinarily used, or for which it has been specially made; Benj. Sales § 645; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515; Omaha C. C. & L. Co. v. Fay, 37 Neb. 68, 55 N. W. 211; Morse v. Stock Yard Co., 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; Bagley v. Fire Extinguisher Co., 150 Fed. 284, 80 C. C. A. 172. Thus where a party conveyed a ship to another by deed, but at the time of the conveyance the ship was ashore in a wrecked and ruinous condition, it was held that there was an implied warranty that the article conveyed should be a ship, and not a mere "bundle of timber"; 3 M. & W. 390. Another exception is in the sale of goods by sample. There is a warranty that their quality is equal to the sample; Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122; Borrekins v. Bevan, 3 Rawle (Pa.) 37, 23 Am. Dec. 85; Leonard v. Fowler, 44 N. Y. 289; Brigham v. Retelsdorf, 73 Ia. 712, 36 N. W. 715; but a sale of goods by sample only binds the vendor to supply goods equal to sample, and not goods fit for a particular purpose; Kauffman Milling Co. v. Stuckey, 37 S. C. 7, 16 S. E. 192.

By the Sales Act, in the case of a contract to sell or a sale by sample there is an implied warranty (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) if the seller is a dealer in goods of that kind, that then the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample.

An implied warranty may also result from the usage of a particular trade; 2 Disney 482; 4 Taunt. 847. In a sale by description of goods not inspected by the buyer, there is an implied warranty that the goods are salable or merchantable; Baker v. Henderson, 24 Wis. 509; McClung v. Kelley, 21 Ia. 508; Gaylord Mfg. Co. v. Allen, 53 N. Y. 518; but see Whitman v. Freese, 23 Me. 212; and an express warranty of quality excludes any implied warranty that the articles sold are merchantable or fit for their intended use; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896. It has

been held that words of description constitute a warranty that the articles sold are of the quality and description so described; Hogins v. Plympton, 11 Pick. (Mass.) 99; Borrekins v. Bevan, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; but the better opinion has been said to be that the words of description constitute not a *warranty* of the description, but a *condition precedent* to the seller's right of action, that the thing which he offers to deliver, or has delivered, should answer the description; Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 N. E. 18, 25 L. R. A. (N. S.) 160; 4 M. & W. 39.

By the Sales Act, in the case of a contract to sell or sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Where the buyer relies on the seller's skill and judgment to supply him an article, there is an implied warranty that the article will suit the desired purpose; 2 M. & G. 279; Benj. Sales § 661. Finally, it is said that there is always an implied warranty in sales of provisions for household use; Winsor v. Lombard, 18 Pick. (Mass.) 57; Hoover v. Peters, 18 Mich. 51; Divine v. McCormick, 50 Barb. (N. Y.) 116. But see Benj. Sales § 670. It is generally implied that they are wholesome, if the seller was a dealer; and importance is also attached to the fact that the buyer was buying for immediate consumption; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Farren & Co. v. Dameron & Bailey, 99 Md. 293, 58 Atl. 367, 105 Am. St. Rep. 297; Tomlinson v. Armour & Co., 74 N. J. L. 274, 65 Atl. 883; Warren v. Buck, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754. So far as reliance on the seller's skill and judgment is essential to establish a warranty of provisions, the mere fact of purchase from a dealer for immediate consumption seems to have been regarded generally as sufficient evidence, but in a few jurisdictions it is held that proof of such reliance is essential and is not to be presumed; 7 H. & N. 955; Farrell v. Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076. The implied warranty of quality which attaches to provisions sold for domestic use has no application to the sale of a cow to a butcher, even although the vendor knew that it was intended to be slaughtered and retailed as meat; Wart v. Hoose, 65 Misc. 462, 119 N. Y. Supp. 1107.

Where the seller manufactured the goods which he sold, a warranty that the goods are merchantable is implied unless the buyer had an opportunity to inspect the goods and this inspection would have disclosed the defect; [1905] 1 K. B. 608; Buick Motor Co. v. Mfg. Co., 150 Mich. 118, 113 N. W. 591; Pease v. Sabin, 38 Vt. 432, 91 Am. Dec. 364; Hood v. Bloch, 29 W. Va. 244, 11 S. E. 910. If the seller holds himself out to the buyer as the manufacturer of the subject matter of the bargain, the case is governed by the principles applicable to sales by manufacturers; 2 M. & G. 279. Special circumstances may indicate in particular cases that the risk, either wholly or in part, is assumed by the buyer. When goods are sold at second hand even by a manufacturer, it cannot be supposed that a warranty is implied of the same sort that would be implied had the goods been new; Morley v. Mfg. Co., 196 Mass. 257, 81 N. E. 993. Where a manufacturer sells goods which are a waste product, as such, it will be generally true that the buyer assumes the risk of the quality and value of the goods; Listman Mill Co. v. Miller, 131 Wis. 393, 111 N. W. 496.

According to the English and American Sales Acts, the seller impliedly warrants the merchantable character of the goods which he sells as fully when he is merely a dealer in goods of that description as when he is a manufacturer; [1903] 2 K. B. 148.

The manufacturer of goods impliedly warrants that goods are reasonably fit for the general purpose for which they are manufactured; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; The Nimrod, 141 Fed. 215; Redhead Bros. v. Inv. Co., 126 Ia. 410, 102 N. W. 144; Southern B. & I. Co. v. Machine Works, 109 Tenn. 67, 70 S. W. 614. The word "manufacturer" includes all sellers who produce the article which they sell; thus a grower of plants or seeds; Shaw v. Smith, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916; and one who has bred horses or cattle; Edwards v. Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199.

In the sale of commercial paper without indorsement or express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it as between vendor and vendee are governed by the common law relating to the sale of goods and chattels; and the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends on whether he has delivered that which he contracted to sell, this rule being designated in England as a condition of the principal contract, and in this country being generally termed an implied warranty of identity of the thing sold; Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199. See NEGOTIABLE INSTRUMENTS.

The rule of the civil law was that a fair price implied a warranty of quality; Dig. 21. 2. 1. This rule has been adopted in Louisiana; Fuentes v. Caballero, 1 La. Ann. 27; and in South Carolina: Timrod v. Shoolbred, 1 Bay (S. C.) 324, 1 Am. Dec. 620.

A purchaser may examine an article and exercise his judgment upon it, and at the same time protect himself by a warranty; Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; but if he elects not to accept the property as not answering the warranty, there is no duty imposed upon either party thereafter to make further tests or experiments to see whether the property complies with the warranty; U. S. Sugar Refinery v. E. P. Allis Co., 56 Fed. 786, 6 C. C. A. 121, 9 U. S. App. 550.

A warranty in general terms is held not to cover defects which the buyer must have observed; Mulvany v. Rosenberger, 18 Pa. 203. The same rule is applicable to a defect which is not obvious, but of which the seller tells the buyer; Knoepker v. Ahman, 99 Mo. App. 30, 72 S. W. 483; or of which the buyer knows; Harwood v. Breese, 73 Neb. 521, 103 N. W. 55.

Antecedent representations, made as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties; it is not, however, necessary that the representation should be made simultaneously with the bargain, but only that it should enter into it; Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855; Way v. Martin, 140 Pa. 499, 21 Atl. 428; Powers v. Briggs, 139 Mich. 664, 103 N. W. 194; *contra*, Bryant v. Crosby, 40 Me. 9; 15 C. B. 130; Benj. Sales § 610.

No special form of words is necessary to constitute a warranty; Polhemus v. Heiman, 45 Cal. 573; Murray v. Smith, 4 Daly (N. Y.) 277; 3 Mod. 261.

A warranty "may rest in parol and no particular form of words is necessary thereto. A warranty arises when there is a distinct assertion or affirmation of fact, which is relied upon, respecting the quality of the goods or the adaptability thereof to the purpose for which they are desired;" Conkling v. Oil Co., 138 Ia. 596, 603, 116 N. W. 822; an assurance that an article purchased for a particular use is "all right," or words equivalent, if relied on, is a warranty; Briggs v. M. Rumely Co., 96 Ia. 202, 64 N. W. 784. If a warranty is in writing a construction of it will be for the court, and if the language used is doubtful, the court will seek to give the meaning to the language which the parties intended it should bear.

The rule is *simplex commendatio non obligat*. See 2 Esp. 572. A warranty made after a sale requires a new consideration; 3 Q. B. 234; Oliver v. F. Ins. Co., 100 Mass. 532; representations made after a sale is complete and after delivery, and not entering into the consideration, cannot amount to a warranty; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Where one orders a specific article, there is only an implied warranty that the article supplied shall correspond with the designation and no implied agreement that it shall be fit for the purpose for which the buyer designed it; Morris v. Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34, 28 U. S. App. 87. Where a seller furnishes a machine of a particular kind in fulfillment of an order and the machine proves defective, the buyer has no right to rescind and return the machine; Worcester Mfg. Co. v. Brass Co., 73 Conn. 554, 48 Atl. 422.

Where a known, described, and definite article is ordered of a manufacturer, though he has notice that it is required for a particular purpose, there is no implied warranty that it shall answer that purpose; Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Jarecki Mfg. Co. v. Kerr, 165 Pa. 529, 30 Atl. 1019, 44 Am. St. Rep. 674; Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973.

Proposals made by an equipment company to a street railway company to furnish electric equipment which should comply with certain conditions of performances, are affirmations of quality amounting to a warranty; Accumulator Co. v. R. Co., 64 Fed. 70, 12 C. C. A. 37, 27 U. S. App. 364. Where there is a complete contract of sale in writing, there can be no implied warranty as to the subject-matter; Ramming v. Caldwell, 43 Ill. App. 175. In the sale of a patent there is an implied warranty of title, without regard to the form of the instrument of transfer; Faulks v. Kamp, 3 Fed. 898. In Louisiana a warranty, while not of the essence, is of the nature of a contract of sale, and is implied in every such contract; Meyer v. Richards, 163 U. S. 386, 16 Sup. Ct. 1148, 41 L. Ed. 199.

It is settled that in an executory agreement the vendor warrants, by implication, his title to the goods which he promises to sell, and that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title, and that this affirmation may be implied from his conduct as well as his words. It is further said that the rule in England is, in the absence of such implication or affirmation, that the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and, therefore, he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold; Benj. Sales, §§ 627, 639.

As to the goods in the possession of the vendor, there is an implied warranty of title; but where the goods sold are in possession of a third party at the time of the sale, then there is no such warranty; Huntington v. Hall, 36 Me. 501, 58 Am. Dec. 765; Long v. Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118; 2 Kent 478; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692; *contra*, 3 Term 58; 17 C. B. (N. S.) 708.

A vendor knowing he has no title, and concealing the fact from the vendee, is liable on the ground of fraud; Benj. Sales § 627.

By the Sales Act: In a sale or contract to sell, unless a contrary intention appears, there is: 1. An implied warranty on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. 2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. 3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. 4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest.

But where there is a written contract for goods, sold by sample, without warranty of quality, parol evidence is inadmissible to show that the seller guaranteed the quality; Vierling v. Iroquois Furnace Co., 170 Ill. 189, 48 N. E. 1069; Zimmerman Mfg. Co. v. Dolph, 104 Mich. 284, 62 N. W. 339. The rule is stated in Hare on Contracts 532, as follows: "Where the contract is reduced to writing, everything that the writing does not contain is presumably excluded from the contract, and evidence is not admissible that the vendor warranted the goods orally during the previous negotiations or when the instrument was executed; or even that the sale was by sample and the bulk does not correspond. . . . A warranty is essentially contractual —a provision or undertaking as distinguished from an affirmation, and hence, when the parties reduce the agreement to writing, nothing that is not set forth in the instrument can operate as a warranty."

See EVIDENCE.

The question is for the jury, to be inferred from the sale and the circumstances of the particular case; Morrill v. Wallace, 9 N. H. 111; Toner v. Zell, 149 Pa. 458, 27 Atl. 304; McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687; even if the contract is written; Benj. Sales § 614; but see Brown v. Bigelow, 10 Allen (Mass.) 242.

As to the rights and remedies of the buyer and seller upon breach of warranty, see SALES; RESCISSION.

As to warranty in deeds, see DEEDS.

As to the states which have passed the Uniform Sales Act, see SALES.

In Sales of Real Property. A real covenant, whereby the grantor of an estate of freehold and his heirs were bound to warrant the title, and, either upon voucher or by judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there has been an eviction by a paramount title. Co. Litt. 365 *a*.

Collateral warranty existed when the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the land by any collateral title, upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets. 2 Bla. Com. 301.

Lineal warranty existed when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

The statute of 4 Anne, c. 16, annulled these collateral warranties, which had become a great grievance. Warranty in its original form has never, it is presumed, been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases. And in England the matter has become one of curious learning and of little or no practical importance. See 4 Kent 469; Paxson v. Lefferts, 3 Rawle (Pa.) 67, n.; Bates v. Norcross, 17 Pick. (Mass.) 14, 28 Am. Dec. 271; Flynn v. Williams, 23 N. C. 509; 2 Saund. 38, n. 5.

Rawle, in his work on Covenants for Title 205, is of opinion that there is no evidence that the covenants of warranty as employed in the United States ever had a place in English conveyancing. In the earlier conveyances which remain on record in the colonies are to be found some or all of the covenants which were coming into use in the mother country, together with a clause of warranty, sometimes with and sometimes without the addition of words of covenant. Later the words of covenant became more general, and at the present day their use is almost universal. As to the extent and scope of the American covenant of warranty, the sounder view is that it is merely a covenant for quiet enjoyment, the only difference being that under the latter, a recovery may sometimes be had where it would be denied under the former. See COVENANT, and various titles thereunder.

WARRANTY, VOUCHING TO. In Old Practice. The calling a warrantor into court by the party warranted (when tenant in a real action brought for recovery of such lands), to defend the suit for him; Co. Litt. 101 *b*; 2 Saund. 32, n. 1; and the time of such voucher is after the demandant has counted.

It lies in most real and mixed actions, but not in personal. Where the voucher has been

made and allowed by the court, the vouchee either voluntarily appears, or their issues a judicial writ (called a summons *ad warrantizandum*), commanding the sheriff to summon him. Where he, either voluntarily or in obedience to this writ, appears and offers to warrant the land to the tenant, it is called entering into the warranty; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him *de novo*, the vouchee pleads to the new count, and the cause proceeds to issue.

It seems to have lasted until the practical disappearance of real actions and formed an essential part of the fiction of common recovery; Jenks, Hist. E. L. 110.

WARREN. A place privileged by prescription or grant of the king for the preservation of hares, conies, partridges, and pheasants, or any of them. An action lies for killing beasts of warren inside the warren; but they may be killed *damage feasant* on another's land; 5 Co. 104. It need not be inclosed; Co. 4th Inst. 318.

WASHINGTON. One of the states of the United States of America.

By the act of congress of February 22, 1889, the people of Washington were enabled to form a constitution and state government, and be admitted into the Union on an equal footing with the original states. Accordingly, after all the requirements had been complied with on November 11, 1889, the president by proclamation announced the admission of Washington into the Union.

An amendment in 1910 provided for woman suffrage; and in 1912 for initiative, referendum and recall.

WASTE. Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder.

"Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lessor interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Poll. Torts 327.

An unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474.

Many of the earliest English statutes related to waste (Marlborough, Gloucester, etc.); the Year Books contain many decisions upon them which are the basis of the modern law. 3 Holdsw. Hist. E. L. 104.

Permissive waste consists in the mere neglect or omission to do what will prevent injury: as, to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises. See *infra*.

Voluntary waste consists in the commission of some destructive act: as, in pulling down a house or ploughing up a flower-garden. Gardiner v. Derring, 1 Paige, Ch. (N. Y.) 573.

Equitable waste may be defined as such acts as at law would not be esteemed to be waste under the circumstances of the case, but which in the view of a court of equity are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. 2 Story, Eq. Jur. § 915.

Where a tenant "without impeachment of waste" commits acts of wanton destruction, it has been called *equitable waste* because such acts were cognizable only in equity. Jenks, Mod. Land L. 44.

Voluntary waste is committed upon cultivated *fields*, *orchards*, *gardens*, *meadows*, and the like, whenever a tenant uses them contrary to the usual course of husbandry or in such a manner as to exhaust the soil by negligent or improper tillage; Livingston v. Reynolds, 2 Hill (N. Y.) 157; 2 B. & P. 86. It is, therefore, waste to convert arable into wood land, or the contrary; Co. Litt. 53 *b*. Cutting down fruit-trees, although planted by the tenant himself, is waste; 2 Rolle, Abr. 817; and it was held to be waste for an outgoing tenant of garden-ground to plough up strawberry-beds which he had bought of a former tenant when he entered; 1 Camp. 227. When lands are leased on which there are open mines of metal or coal, or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines or pits; but he cannot open any new mines or pits without being guilty of waste; Co. Litt. 53 *b*; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308. See MINES; OIL. Any carrying away of the soil is also waste; Com. Dig. *Waste* (D 4); Kidd v. Dennison, 6 Barb. (N. Y.) 13; Co. Litt. 53 *b*; 1 Sch. & L. 8. And so is the taking of clay from the soil and manufacturing it into bricks and selling the same; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; 13 Q. B. 591. A tenant in common who quarries stone from the common property is guilty of waste; Childs v. R. Co., 117 Mo. 414, 23 S. W. 373; and a life tenant who unlawfully removes petroleum; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; so sowing the seed of a noxious plant was held waste; 2 Madd. Ch. 62; and inoculating a building with the germs of small-pox; Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474.

Waste need not consist in loss of market value; it may be an injury in the sense of destroying identity; L. R. 20 Eq. 539. Where premises leased for 99 years were sublet for a dumping ground, and there was conflicting evidence as to whether the added material increased the value of the land, an injunction was granted on the ground that it altered the premises; [1900] 1 Ch. 624; an injunction was refused against converting a store into a dwelling house; [1892] 2 Ch. 213.

It is committed *in houses* by removing things once fixed to the freehold, although they may have been erected by the lessee himself, unless they are mere fixtures. See FIXTURES. It may take place not only in pulling down houses or parts of them, but also in changing their forms; as, if the tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first: 2 Rolle, Abr. 815; Dooly v. Stringham, 4 Utah 107, 7 Pac. 405; 13 Q. B. 588; or convert a parlor into a stable, or a grist-mill into a fulling-mill; *ibid.;* or turn two rooms into one; *ibid.* See 13 Q. B. 572; 14 Ves. 526. The placing of an excessive weight in a building, by reason of which it falls, is waste; Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769. The building of a house where there was none before was, by the strict rules of the common law, said to be waste: Co. Litt. 53 *a;* and taking it down after it was built was waste also; 1 B. & Ad. 161; Whiting v. Brastow, 4 Pick. (Mass.) 310; Beers v. St. John, 16 Conn. 322.

Voluntary waste may also be committed *upon timber.* The law of waste accommodates itself to the varying wants and conditions of different countries: that will not, for instance, be waste in an entire woodland country which would be so in cleared one. The clearing up of land for the purpose of tillage in a new country where trees abound is no injury to the inheritance, but, on the contrary, is a benefit to the remainderman, so long as there is sufficient timber left and the land cleared bears a proper relative proportion to the whole tract; 4 Kent 316; Livingston v. Reynolds, 26 Wend. (N. Y.) 122; where timber is grown for sale, cutting timber would be a "mode of cultivation." See L. R. 18 Eq. 309; [1891] 3 Ch. 206.

The extent to which wood and timber on such land may be cut without waste is a question of fact for a jury; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258. A tenant may always cut trees for the repair of the houses, fences, hedges, stiles, gates, and the like; Co. Litt. 53 *b*; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Calvert v. Rice, 91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240; and for making and repairing all instruments of husbandry; Wood, Inst. 344. See ESTOVERS. He may fell dead or dying timber; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308; Keeler v. Eastman, 11 Vt. 293. And he may, when unrestrained by the terms of the lease, cut timber for firewood, if there be not enough dead timber for such purposes; Com. Dig. *Waste* (D 5). But not ornamental trees or those planted for shelter; 6 Ves. Ch. 419; or to exclude objects from sight; 16 Ves. Ch. 375; Dalton v. Dalton, 42 N. C. 197; Kidd v. Dennison, 6 Barb. (N. Y.) 9. He cannot promiscuously cut trees to make staves to be sold: Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407; nor railroad ties; Davis v. Clark, 40 Mo. App. 515.

It is waste for a tenant for life to neglect to pay the interest on a mortgage whereby the land was sold to the prejudice of the remainderman; Wade v. Malloy, 16 Hun (N. Y.) 226; and so of a failure to pay taxes; Stetson v. Day, 51 Me. 434; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527.

Windfalls are the property of the landlord; for whatever is severed by inevitable necessity, as, by a tempest, or by a trespasser, and by wrong, belongs to him who has the inheritance; 3 P. Wms. 268; 11 Co. 81.

In general, a tenant is answerable for waste although it is committed by a stranger; for he is the custodian of the property, and must take his remedy over; 2 Dougl. 745; 1 Taunt. 198; Cook v. Transp. Co., 1 Denio (N. Y.) 104.

Permissive waste to buildings consists in omitting to keep them in tenantable repair; suffering the timbers to become rotten by neglecting to cover the house; or suffering the walls to fall into decay for want of plastering, or the foundation to be injured by neglecting to turn off a stream of water, and the like; Co. Litt. 53 *a*. See Schulting v. Schulting, 41 N. J. Eq. 130, 3 Atl. 526; Cannon v. Barry, 59 Miss. 289; LANDLORD AND TENANT. Permissive waste in houses, however as a general rule, is now only punishable when a tenant is bound to repair, either expressly or by implication; 4 B. & P. 298; 10 B. & C. 312. See Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

The redress for this injury is of two kinds, *preventive* and *corrective*. A reversioner or remainderman, in fee, for life, or for years, may now recover, by an ordinary action at law, all damages he has sustained by an act of *voluntary waste* committed by either his tenant or a stranger, provided the injury affects his reversion. But as against a tenant for years, or from year to year, he can only sustain an action for damages for *permissive waste* if his lease obliges the tenant to repair; 2 Saund. 252 *d*, note; 10 B. & C. 312; 41 Ch. D. 352. Where a particular course of user has been carried on for a considerable course of time, with the apparent knowledge and consent of the owner of the inheritance, all lawful presumptions will be made in favor of the lawfulness of the acts complained of; Pollock, Torts 328; 4 App. Cas. 465. The statutes of the several states also provide special relief against waste in a great variety of cases, following, in general, the Statute of Gloucester, which not only forfeits the premises, but gives exemplary damages for all the injury done. The rules as to waste are less stringent in the western states than in the east.

These legal remedies, however, are still so inadequate, as well to prevent future waste as to give redress for waste already committed, that they have in a great measure given way to the remedy by bill in equity, by which not only future waste, whether vol-

untary or permissive, will be prevented, but an account may be decreed and compensation given for past waste in the same proceeding; 2 Story, Eq. Jur. 179. Complainant in an action for waste must either have actual possession, or must show in himself an actual, valid, subsisting title; Walker v. Fox, 85 Tenn. 154, 2 S. W. 98.

A contingent remainderman may maintain an injunction to restrain waste by the life tenant; University v. Tucker, 31 W. Va. 621, 8 S. E. 410.

An action on the case in the nature of waste, will lie by the holder of a mortgage on lands, against a purchaser from the mortgagor of the equity of redemption, for acts of waste committed with a knowledge that the value of the security will be injured thereby. This was a case of new impression (so stated in both courts) and was decided on general principles; Van Pelt v. McGraw, 4 N. Y. 110.

The reversioner need not wait until waste has actually been committed before filing his bill; for if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere and restrain him by injunction from doing so; 18 Ves. Ch. 355; Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; 1 Jac. & W. 653.

Sometimes a tenant, whether for life or for years, by the instrument creating his estate holds his lands *without impeachment of waste*. This expression is equivalent to a general permission to commit waste, and at common law would authorize him to cut timber, or open new mines and convert the produce to his own use; Co. Litt. 220; 11 Co. 81 *b*; 15 Ves. 425. But equity puts a limited construction upon this clause, and only allows a tenant those powers under it which a prudent tenant in fee would exercise, and will, therefore, restrain him from pulling down or dilapidating houses, destroying pleasure-houses, or prostrating trees planted for ornament or shelter; 2 Vern. 739; 6 Ves. 110.

As to remedy by writ of estrepement to prevent waste, see ESTREPMENT; Dickinson v. Nicholson, 2 Yeates (Pa.) 281; 3 Bla. Com. 226.

As to remedies in cases of fraud in committing waste, see Hov. Frauds 226.

In Forest Law. The destruction of vert by cutting down or lopping off trees, which might afterwards grow. Rawle, Exmoor Forest 29.

As used in a tariff act, it generally refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material. Scrap does retain the name and quality; Patton v. U. S., 159 U. S. 503, 16 Sup. Ct. 89, 40 L. Ed. 233. Articles produced incidentally to the manufacture of other articles and which are themselves ready to be used for various purposes without further treatment are, under the tariff laws, subject to the classification as manufactures rather than as "waste"; Shatlus v. U. S., 155 Fed. 213.

WASTE-BOOK. A book used among merchants. All the dealings of the merchants are recorded in this book in chronological order as they occur.

WASTEL. A standard of quality of bread, made of the finest white flour. *Cocket* bread was slightly inferior in quality. The statute of 1266 mentions seven kinds of bread. See ASSISA; Studer, Oak Book of Southhampton, Vol. II.

WASTING PROPERTY. A mine or a patent is considered a wasting property. See 41 Ch. Div. 1.

WASTING TRUST. A trust in which the trustee may apply a part of the principal to make good a deficiency of income.

WATCH. To stand sentry and attend guard during the night-time. Certain officers called watchmen are appointed in most of the United States, whose duty it is to arrest all persons who are violating the law or breaking the peace. See 1 Bla. Com. 356; 1 Chitty, Cr. Law 14, 20.

WATCH AND WARD. A phrase used in the English law to denote the superintendence and care of certain officers whose duties are to protect the public from harm.

WATCHMAN. An officer in many cities and towns, whose duty it is to watch during the night and take care of the property of the inhabitants. He possesses, generally, the common-law authority of a constable to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed; 1 Chitty, Cr. Law 24; 1 B. & Ald. 227. See ARREST.

WATER BAILIFF. In English Law. An officer appointed to search ships in ports. 10 Hen. VII. 30.

WATER COMPANY. A municipality has no implied power, from the mere fact of its creation, to engage in the business of supplying its citizens water for pay. It cannot do so except by virtue of express legislative authority. A municipality having such legislative authority, which has entered into a contract with an existing water company to supply the citizens with water, has thereby exhausted its power and cannot subsequently erect its own water works for the same purpose; White v. Meadville, 177 Pa. 643, 25 Atl. 695, 34 L. R. A. 567. But it was held that, although a contract between a water company and a city provided that no contract or privilege would be granted to any other person or corporation to furnish water, the city was not precluded from building its own system; Knoxville W. Co. v. Knoxville,

200 U. S. 23, 26 Sup. Ct. 224, 50 L. Ed. 353; following Helena W. W. Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245; see Walla Walla v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg v. Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253.

A municipal corporation furnishing water to its inhabitants acts in a private capacity; its relation is one of contract. Water rates are not taxes; they are the price paid for a commodity; Jolly v. Monaca Borough, 216 Pa. 345, 65 Atl. 809; but their collection has been considered not a source of private profit, but a mode of taxation; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667. Their regulation is a governmental power; Owensboro v. Waterworks Co., 191 U. S. 358, 24 Sup. Ct. 82, 48 L. Ed. 217.

A water company under a statute which provides that water companies shall furnish pure water, will be enjoined from collecting water rents when it has supplied water utterly unfit for domestic use or for steam purposes. The courts cannot decree that the company must obtain a supply of pure water. They can only enjoin it from collecting water rents for impure water; Brymer v. Water Co., 172 Pa. 489, 33 Atl. 707.

A water company which has a contract with a city to furnish water to extinguish fires is not liable to the owners of private property destroyed by fire through its failure to furnish water according to the contract; House v. Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; there is no privity of contract between the parties to the action; Nickerson v. Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1; Fitch v. Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; Wainwright v. Water Co., 78 Hun (N. Y.) 146, 28 N. Y. Supp. 987; Beck v. Water Co., 11 Atl. 300; Foster v. Water Co., 3 Lea (Tenn.) 42; nor does the fact that the ordinance granting the franchise requires the company to supply the city and its inhabitants with sufficient water to put out fires, or to maintain the water at a certain pressure, create the necessary privity of contract; Fowler v. Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; Eaton v. Waterworks Co., 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; Britton v. Water Works Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; not even a statute, requiring the pipes to be kept charged at a certain pressure, will give the right of action; 2 Exch. Div. 441, reversing 6 L. R. Exch. 404. Such owner cannot maintain an action, even though the city has raised by taxation a special fund, to which the plaintiff contributed, to pay for a sufficient supply of water for use in case of fire; Becker v. Keokuk Waterworks, 79 Ia. 419, 44 N. W. 694, 18 Am. St. Rep. 377; or though the citizens pay a special tax to the company, under its contract with the city; Howsmon v. Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654. Nor has a municipality such an interest in the property destroyed as to give it a right of action, and the owner of the property destroyed cannot maintain an action as assignee of the right of action of the municipality; Ferris v. Water Co., 16 Nev. 44, 40 Am. Rep. 485. An action of tort will not lie; Fowler v. Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313. But it has been held that when the contract of a water company with the city declares that it is made, *inter alia*, for the protection of private property against fire, the owner of property which is taxed for water rent, and is destroyed by fire through the failure of the company to supply a sufficient quantity of water, may, in his own name, sue the company on its contract with the city; Paducah Lumber Co. v. Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; in such case the company is liable; Mugge v. Waterworks Co., 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207; see 13 Harv. L. Rev. 226. That a taxpayer has no right of action against a water-supply company for failure to perform its contract with the municipality, see German Alliance Ins. Co. v. Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000, where it is said a majority of the cases so hold.

A company for furnishing water to the public is subject to the visitatorial power of the state; Com. v. Russell, 172 Pa. 506, 33 Atl. 709.

An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation, is private property which may be acquired by eminent domain; Long Island W. S. Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.

A statutory provision that all water companies must furnish free water to their municipalities does not constitute a contract to which the municipality is a party. The state may relieve the water companies therefrom and permit them to furnish water at reasonable cost; Boise Water Co. v. Boise City, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400.

The right which a water company acquires by a lease from a riparian owner and not by the exercise of eminent domain is no greater than the right of the riparian owner; Philadelphia & R. R. Co. v. Water Co., 182 Pa. 418, 38 Atl. 404.

A regulation requiring a consumer to pay a month's rates in advance or in default thereof the company will shut off the water or requiring the consumer to pay at the end of the month the rates for the preceding month or in default the company will shut off the water, has generally been held rea-

sonable within the power of such public service corporations; Tacoma Hotel Co. v. Water Co., 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35; Shepard v. Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; State v. Board of Duluth, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; Cedar Rapids G. L. Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299. The rules of some companies seem to require one month's payment in advance while others have required a quarter's payment in advance. It has been held, however, that a requirement that a consumer pay one year in advance is unreasonable; Rockland W. Co. v. Adams, 84 Me. 472, 24 Atl. 840, 30 Am. St. Rep. 368; also that where the water has been shut off from the consumer for default in the payment of rates when due, he can not be charged $1 for turning the water off and on; American W. W. Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610. A company may not refuse to supply water to a consumer upon payment of rates in advance as required by the rules of the company merely because he refuses to pay a disputed bill, or to pay past-due water rates for some other and independent use, or at some other place or residence, or for a separate or distinct transaction from that for which he is claiming and demanding a water supply; Crumley v. Water Co., 99 Tenn. 420, 41 S. W. 1058; Wood v. Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376; American W. W. Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610; Covington v. Ratterman, 128 Ky. 336, 108 S. W. 297, 17 L. R. A. (N. S.) 923; or until unpaid rates of a previous owner are paid; Turner v. Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432. A public service corporation cannot safely be invested with an authority which will allow it to become both judge and jury in the determination of a disputed claim on it by a consumer; Wood v. Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376.

Municipal corporations operating water works may require consumers to use water meters put in at their own expense; Cooper v. Goodland, 80 Kan. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410; Shaw S. Co. v. Lowell, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746, 15 Ann. Cas. 377; State v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33.

In State v. Jersey City, 45 N. J. L. 246, this rule was upheld, but the right to charge the cost of meters to consumers was denied.

When required by franchise ordinance "to furnish water to users," a company must deliver it at the property line and a mandamus issued; Cleveland v. Waterworks Co., 69 Wash. 541, 125 Pac. 769. A water company cannot be compelled to furnish taps free without assurance of continual use; Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482; State v. Water Co., 49 Wash. 232, 94 Pac. 1080; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261. They may require a deposit or other assurance that they will be paid for water furnished; Cedar Rapids G. L. Co. v. Cedar Rapids, 144 Ia. 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299.

A city may, in contracting for its own water supply, contract that the company shall furnish water free to churches, etc.; Independent School Dist. v. Light Co., 131 Ia. 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859.

See WATER RENTS; RATES.

WATER-COURSE. This term is applied to the flow or movement of the water in rivers, creeks, and other streams.

A water-course is a stream of water flowing in a definite channel, having a bed and sides or banks and discharging itself into some other stream or body of water. Hutchinson v. Ditch Co., 16 Idaho 484, 101 Pac. 1059, 133 Am. St. Rep. 125. The flow need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream which is ordinarily a moving body of water. *Id.;* Barnes v. Sabron, 10 Nev. 217.

There must be a supply which is permanent in the sense that similar conditions will always produce a flow of water in the same channel, and that the conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream; Mann v. Mining Co., 49 App. Div. 454, 63 N. Y. Supp. 752.

Whenever surface water flows in one continuous well marked channel it becomes a water-course, if this flow becomes regular each season; Borman v. Blackmon, 60 Or. 304, 118 Pac. 848; or if the course has reasonable limits as to width; Chicago, B. & Q. R. Co. v. Board of Sup'rs, 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117.

The essential characteristics of a water-course are a channel consisting of a well defined bed and banks, and a current of water; Lessard v. Stram, 62 Wis. 112, 22 N. W. 284, 51 Am. Rep. 715; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848; Barnes v. Sabron, 10 Nev. 217; Board of Com'rs of Shelby County v. Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687.

The rule is that in order to have a water-course there must be a channel; it has even been held that where there was a channel there was a water-course, although it carried no water except in times of heavy rains and of melting snows, thus forming what is called a torrential stream; York v. Davidson, 39 Or. 81, 95 Pac. 819. It does not include surface water conveyed from a high-

er to a lower level for limited periods during the melting of snow, or during or soon after the fall of rain, through hollows or ravines, which at other times are dry; Hoyt v. Hudson, 27 Wisc. 656, 9 Am. Rep. 473.

Where the water flows merely over the low land, a bog or a slough, it is not a water-course; Chicago, K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 Pac. 413; nor where it merely oozes from a spring through soft spongy ground; Meyer v. Power Co., 8 Wash. 144, 35 Pac. 601.

The bed, which is a definite and commonly a permanent channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the strata of the earth. The banks of a water-course are the elevations which confine the waters to their natural channel when they rise; Howard v. Ingersoll, 13 How. (U. S.) 381, 14 L. Ed. 189; People v. Madison County, 125 Ill. 9, 17 N. E. 147. The water of a water-course must have a current. The flow of the water must usually be in one direction; 1 B. & Ad. 289; and by a regular channel having both a source and a mouth; Chamberlain v. Hemingway, 63 Conn. 1, 27 Atl. 239, 22 L. R. A. 45, 38 Am. St. Rep. 330.

The controlling distinction between a water-course and a pond or lake is that in the former case the water has a natural motion or a current, while in the latter the water is, in its natural state, substantially at rest. And this is so independently of the size of the one or of the other; Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. 661. If the current continues, the mere fact that the stream spreads out does not change its character as a water-course; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349. A hollow or ravine without a permanent flow of water is not a water-course; Los Angeles C. Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375; neither is a swale or swamp or bog; Sanquinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; Hough v. Porter, 51 Or. 318, 93 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

It may be if water flows into it throughout the year from springs; Maxwell v. Shirts, 27 Ind. App. 529, 61 N. E. 754, 87 Am. St. Rep. 268; or where there is a flow of surface-water from rains and melting snows at regular seasons and such has been immemorially the case; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 737.

A stream does not cease to be a water-course and become mere surface water, because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again into a definite channel; West v. Taylor, 16 Or. 165, 13 Pac. 665. Overflow water from a water-course is not surface water; Cole v. R. Co., 20 Okl. 227, 94 Pac. 540, 15 L. R. A. (N. S.) 268.

In the absence of a permanent source of supply, there can be no water-course in its legal sense; Jeffers v. Jeffers, 107 N. Y. 650, 14 N. E. 316; Shields v. Arndt, 4 N. J. Eq. 234; Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713.

A swale is a low body of wet land without channel or perceptible current. In a strict legal sense it is not a water-course, but where water has accumulated from springs, rains, and melting snows and has flowed for several miles between regular banks of a well defined water-course, which empties into a lake from which the water flows through water-ways and through which the water flows into a bay or the sea, the water-ways referred to are water-courses and the water therein is not mere surface water; West v. Taylor, 16 Or. 165, 13 Pac. 665.

If a flow of water through an artificial ditch, established originally to carry a portion of a river and continued for many years without change or objection, was such as to constitute a natural water-course had the flow begun without artificial aid, the jury may find that it is a water-course, subject to the rules applicable to natural water-courses; Stimson v. Brookline, 197 Mass. 568, 83 N. E. 893, 16 L. R. A. (N. S.) 280, 125 Am. St. Rep. 382, 14 Ann. Cas. 907. It has often been decided both in England and America that water-courses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public are concerned, they are to be treated as if they were of natural origin; Freeman v. Weeks, 45 Mich. 335. They are natural streams or flow of water, though flowing in an artificial channel; Nuttall v. Bracewell, L. R. 2 Exch. 1; Reading v. Althouse, 93 Pa. 400; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697.

Flood waters are not classified as surface waters. They are divided into ordinary and extraordinary floods. By the common law, flood water overflowing the banks of a stream is a part of the stream although not flowing in the channel; Broadbent v. Ramsbotham, 11 Exch. 602. In some states, flood waters of a stream are treated as surface waters, to be dealt with as such; Shelbyville & B. Turnpike Co. v. Green, 99 Ind. 205; Kenney v. R. Co., 74 Mo. App. 301; Missouri P. R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249; Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859. But in the majority of the states, flood waters are held to be part of the stream. The United States circuit court for the district of Indiana declined to follow the decisions of the supreme court of that state respecting this subject. The supreme court in Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114, and subsequently, held that flood waters are surface waters. The federal court

in Cairo, V. & C. R. Co. v. Brevoort, 62 Fed. 129, 25 L. R. A. 527, held that flood waters constitute the waters of the rivers and are not surface waters.

Under a covenant by a lessor to pay "all water rents imposed or assessed upon the premises or on the lessor or lessee in respect thereof," the lessor is not bound to pay for water supplied by a water company to the lessees for trade purposes; [1897] 1 Ch. 633, A. C.

WATERGANG (Law Lat. *watérgangium*). A Saxon word for a trench or course to carry a stream of water, such as are commonly made to drain water out of marshes. *Ordin. Marisc. de Romn. Chart.* Hen. III.

WATERGAVEL. A rent paid for fishing in, or other benefit from, some river. Chart. 15 Hen. III.

WATERS. The peculiar nature of running water was referred to in one of the old cases holding that ejectment would not lie for a water-course; that livery could not be made of it, "for *non moratur*, but is ever flowing," and comparing running water to the water in the sea; Chancellor v. Thomas, Yelv. 143. "For water is a movable, wandering thing, and must of necessity continue common by the law of nature"; 2 Bla. Com. 18. In 1833, Lord Denman, in Mason v. Hill, 5 B. & Ad. 1, says concerning the civil law: No one had any property in the water itself, except in that particular portion which he might have abstracted from the stream and of which he had the possession Later the rule was laid down that flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it; Embrey v. Owen, 6 Exch. 355. That running water is *publici juris* and that no one could claim the ownership of the corpus of the water of a stream was held in [1906] A. C. 83; U. S. v. Inv. Co., 156 Fed. 123; Philadelphia v. Spring Garden, 7 Pa. 363, per Gibson, C. J.

By the modern as well as the older authorities, the right of the riparian owner in the water is usufructuary, and consists not so much in the fluid itself as in its uses; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674. The law does not recognize a riparian property right in the *corpus* of the water; the riparian proprietor does not own the water. He has the right only to enjoy the advantage of a responsible use of the stream as it flows through the land, subject to a like right belonging to all other riparian proprietors; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. Water when reduced to possession is property, and it may be bought and sold and have a market value; but it must be in actual possession, subject to control and management; Syracuse v. Stacey, 169 N. Y. 231, 62 N. E. 354. When stored in an artificial appliance or water-course, it is personal property; Riverside Water Co. v. Gage, 89 Cal. 418, 26 Pac. 889; Dunsmuir v. Power Co., 24 Wash. 114, 63 Pac. 1095.

Irrigation. To give security to irrigators, irrigation contracts are generally viewed as having for their subject matter the usufructuary right in the stream through the intermediate agency of the ditch, thereby making them contracts affecting real property—the ditch and the water right in the stream through which the ditch heads. A contract granting a right to take water from a ditch for irrigation is held to grant a servitude upon real property, upon the canal and water rights of the grantor, Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359. The arid states have settled it as a fixed rule, aside from contract, that one who has a right to take water from a ditch is an appropriator from the natural stream through the intermediate agency of the ditch; Wheeler v. Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Hard v. Land Co., 9 Idaho 589, 76 Pac. 331, 65 L. R. A. 407; Gould v. Canal Co., 8 Ariz. 429, 76 Pac. 598. Rights in a flow in a ditch thus relate back to the same subject matter when concerning irrigation, though the distinction between the *corpus* of the water and its use and flow would still prevail in such matters as larceny from a ditch or contract for house supply in cities; see 22 Harv. L. Rev. 212.

Under the doctrine of prior appropriation, a sale of water right separate from the land, whereby the water is applied to other lands, may be made if the rights of others are not infringed; Cache La Poudre Irr. Co. v. Reservoir Co., 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123. The users of the water from a canal or ditch acquire such a property right as they may transfer to other lands under such ditch or canal; Hard v. Land Co., 9 Idaho 589, 76 Pac. 331, 65 L. R. A. 407. Such a right on the part of the landowner cannot be doubted; Winchell v. Clark, 68 Mich. 64, 35 N. W. 907.

In the arid states, the common law doctrine of riparian rights has been repudiated and the law of appropriation prevails. It has been there established as a rule of property governing riparian land that mere priority of occupation or appropriation gives rights superior to those of the riparian owner in the beneficial use of the waters and the beds of streams, whether such appropriation is made upon, or adjacent to, riparian lands owned by the government or those passed to private owners. Not all riparian rights,

as such are defined in the common law, are lost by such appropriation. But, generally speaking, the riparian right law does not prevail in those jurisdictions. The custom of appropriation became a law of property in those states, and as such has been confirmed by congress and the federal supreme court, as applicable to lands there situated, the rule of law having been established by the local jurisdictions and having become the common law of those states through adjudications of their own courts; Act Cong. July 26, 1866; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; Isaacs v. Barber, 10 Wash. 124, 38 Pac. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; Ft. Morgan L. & C. Co. v. Ditch Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259; Boquallis L. & C. Co. v. Curtis, 213 U. S. 339, 29 Sup. Ct. 493, 53 L. Ed. 822; U. S. v. Irrig. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136.

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from congress a state cannot by its legislation destroy the right of the United States as the owner of lands bordering on a stream to a continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of all navigable water-courses of the country, even against any state action; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

One who diverts water from a stream for domestic and irrigation purposes must, in order to protect his appropriation, use a reasonable degree of care to prevent loss by evaporation and seepage in conveying it to the place of use, since the law will not countenance a diversion of a volume many times greater than that which is actually consumed; Sterling v. Ditch Extension Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238. While a prior appropriator of water can claim only the amount which is necessary to supply his needs, and can permit no water to go to waste, he is not bound to adopt the best means for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality, and so long as he does so other persons can not complain of his acts. The amount of water required by an appropriator should be determined by reference to the system used, although it results in a waste of water which might be avoided by the adoption of another system; 3 Farn. Waters & Water Rights 675; Rodgers v. Pitt, 89 Fed. 420. But where an appropriation has been made, and the original method of conveying the water was direct and economical, a change of method whereby the waste is materially increased cannot be made, to the detriment of a subsequent appropriator; Roeder v. Stein, 23 Nev. 92, 42 Pac. 867. He is not liable for water lost by absorption and evaporation, which is necessarily so lost in a well constructed ditch or flume which is kept in good condition; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Sterling v. Ditch Extension Co., 42 Colo. 421, 94 Pac. 339, 15 L. R. A. (N. S.) 238.

The most essential element of an appropriation of water is application to a beneficial purpose; North Fork Water Co. v. Medland, 187 Fed. 163.

Submerged Land. When land is gradually submerged by a river the former owner retains no rights in it, and the owner of the river bed acquires the absolute title; Wallace v. Driver, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317. Where the plaintiff's lot was formerly separated from the Mississippi river by another lot, and he offered to prove that the lot had been gradually but totally submerged by the river, but had afterwards gradually emerged, forming the land in dispute, it was held that the plaintiff could acquire no land by accretion beyond his original boundary; Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324; to the same effect; Ocean City Ass'n v. Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425. See 16 Harv. L. Rev. 527; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344.

A grant bounded by a navigable water-course extends only to high-water mark; but one bounded by a non-navigable stream extends to the middle thereof; Ex parte Jennings, 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; Ball v. Slack, 2 Whart. (Pa.) 508, 30 Am. Dec. 278, 286. See Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Haight v. Keokuk, 4 Ia. 199; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224. When an island is on the side of a river, so as to give the riparian owner of that side only one-fourth of the water, he has no right to place obstructions at the head of the island to cause one-half of the stream to descend on his side of the river, but the owner opposite is entitled to the flow of the remaining three-fourths; Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555.

Grants of the government for lands bounded on streams and other waters, without any reservations or restrictions of terms, are to be construed as to their effect according to the law of the state in which the lands lie; Hardin v. Jordan, 140 U. S. 371, 11 Sup.

Ct. 808, 838, 35 L. Ed. 428; Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156.

It is for the states to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto; the proprietorship of the beds and shores of navigable waters, above as well as below the flow of the tide, properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended on the local laws of the states in which the lands were situated; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224.

When land is conveyed by the United States bounded on navigable water, the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. If it passes to the riparian proprietor, it does not pass by the grant alone, but by force of the declaration of the state which does own it that it is attached to the shore; Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107. Congress, in disposing of the public lands, has constantly acted upon the theory that navigable waters and the soil under them, whether within or above the flow of the tide, shall be held in trust for the future states, which, when admitted to the Union, shall have all the powers pertaining to the older states with regard thereto; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331 (an exhaustive opinion by Gray, J.).

There is no federal right involved in the obstruction or use by private owners of a non-navigable stream wholly within a state; where a state court has decided it to be non-navigable in fact, there is no right left to review; Illinois v. Economy Light &c. Co., 234 U. S. 497, 34 Sup. Ct. 973, 58 L. Ed. ——.

Quantity Used. Each successive riparian proprietor is entitled to the reasonable use of the water for the supply of his natural wants and for the operation of mills and machinery; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; L. R. 2 Ex. 1; Brown v. Kistler, 190 Pa. 499. The right to use for domestic purposes is primary and for mechanical power is secondary. When the two rights conflict the latter right must yield to the former; Auburn v. Water Power Co., 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188. The right of a riparian proprietor on a non-navigable stream to the use of its ordinary flow of water, undiminished by an unreasonable use by an upper proprietor, is not an easement or appurtenance, but is inseparably annexed to the soil and is part and parcel of the land itself; Pine v. New York, 103 Fed. 337. One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters, but he has no contract with or grant from the government, federal or state, in respect to his privilege; Mohl v. Canal Co., 128 Fed. 776.

Riparian owners may not divert or sell running water for general use, and are limited in their own use of it to ordinary purposes incident to the enjoyment of the riparian land, and in exceptional cases to extraordinary uses upon the land itself, if such use does not unreasonably decrease the quantity of the water or impair its quality; Carpenter v. Gold, 88 Va. 551, 14 S. E. 329. But the extraordinary use must be upon the riparian land. A railroad company, being a riparian owner, cannot divert the water to a reservoir several miles distant, to be used for railroad purposes; Scranton G. & W. Co. v. R. Co., 240 Pa. 604, 88 Atl. 24, 47 L. R. A. (N. S.) 710.

Landowners along tidal streams have no private riparian rights of which the state, as owner of the foreshore, may not deprive them at will; Gould v. R. Co., 6 N. Y. 522; Stevens v. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269.

The test as to "domestic supply" is not whether the water is used in the course of trade, but whether the user is in its nature domestic; [1914] A. C. 118.

Pollution. Where a statute authorized one to empty sewage into a stream, it was held that only landowners above tide water could recover damages, since the foreshore of tidal streams is owned by the state; Simmons v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642; *contra*, Lyon v. Fishmongers Co., L. R. 1 App. Cas. 662; Bowman v. Wathen, 2 McLean 376, Fed. Cas. No. 1,740.

A landowner may not pollute the quality of the water by unwholesome or discoloring impurities; 8 E. L. & E. 217; Townsend v. Bell, 62 Hun 306, 17 N. Y. Supp. 210; Indianapolis Water Co. v. Strawboard Co., 57 Fed. 1000; [1893] App. Cas. 691; Spence v. McDonough, 77 Ia. 460, 42 N. W. 371; Satterfield v. Rowan, 83 Ga. 187, 9 S. E. 677; but see, where the pollution results from a reasonable use; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454; Ferguson v. Mfg. Co., 77 Ia. 576, 42 N. W. 448, 14 Am. St. Rep. 319.

The plaintiffs, neither owning nor leasing any land abutting on a river, leased from a power company the right to draw water from the power canals which it had dug above its dam upon the river. A city higher up the river was impliedly authorized by statute to drain its sewage into the stream.

It was held that the plaintiffs could recover in an action against the city for pollution of the water; Doremus v. Paterson, 65 N. J. Eq. 711, 55 Atl. 304.

A state may have relief in the federal supreme court against another state to prevent it from polluting the waters of a river flowing through both states, on which the complainant state relies for water supply; Missouri v. Illinois, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

See POLLUTION.

Dams. A riparian owner may construct a dam; Fisher v. Feige, 137 Cal. 39, 69 Pac. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; Anderson v. R. Co., 86 Ky. 44, 5 S. W. 49, 9 Am. St. Rep. 263. It is not *per se* an improper structure as to lower owners; Arroyo D & W. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874; Sullivan v Jones, 13 Ariz. 229, 108 Pac. 476. But a dam may not be constructed of such a height that it will back the water upon the lands of others. This rule is the same under the doctrine of appropriation as at common law; Kalama E. L. & P. Co. v. Driving Co., 48 Wash. 612, 94 Pac. 469, 22 L. R. A. (N. S.) 641, 125 Am. St. Rep. 948; Cline v. Stock, 71 Neb. 70, 98 N. W. 454, 102 N. W. 265; North Alabama C. I. & R. Co. v. Jones, 156 Ala. 360, 47 South. 144; Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545; Mentone Irr. Co. v. Power Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222.

By act of congress June 29, 1906, the diversion of water from Niagara river or its tributaries in the state of New York is prohibited except with the consent of the secretary of war, who is authorized to grant permits for the diversion of water in the United States for the creation of power to individuals, companies and corporations legally authorized therefor, and who may regulate the amount of water diverted. The object of the act was to prevent injury to the scenery of Niagara Falls. In pursuance of the act a treaty between the United States and Great Britain, Jan. 11, 1909, was made for the purpose of limiting the diversion of water from Niagara river.

Where streams flow through more than one state it will be presumed, in the absence of legislation on the subject, that each allows the same rights to be acquired from outside the state as could be acquired from within; Bean v. Morris, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821. It has been held that one may appropriate water from a stream in one state for application to lands in another; Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939.

Where riparian rights of several parcels of land in different states, but on the same river, are involved, the courts of both states have concurrent jurisdiction, and the court first taking jurisdiction should proceed to a determination without interference; Rickey L. & C. Co. v. Miller, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032.

Surface Water. In Hoyt v. Hudson, 27 Wis. 656, 659, 9 Am. Rep. 473, the difference between the civil and the common law was thus stated: "The doctrine of the civil law is that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any proprietor. . . . The doctrine of common law is that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow, and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion; Walker v. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837, a case arising in New Mexico, where the common law rule was adopted.

The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but is in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont and Wisconsin; Eulrich v. Richter, 37 Wis. 226; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Beauchamp v. Taylor, 132 Mo. App. 92, 111 S. W. 609; Clay v. R. Co., 164 Ind. 439, 73 N. E. 904; Kansas City & E. R. Co. v. Riley, 33 Kan. 374, 6 Pac. 581.

Other cases in effect adhere to the civil law doctrine—that as against the rights of the upper proprietor, the owner of the servient estate cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression; Glass v. Fritz, 148 Pa. 324, 23 Atl. 1050; Lawton v. R. Co., 61 S. C. 548, 39 S. E. 752; Alabama G. S. R. Co. v. Prouty, 149 Ala. 71, 43 South. 352; Launstein v. Launstein, 150 Mich. 524, 114 N. W. 383, 121 Am. St. Rep. 635.

The common law doctrine is adopted in Oklahoma with certain qualifications; Chicago, R. I. & P. Ry. Co. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802; the owner of land cannot collect the water in an artificial channel or volume and pour it upon the land of another to his injury; Davis v. Fry, 14 Okl. 340, 78 Pac. 180, 68 L. R. A. 460, 2 Ann. Cas. 193; Davis v

Crawfordsville, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; Rychlicki v. St. Louis, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; Fremont, E. & M. V. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; he cannot interfere with the flow of surface water in a natural channel; where water has been accustomed to gather and flow along in a well defined channel where by frequent running it has worn or cut into the soil, it may not be obstructed to the injury of the dominant tenant; Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Sinai v. Ry. Co., 71 Miss. 552, 14 South. 87; Boyd v. Conklin, 54 Mich. 590, 20 N. W. 595, 52 Am. Rep. 831; Norfolk & W. R. Co. v. Carter, 91 Va. 587, 22 S. E. 517; where by force of the surface water a ditch has been formed, a lower tenant cannot even fill up such ditch to the original level of the swale or channel; Ribordy v. Murray, 177 Ill. 134, 52 N. E. 325. The rule of the civil law is in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio; Walker v. R. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837.

See Rait v. Furrow, 74 Kan. 934, 85 Pac. 934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044.

Percolating water. A city built extensive wells, which drew off the water percolating through the plaintiff's land, thus rendering it unfit for crops. The defendant was held liable for the damage done; Forbell v. New York, 27 Misc. 12, 56 N. Y. Supp. 790, following Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141. The court laid down the general doctrine that the right to percolating water comprises only the right to use it on the owner's land.

One may not divert percolating water from his neighbor for purposes other than his own beneficial use or the improvement of his premises; Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541; whenever interference with percolating waters has been allowed, it has been incident to a reasonable use on the land; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; diversion for any other purpose is unlawful; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; the use can only be according to the usual law of waters; Forbell v. New York, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666.

Subterranean waters are classified at common law as underground currents flowing in known and defined channels; and water passing in channels which are undefined and unknown. The rights to the waters of the first class are governed by the rules of law governing surface streams; while the waters of the second class are treated as mere percolations and belong to the owner of the soil where found; Kinney, Irrigation, etc., § 1155. The right to waters of the first class (*supra*) was recognized in [1902] 2 Ch. 655, 665, following 7 Ex. 300, as belonging to the owner of the land just as if the stream had been wholly above ground; but if the course of the underground channel is not known, and cannot be ascertained except by excavation, the lower riparian owner on the stream has no right of action for the abstraction of the underground water; [1902] 2 Ch. 655.

Where water percolates in no known channel, one who put down an extensive well to supply water to the inhabitants of the district (some of whom were not riparian owners) was held not liable to a mill owner who had for sixty years enjoyed the use of a stream chiefly supplied by such percolating water; 7 H. L. Cas. 349. One may collect percolating waters for use off the land, though he thereby drains a well on neighboring premises, the waters from which had been used only for domestic purposes; Houston & T. C. R. Co. v. East, 98 Tex. 146, 81 S. W. 279, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827. See 16 Harv. L. Rev. 295. Each landowner may absolutely enjoy the percolating water and owes no duty to his neighbor; Chatfield v. Wilson, 28 Vt. 49.

A pool of water, or a stream or watercourse, is considered as part of the land; hence a pool of twenty acres would pass by the grant of twenty acres of land, without mentioning the water; 2 Bla. Com. 18; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55; Rogers v. Jones, 1 Wend. (N. Y.) 255, 19 Am. Dec. 493; Mitchell v. Warner, 5 Conn. 497; Hart v. Evans, 8 Pa. 13. A mere grant of water passes only a fishery; Co. Litt. 4 *b;* Jackson v. Halstead, 5 Cow. (N. Y.) 216. But the owner of land over which water flows may grant the land, reserving the use of all the water to himself, or may grant the use of all or a portion of the water, reserving the fee of the land to himself; Rood v. Johnson, 26 Vt. 64.

But it is held that a riparian proprietor may not assign his rights in gross; 3 H. & C. 300; see 19 Harv. L. Rev. 216. A riparian owner cannot assign his water-rights as against upper or lower proprietors, but can create only a contract right against himself; 16 Harv. L. Rev. 145, citing 11 Q. B. D. 115; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181. But see Gillis v. Chase, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645; St. Anthony Falls W. P. Co. v. Minneapolis, 41 Minn. 270, 43 N. W. 56.

The public cannot, in the United States, gain any proprietary right in streams of inland water too small to be used for the transportation of property; Ang. Water-C. § 2; Wadsworth v. Smith, 11 Me. 278, 26 Am. Dec. 525. In the case of navigable waters used as a highway of commerce between the states or with foreign nations no state can grant a monopoly for the navigation of any portion of such waters; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed.

23; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Saunders v. R. Co., 144 N. Y. 88, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729; Pacific G. I. Co. v. Ellert, 64 Fed. 436. A state has the same power to improve such waters as it has in the case of any highway; Cooley, Const. Lim. 738; Stockton v. Powell, 29 Fla. 1, 10 South. 688, 15 L. R. A. 42; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Falls Mfg. Co. v. Imp. Co., 87 Wis. 151, 58 N. W. 257; and, having expended money for such improvement, it may impose tolls upon the commerce which has the benefit of the improvement; Palmer v. Cuyahoga County, 3 McLean 226, Fed. Cas. No. 10,688; McReynolds v. Smallhouse, 8 Bush (Ky.) 447. The states may authorize the construction of bridges over such waters, for railroads and other species of highways, notwithstanding they may to some extent interfere with navigation. See Hare, Am. Const. L. 457, 487, 497; Com. v. Breed, 4 Pick. (Mass.) 460; State v. Leighton, 83 Me. 419, 22 Atl. 380; Willamette I. B. Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; Oregon City Transp. Co. v. Bridge Co., 53 Fed. 549; BRIDGE. A state may establish ferries over such waters; Conway v. Taylor, 1 Black (U. S.) 603, 17 L. Ed. 191; Marshall v. Grimes, 41 Miss. 27; and authorize the construction of dams; Cooley, Const. Lim. 740. A state may also regulate the speed and general conduct of vessels navigating its water highways, provided its regulations do not conflict with any regulations made by congress; People v. Jenkins, 1 Hill (N. Y.) 469. See Cooley, Const. Lim. 737, 741. It may prohibit the transportation of its water into any other state; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

In the Salton Sea Cases the court, having jurisdiction of land alleged to be injured by the wrongful acts of the defendant corporation in flooding the plaintiff's land, enjoined the defendant though the wrongful act was committed in Mexico; The Salton Sea Cases, 172 Fed. 792, 97 C. C. A. 214.

WAVESON. Such goods as appear upon the waves after shipwreck. Jacob.

WAY. A passage, street, or road.

A right of way is the privilege which an individual, or a particular description of individuals, as the inhabitants of a village or the owners or occupiers of certain farms, have of going over another's ground. It is an incorporeal hereditament of a real nature, entirely different from a common highway. Cruise, Dig. tit. xxiv. s. 1.

A right to pass over another's land more or less frequently according to the nature of the use to be made of the easement, and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. Bodfish v. Bodfish, 105 Mass. 319.

A right of way may arise: *By prescription* and immemorial usage, or by an uninterrupted enjoyment for twenty years under a claim of right; Co. Litt. 113; Garrett v. Jackson, 20 Pa. 331; Reimer v. Stuber, 20 Pa. 458, 59 Am. Dec. 744; Sheeks v. Erwin, 130 Ind. 31, 29 N. E. 11; Coburn v. San Mateo Co., 75 Fed. 520; Bushey v. Santiff, 86 Hun 384, 33 N. Y. Supp. 473; Follendore v. Thomas, 93 Ga. 300, 20 S. E. 329. *By grant;* as where the owner grants to another the liberty of passing over his land; 1 Ld. Raym. 75; Salisbury v. Andrews, 19 Pick. (Mass.) 250; 7 B. & C. 257. If the grant be of a freehold right it must be by deed; 5 B. & C. 221; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505. *By necessity;* as where a man purchases land accessible only over land of the vendor, or sells, reserving land accessible only over land of the vendee, he shall have a way of necessity over the land which gives access to his purchase or reservation; 5 Taunt. 311; Wissler v. Hershey, 23 Pa. 333; Collins v. Prentice, 15 Conn. 39, 38 Am. Dec. 61; Bass v. Edwards, 126 Mass. 445; Mead v. Anderson, 40 Kan. 203, 19 Pac. 708; Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658; and this may exist even after the vendor has conveyed his land to a third person; Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; but a way of necessity is not created by the fact that a road over grantor's land would be of less distance to a highway than a road already established; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734. The necessity must be absolute, not a mere convenience; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; Stevens v. Orr, 69 Me. 323; Mayo v. Thigpen, 107 N. C. 63, 11 S. E. 1052; Oliver v. Pitman, 98 Mass. 50; 11 Ch. Div. 968; L. R. 9 Ch. 111; *contra*, Williams v. Safford, 7 Barb. (N. Y.) 309; and when it ceases the way ceases with it; Pierce v. Selleck, 18 Conn. 321; New York, L. I. & T. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353. See EASEMENT. *By implication;* Rightsell v. Hale, 90 Tenn. 556, 18 S. W. 245. *By reservation* expressly made in the grant of the land over which it is claimed; White v. Crawford, 10 Mass. 183; Hart v. Connor, 25 Conn. 331. *By custom;* as where navigators have a right of this nature to tow along the banks of navigable rivers with horses; 3 Term 253. *By acts of legislature;* though a private way cannot be so laid out without the consent of the owner of the land over which it is to pass; Reynolds v. Reynolds, 15 Conn. 83; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; McCauley v. Dunlap, 4 B. Mon. (Ky.) 57. The easement of a property owner in a private way across a railroad track is extinguished on his joining in a proceeding to establish, against the will of the company, a public road upon

the private way; McKinney v. R. Co., 222 Pa. 48, 70 Atl. 946, 21 L. R. A. (N. S.) 1002.

A right of way may be either a right in gross, which is a purely personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant; 3 Kent 420; Shepherd v. Watson, 1 Watts (Pa.) 35; Salisbury v. Andrews, 19 Pick. (Mass.) 250. But see EASEMENT. A right of way appurtenant to land is appurtenant to all and every part of the land, and if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees; Underwood v. Carney, 1 Cush. (Mass.) 285; Watson v. Bioren, 1 S. & R. (Pa.) 229, 7 Am. Dec. 617. A way is never presumed to be in gross when it can be construed to be appurtenant to land; French v. Williams, 82 Va. 462, 4 S. E. 591. Where a way appurtenant to land granted is not located by the grant, the parties may locate it by parol agreement at any point on the premises over which the right is granted; Kinney v. Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

Ways may be abandoned by agreement, by evident intention, or by long non-user. Twenty years' occupation of land adverse to a right of way and inconsistent therewith bars the right; Yeakle v. Nace, 2 Whart. (Pa.) 123; Crain v. Fox, 16 Barb. (N. Y.) 184; Pope v. Devereux, 5 Gray (Mass.) 409. Where a way of necessity once existed it will be presumed to exist until some fact is shown establishing non-existence; Blum v. Weston, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188.

A person cannot acquire a prescriptive right of way over his own lands, or the lands of another which he occupies as tenant; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; and where one has uninterruptedly used a way over another's land for the necessary length of time to establish an easement by adverse user, it will be presumed that the user was adverse, and under claim of title, and the burden is on one claiming that it was by virtue of a license to prove that fact; Colburn v. Marsh, 68 Hun 269, 22 N. Y. Supp. 990.

The owner of a right of way may disturb the soil to pave and repair it. But a way granted for one purpose cannot be used for another; Brown v. Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

A person having a right of way which is obstructed by a house erected upon the way may, after notice and request to remove it, pull it down, although it is actually inhabited; [1891] 3 Ch. 411.

Lord Coke, adopting the civil law, says there are three kinds of ways: a footway, called *iter;* a footway and horseway, called *actus;* a cartway, which contains the other two, called *via;* Co. Litt. 56 *a.* To which may be added a *driftway*, a road over which cattle are driven; 1 Taunt. 279.

Where a railway company closed an old road at a level crossing, by the consent of the plaintiff's predecessor, it was held that the defendant had a right, in passing, to go on plaintiff's land; 39 T. L. R. 555.

See HIGHWAY; STREET; EASEMENT; THOROUGHFARE.

WAY-BILL. A writing in which are set down the names of passengers who are carried in a public conveyance, or the description of goods sent with a common carrier by land.

WAY-GOING CROP. In Pennsylvania. By the custom of the country, a tenant for a term certain is entitled, after the expiration of his lease, to enter and take away the crop of grain which he had put into the ground the preceding fall. This is called the *way-going crop;* Stultz v. Dickey, 5 Binn. (Pa.) 289, 6 Am. Dec. 411; Biggs v. Brown, 2 S. & R. (Pa.) 14. See AWAY-GOING CROP; EMBLEMENTS; GROWING CROPS.

WAYS AND MEANS. In legislative assemblies, there is usually appointed a committee whose duties are to inquire into and propose to the house the ways and means to be adopted to raise funds for the use of the government. This body is called the committee of ways and means.

WEAPON. An instrument of offensive or defensive combat. Statutes have been passed in many of the states prohibiting the carrying of concealed weapons. They are merely police regulations; State v. Jumel, 13 La. Ann. 399. Under particular statutes it has been held that to constitute the offence locomotion is not necessary, the possession is sufficient; Owen v. State, 31 Ala. 387; even if the weapon is not in perfect order and ready for use; Atwood v. State, 53 Ala. 508; State v. Duzan, 6 Blackf. (Ind.) 31; Gamblin v. State, 45 Miss. 658. Persons on their own premises; Kinkead v. State, 45 Ark. 536; or on a journey (see TRAVELLER); or having good reasons to fear bodily harm; Bell v. State, 89 Ala. 61, 8 South. 133; are exempted from the operation of such statutes; as are officers of the law; Irvine v. State, 18 Tex. App. 51. See ARMS; CONCEALED WEAPONS.

The ordinary implements of war are lawful: swords, fire-arms, and cannon, and even those which are secret or concealed, such as pits and mines. But this does not include poisoned weapons of any kind. See 2 Oppenheim, Int. L. 79. Great Britain, France, Prussia, Russia, and other nations united in a declaration at St. Petersburg in 1868, by which they agreed to renounce, in case of war among themselves, the employment of any projectile of a weight less than 400 grammes, charged with fulminating or inflammable substances. 1 Halleck, Int. L., Baker's ed. 563. See Oppenheim, Int. L. 503.

Floating mines were first used in the Russo-Japanese War, 1904. As to permitting their use, see 2 Oppenheim, Int. L. 189.

WEAR, WEIR. A dam made across a river accommodated for the taking of fish or to convey a stream to a mill. Jacob. See DAM.

WEAR AND TEAR. Destruction to some extent, *e. g.* destruction of surface by ordinary friction, but the words do not include total destruction by a catastrophe which was never contemplated by either party. 5 C. P. Div. 507.

Natural and reasonable wear and tear covers only such decay or depreciation in value of the property as may arise from ordinary and reasonable use; and injury by a freshet is not within the meaning; Green v. Kelly, 20 N. J. L. 547.

WEARING APPAREL. As generally used in statutes, refers not merely to a person's outer clothing, but covers all articles usually worn, and includes underclothing; Arnold v. U. S., 147 U. S. 494, 13 Sup. Ct. 406, 37 L. Ed. 253. It may include a gold watch; Stewart v. McClung, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374; but see Smith v. Rogers, 16 Ga. 479; Gooch v. Gooch, 33 Me. 535; a pearl necklace; U. S. v. One Pearl Chain, 139 Fed. 513, 71 C. C. A. 500; but not a travelling trunk or a breastpin; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726; and under the revenue laws shoes are not included; Swayne v. Hager, 37 Fed. 782. See BAGGAGE.

WEATHER BUREAU. Its bulletins are not notice of rain, so as to make it negligent to unload goods on an open wharf; but the master of a ship is bound to take notice of information from the weather bureau of storms of great violence and extent, such as frequently occur on the Atlantic coast; The St. Georg, 104 Fed. 898, 44 C. C. A. 246. The work of the weather bureau is not of such reputed accuracy that its prognostications as to a coming flood can be made the basis of a recovery; they may be evidence, but they are not conclusive; Cunningham v. R. Co., 40 Pa. Super. Ct. 212.

See Year Book (1903) U. S. Dept. Agricult. 304.

By a Michigan act, 1897, weather conditions are provable in civil cases by United States signal service records; so by a New York act of 1897. In Vermont, an act of 1894 provides that weather records at the place where taken are admissible to prove weather conditions. Wherever there is a duty to record official doings, the record thus kept is admissible, whether prescribed by statute or implied from the nature of the office; Wigmore, Evid. § 1639.

WED (Anglo-Sax.). A covenant or agreement; thus, a wedded husband.

A pledge. Jenks, Hist. E. L. 13. See SYMBOLIC DELIVERY.

WEDDING. In the Teutonic races, more importance was attached to the betrothal than to the subsequent wedding. The former seems to have been the sale of a woman by her guardian for a price. This came to be represented by a handsel, which was not paid over until the wedding. Later, the betrothal was the woman's own act, and the handsel was payable to herself. In Roman law there was a distinction between *sponsalia* and *matrimonium*, which was obscured by another which divided marriages into clandestine and regular—the former resting merely in the agreement of the parties. The Christian church upheld "clandestine" marriage as valid until the Council of Trent declared all marriages to be void unless made in the presence of a priest and witnesses. In England, where that decree was not received, either of the parties to a clandestine marriage could compel the other, in an ecclesiastical court, to solemnize it in due form. It has been held (10 Cl. & F. 655) that the English common law never recognized such a contract *per verba de præsenti* as valid, although it recognized it, as well as a contract "*per verba de futuro*," down to the middle of the eighteenth century as giving either of the parties a right to sue for a celebration and as impeding the marriage of either party with a stranger. Holland, Jurispr. 240.

In the later Anglo-Saxon period the husband gave the parent or guardian security (*wed*) that "he will keep her according to God's law as a man should his wife"; he arranged with her friends and with herself what settlement he would make upon her, and what should be her rights after his death, and for this promise he gave her a *wed*. The actual nuptials were performed in the presence of a priest. The marriage service of the English church reproduces these old ideas. The *wed* appears in the ring; the settlement is found in the endowment of the bride by the bridegroom with "all his worldly goods." There is the giving away of the bride by her guardians, and the presence of the priest. 2 Holdsw. Hist. E. L. 76. The Church of England marriage service is said to be a cabinet of antiquities. 2 Poll. & Maitl. 365.

As to wedding presents, see PARAPHERNALIA.

WEEDS. As to permitting the spread of seeds, see Gulf, C. & S. F. Ry. Co. v. Oakes, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835.

See WASTE.

WEEK. Seven days of time.

The week commences immediately after twelve o'clock on the night between Saturday and Sunday, and ends at twelve o'clock, seven days of twenty-four hours each, thereafter. See Ronkendorff v. Taylor, 4 Pet. (U. S.) 361, 7 L. Ed. 882; 24 L. J. Ch. 368; or it may mean a period of time of seven days

duration without reference to when that period commences; State v. Mining Co., 5 Nev. 430.

In a contract for employment, *week* will be construed to mean week days only where employment is prohibited on Sunday; Keith v. Kellermann, 169 Fed. 196.

The first publication of a notice of a sale, under a power contained in a mortgage, which requires the notice to be published "once each week for three successive weeks," need not be made three weeks before the time appointed for the sale; Dexter v. Shepard, 117 Mass. 480. See TIME.

Week-Work. In early English times, the obligation of a tenant to work two or three days in every week for his lord, during the greater part of the year, and four or five during the summer months. 1 Poll. & Maitl. 349.

WEEKLY PAYMENT LAWS. See LIBERTY OF CONTRACT.

WEIGHAGE. In English Law. A duty or toll paid for weighing merchandise: it is called *tronage* for weighing wool at the king's beam, or *pesage* for weighing other avoirdupois goods. 2 Chitty, Com. Law 16.

WEIGHT. A quality in natural bodies by which they tend towards the centre of the earth.

Under the police power, weights and measures may be established and dealers compelled to conform to the fixed standards under a penalty; Cooley, Const. Lim. 749.

By the constitution congress has the power "to fix the standard of weights and measures."

Troy weight is used for weighing gold, silver, and precious stones, except diamonds. Troy weight is also used by apothecaries in compounding medicines; but by them the ounce is divided into eight drams, and the dram into three scruples, so that the latter is equal to twenty grains. For scientific purposes (when the metric system is not employed, as it now usually is), the grain only is used, and sets of weights are used constructed in decimal progression from 10,000 grains downward to one-hundredth of a grain. The carat used for weighing diamonds is three and one-sixth grains.

See GRAMME.

By act of March 4, 1911, R. S. § 3548, was amended by the substitution of the standard troy pound of the bureau of standards for the standard prescribed by the original section.

See LEGAL TENDER; GOLD.

The legislative power to enact statutes to compel the use of correct weights and measures can be delegated to a municipal corporation; Ford v. R. Co., 33 App. Div. 474, 53 N. Y. Supp. 764; Seattle v. Goldsmith, 73 Wash. 54, 131 Pac. 456; it is within the police power; *id.* A city having the statutory right to provide for the public weighing of coal, hay and corn, may maintain public scales; 165 Mo. 671; the exemption of amounts under 500 pounds, or of cases where the parties agreed does not invalidate the act; State v. Eck, 141 N. W. 106, 121 Minn. 202.

A city ordinance requiring grain sold for consumption in the city to be weighed on the city scales is not invalid as an unreasonable restraint of trade; State v. Smith, 123 Ia. 654, 96 N. W. 899; so of coal; State v. Eck, 141 N. W. 106, 121 Minn. 202.

A state act providing that the state weighmaster in various cities shall have exclusive control of the weighing of grain subject to inspection, and his action and certificates shall be conclusive on all parties, is unconstitutional, as depriving the shipper of his day in court; Vega S. S. Co. v. Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484.

An ordinance regulating the weight of baker's bread is void as being an unreasonable invasion of the right to engage in a lawful business; Buffalo v. Baking Co., 39 App. Div. 432, 57 N. Y. Supp. 347.

To cheat a man of his money or goods by using false weights or false measures is indictable at common law; Com. v. Warren, 6 Mass. 72; and it is no defence that the scales got out of order because of the pans getting mixed up after being cleaned; New York v. Biffle, 91 N. Y. Supp. 737.

An ordinance penalizing any person using any weight, etc., not conforming to the standard or which shall be incorrect, is aimed at the use of such defective weight and not at an intentional alteration of it; New York v. Hewitt, 91 App. Div. 445, 86 N. Y. Supp. 832. Proof of intent or guilty knowledge is not essential in an action to recover the penalty; *id.*

Evidence of short weight in a sale by a servant of defendant in his absence warrants a conviction; Com. v. Sacks, 214 Mass. 72, 100 N. E. 1019, 43 L. R. A. (N. S.) 1, Ann. Cas. 1914B, 1076; but not a sale by a wholesale dealer of meats in the ordinary package, packed at the wholesale dealer's plant in another state under federal inspection; New York v. Sulzberger & Sons Co., 80 Misc. 660, 141 N. Y. S. 876.

Under act of congress of March 2, 1895, giving to the sealer of weights and measures the custody and control of such standard weights and measures as now are, or as shall hereafter be, provided by the District of Columbia, the English standard which was brought to the colonies and has been recognized by congressional action is the standard with which they are given the power to enforce conformity; Thompson v. District of Columbia, 21 App. D. C. 395.

The only method of testing scales is provided by act of congress, supplemented by How. St., which provides for supplying each

county, etc., with weights and measures compared with the standards in the office of the state treasurer; and it is improper to permit any comparison of scales or weights except by reference to this standard; McGeorge v. Walker, 65 Mich. 5, 31 N. W. 601.

For French weights, see MEASURE.

In Anglo-Norman times weights were usually expressed in pounds, shillings and pence. 2 Studer, Oak Book of Southhampton.

WEIGHT OF EVIDENCE. This phrase is used to signify that the proof on one side of a cause or issue is greater than on the other.

When a verdict has been rendered against the weight of the evidence, the court may, on this ground, grant a new trial; but the court will exercise this power not merely with a cautious but a strict and sure judgment, before they send the case to a second jury.

The general rule, under such circumstances, is that the verdict once found shall stand: the setting aside is the exception, and ought to be an exception of rare and almost singular occurrence. A new trial will be granted on this ground for either party: the evidence, however, is not to be weighed in golden scales: 2 Bingh. N. C. 109; Williams v. Gilman, 3 Greenl. (Me.) 276; Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; Rice v. Welling, 5 Wend. (N. Y.) 595. See NEW TRIAL; Moore, Facts; Wigmore, Ev.

WEIR. See WEAR.

WELFARE CLAUSE. See CONSTITUTION OF THE UNITED STATES.

WELL. A hole dug in the earth in order to obtain water.

In a deed, well designates the portion of land under and occupied by the excavation, and its surrounding retaining walls, and by any structures or appliances built upon the land to facilitate its use, and also the water actually at any time in the excavation; Davis v. Spaulding, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102.

The owner of the estate has a right to dig in his own ground at such a distance as is permitted by law from his neighbor's land; he is not restricted as to the size or depth, and is not liable to any action for rendering the well of his neighbor useless by so doing. See Chesley v. King, 74 Me. 170, 43 Am. Rep. 569; SUBTERRANEAN WATERS; WATERS; Collins v. Gas Co., 131 Pa. 143, 18 Atl. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791.

WELL-BORN MEN. A tribunal in New Amsterdam (New York). 1 Fiske, Dutch and Quaker Colonies 238.

WELL KNOWING. In Pleading. Words used in a declaration when the plaintiff sues for an injury which is not immediate and with force, and the act or nonfeasance complained of was not *prima facie* actionable. Not only the injury, but the circumstances under which it was committed, ought to be stated: as, where the injury was done by an animal. In such case the plaintiff, after stating the injury, continues, the defendant, *well knowing* the mischievous propensity of his dog, permitted him to go at large. See SCIENTER.

WELSH MORTGAGE. In English Law. A species of security which partakes of the nature of a mortgage, as there is a debt due, and an estate is given as security for the repayment, but differs from it in the circumstances that the rents and profits are to be received without account till the principal money is paid off, and there is no remedy to enforce payment, while the mortgagor has a perpetual power of redemption. It is now rarely used.

It is a species of *vivum vadium*. Strictly, however, there is this distinction between a Welsh mortgage and a *vivum vadium:* in the latter the rents and profits of the estate are applied to the discharge of the principal after paying the interest; while in the former the rents and profits are received in satisfaction of his interest only; 1 Powell, Mortg. 373 *a*; Jones, Mtg. 1153. See MORTGAGE.

WELSHING. Receiving a sum of money or valuable thing, undertaking to return the same or the value thereof together with other money, if an event (for example, the result of a horse-race) shall be determined in a certain manner and at the time of receiving the deposit intending to cheat and defraud the depositor. Coldr. & Hawks. Gambling 303. The crime is larceny at common law.

WEOTUMA. The purchase price of a wife among the heathen Germans. 2 Holdsw. Hist. E. L. 77. See MORNING GIFT; DOWER.

WERGILD. In Old English Law. The price which, in a barbarous age, a person guilty of homicide or other enormous offence was required to pay, instead of receiving other punishment. 4 Bla. Com. 188.

The "man's price" which a man's kinfolk were entitled to demand from his slayer, and which he sometimes might have to pay for his own offences. Pollock, 1 Sel. Essays in Anglo-Amer. Legal Hist. 98.

The only punishments, in the proper sense, applicable to free men, were money fines, and death in the extreme cases. 1 Poll. & Maitl. 26. In the early days there was no power to compel their acceptance; Jenks, Hist. E. L. 158.

The life of every man, not excepting that of the king himself, was estimated at a certain price, which was called the *wer* or *æstimatio capitis*. The amount varied according to the dignity of the person murdered. The price of wounds was also varied according to the nature of the wound, or the member injured.

See, for the etymology of this word, and a tariff which was paid for the murder of the

different classes of men, Guizot, *Essais sur l'Histoire de France, Essai 4ème*, c. 2, § 2. See Thorpe, Wergilds; Seebohm, Tribal Customs in Anglo-Saxon Law.

WEST SAXON LAGE. The law of the West Saxons, which was observed in the counties in the south and west of England, from Kent to Devonshire, in the beginning of the eleventh century; supposed by Blackstone to have been much the same as the laws of Alfred. 1 Bla. Com. 65. It is said to have been compiled by King Alfred. 4 Steph. Com. 428.

WEST VIRGINIA. The name of one of the United States of America.

This state was formed in 1861 of the western counties of Virginia, owing to their non-concurrence in the ordinance of secession passed by the legislature of that state. A constitution was framed by a convention which met at Wheeling on November 26, 1861. This was submitted to the people on April 3, 1862, and ratified almost unanimously. The consent of the body, recognized by the federal government as the legislature of Virginia, was given, and congress then passed an act approved December 31, 1862, providing for the admission of the new state into the Union upon condition of the adoption of an amendment to the constitution providing for emancipation of slaves. This was done, and the state was admitted to the Union. The first constitution remained in force until 1872, when the present constitution was framed by a convention which met on January 16, 1872, and completed its labors on April 9 of that year. It was submitted to the people and ratified by them on August 22, 1872. The constitution was amended in 1913 by providing for prohibition, which took effect July 1, 1914.

Com. v. West Virginia, 206 U. S. 290, was a suit to adjust, between those states, the debt of Virginia before the separation. It contains much historical information.

WESTERN RESERVE. See OHIO.

WESTMINSTER 2nd, STATUTE OF. A statute of 13 Edw. I. c. 24 (1285), under which it was provided that where in one case a writ was found and in a like case no writ was to be found, the clerks of the chancery should agree in making a writ, or adjourn the complaint until the next parliament and refer to it the cases in which they could not agree. Steph. Pl. *7. See CONSIMILI CASU.

WETHER. A castrated ram, at least one year old. In an indictment it may be called a sheep. 4 C. & P. 216.

WHALER. A vessel employed in the whale fishery.

It is usual for the owner of the vessel, the captain, and crew, to divide the profits in just proportions, under an agreement similar to the contract Di Colona, which see. See LAY.

WHARF. A space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel.

A wharf occupied by a ferry company, to which access can only be had through a gate controlled by the ferry company, or over private property of another, is a private wharf; Malloy v. R. Co., 78 Hun 166, 28 N. Y. Supp. 979; but a public quay in a city, dedicated to public use, does not cease to be *locus publicus* and become private property because it is leased by the public authorities for a purpose subservient to the public use; New Orleans v. Const. Co., 140 U. S. 654, 11 Sup. Ct. 968, 35 L. Ed. 556.

At common law, the soil or all tide-waters below high-water mark being vested in the crown, the erection of a wharf thereon without the consent of the crown is an encroachment upon the royal domain of that kind which has been denominated a *purpresture*, and, as such, may be either abated, or, if more beneficial to the crown, the party arrested, unless it be a public nuisance; 10 Price, 350, 378; 18 Ves. 214; 2 Story, Eq. Jur. § 920. But if it obstruct navigation to such a degree as to be a public nuisance, neither the crown nor its grantee has authority to erect or maintain it without the sanction of an act of parliament; 8 Ad. & E. 336; 5 M. & W. 327; Phear, Rights of Water 54. It is not every wharf erected in navigable water which is a nuisance, for it may be a benefit rather than an injury to the navigation; and it is for the jury to determine, in each particular case, whether such a wharf is a nuisance or not; 1 C. & M. 496; 4 Ad. & E. 384; 15 Q. B. 276.

In this country, the several states, being the owners of the soil of the tide waters within their respective territories, may by law authorize and regulate the erection of wharves thereon, at least until the general government shall have legislated upon the subject; Savannah v. State, 4 Ga. 26; Com. v. Alger, 7 Cush. (Mass.) 53; Wilson's Lessee v. Inloes, 11 Gill & J. (Md.) 351; and may grant to a municipal corporation the exclusive right to make and control wharves on the banks of a navigable river; Keokuk N. L. P. Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377. The riparian proprietor is entitled to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe; Illinois C. R. Co. v. Illinois, 146 U. S. 445, 13 Sup. Ct. 110, 36 L. Ed. 1018; Yates v. Milwaukee, 10 Wall. (U. S.) 504, 19 L. Ed. 984. In Massachusetts and Maine, by a colonial ordinance, the provisions of which are still recognized as the law of those states, the property of the shores and flats between high and low water mark, for one hundred rods, subject to the rights of the public, was transferred to the owners of the upland, who may, therefore, build wharfs out to that distance, if by so doing they do not unreasonably interrupt navigation; Drake v. Curtis, 1 Cush. (Mass.) 395; Partridge v. Luce, 36 Me. 16. If without legislative sanction they extend a wharf beyond that distance, such extension is *prima facie* a nuisance, and will be abated as such, unless it can be shown that it is no material

detriment to navigation; Gray v. Bartlett, 20 Pick. (Mass.) 186, 32 Am. Dec. 208; Thornton v. Grant, 10 R. I. 477, 14 Am. Rep. 701. It is said that a wharf may extend to the point of navigability; Clifford v. U. S., 34 Ct. Cl. 223. In Connecticut, and probably in other states, by the law of the state founded upon immemorial usage, the proprietor of the upland has the right to wharf out to the channel,—subject to the rights of the public; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Martin v. Waddell, 16 Pet. (U. S.) 369, 10 L. Ed. 997; State v. Jersey City, 1 N. J. L. 525; Rippe v. R. Co., 23 Minn. 18; Paine L. Co. v. U. S., 55 Fed. 854. In Pennsylvania, the riparian proprietor is held to be the owner of the soil between high and low water mark, and to be entitled to erect wharves thereon; Hart v. Hill, 1 Whart. (Pa.) 131; but not without express authority from the state; Tinicum F. Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. In the same state it has been held that wharves are not the private property of him who erects them, and persons who go upon and fasten vessels to them are not trespassers; Degan v. Dunlap, 15 Phila. (Pa.) 69.

Riparian owners have the right, among others, to build private wharves out so as to reach the navigable waters of the stream; Weems Steamboat Co. v. Steamboat Co., 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222.

The owner of a wharf is liable for damages caused to a vessel by concealed obstructions which he might have ascertained by reasonable diligence; Manhattan Transp. Co. v. New York, 37 Fed. 160. A railroad company which maintained a wharf was held bound to know whether obstructions existed thereat which would endanger a vessel assigned by it to berth at such wharf; Verdon v. R. Co., 157 Fed. 481. A wharfinger is bound to exercise reasonable diligence in ascertaining the condition of the berths at his wharf and remove dangerous obstructions thereat, or to give notice thereof to vessels about to dock; and the master is bound to use ordinary care; Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; [1891] App. Cas. 11; Carleton v. Steel Co., 99 Mass. 216. The master is not bound to take soundings before going into the berth; and in an action for injuries sustained in grounding on a rock in the bottom of the dock, it is sufficient to show that the owner of the dock could have discovered the rock by reasonable diligence; Garfield & Proctor Coal Co. v. Lime Co., 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. Rep. 543.

Such claims are within the jurisdiction of admiralty; and a libel *in personam* will lie; Ball v. Trenholm, 45 Fed. 588. The wharfinger was also held liable for damages to vessels caused by the insufficiency of the wharf; The Francisco R. v. The Waterloo, 79 Fed. 113.

Owners of land abutting on a lake, the title to which is in the state, have the right to build wharves in aid of navigation, but not obstructing it, far enough to reach water navigable for such boats as are in use; Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635, with an extended note on the right of the riparian owner to erect wharves.

Where abutters on a navigable stream have grants from the state conveying land under water, conditioned upon their erecting docks and promoting commerce, the public has the incidental right to pass over the abutting lines to reach the docks; Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, 71 N. E. 764.

A wharf built by a railroad company by municipal authority on what might be the extension of a street is not a public wharf; Louisville & N. R. Co. v. Naval Stores Co., 198 U. S. 483, 25 Sup. Ct. 745, 49 L. Ed. 1135; but one built on a navigable stream at the terminus of public highways in the country, which is the only means of reaching the river and was built for that purpose, and is being so used, is impressed with a public interest; Weems Steamboat Co. v. Steamboat Co., 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222.

Long continued use of a wharf by the public at large, without objection on the part of the town, will support a verdict finding it to be a public landing place; Coolidge v. Learned, 8 Pick. (Mass.) 504. The title to a wharf may be obtained by prescription as against the commonwealth; Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132.

See RIPARIAN PROPRIETORS; WATER-COURSE; RIVERS; WATERS; 40 L. R. A. 635; 16 L. R. A. (N. S.) 506, for valuable notes.

WHARFAGE. The money paid for landing goods upon, or loading them from, a wharf. Dane, Abr. Index; Sacramento v. The "New World," 4 Cal. 41. It may be on an artificial or a natural landing; Sacramento v. The "New World," 4 Cal. 41.

Wharfingers in London are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharves; 3 Burr. 1409; 1 W. Bla. 243. And see Camden & A. R. Co. v. Finch, 5 Sandf. (N. Y.) 48. It has been held that, owing to the interest which the public have in the matter, rates of wharfage may be regulated by statute; Murphy v. Montgomery, 11 Ala. 586. And see Albany v. Trowbridge, 5 Hill (N. Y.) 71; Fitzsimons v. Milner, 2 Rich. (S. C.) 370; 8 B. & C. 42.

Claims for wharfage are cognizable in admiralty, and, if the vessel is a foreign one or from another state, the claim of the wharfinger is a maritime lien against the vessel, which may be enforced by a proceeding *in rem*, or by a libel *in personam* against the owner of such vessel; Ex parte Easton,

95 U. S. 68, 24 L. Ed. 373; The Allianca, 56 Fed. 609. A state statute conferring a remedy for such claims by proceedings *in rem* is void; Brookman v. Hamill, 43 N. Y. 554, 3 Am. Rep. 731. But as to domestic vessels, the lien of the wharfinger is only enforceable as a *common-law* lien; Russel v. The Asa R. Swift, 1 Newb. 553, Fed. Cas. No. 12,144; Delaware R. S. Co. v. The Thomas, 9 Phila. 364, Fed. Cas. No. 3,769. See The Advance, 60 Fed. 766. In the absence of any agreement between the parties, reasonable wharfage will be allowed; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373. A lease giving the lessee "the sole and exclusive right to use the public wharf for his ferry boat," does not authorize the collection of toll for wharfage; Russel v. The Empire State, 1 Newb. 541, Fed. Cas. No. 12,145. A municipal corporation cannot exact a charge upon vessels for entering or leaving a port or remaining therein and using the wharves or landings, for the *general revenue* of such corporation; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; Keokuk N. L. P. Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377; but it may collect from parties using its wharves, such reasonable fee as will fairly remunerate it for the use of its property; Northwestern U. P. Co. v. St. Louis, 100 U. S. 423, 25 L. Ed. 688; De Bary Baya M. L. v. R. Co., 40 Fed. 392. That such fees are regulated by the tonnage of the vessel will not constitute them a tonnage tax under the constitution, art. 1, paragraph 3, § 10; Johnson v. Drummond, 20 Gratt. (Va.) 419. See Leathers v. Aiken, 9 Fed. 679. A ship compelled by stress of weather to moor to a wharf for safety, is not liable to a charge for wharfage, where the wharf is a private one, and no fixed rate of charge is in use; Heron v. The Marchioness, 42 Fed. 173. Vessels which have made use of a wharf, whether under express or implied contract, cannot refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property; The Idlewild, 59 Fed. 628.

See full note on the right to wharfage in 70 L. R. A. 193; and on lien for wharfage in *id.* 353.

WHARFINGER. One who owns or keeps a wharf for the purpose of receiving and shipping merchandise to or from it for hire.

A wharfinger stands in the position of an ordinary bailee for hire, and therefore, like a warehouseman, he is responsible for ordinary neglect, and is required to take ordinary care of the goods intrusted to him as such; Foote v. Storrs, 2 Barb. (N. Y.) 328; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175; 4 Term 581. He is not an insurer of the safety of his dock, but he must use reasonable care to keep it in safe condition, for vessels which he invites to enter it; Nickerson v. Tirrell, 127 Mass. 236; Sawyer v. Oakman, 7 Blatchf. 290, Fed. Cas. No. 12,402; New Orleans, M. & C. R. R. Co. v. Hanning, 15 Wall. (U. S.) 649, 21 L. Ed. 220; Poll. Torts 483; [1891] A. C. 11.

While he does not guarantee the safety of vessels coming to his wharf, he is bound to exercise reasonable diligence in ascertaining the condition of berths thereat; and a master of a ship is bound to use ordinary care; Smith v. Burnett, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756.

He is not, like an innkeeper or carrier, to be considered an insurer unless he superadd the character of carrier to that of wharfinger; 5 Burr. 2825; Platt v. Hibbard & Webb, 7 Cow. (N. Y.) 497; Ducker v. Barnett, 5 Mo. 97. The responsibility of a wharfinger begins when he acquires and ends when he ceases to have the custody of the goods in that capacity.

As to when he begins and ceases to have such custody depends, generally, upon the usages of trade and of the business. When goods are delivered at a wharf, and the wharfinger has agreed, expressly or by implication, to take the custody of them, his responsibility commences; but a mere delivery at the wharf, without such assent, does not make him liable; 3 Camp. 414; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175; 14 M. & W. 28. When goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the possession and the care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility; 1 M. & W. 174; Gass v. R. Co., 99 Mass. 220, 96 Am. Dec. 742. The wharfinger does not, however, discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board of it; 1 C. & P. 638.

A wharfinger has a general lien upon all goods in his possession for the balance of his account; 4 B. & Ald. 50; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373; and in respect to the right of lien there is no distinction between the wharfinger and the warehouseman; 23 Am. L. R. Eq. 465, 468. A wharfinger has equally a lien on a vessel for wharfage; The Phebe, 1 Ware 354, Fed. Cas. No. 11,065; Johnson v. McDonough, Gilp. 101, Fed. Cas. No. 7,395.

See WHARFAGE.

WHEEL. The punishment of the wheel was formerly to put a criminal on a wheel, and then to break his bones until he expired. This punishment was never used in the United States; and it has been abolished in every civilized country.

WHELPS. The young of certain animals of a base nature or *feræ naturæ*.

It is a rule that when no larceny can be committed of any creatures of a base nature which are *feræ naturæ*, though tame and re-

claimed, it cannot be committed of the young of such creatures in the nest, kennel, or den; Co. 3d Inst. 109; 1 Russ. Cr. 153.

The owner of the land is, however, considered to have a qualified property in such animals, *ratione impotentiæ;* 2 Bla. Com. 394.

WHEN. At which time. At that time. St. Louis v. Withaus, 90 Mo. 646, 3 S. W. 395.

In wills, standing by itself unqualified and unexplained, this is a word of condition denoting the time at which the gift is to commence; 6 Ves. Jr. 243; 10 Co. 50; 16 C. B. 59. The context of a will may show that the word is to be applied to the possession only, not to the vesting of a legacy; 7 Ves. 422; 3 Bro. C. C. 471. See 2 Jar. Wills 417. See DEVISE; TIME.

WHEN AND WHERE. Technical words in pleading, formerly necessary in making *full defence* to certain actions. See 1 Chit. Pl. *445; DEFENCE.

WHENEVER. Though often used as equivalent to "as soon as," it is also often used where the time intended by it is, and will be, until its arrival, or for some uncertain period at least, indeterminate. Robinson v. Greene, 14 R. I. 188.

WHEREAS. This word implies a recital, and, in general, cannot be used in the direct and positive averment of a fact in a declaration or plea. Those facts which are directly denied by the terms of the general issue, or which may, by the established usage of pleading, be specially traversed, must be averred in positive and direct terms; but facts, however material, which are not directly denied by the terms of the general issue, though liable to be contested under it, and which, according to the usage of pleading, cannot be specially traversed, may be alleged in the declaration by way of recital, under a whereas; 2 Chitty, Pl. 151, 178, 191.

WHEREUPON. Sequence; succession; order of action; relation. A thing done with reference to something previously done. It is interchangeable with the words upon which, and after which. Lee v. Cook, 1 Wyo. 419.

WHIPPING. The infliction of stripes.

This mode of punishment, which is still practised in several states, has yielded in most of the states to the penitentiary system. It is still used in Maryland for wife-beating, and in Delaware for all felonies (but not for women).

Whipping has been held to be punishment worse than death; Herber v. State, 7 Tex. 69; but see State v. Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741. It is not a "cruel or unusual punishment"; Foote v. State, 59 Md. 264.

The punishment of whipping, so far as the same was provided by the laws of the United States, was abolished by the act of congress of February 28, 1839, s. 5. See CORRECTION; SEAMEN.

At common law whipping was inflicted on inferior persons for petty larceny, etc.; but by the usage of the star chamber, never on a gentleman. 4 Steph. Com. 379. By 1 Geo. IV. c. 57, it was abolished as to women. By 5 & 6 Vict. striking or firing at the queen is punishable with whipping thrice or fewer times. The Criminal Law Consolidation Acts of 1861 authorize the whipping of males below 16 who have been convicted of sending letters threatening to kill; placing explosives near a house, ship, etc.; defiling a girl under 13 years of age; robbing with violence (not over twenty-five stripes); but it must be done in private and only once, and the court must specify the number of strokes and the instrument. By 25 Vict. c. 18, for boys under 14, the number of stripes shall not exceed twelve with a birch rod. For the offences of robbery accompanied with personal violence, and of attempting by any means to strangle or to render insensible any one with intent to enable himself or others to commit an indictable offence, in addition to imprisonment, the 24 & 25 Vict. c. 100, and 26 & 27 Vict. c. 96, direct that the offender, if a man, be once, twice, or thrice privately whipped. See Whart. Lex.

Juvenile offenders may in some cases be sentenced to receive 12 strokes with a birch rod. By act of 1912, whipping shall be privately done and the sentence shall specify the number of strokes and the instrument.

It is forbidden by the constitution of South Carolina and Georgia, except that in Georgia convicts can be so punished. So in North Carolina; see State v. Morris (N. C.) 81 S. E. 462. Whipping (but not of females) is a method of punishment in Canada under the Code for an assault on the king, burglary when armed, choking or administering a narcotic when committing an indictable offence, and for carnal knowledge of a girl under 14, or an attempt thereto. It is in most cases to be administered one, two or three times, the number of times and of strokes, and the whip, to be fixed in the sentence; otherwise to be the cat-o'-nine-tails.

It is generally understood that corporal punishment is still in use in the English public schools, although rarely administered; the cane has been substituted for the birch. The same substitution was made in 1910 at Eton for the upper form boys, but the former practice still obtains there for the younger boys.

It is in use in some penal institutions as a means of discipline. See ASSAULT.

WHISKY. Within the pure food act of 1906, it is the product of sound grain distilled at a low temperature so as to retain in the distillate the congeneric properties of the grain which gives to the liquor when matured by aging in charred casks its desirable

potable character. Neutral spirits which are distilled at a high temperature may be made from different materials and do not contain such properties, and which are not rendered potable by aging although reduced by water to potable strength, and from which most of the fusel oil has been removed, are not whisky, nor a like substance with whisky; Woolner & Co. v. Rennick, 170 Fed. 662. See FOOD AND DRUG ACTS; LIQUOR LAWS.

WHITE ACRE. See BLACK ACRE.

WHITE-CAPS. A state statute disqualifying for jury service all persons shown to be engaged in a general conspiracy against law and order is not unconstitutional; Jenkins v. State, 99 Tenn. 569, 42 S. W. 263.

WHITE PERSON. As used in the naturalization laws, a person of the Caucasian race. In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104. It does not include a Mongolian; *id.;* it includes a person nearer white than black or red; Jeffries v. Ankeny, 11 Ohio 375; a Mexican, In re Rodriguez, 81 Fed. 337; an Armenian; In re Halladjian, 174 Fed. 834; a Maronite; In re Ellis, 179 Fed. 1002; a Parsee; U. S. v. Balsara, 180 Fed. 694, 103 C. C. A. 660; but not a half-breed Mongolian and white; In re Knight, 171 Fed. 299; or a half-breed Indian and white; In re Camille, 6 Fed. 256. Whether one is a "free white person" cannot be determined on any ground of complexion or race, but, in view of the conditions existing in 1790, when they were first used in the naturalization statute, must be limited to persons of European nativity or descent. As so construed a Syrian is not entitled to naturalization; In re Dow, 213 Fed. 355.

This case contains an elaborate ethnological discussion by Smith, D. J. (district of South Carolina), as do also his opinions in Ex parte Dow, 211 Fed. 486, and Ex parte Shahid, 205 Fed. 812. A Syrian was held entitled to naturalization in Re Ellis, 179 Fed. 1002, and Bessho v. U. S., 178 Fed. 245, 101 C. C. A. 605.

In South Africa it means a person of European descent; [1905] T. S. 621.

See NEGRO.

In the legislation of the slave period it referred to a person without admixture of colored blood, whatever the actual complexion might be; Du Val v. Johnson, 39 Ark. 192. The words white and colored as used in the statutes providing for the maintenance of schools are held to be used in the ordinary acceptation; Van Camp v. Board of Education of Logan, 9 Ohio St. 407.

WHITE RENTS. In English Law. Rents paid in silver, and called *white rents*, or *reditus albi*, to distinguish them from other rents which were not paid in money. Co. 2d Inst. 19. See ALBA FIRMA.

WHITE SLAVE. A term used in the United States Compiled Statutes and in common talk (though not very appropriately) to indicate offences under the federal act of June 25, 1910, prohibiting the "transportation in interstate and foreign commerce for immoral purposes of women and girls." It makes it a criminal offence if any person shall knowingly transport or cause to be transported, or assist in obtaining transportation for, or shall transport in interstate or foreign commerce, "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose," or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or engage in any other immoral practice, or in going to any place for the purpose of prostitution or debauchery, etc., or with the intent or purpose to induce, entice or compel her to give herself up to prostitution, etc. The penalty is a fine not exceeding $5,000, or imprisonment for not more than five years, or both in the discretion of the court.

It is made a criminal offence if any person shall knowingly persuade, induce, entice or coerce, etc., or aid or assist in persuading, etc., any woman or girl to go to any place in interstate or foreign commerce for prostitution or debauchery, or any other immoral purpose, or with intent and purpose on the part of the person that such woman or girl shall engage in the practice of prostitution and debauchery, and a like penalty is provided.

A special section relates to a like offence in relation to a woman or girl under 18 years of age. This offence is made a felony and is punishable by a fine not exceeding $10,000, or imprisonment for not more than ten years, or both, in the discretion of the court.

The offence is to be tried in any court having jurisdiction of crimes in the district in which it occurred, or from, through or into which any woman or girl has been carried or transported as a passenger in interstate commerce.

A section provides that for the regulation and prevention of like transportation in foreign commerce of alien women and girls under the international agreement for the suppression of the white slave traffic (as adhered to by the United States June 6, 1908), every person keeping in a house of prostitution any alien woman or girl within three years after entering the United States from any country which is a party to the agreement, is required under a penalty to file with the commissioner general of immigration a statement in writing setting forth the name of such woman or girl, etc.

The act is a legal exercise of the power of congress under the commerce clause, and does not abridge the privileges or immunities of the citizens of the states, or interfere with the reserved powers of the states; Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas.

1913E, 905; Wilson v. U. S., 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. ——; Kalen v. U. S., 196 Fed. 888, 116 C. C. A. 450; Paulsen v. U. S., 199 Fed. 423, 118 C. C. A. 97, where the evidence was held sufficient to sustain a conviction; Bennett v. U. S., 194 Fed. 630, 114 C. C. A. 402; Harris v. U. S., 194 Fed. 634, 114 C. C. A. 406, where the evidence was held sufficient to sustain a conviction; U. S. v. Warner, 188 Fed. 682, where Holt, J., in the southern district of New York, in an earlier case, held the act constitutional.

The act has the quality of a police regulation, though enacted in the exercise of the right to regulate commerce. The transportation need not be by a common carrier. The offence is complete when transportation has been accomplished; there is no *locus pœnitentiæ* thereafter; Wilson v. U. S., 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. ——.

The act includes importation for the purpose of living with the person in concubinage; U. S. v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543; U. S. v. Flaspoller, 205 Fed. 1006. The offence may be committed where the woman transported is the wife of the accused; Cohen v. U. S., 214 Fed. 23.

There was no error in refusing to charge that "debauchery," as used in the act, means sexual intercourse, or that the act does not extend to any vice or immorality other than that applicable to sexual actions; Athanasaw v. U. S., 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911.

See Harris v. U. S., 227 U. S. 340, 33 Sup. Ct. 289, 57 L. Ed. 534.

The opinion in U. S. v. Hoke, 187 Fed. 992, is fully considered and quotes many acts of congress in recent years having the same general purpose as the act in question.

Transporting (interstate) a woman for the purpose of sexual immorality is within the act without regard to her previous character; Suslak v. U. S., 213 Fed. 913.

Pollock, D. J. (district court, Kansas), in a recent case is said to have suggested to the accused to change his plea from guilty to not guilty, intimating that he would direct the jury to acquit, if it did not appear that the girl was taken to another state for the purpose of commercializing her immorality.

WHOLE BLOOD. Being related by both the father and mother's side; this phrase is used in contradistinction to *half blood*, which is relation only on one side. See BLOOD.

WHOLESALE. To sell by wholesale is to sell by large parcels, generally in original packages, and not by retail.

WHOLESALE PRICE. The price fixed on merchandise by one who buys in large quantities of the producer or manufacturer, and who sells the same to jobbers or to retail dealers therein. Fawkner v. Paper Co., 88 Ia. 169, 55 N. W. 200, 45 Am. St. Rep. 230.

WIDOW. An unmarried woman whose husband is dead.

In legal writings, widow is an addition given to a woman who is unmarried and whose husband is dead. A widow who has married again cannot be a widow; 20 Q. B. D. 103. A woman surviving a man to whom she has been married, but with regard to whom she had obtained a declaration of nullity of marriage, is not a widow; 52 L. J. Ch. 239. The addition of spinster is given to a woman who never was married. Lovelace, Wills 269. See ADDITION.

See DOWER; QUARANTINE.

WIDOW'S BENCH. The share of her husband's estate which a widow is allowed besides her jointure. Whart. Lex.

WIDOW'S CHAMBER. In London the apparel of a widow and the furniture of her chamber, left by her deceased husband, is so called, and the widow is entitled to it. 2 Bla. Com. 518.

WIDOWER. A man whose wife is dead. A widower has a right to administer to his wife's separate estate, and, as her administrator, to collect debts due to her, generally, at common law, for his own use. The modern married women's acts have practically abrogated this rule. See HUSBAND AND WIFE.

WIDOWHOOD. The state of a man whose wife is dead, or of a woman whose husband is dead. In general, there is no law to regulate the time during which a man must remain a widower, or a woman a widow, before they marry a second time. The term widowhood is mostly applied to the state or condition of a widow.

WIFE. A woman united to a man by marriage. See MARRIED WOMAN; HUSBAND AND WIFE.

WIFE'S EQUITY. See HUSBAND AND WIFE.

WIFE'S PART. See LEGITIME.

WILD ANIMALS. Animals in a state of nature; animals *ferœ naturæ*. See WHELP; ANIMALS; FERÆ NATURÆ.

WILFULLY. Intentionally.

In charging certain offences, it is required that they should be stated to be wilfully done. Archb. Cr. Pl. 51, 58. In an indictment charging a wilful killing, it means intentionally and not by accident; State v. Schaefer, 116 Mo. 96, 22 S. W. 447. It is distinguished from maliciously in not implying an evil mind; L. R. 2 Cr. Cas. Res. 161. It is synonymous with intentionally, designedly, without lawful excuse, and, therefore, not accidentally. Miller v. State (Okl.) 130 Pac. 813.

It implies that the act is done knowingly and of stubborn purpose, but not with malice; State v. Swaim, 97 N. C. 465, 2 S. E. 68; and in penal statutes, it means with evil intent, or with legal malice; Galvin v. Mill Co.,

98 Cal. 268, 33 Pac. 93; or with a bad purpose; Com. v. Kneeland, 20 Pick. (Mass.) 220, quoted in Potter v. U. S., 155 U. S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214. It is frequently understood as signifying an evil intent without justifiable excuse; 1 Bish. Cr. Law 428.

A wilful act is one that is done knowingly and purposely, with the direct object in view of injuring another; Hazle v. So. Pac. Co., 173 Fed. 431.

A "wilful" violation of a factory act is established by proof of any conscious knowing or intentional failure to comply therewith, though there be no wrongful intent; Roberts, J. & R. S. Co. v. Dower, 208 Fed. 270, 125 C. C. A. 470.

In Pennsylvania it has been decided that the word *maliciously* was an equivalent for the word *wilfully*, in an indictment for arson; Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565. See MENS REA.

WILL. The disposition of one's property, to take effect after death. Swinb. Wills pt. 1, § 2; Godolphin pt. 1, c. 1, s. 2.

The term will, as an expression of the final disposition of one's property, is confined to the English laws and those countries which derive their jurisprudence from that source. The term *testamentum*, or *testament*, is exclusively used in the Roman civil law and by the continental writers upon that subject. Some controversy seems to exist whether the word *testamentum* is strictly derived from *testatum* or from that in combination with *mentis*. There does not seem to be much point in this controversy, for in either view the result is the same. It is the final declaration of the person in regard to the disposition of his property. It is his *testimony* upon that subject, and that is the expression of his *mind* and *will* in relation to it.

The practice of allowing the owner of property to direct its destination after his death is of very ancient date. Genesis, xlviii. 22; Gal. iii. 15; Plutarch's Life of Solon; Roman Laws of the Twelve Tables. But wills are not like succession, a law of nature. A stage where they are not recognized always, in every society, precedes the time when they are allowed. In their early growth they were not regarded as a method of distributing a dead man's goods, but as a means of transferring the power and authority of a family to a new chief. It is not until the latter portion of the middle ages that they become a mode of diverting property from the family or of distributing it according to the fancy of the owner. Maine, Anc. Law 171-217. Nor is the power to dispose of property by will a constitutional right. It depends almost wholly upon statute; Brettun v. Fox, 100 Mass. 234. See TAX.

"The right to take property by devise or descent is the creature of the law and not a natural right;" Magoun v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; U. S. v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; Eyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; Pullen v. Wake County Com'rs, 66 N. C. 361; this statement is combated vigorously and the position maintained that it is a natural right in Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711, where a note collects the cases, finding no case agreeing with the one annotated.

The right of disposing of property by will did not exist in early times among the ancient Germans, or with the Spartans under the laws of Lycurgus, or the Athenians before the time of Solon. 4 Kent 502, and note. And in England, until comparatively a recent period, this right was to be exercised under considerable restrictions, even as to personal estate. 2 Bla. Com. 492.

"The will or testament of modern law, with its specific characters of being secret, revocable and posthumous in operation, is unknown to archaic law, and is of comparatively recent introduction wherever we find it." Pollock's Notes on Maine's Ancient Law. The power to devise land did not exist at common law but is governed by statute; Gibson v. Van Syckle, 47 Mich. 439, 11 N. W. 261.

Until the statute of 32 & 34 Henry VIII., called the statute of wills, the wife and children were each entitled to claim of the executor their reasonable portion of the testator's goods, *i. e.* each one-third part. So that if one had both a wife and children, he could only dispose of one-third of his personal estate, and if he had either a wife or child, but not both, he could dispose of one-half; Fitzh. N. B. 122 H (b), 9th ed.; 2 Saund. 66, n. (9); 2 Bla. Com. 492. All restrictions are now removed from the disposition of property by will, in England, whether real or personal, by the statute of 1 Vict. c. 26; 3 Jarm. Wills (Randolph & Talcott's ed.) 731. As to the history of wills in England, see Bigelow, 3 Sel. Essays, Anglo-Amer. L. H. 770 (11 Harv. L. Rev. 69). And in the Roman civil law the children were always entitled to their share, or legitime, being one-fourth part of the estate, of which they could not be deprived by the will of their father. The legitime was by the emperor Justinian increased to one-third part of the estate where there were four or a less number of children, and if more than four then they might claim one-half the estate, notwithstanding the will. Novell. 18, c. 1; 2 Domat, Civil Law 15. See LEGITIME.

According to the civil law the naming of an executor was of the essence of a will; and that constituted the essential difference between a will and a codicil; the latter, not making any such appointment (*absque executoris constitutione*), was, on that account, called an unsolemn last will. Swinb Wills 29. The executor under a Roman will succeeded to the entire legal position of the deceased. He continued the legal personality of the testator, taking all the property as his own, and becoming liable for all the obligations. Maine, Anc. Law 126.

VALIDITY. The homestead laws in some states affect the validity of wills by making void a husband's devise of homestead land; 3 Jarm. Wills (Rand. & Tal. ed.) 740. See same citation for regulations in various states as to devises to corporations, or for charitable purposes.

A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state; Weed v. Knorr, 77 Ga. 636, 1 S. E. 167; Russell v. Russell, 84 Ala. 48, 3 South. 900; In re Bissell's Will, 63 Neb. 588, 88 N. W. 683. A provision for the purchase and erection of a monument on testator's grave is valid; McIlvain v. Hockaday, 36 Tex. Civ. App. 1, 81 S. W. 54; In re Koppikus Estate, 1 Cal. App. 84, 81 Pac. 732.

The right of a decedent to recover damages for his death, does not pass by will; Sturges v. Sturges, 126 Ky. 80, 102 S. W. 884, 12 L. R. A. 1014; Caruthers v. Neal, 12 Ky. L. Rep. 567, 14 S. W. 599.

Provisions annexing to a legacy or devise a *condition that it should be forfeited* in case the beneficiary contested the will were resorted to very early in England, and were upheld by the courts. The rule established was that where there was *probabilis causa litigandi*, and no gift over of the legacy or devise, an unsuccessful contest of the validity of the will did not forfeit the legacy or devise; 2 Vern. 90; 3 P. Wms. 344; 2 Atk. 148; but if there was a gift over, the breach of the

condition would work a forfeiture; 1 Atk. 526. Later it was held that such conditions were not contrary to the policy of the law; 15 M. & W. 727; and a similar decision was rendered by the Privy Council on an appeal from Quebec; L. R. 6 C. P. 1, where the French and civil law is discussed at large. In this country, such conditions have been sustained, though with some difference of opinion as to what constitutes a breach of its condition and its effect. Their validity has been upheld in several states; Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419; In re Friend's Estate, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; In re Barandon's Estate, 41 Misc. 380, 84 N. Y. S. 937; Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; Rouse v. Branch, 91 S. C. 111, 74 S. E. 133, 39 L. R. A. (N. S.) 1160, Ann. Cas. 1913E, 1296; Kayhart v. Whitehead, 77 N. J. Eq. 12, 76 Atl. 241, 140 Am. St. Rep. 575; Moran v. Moran, 144 Ia. 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898; In re Miller's Estate, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868; Massie v. Massie, 54 Tex. Civ. App. 617, 118 S. W. 219.

In these cases generally there was no gift over, and as to the conflict of decisions on this subject, see 14 Y. L. J. 58. The mere filing of a *caveat* does not constitute a contest within such provision; In re McCahan's Estate, 221 Pa. 188, 70 Atl. 711. A provision that if any devisee should attempt, or aid in attempting, to prevent the proof of the will, the expense of probating it should be taken from their shares thereunder, is valid; Kayhart v. Whitehead, 78 N. J. Eq. 580, 81 Atl. 1133. Where the net income of a trust fund was given to testator's son for life, with remainder over, a condition that the gift should fail, if the son contested the will, was void; In re Wall, 76 Misc. 106, 136 N. Y. Supp. 452.

In some cases when the legatee had reasonable cause to contest he was held not barred by the provision as to forfeiture; In re Friend's Estate, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447; Jackson v. Westerfield, 61 How. Prac. (N. Y.) 399. If bequests are made upon condition that the legatees acquiesce in the provisions of the will, no legatee can, without compliance with the condition, receive his bounty; Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793.

A *contract* to give property to a person by will is valid; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Whiton v. Whiton, 179 Ill. 32, 53 N. E. 722; Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609; Spencer v. Spencer, 25 R. I. 239, 55 Atl. 637; and such agreement to dispose of property in a particular way by will may be enforced in equity after the decease of the person making the promise against his heirs, devisees or personal representatives; Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841; Johnson v. McCue, 34 Pa. 180; Anderson v. Eggers, 61 N. J. Eq. 85, 47 Atl. 727. Such contracts have been sustained, to execute a will containing a legacy compensating the other for services rendered; Banks v. Howard, 117 Ga. 94, 43 S. E. 438; Jones v. Bean, 136 Ill. App. 545; to devise a homestead in consideration of services to the testator and his wife; Brandes v. Brandes, 129 Ia. 351, 105 N. W. 499; to vest the family homestead in the son, after the death of his parents, in consideration of their maintenance; Teske v. Dittberner, 65 Neb. 167, 91 N. W. 181, 101 Am. St. Rep. 614; to leave the property to an adopted son, in consideration of the adoption; Heath v. Heath, 18 Misc. 521, 42 N. Y. Supp. 1087; to devise real estate in consideration of board and attendance; McAllister's Adm'r v. Bronaugh (Ky.) 113 S. W. 821. Such contracts must be based on sufficient consideration; Lewallen's Estate, 27 Pa. Super. Ct. 320.

An action for breach of contract to make a will is not maintainable during the proposed testator's life; Warden v. Hinds, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529; and mutual wills between husband and wife do not raise a contractual relation; Mullen v. Johnson, 157 Ala. 262, 47 South. 584. A contract not to contest a will has been upheld; Grochowski v. Grochowski, 77 Neb. 506, 109 N. W. 742, 13 L. R. A. (N. S.) 484, and note, 15 Ann. Cas. 300.

Specific performance may be enforced of an agreement to give a legacy where the consideration had been accepted; Bush v. Whitaker, 45 Misc. 74, 91 N. Y. Supp. 616; or where the subject matter was real estate; Emery v. Darling, 50 Ohio St. 160, 33 N. E. 715; or if it is both real and personal; Schutt v. Society, 41 N. J. Eq. 115, 3 Atl. 398, where equity assumed jurisdiction because realty was involved and then settled the whole case; but where personal property alone was involved, and the defendant who had furnished the decedent with maintenance on condition that the property should go to him (it being a sum of money), and he took possession of it, the administrator could not recover; Koslowski v. Newman, 74 Neb. 704, 105 N. W. 295, 3 L. R. A. (N. S.) 704. In commenting on this case, it is suggested that the doctrine that the defendant was the equitable owner with the right to specific performance, is not sustained by authority, as the citations are either *dicta* or cases involving both realty and personalty; but the case may be supported on the ground of avoiding circuity of action; 19 Harv. L. Rev. 473. Such a contract was not sustained in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, where the decision was put upon the ground of hardship to the wife, who had married after the contract was made and in ignorance of it. There is an adequate remedy at law on such a contract; Brady v.

Smith, 8 Misc. 465, 28 N. Y. Supp. 776; Rhodes v. Stone, 63 Hun 624, 17 N. Y. Supp. 561; *contra*, Shakespeare v. Markham, 72 N. Y. 400; the statute of limitations does not begin to run until the death of the testator; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703, and note, 8 Ann. Cas. 112.

If a contract to dispose of property by will affects real estate, it must be in writing under the statute of frauds; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703, 8 Ann. Cas. 112; Hale v. Hale, 90 Va. 728, 19 S. E. 739. A promise to a testator *in extremis* by a residuary legatee to pay an intended legacy, is binding on him, but whether it binds the others interested was undecided; Yearance v. Powell, 55 N. J. Eq. 577, 37 Atl. 735.

An agreement to defeat probate by compensating the executor and trustee for what he would have received, is contrary to public policy and void; Cochran v Zachery, 137 Ia. 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235 and note, 126 Am. St. Rep. 307, 15 Ann. Cas. 297; and so is a contract by an attorney to do it; *id.* But a contract between next of kin of a decedent to divide the estate is not an agreement to defeat probate of will, and the promise of one who intends in good faith to contest not to do so is a good consideration for a promise of a share in the estate; Blount v. Wheeler, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036.

A joint will executed by two brothers revocable at the will of either is valid; Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437. The joint will of two persons devising to a third person land, parts of which belong to each, may be proved as the separate will of one as to his part, on his death while the other is still living; In re Davis' Will, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771. It has been said that no such testamentary paper is known to the common law; Walker v. Walker, 14 Ohio St. 157, 82 Am. Dec. 474; but it is in fact the will of each as to his property and revocable by either party without notice to the other, remaining in such case as the will of the person who does not revoke; 11 Harv. L. Rev. 67. See, as to joint wills, 20 Harv. L. Rev. 315.

In order to make the will of a married woman valid as a disposition of property which she has no power to dispose of without her husband's assent, it is not necessary that his assent should be given during her life; it is sufficient if given after her death; [1901] 1 Ch. Div. 424.

A testator cannot in his will reserve the right to alter or complete it by a subsequent unattested paper; Thayer v. Wellington, 9 Allen (Mass.) 283, 85 Am. Dec. 753; but he may provide that the disposition of property shall be altered by the occurrence of extrinsic events; Robert v. Corning, 89 N. Y. 225; In re Moore, 61 N. J. Eq. 616, 47 Atl. 731; and such event may be in control of the testator; 3 Myl. & Cr. 507.

As in England and this country the primary purpose of a will is the transmission of property after death, it is sometimes said in a general way that an instrument testamentary in form, which contains no disposition of property, is not a will, and should not be admitted to probate; so a letter to an undertaker authorizing the cremation of the writer's body, and saying, "My brother will be sole administrator and take charge of the estate," was held not to appoint an executor, or make a devise, or to be entitled to probate; In re Meade's Estate, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244. But where a writing merely made a declaration of the legitimacy of two children and revoked all testamentary dispositions, it was held that the paper should be admitted to probate; In re Williamson's Will, 6 Ohio N. P. 79. The court said that the paper was drafted in Paris by a French lawyer, educated in the civil law, under which the primary object of a will is the appointment of a *hæres*, and not the devolution of property, which follows the appointment as of course, with universal succession. The court further cited Colton v. Colton, 127 U. S. 300, 309, 8 Sup. Ct. 1164, 32 L. Ed. 138, where the court adopted Blackstone's definition (2 Com. 499) declaring a will to "be a legal declaration of a man's intention, which he wills to be performed after his death," without any actual mention of devolution of property. In another case, the death of the sole devisee, legatee, and executrix named therein, was held no ground for defeating probate of a will; In re Davis' Will, 182 N. Y. 468, 75 N. E. 530.

Wills are unwritten or nuncupative, and written. See NUNCUPATIVE WILL.

A will may be written in pencil. But it is a strong indication that the will so written was not a final act, but merely a deliberative one. This indication may, however, be overcome by proof; Myers v. Vanderbelt, 84 Pa. 510, 24 Am. Rep. 227; 1 Hagg. 219; 3 Moo. P. C. 223; 23 Beav. 195; and it has been held that the use of a pencil in writing a will, otherwise duly executed, or in making alterations in such will, raises no presumption of want of deliberation and finality, and that its use may be as conclusive as to the intent of the testator as any other; La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968, 129 Am. St. Rep. 978.

A letter in lead pencil, addressed to nobody by name, but clearly intended for those who should have control of the writer's property after her death, and requesting that certain things be given to persons named is a will; its precatory form is immaterial. It is not essential that the full name should be signed (here it was "Harriet"); Knox's Estate, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798.

It was held in Pennsylvania that writing

on a slate is insufficient; Reed v. Woodward, 11 Phila. (Pa.) 541; but in a note to the citation of this case a *quære* is suggested whether a slate and pencil might not be used in an extreme case; Schoul. Wills § 258, note.

There is no set form of a will. A paper in the form of a deed, if testamentary, may be proved as a will; Lincoln v. Felt, 132 Mich. 49, 92 N. W. 780; but it is not a will merely because ineffectual to operate as a deed; Estate of Skerrett, 67 Cal. 585, 8 Pac. 181. In case of ambiguity, parol evidence has been permitted to prove which it is; Robertson v. Dunn, 6 N. C. 133, 5 Am. Dec. 525; L. R. 15 P. D. 156; in other cases it was excluded; Clay v. Layton, 134 Mich. 317, 96 N. W. 458; Noble v. Fickes, 230 Ill. 594, 82 N. E. 950; 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282. A letter may serve as a will; Milam v. Stanley, 111 S. W. 296, 33 Ky. L. Rep. 783, 17 L. R. A. (N. S.) 1126; In re Billis' Will, 122 La. 539, 47 South. 884, 129 Am. St. Rep. 355; but an instrument in the form of a statutory deed is not testamentary simply because it is not to take effect before the grantor's death; Garrison v. McLain (Tex.) 112 S. W. 773; where a will referred to certain articles in an uncontested memorandum it was held that probate could not be refused on the ground that it was not the entire will of the testator; In re Reins' Estate, 59 Misc. 126, 112 N. Y. Supp. 203; marginal interlineations in a will will not invalidate it unless they are below the signature; In re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266.

The jurisdiction of the courts to pass upon the construction of a will is not ousted by a direction in a will that the executors are to define its provisions, and that their decision shall be final and conclusive upon all matters in it; In re Reilly's Estate, 200 Pa. 288, 49 Atl. 939.

As to construction of wills, see LEGACY; DEVISE.

THE TESTATOR'S CAPACITY. He must be *of the age of discretion*, which, by the common law of England, was fixed at twelve in females, and fourteen in males; Swinburne, pt. 2, § 2, pl. 6; 1 Will. Ex. 13; 1 Jarm. Wills 29. This is now regulated by statute, both in England and most of the states. The period of competency to execute a will, in England, is fixed at twenty-one years, and the same rule is adopted in many of the states, and the disposition is strongly manifested in that direction throughout the states; 3 Jarm. Wills (Randolph & Talcott's ed.) 748, note.

"Sound mind and memory," which constitute testamentary capacity, may be properly described as that condition which would render the testator capable of transacting the ordinary business of life; Keithley v. Stafford, 126 Ill. 507, 18 N. E. 740. But it has been held in many cases that the fact of not possessing sufficient mental capacity to enable one to transact the ordinary business of life does not necessarily involve a want of testamentary capacity; Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Crossan v. Crossan, 169 Mo. 631, 70 S. W. 136; Waugh v. Moan, 200 Ill. 298, 65 N. E. 713; Stewart v. Lyons, 54 W. Va. 665, 47 S. E. 442; the ability to transact business is not the sole test; Petefish v. Becker, 176 Ill. 448, 52 N. E. 71; and probably the actual rule is fairly stated that if the testator had capacity to transact ordinary business, he is presumed by law to have testamentary capacity; but incapacity to transact ordinary business is not necessarily incapacity to make a will; Hess v. Killebrew, 209 Ill. 193, 70 N. E. 675; Whitney v. Twombly, 136 Mass. 145; and absolutely sound and perfect mental faculties are not requisite to testamentary capacity; Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; nor the highest degree of mental soundness; Whitney v. Twombly, 136 Mass. 145; Hamon v. Hamon, 180 Mo. 685, 79 S. W. 422. There is required only soundness of mind with respect to the particular matters under consideration; Delaney v. City of Salina, 34 Kan. 532, 9 Pac. 271. One who has capacity to make a contract is competent to make a will; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; but one may be capable of making a will, and yet incapable of making a contract, or managing his estate; Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065.

Though a will be dictated by testator when entirely competent, it is none the less invalid if executed by him at a time when he was not of sound and disposing mind; In re Hoover's Will, 19 D. C. 495.

Aliens. By the common law in England, an alien could not devise or take by devise, real estate; and an alien enemy could not devise personalty until 33 Vict. c. 14, § 2. This rule is now, in the United States, much altered by statute; 1 Redf. Wills 8–14; 3 Jarm. Wills (Rand. & Talc. ed.) 743, note. *Indians*, in the absence of statute on the subject, are governed by the same law as resident aliens; p. 745 of last citation. See same citation as to *convicts*, for whom the regulations are mostly statutory. *Coverture* was a disability in the execution of a will, unless by the consent of the husband; 2 Bla. Com. 498; 4 Kent 505. But a married woman could not, even with her husband's consent, devise land, because she would thereby exclude her heir; otherwise with chattels; Osgood v. Breed, 12 Mass, 525; Reed v. Blaisdell, 16 N. H. 194, 41 Am. Dec. 722; West v. West, 10 S. & R. (Pa.) 445; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384. The disability as to coverture has been largely changed by statute; 1 Redf. Wills 22–29. *Blindness* is so far an incapacity that it requires express and satisfactory proof that the testator understood the contents of the will, in addition to what is required in other cases; 1 Rob. Eccl. 278; Ray v. Hill, 3 Strobh. (S. C.) 297, 49 Am. Dec. 647. *Deaf and dumb* persons will labor under a similar inconvenience,

and especially in communicating with the witnesses, unless they have been educated so as to be able to write; Whart. & St. Med. Jur. § 13. But the witnesses must, to be present with the testator, be within the possible cognizance of his remaining senses; Richardson, J., in Reynolds v. Reynolds, 1 Spears (S. C.) 256, 40 Am. Dec. 599. Persons deaf, dumb, and blind were formerly esteemed wholly incapable of making a will; but that class of persons are now placed upon the same basis as the two former, with only the additional embarrassment attending the defect of another sense; 1 Will. Ex. 17, 18; 1 Redf. Wills 53. A *speechless paralytic*, who retained his interest in and knowledge of the details of his business, and whose mind was unimpaired up to the time of his death, was held capable of making a will where his wishes as to the disposition of his property were communicated by negative and affirmative replies to questions asked him, and, after it had been written, it was read to him item by item, and his assent given by nods of his head; Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453.

Idiots are wholly incapable of executing a will, whether the defect of the understanding is congenital or accidental; but imbecility of mind alone is not incapacity, unless it amounts to a total deprivation of understanding; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329. *Lunatics* are incapable of executing a last will and testament, except during such a lucid interval as allows the exercise of memory and judgment. It must be an absolute, but not necessarily a perfect, restoration, to reason and reflection, and not a mere temporary remission; 3 Bro. C. C. 441; 3 Add. Eccl. 79; Whart. & St. Med. Jur. § 255; Lee v. Scudder, 31 N. J. Eq. 633; Brown v. Riggin, 94 Ill. 560; Stewart's Ex'r v. Lispenard, 26 Wend. (N. Y.) 255; 1 Redfield, Wills 107, 120. But mere weakness of understanding is not sufficient to invalidate a will, if the testator is capable of comprehending the object in view; Abraham v. Wilkins, 17 Ark. 292. Nor as a matter of law is a testator of unsound mind, if he mistakenly believed that his relatives had mistreated him, and therefore made no provision for them in his will; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101.

Moral debasement is not of itself necessarily insanity amounting to testamentary incapacity; Mayo v. Jones, 78 N. C. 402; nor is mere moral insanity unless accompanied by insane delusions; Boardman v. Woodman, 47 N. H. 120; the legal test with respect to such capacity is not disorder of the feelings and propensities, but of the intellect, which is delusion; In re Forman's Will, 54 Barb. (N. Y.) 274; and the essence of an insane delusion is that it has no basis in reason and therefore cannot be dispelled by it; In re Tracy, 11 N. Y. St. Rep. 103; but mere prejudice, however unreasonable, or a mistake of fact, however absurd, is not an insane delusion; 2 Lack. Leg. N. 43; nor is a mistaken belief respecting a person's character; In re Lang's Will, 9 Misc. 521, 30 N. Y. Supp. 388.

Delusions are only to be considered so far as they concern the person to whom they relate; Ballantine v. Proudfoot, 62 Wis. 216, 22 N. W. 392; Potter v. Jones, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161. See In re White, 121 N. Y. 406, 24 N. E. 935; unless they are insane delusions; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422. Belief in Spiritualism does not constitute incapacity to make a will; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; In re Spencer, 96 Cal. 448, 31 Pac. 453; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; In re Halbert's Will, 15 Misc. 308, 37 N. Y. Supp. 757; Whipple v. Eddy, 161 Ill. 114, 43 N. E. 789; especially if the views held thereon had nothing to do with making the will; *id.*; nor does a belief in witchcraft; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; Lee's Heirs v. Lee's Ex'r, 4 McC. (S. C.) 183, 17 Am. Dec. 722; nor moral insanity; In re Jones, 5 Misc. 199, 25 N. Y. Supp. 109; nor partial unsoundness; L. R. 5 Q. B. 549; Reynolds v. Root, 62 Barb. (N. Y.) 250; nor advanced age, nor enfeebled condition; Horn v. Pullman, 72 N. Y. 269; nor failure of memory alone; unless it be total or extend to the members of his family or property; 4 Kent 510; if the testator comprehends the nature and extent of his property and the nature of the claims of those he is excluding, he is competent; L. R. 5 Q. B. 549; Meeker v. Meeker, 75 Ill. 260; L. R. 3 P. & D. 64; Converse's Ex'r v. Converse, 21 Vt. 168, 52 Am. Dec. 58; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489; Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650; Howell v. Taylor, 50 N. J. Eq. 428, 26 Atl. 566; Prentis v. Bates, 88 Mich. 567, 50 N. W. 637; In re Estate of Douglass, 162 Pa 567, 29 Atl. 715; Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Ledwith v. Claffey, 18 App. Div. 115, 45 N. Y. Supp. 612; Berry v. Trust Co., 96 Md. 45, 53 Atl. 720; Todd v. Fenton, 66 Ind. 25; Martin v. Bowdern, 158 Mo. 379, 59 S. W. 227; Mullen v. Johnson, 157 Ala. 262, 47 South. 584.

The use of narcotics by a testatrix, with a cancerous disease, raises a presumption of absence of testamentary capacity; Mullen v Johnson, 157 Ala. 262, 47 South. 584.

Moral-medical insanity, manifested in jealousy, anger and hate, however violent or unintentional, will not defeat a will unless an emanation of a delusion; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

A finding that a testator was insane at any time prior to the making of the will does not support a presumption that the insanity continued to the making of the will, unless it is also found that the insanity is habitual and fixed; Johnson v. Armstrong, 97 Ala. 731, 12 South. 72; Manley's Ex'r v. Staples, 65 Vt. 370, 26 Atl. 630. When it appears that the will is the direct offspring of monomania

it should be held invalid, notwithstanding the general soundness of the testator; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Townshend v. Townshend, 7 Gill (Md.) 10; Boyd v. Eby, 8 Watts (Pa.) 70. See, also, 6 Moore, P. C. 341, 349; 12 Jurist 947, where Lord Brougham contends for the extreme notion that every person laboring under any form of partial insanity or monomania is incompetent to execute a valid will, because the mind being one and entire, if unsound in any part it is an unsound mind. This extreme view will scarcely gain final acceptance in the courts; Whart. & St. Med. Jur. § 18, *contra.*

Delirium from disease or stimulus. This, while the paroxysm continues to such an extent as to deprive a person of the right exercise of reason, is a sufficient impediment to the execution of a will; Tayl. Med. Jur. 626; 18 Ves. Ch. 12; 1 Ves. Sen. 19. See, also, Barrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691. But there is not the same presumption of the continuance of this species of mental perversion, whether it proceed from the intoxication of stimulus or the delirium of fever, as in ordinary insanity; Black v. Ellis, 3 Hill (S. C.) 68; Hix v. Whittemore, 4 Metc. (Mass.) 545. See DELIRIUM FEBRILE; DELIRIUM TREMENS; DRUNKENNESS; DEMENTIA; IDIOT.

Fraud. If a person is induced by fraud or undue influence to make a will or legacy, such will or legacy is void; 4 Ves. 802; 6 H. L. Cas. 2; Tyler v. Gardiner, 35 N. Y. 559; Griffith v. Diffenderffer, 50 Md. 466, 480; 1 Redf. Wills 507–537. See UNDUE INFLUENCE.

The nature and character of the will are generally irrelevant; Jackson v. Jackson, 39 N. Y. 153; though unreasonable or unnatural provisions are evidence of mental defect; Caldwell v. Anderson, 104 Pa. 199; Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171; In re Budlong, 126 N. Y. 423, 27 N. E. 915.

When a testator has the legal capacity to make a will he has the legal right to make an unequal, unjust, or unreasonable will; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Snider v. Burks, 84 Ala. 53, 4 South. 225. The fact that a will is unreasonable is not enough to render it invalid; In re Spencer, 96 Cal. 448, 31 Pac. 453; but it tends to prove invalidity; Appeal of Crandall, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375.

The burden of proof on the issue of testamentary capacity is upon those who contest the will; Leach v. Burr, 188 U. S. 510, 23 Sup. Ct. 393, 47 L. Ed. 567; In re Motz's Estate, 136 Cal. 558, 69 Pac. 294; Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Smith v. Day, 2 Pennewill (Del.) 245, 45 Atl. 396; In re Burns' Will, 121 N. C. 336, 28 S. E. 519; a person of full age is presumed to be capable of making a will; Steele v. Helm, 2 Marv. (Del.) 237, 43 Atl. 153; Hull v. Hull, 117 Ia. 738, 89 N. W. 979; but where unsoundness of mind is established, the burden of proving a sufficient disposing memory, when the will was executed, is on the defendant; Kenworthy v. Williams, 5 Ind. 375; when permanent unsoundness of mind has been established by the plaintiffs, it is presumed to continue until the contrary is shown, but the presumption is overcome when the evidence of defendants leaves the question evenly balanced; Roller v. Kling, 150 Ind. 159, 49 N. E. 948. The effect of the presumption in favor of sanity is merely to shift the duty of going forward with the evidence to the contestants and not to change the burden of establishing the will. See 13 Harv. L. Rev. 510. Where insanity is in issue, the burden is on the proponent to show testamentary capacity; but the presumption of sanity obtains until it is overcome by the contestant's evidence; Hopkins v. Wampler, 108 Va. 705, 62 S. E. 926; Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302.

See also, as to the burden of proof, 36 Cent. L. J. 408; Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Graybeal v. Gardner, 146 Ill. 337, 34 N. E. 528; Norton v. Paxton, 110 Mo. 456, 19 S. W. 807; Eastis v. Montgomery, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227.

THE MODE OF EXECUTION depends upon the statutory requirements; 3 Jarm. Wills (Rand. & Talc. ed.) 763.

By the uniform act relating to foreign wills, a will admitted to probate in the testator's domicile may be admitted to probate in the state passing the act by filing a duly exemplified copy thereof. It has been enacted in Colorado, Kansas, Louisiana, Massachusetts, Michigan, Rhode Island, Washington, Wisconsin and Alaska.

Under the English statute of frauds, 29 Car. II., as "signing" only was required, it was held that a mark was sufficient; 8 Ad. & E. 94; Chaffee v. Missionary Convention, 10 Paige, Ch. (N. Y.) 85, 40 Am. Dec. 225. And under the statute of 1 Vict. c. 26, the same form of execution is required so far as signing is concerned. But sealing seems not to be sufficient where signing is required; 1 Wils. 313; 1 Jarm. Wills 69, 70. So, it was immaterial in what part of the will the testator signed. It was sufficient if the instrument began, I, A B, etc., and was in the handwriting of the testator, and he treated that as signing or did not regard the instrument as incomplete, as it evidently would be so long as he intended to do some further act to authenticate it; 1 Eq. Cas. Abr. 403, pl. 9; Prec. in Chanc. 184; Adams v. Field, 21 Vt. 256. But, if it appear from the form of attestation at the close, or in any other way, that the testator did not regard the instrument as complete, the introduction of the testator's name at the beginning, in his own handwriting, is not a sufficient signing; Dougl. 241; Waller v. Waller, 1 Gratt. (Va.) 454, 42 Am. Dec. 564; Ramsey v. Ramsey's Ex'r, 13 Gratt. (Va.) 664, 70 Am. Dec. 438; Chaffee v. Missionary Convention, 10 Paige,

Ch. (N. Y.) 85, 40 Am. Dec. 225. See 7 Q. B. 450.

Inability to write does not create a presumption that a testator did not know the contents of the paper declared to be by him his last will and duly executed as such. There is a presumption that the testator does know the contents of a will properly executed, which, while not conclusive, must prevail in the absence of proof of fraud, undue influence, or want of testamentary capacity, even where the testator's inability to read is proved; Lipphard v. Humphrey, 209 U. S. 264, 28 Sup. Ct. 561, 52 L. Ed. 783, 14 Ann. Cas. 872.

The testator should sign before the witnesses subscribe; L. R. 2 P. & D. 97; Jackson v. Jackson, 39 N. Y. 153; but if the testator acknowledge his signature, so that the witnesses can see it at the time, it is enough; 7 P. D. 102.

A will may be signed by another, if done in the testator's presence and at his request, when he cannot write; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565; or is physically incapacitated; Smythe v. Irick, 46 S. C. 299, 24 S. E. 69, 32 L. R. A. 77, 57 Am. St. Rep. 684; but see McFarland v. Bush, 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662, 45 Am. St. Rep. 760.

In England and in some states there is a statutory requirement that the signature shall be at the end of the will. In England it was held to mean the end of the sequence of meaning; 3 Sw. & Tr. 427; but in New York, literally, the physical end of the writing; In re O'Neil's Will, 91 N. Y. 516; In re Conway, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; and the statute was not complied with if any disposing part of the will followed the name signed; In re Andrews' Will, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; where the attestation and signature were at the top of the second page so that the two first paragraphs made a complete will, it was held not subscribed at the end when the third paragraph contained further material and a complete disposition of property in no way connected with the first or second page; and where the name was not signed in a blank left for it, but in one contained in the printed attestation clause; Sears v. Sears, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353, and note, 11 Ann. Cas. 1008; but it was held sufficient when it followed the attestation clause; In re Morrow's Estate, 204 Pa. 479, 54 Atl. 313; see 21 Harv. L. Rev. 452. In a later Pennsylvania case, it was held that the validity of the signature with respect to its position depends on the continuity of sense and not the mere position on the page; In re Swire's Estate, 225 Pa. 188, 73 Atl. 1110, where the signature was at the bottom of the page after paragraph eight with three other paragraphs written on the margin; but where there was written on the margin a disposing clause separate and not marked to show where it came in, the signature at the bottom of the last page of what was written across was not "at the bottom". In Irwin v. Jacques, 71 Ohio St. 395, 73 N. E. 683, 69 L. R. A. 422, it was said that the only question is whether it has been executed in substantial compliance with the statutory requirements; and where a marginal interlineation was immaterial, the will was admitted to probate; In re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266. Where there was a blank space between the last clause and the *in testimonium* clause (in a printed blank) it did not invalidate the will, as the signature, being in the place intended, was held to be at the end; Mader v. Apple, 80 Ohio St. 691, 89 N. E. 37, 131 Am. St. Rep. 719, 23 L. R. A. (N. S.) 515, and note, with cases. But where there was a long blank above the signature where unauthorized insertions could have been made, and a material part of the will was written after the signature in lieu of in the blank where it belonged, it was held not properly executed; In re O'Neil's Will, 91 N. Y. 516; In re Conway, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; where the whole of the disposing portion of a will was written on the first side of a sheet of foolscap, the second and third sides being blank, while the attestation clause, with the signatures of the testator and the witnesses, was on the fourth side, the will was held to be duly executed; [1892] Prob. 377.

Written matter, following the signature to a will, will not invalidate it, if such matter be not testamentary in character; In re Beaumont's Estate, 216 Pa. 350, 65 Atl. 799, 9 Ann. Cas. 42.

It was held not necessary under the statute of frauds that the witnesses should subscribe in the presence of each other. They might attest the execution at different times; 1 Ves. Ch. 12; 1 Will. Ex. 79.

The term "presence" in a statute requiring the subscription of witnesses to a will, to be made in the presence of a testator, means "conscious presence"; Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650.

A will invalid in New York for lack of subscribing witnesses is valid in Pennsylvania if the testator subsequently changed his domicile to Pennsylvania; In re Beaumont's Estate, 216 Pa. 350, 65 Atl. 799, 9 Ann. Cas. 42.

The presence of the witness may be actual or constructive; 1 Brown C. C. 98; and the effort of the courts is to support the will as against a technicality; 1 Dougl. 243. Attestation in another room out of the rays of testator's vision is not in his presence; Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182, 108 Am. St. Rep. 233, 1 L. R. A. (N. S.) 393, and note; but where it was in another room, but might have been seen, it was sufficient; Raymond v. Wagner, 178 Mass. 315, 59 N. E. 811; Baldwin v. Baldwin's Ex'r, 81 Va. 405, 59 Am. Rep. 669; but the rule is not complied with when the signing is done elsewhere and

subsequently acknowledged in his presence; Mendell v. Dunbar, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277; In re Downie's Will, 42 Wis. 66; when in the same room out of the testator's sight, it was not sufficient; Beall v. Drane, 25 Ga. 441; or in an adjoining room, out of his sight; Mandeville v. Parker, 31 N. J. Eq. 242.

The witness may have had no other previous acquaintance with testator; Barbour v. Moore, 10 App. D. C. 30; In re Lee's Estate, 5 Pa. Co. Ct. R. 396; Marx v. McGlynn, 88 N. Y. 357; *dictum, contra*, Brinckerhoof v. Remsen, 8 Paige Ch. (N. Y.) 488; except the latter's statement that he was such person and signed and acknowledged the will as such; Harris v. Martin, 150 N. C. 367, 64 S. E. 126, 17 Ann. Cas. 685, 21 L. R. A. (N. S.) 531, and note. The identity may be otherwise established; Mowry v. Silber, 2 Bradf. Sur. (N. Y.) 133.

Testimony of a subscribing witness that testator was not in condition to make a will, does not impair the effect of his attestation, and a will may be established in opposition to the testimony of the subscribing witnesses; In re Shapter's Will, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; such testimony is generally received with great caution; In re Robinson's Will, 190 Ill. 95, 60 N. E. 194; Lamberts v. Cooper, 26 Gratt. (Va.) 61; Hoerth v. Zable, 92 Ky. 203, 17 S. W. 360; In re Nelson's Estate, 132 Cal. 182, 64 Pac. 294; Gwin v. Gwin, 5 Idaho 271, 48 Pac. 295; on the ground that their act and their subsequent testimony are inconsistent; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; McMeekin v. McMeekin, 2 Bush (Ky.) 79.

The attestation clause is not necessary to make a will valid; Mead v. Presbyterian Church, 229 Ill. 526, 82 N. E. 371, 14 L. R. A. (N. S.) 255, 11 Ann. Cas. 426.

Where three witnesses were required, and two signed and a notarial acknowledgment signed by the notary was surplusage, the notary's signature was held equivalent to a third witness; Keely v. Moore, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376.

Where a statute provided that the will must be attested by credible witnesses, it was held that the executors were not such, but that they might be compelled to testify and barred from acting as executors; Jones v. Grieser, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787; *contra*, Stewart v. Harriman, 56 N. H. 25, 22 Am. Rep. 408; and this is said to be in accordance with the weight of authority that an executor is not beneficially interested and is therefore competent; 22 Harv. L. Rev. 616.

Where a statute declared void devises and legacies to subscribing witnesses, the devise was valid and the witnesses were competent where a will leaving all of testator's property to a charitable corporation was witnessed by two members of the corporation; Will v. Sisters of St. Benedict, 67 Minn. 335, 69 N. W. 1090; Quinn v. Shields, 62 Ia. 129, 17 N. W. 437, 49 Am. Rep. 141.

The competency of witnesses and the validity of devises to witnesses, or to the husband or wife of a witness, are questions usually controlled by statute; 3 Jarm. Wills (Randolph & Talcott's ed.) 775.

A *holographic* will is one wholly written, dated and signed by the hand of the testator himself; In re Lakemeyer's Estate, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96; In re Plumel's Estate, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100; it need not be in any particular form; In re Noyes' Estate, 40 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145, 20 Ann. Cas. 366; but the words "my will" in another handwriting as a caption do not invalidate it; Baker v. Brown, 83 Miss. 793, 36 South. 539, 1 Ann. Cas. 371; Stead v. Curtis, 191 Fed. 529, 112 C. C. A. 463. The statutes in the different states differ to some extent, but agree substantially with the English statute of Charles II.

Holographic wills in general require no attestation; 3 Jarm. Wills (Rand. & Talc. ed.) 767; but, if required, it is sufficient if the testator acknowledge his signature to two witnesses; Stewart v. Stewart, 56 N. J. Eq. 761, 40 Atl. 438; Matter of Akers, 74 App. Div. 461, 77 N. Y. Supp. 643, order affirmed 173 N. Y. 620, 66 N. E. 1103. Such will is not invalidated by bearing an attestation clause without witnesses; Ainsworth v. Briggs, 49 Tex. Civ. App. 344, 108 S. W. 753; and the absence of an attestation clause is not fatal; In re Palmer's Will, 42 Misc. 469, 87 N. Y. Supp. 249; nor that the amount of the legacy is in figures; Succession of Vanhille, 49 La. Ann. 107, 21 South. 191, 62 Am. St. Rep. 642. The writing of the name of testator at the commencement of a paper is not sufficient signing; Roy v. Roy's Ex'r, 16 Grat. (Va.) 418, 84 Am. Dec. 696; but the writing of his name in a clause in the will is sufficient; In re Camp's Estate, 134 Cal. 233, 66 Pac. 227. The fact that it is holographic does not dispense with the acknowledgment of his signature by the testator and his declaration that it is his will; In re Turell, 166 N. Y. 330, 59 N. E. 910; Matter of Moore, 100 App. Div. 762, order affirmed 187 N. Y. 573, 80 N. E. 1114; but probate will be refused where both of the subscribing witnesses swear positively that there was no publication and that they did not know that it was a will until long after they signed it; In re Wilmerding, 75 Misc. 432, 135 N. Y. Supp. 516.

A memorandum written on the front page of a book, dated eight years before the death of testator and signed by testator, reading "everything is Lou's," is insufficient; Smith v. Smith, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (N. S.) 1018. A letter written six months before death has been approved as a valid holographic will; Buffington v. Thomas, 84

Miss. 157, 36 South. 1039, 105 Am. St. Rep. 423, where it was held that the insertion of a request to "answer at once" or "this is private" raised no presumption of a design of the writer to alter the nature of the instrument. A letter was also held good as a will; Alston v. Davis, 118 N. C. 202, 24 S. E. 15; and also in Dougherty v. Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113, where it was wholly written by the testator and the attestation of subscribing witnesses was held unnecessary.

A holographic will of an illiterate testator was sustained and the words at the beginning, "I am going on a journey and may not ever return, and if I do not, this is my last request," were held not conditional; Eaton v. Brown, 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730, where English cases *contra* are reviewed.

Where such will was found in a locked safe in which testator kept valuable papers, it meets the requirements of a statute that a holographic will must have been found among valuable papers of decedent, although there was no other paper in that particular drawer of the safe; Harper v. Harper, 148 N. C. 453, 62 S. E. 553.

An *unofficious* will, in the civil law, *testamentum inofficium*, was one made in disregard of natural obligations as to inheritance; Stein v. Wilzinski, 4 Redf. Sur. (N. Y.) 450; and was set aside if it disinherited children without assigning any cause, though this was prevented by any legacy however small; 2 Bla. Com. 502; Hadley, Rom. L. 317. It has no place in the common law; 1 Fost. & F. 578. An unnatural division of his property is not sufficient, but where there is evidence of an insane delusion in respect to a certain person or thing, and the disposition of the property is in accordance therewith and indicates the effect of such delusion, such disposition may be considered in connection with the evidence tending to prove an insane delusion; Morgan v. Morgan, 30 App. D. C. 436, 13 Ann. Cas. 1037. To the same effect, Donnan v. Donnan, 236 Ill. 341, 86 N. E. 279.

A *non-intervention* will is one, known in some jurisdictions, authorizing the executor to act without bond and to manage, control, and settle the estate without the intervention of any court whatsoever; In re MacDonald's Estate, 29 Wash. 422, 428, 69 Pac. 1111.

A *mystic* will is a form of testament made under Spanish law which prevailed in Louisiana and California. It is recognized in the Louisiana Civil Code; see Broutin v. Vassant, 5 Mart. O. S. (La.) 182; Schoul. Wills § 9. It is in writing and signed by the testator, with seven witnesses. It takes its name from the liberty given the testator, if he wishes to conceal the disposition of his property, to enclose it in an envelope and write his name thereon, and the witnesses did the same, with a declaration that it was his last will and testament; Adams v. Norris, 23 How. (U. S.) 353, 16 L. Ed. 539. See TESTAMENT.

PUBLICATION. The best-considered cases, under statutes similar to that of Charles II., only require the production of the instrument by the testator for the purpose of being attested by the witnesses, if it bear his signature; Osborn v. Cook, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; 1 Burr. 421; 3 Curt. Eccl. 181; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237; Cilley v. Cilley, 34 Me. 162; Will of Meurer, 44 Wis. 392, 28 Am. Rep. 591; Robbins v. Robbins, 50 N. J. Eq. 742, 26 Atl. 673. Where a will or codicil refers to an existing unattested will or other paper, it thereby becomes a part of the will; 1 Ad. & E. 423; 1 Will. Ex. 86; 1 Rob. Eccl. 81; but a document referred to in a will, which is not in existence at the time of its execution, does not constitute a part of the will, and is not entitled to probate as such; Estate of Shillaber, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433.

Witnesses may attest by a mark; 4 Kent 514, n.; Davis v. Semmes, 51 Ark. 48, 9 S. W. 434.

REVOCATION. The mode of revocation of a will provided in the statute of frauds is by "burning, cancelling, tearing, or obliterating the same." See Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339. In the English statute of wills, the terms used are "burning, tearing, or otherwise destroying."

Revocation by destroying must be with intent; "all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two;" L. R. 2. P. D. 251. Where a will was executed in duplicate and testator destroyed the copy in his possession, evidence of his oral declarations is admissible to prove that the act was not *animo revocandi;* Managle v. Parker, 75 N. H. 139 (where many authorities are collected), 71 Atl. 637, 24 L. R. A. (N. S.) 180, and note, Ann. Cas. 1912A, 269; but the intention to revoke is presumed; Snider v. Burks, 84 Ala. 53, 4 South. 225.

It was held to be a revocation where the seal and signature at the end of the will were torn off or effaced; 1 Add. Eccl. 78; In re White's Will, 25 N. J. Eq. 501; where lines were drawn over the name of the testator; In re Philp's Will, 64 Hun 635, 19 N. Y. Supp. 13; where the instrument was cut out from its marginal frame, but not otherwise defaced, except that the attestation clause was cut through; 1 Phil. Eccl. L. 375, 406; where a memorandum (in pencil) was written on the will; Billington v. Jones, 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654, 91 Am. St. Rep. 751; where a letter was duly signed and attested requesting a third per-

son to destroy the will; 2 P. & D. 406; where the words "null and void" with testator's name were written on the face of each paragraph; In re Barnes' Will, 76 Misc. 382, 136 N. Y. Supp. 940; where a revocation was written on the back of a page including material parts; Warner v. Warner's Estate, 37 Vt. 356; but a signed and witnessed statement that it was revoked, indorsed on a will, is not a revocation under the New York statute, which specifies burning, tearing, cancelling, obliterating or destroying; In re Miller's Estate, 50 Misc. 70, 100 N. Y. Supp. 344; nor is a revocation in the margin sufficient; Lewis v. Lewis, 2 W. & S. (Pa.) 455, even if touching an immaterial part of the will; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643; Oetjen v. Oetjen, 115 Ga. 1004, 42 S. E. 387; it must cancel some material part; Howard v. Hunter, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121. The New York decision is said to be the soundest construction of such statutes; 20 Harv. L. Rev. 76.

Where a will was destroyed under the mistaken supposition that another had been made, a copy was admitted to probate with the consent of the next of kin, all being *sui juris;* 25 L. R. 41; see comments on this and other cases of mistake; 22 Harv. L. Rev. 374.

To effect revocation actual destruction is not essential, as where the instrument was thrown on the fire with the intention of destroying it, and snatched off partly burned without testator's knowledge; 2 W. Bl. 1043. But it would seem that it must be an actual burning or tearing to some extent,—an intention merely to do the acts not coming within the statute; 6 Ad. & E. 209; 2 Nev. & P. 615. See Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339. But, aside from the statute, a mere intention to revoke evidenced by any other act, will be effectual to revoke: as, burning or tearing, etc.; 8 Ad. & E. 1. How much the will must be burned or torn to constitute a revocation under the statute of frauds was left by the remarks of the different judges in Doe v. Harris, 6 Ad. & E. 209, in perplexing uncertainty; 1 Williams, Ex. 121.

It was held no revocation where the purpose was arrested before completion, though the will was somewhat torn; 3 B. & Ald. 489; nor tearing a will and writing upon it "superseded by the written one," where the written one is ineffectual, because not properly executed, and it was clear that the revocation proceeded upon the assumption that the written one was valid; Appeal of Strong, 79 Conn. 123, 63 Atl. 1089, 118 Am. St. Rep. 138, 6 L. R. A. (N. S.) 1107, and note upon the effect of the cancellation or mutilation of a will as affected by the invalidity of a second will, the conclusion reached being that such cancellation or mutilation, if under a mistake of fact, does not work a revocation.

What is termed the doctrine of *dependent relative revocation* is that the cancellation, by the testator, under a mistake of law that he has executed another valid will, which is not effective to pass his property, does not work a revocation. Under this doctrine a will was not revoked by being torn in pieces; 2 Vernon 742; or by cutting off the signature and seal; 14 East 423; or where the will had been destroyed; Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363; 78 L. T. N. S. 25; 82 *id.* 203; or where partial obliterations or cancellations were made with the intent not carried out of substituting other words; In re Knapen's Will, 75 Vt. 146, 53 Atl. 1003, 98 Am. St. Rep. 808.

In some cases where the court is unable to determine that the testator would not have destroyed the will if he had known that the other one would never have gone into effect, it declines to apply the doctrine as stated; Townshend v. Howard, 86 Me. 285, 29 Atl. 1077; Banks v. Banks, 65 Mo. 432; Johnson v. Brailsford, 2 Nott & McC. (S. C.) 279, 10 Am. Dec. 601.

An existing will is not revoked by a later one which the testator afterwards purposely destroys; Bates v. Hacking, 28 R. I. 523, 68 Atl. 622, 125 Am. St. Rep. 759, 14 L. R. A. (N. S.) 937, with note. That case was based on the statute providing that all wills should continue in force unless destroyed or altered by other will, or codicil, or other writing. And the same decision under a like statute is in Stetson v. Stetson, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258. But in a leading case it was said that there is an irreconcilable conflict of authority upon the question of the effect of a second or subsequent will upon an earlier one. "The great weight of authority is that the execution of a subsequent will containing an express clause revoking the former will operated as a revocation at once, and that the former will thus revoked cannot be subsequently revived except by republication and is not renewed by a destruction of the later will;" Cheever v. North, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561 and note, 58 Am. St. Rep. 499. This view was later affirmed by the same court; Danley v. Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, 13 Ann. Cas. 242; and in other states; In re Noon's Will, 115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944; Hopf v. State, 72 Tex. 281; In re Moore's Will, 72 N. J. Eq. 371, 65 Atl. 447, in which, however, the decision seems to be based upon the want of proof of evidence of intention, and the question whether the former will was revoked has been held to depend upon the intention of the testator to be inferred from the circumstances; Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306, in which a rehearing was denied; Williams v. Miles, 68 Neb. 479, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306.

The case in Throckmorton v. Holt, 180 U.

S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663, involved the will of Judge Advocate Holt. The paper was addressed to the register of wills in an envelope sent through the mails. It bore evident signs of mutilation by tearing and burning, and although it recited that it had been signed and sealed, there was no seal on it, and if it had ever been affixed, it had been torn away. The court held that no presumption of revocation arose by its appearance when first received by the register of wills. There must be some evidence of the act by the deceased, or under his direction, sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated, torn or defaced under such circumstances that the revocation might be presumed.

This will bore the signatures of U. S. Grant and W. T. Sherman (at that time president and general of the army) and of Mrs. Sherman, all of whose handwriting was proved by members of their families.

Where a paper on which was written a bequest was pasted over a legacy, the court refused to remove it; L. R. 3 P. D. 211; but afterwards finding that the covered passages could be read by holding the document against a window pane, the court allowed probate of the will in its original form; [1894] P. D. 191.

Alteration by a stranger is mere spoliation and does not affect the will; Monroe v. Huddart, 79 Neb. 569, 113 N. W. 149, 14 L. R. A. (N. S.) 259.

Erasures by hand in a holographic will are legal revocation of the portions erased; La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388, 14 L. R. A. (N. S.) 968, 129 Am. St. Rep. 978; pencil is sufficient; *id.*

A will may be revoked in part; 2 Rob. Eccl. 562, 572. But partial revocations which were made in anticipation of making a new will, and intended to be conditional upon that, are not regarded as complete until the new will is executed; 1 Add. Eccl. 409; 2 *id.* 316. Thus a "memorandum of my intended will" was upheld as a will, and held not to be revoked by the drawing up of a new will which was not signed; 2 Hagg. Eccl. 225; 14 C. L. J. 248.

Parol evidence is inadmissible to show that a testator wanted his will to be revoked in the event of a certain contingency happening before his death; Sewell v. Slingluff, 13 Repr. (Md.) 526; but see, *contra*, 3 Sw. & Tr. 282.

Execution of a will and its possession by testatrix having been proved, her subsequent declarations concerning it, though made after its supposed destruction are inadmissible to rebut the presumption of revocation; In re Kennedy, 53 App. Div. 105, 65 N. Y. Supp. 879. This case is said to be against the "great weight of authority in England and America"; 14 Harv. L. Rev. 231, citing L. R. 1 P. D. 154; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322. The declarations were probative of her intent at the time they were made and as such were admissible; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; as part of the *res gestæ;* Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. See 15 Harv. L. Rev. 149, and 17 *id.* 359.

The loss of a will raises a presumption of intention to revoke; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; which may be rebutted by proof to the contrary; In re Steinke's Will, 95 Wis. 121, 70 N. W. 61.

The mere act of defacing a will by accident and without the intention to revoke, or under the misapprehension that a later will is good, will not operate as a revocation; 1 P. Wms. 345; 1 Saund. 279 *b, c;* 1 Add. Eccl. 53. The revocation of a will is *prima facie* a revocation of the codicils; 4 Hagg. Eccl. 361. But it is competent to show that such was not the testator's intention; 2 Add. Eccl. 230; 1 Curt. Eccl. 289. The same capacity is requisite to revoke as to make a will; Idley v. Bowen, 11 Wend. (N. Y.) 227; Rhodes v. Vinson, 9 Gill (Md.) 169, 52 Am. Dec. 685; Ford v. Ford, 7 Humph. (Tenn.) 92.

One lacking testamentary capacity is not competent, by means of an attempted testamentary act, to revoke a prior will; In re Goldsticker's Will, 192 N. Y. 35, 84 N. E. 581, 15 Ann. Cas. 66, 18 L. R. A. (N. S.) 99, and note citing cases to the same effect, and others which, while not adjudicating it, referred to it as a well settled rule.

A testator who is insane cannot revoke an existing will; Estate of Lang, 65 Cal. 19, 2 Pac. 491; Rich v. Gilkey, 73 Me. 595; and tearing a will while suffering from delirium tremens is not a revocation; L. R. 3 P. & D. 37.

Revocation induced by fraud or undue influence is not effectual; Rich v. Gilkey, 73 Me. 595; McIntire v. Worthington, 68 Md. 203, 12 Atl. 251.

The making of a new will purporting on its face to be the testator's last will, and containing no reference to any other paper, and being a disposition of all the testator's property, and so executed as to be operative, will be a revocation of all former wills, notwithstanding it contain no express words of revocation; 2 Curt. Eccl. 468; 4 Moore, P. C. 29; Boudinot v. Bradford, 2 Dall. (U. S.) 266, 1 L. Ed. 375; Mifflin's Estate, 49 Pa. Super. Ct. 605.

So the appointment of an executor is a circumstance indicating the exclusiveness of the instrument; 1 Macq. H. L. 163, 173. And the revocation will become operative, notwithstanding the second will becomes inoperative from the incapacity of the devisee; Laughton v. Atkins, 1 Pick. (Mass.) 535, 543.

A will is revoked by one executed an hour later on the same day, revoking all prior

wills; Head v. Nixon, 22 Idaho 765, 128 Pac. 557. Revocation by destruction of a codicil, containing only a specific legacy, does not revoke the will; Osburn v. Deposit Co., 152 App. Div. 235, 136 N. Y. Supp. 859.

It is regarded as the *prima facie* presumption from the revocation of a later will, a former one being still in existence and uncancelled, that the testator did intend its restoration without any formal republication; 3 Phill. Eccl. 554; Boudinot v. Bradford, 2 Dall. (U. S.) 266, 1 L. Ed. 375. But it is still regarded as mainly a question of intention to be decided by all the facts and circumstances of the case; Bohanow v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631; 2 Add. Eccl. 125; 1 Moore, P. C. 299, 301; Boudinot v. Bradford, 2 Dall. (U. S.) 266, 1 L. Ed. 375; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44. See 15 Harv. L. Rev. 142. The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one; Hopf v. State, 72 Tex. 281, 10 S. W. 589; and revocation by the mere execution of a subsequent will without a clause of revocation is denied, but it is held that the *destruction* of the later will revives the former one; Cheever v. North, 106 Mich. 390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; Williams v. Williams, 142 Mass. 515, 8 N. E. 424, in which case the testator had made three successive wills, intending to choose one of them and then cancelled the first and third; but it will not where the testator intended to make a new one; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44.

The probability of there having been a revocation can be shown by proving the testator's verbal statements concerning his will; Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194; but a declaration of an intent to make a will at a future time, even when made as a formal recital in a deed, is not a revocation of an earlier will; Appeal of Rife, 110 Pa. 232, 1 Atl. 226. Where there has been an act sufficient to constitute a revocation, it would seem that a verbal statement as to the intent of such act would be evidence. See Hoitt v. Hoitt, 63 N. H. 485. An express revocation must be made in conformity with the statute, and proved by the same force of evidence requisite to establish the will in the first instance; 8 Bingh. 479. If one republish a prior will, it amounts to a revocation of all later wills or codicils; 1 Add. Eccl. 38; 7 Term 138. A subsequent will containing a clause revoking former wills is not evidence of revocation until it is admitted to probate; Sewall v. Robbins, 139 Mass. 164, 29 N. E. 650.

When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; where a will was executed in duplicate and the one retained by testatrix was not forthcoming at her decease, it was held that she was presumed to have destroyed it, *animo revocandi;* 58 L. T. R. 60.

Implied revocations were very common before the statute of frauds. But since the new statute of 1 Vict. c. 26, § 19, as to all estates real and personal, it is provided that no will shall be revoked on the ground of a presumed intention resulting from change of circumstances. Before that, it was held under the statute of frauds, by a succession of decisions, that, even as to lands, the marriage of the testator and the birth of children who were unprovided for was such a change of circumstances as to work an implied revocation of the will; 2 Show. 242; 4 Burr. 2171, 2182, in note; and, finally, by all the judges in England in the exchequer chamber; 8 Ad. & E. 14; 2 Nev. & P. 504. This latter case seems finally to have prevailed in England until the new statute; 2 Moore, P. C. 51, 63, 64; 2 Curt. Eccl. 854; 1 Rob. Eccl. 680. And the subsequent death of the child or children will not revive the will without republication; 1 Phill. Eccl. 342; 2 *id.* 266. See Alden v. Johnson, 63 Ia. 124, 18 N. W. 696.

The marriage alone or the birth of a child alone is not always sufficient to operate a revocation; 4 Burr. 2171; Ambl. 487, 557, 721; 5 Term 52, and note. The marriage alone of a woman will work a revocation; 4 Rep. 61; 2 Bro. C. C. 613; the reason assigned being that, as she was incapable of making a will after marriage, neither could she revoke one, hence the law did it for her; and the rule has been quite generally adopted, either as a common law rule, or by statute; Nutt v. Norton, 142 Mass. 242, 7 N. E. 720; Hale v. Hale, 90 Va. 728, 19 S. E. 739; In re Kaufman's Will, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292; In re Craft's Estate, 164 Pa. 520, 30 Atl. 493; in some states the common law rule is considered as at an end because as she has now power to make a will; Appeal of Emery, 81 Me. 275, 17 Atl. 68; Webb v. Jones, 36 N. J. Eq. 163.

At common law a man's will was not revoked by his marriage alone and the reason given was that the wife under the rules of descent, would not be thereby benefited; Page, Wills § 281; but when the wife is by statute made an heir, there is again a case of *cessat ratio*, and marriage has been held to be a revocation; Scherrer v. Brown, 21 Colo. 481, 42 Pac. 668; but in other states, it is held that such a statute does not change the common law rule; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; Hoy v. Hoy, 93 Miss. 732, 48 South. 903, 25 L. R. A. (N. S.) 182, 136 Am. St. Rep. 548, 17 Ann. Cas. 1137; Munday's Ex'rs v. Munday, 15 Ohio Cir. Ct. R.

155; *contra*, Weld v. Sweeney, 85 Ill. 50; Morgan v. Ireland, 1 Idaho 786; Colcord v. Conroy, 40 Fla. 97, 23 South. 561.

See Page, Wills, § 281, where the cases are collected; and see Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419, and note.

Marriage and birth of issue work implied revocation of a woman's will; Nutt v. Norton, 142 Mass. 242, 7 N. E. 720; Durfee v. Risch, 142 Mich. 504, 105 N. W. 1114, 1 Ann. Cas. 785, 5 L. R. A. (N. S.) 1084, and note; but the will of a married woman is not revoked by subsequent marriage after being a widow, under a statute revoking by marriage a will made by an unmarried woman; In re Comassi, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414, where it was also held that adoption of a child is not equivalent to birth of issue, to revoke a will.

But the birth of a child, with circumstances favoring such a result, may amount to an implied revocation; 5 Term 52; 1 Phil. Eccl. 147. See Ware v. Wisner, 50 Fed. 310; Alden v. Johnson, 63 Ia. 124, 18 N. W. 696. A will not made in contemplation of matrimony is revoked by the marriage of the testator and the birth of a posthumous child; Belton v. Summer, 31 Fla. 139. 12 South. 371, 21 L. R. A. 146; Hart v. Hart, 70 Ga. 764. For the history of the common law on this subject, see Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 510. In the absence of statute this rule of the common law may be considered abrogated in those states which give a married woman unrestricted testamentary powers. This matter is controlled in most of the American states, more or less, by statute; 3 Jarm. Wills (Rand. & Talc. ed.) 783, note. In many of them a posthumous child unprovided for in the will of the father inherits the same as if no will had been made; Wilson v. Ott, 160 Pa. 433, 28 Atl. 848. In others, all children born after the execution of the will, and in some states all children not provided for in the will, are placed on the same ground as if no will existed; 1 Will. Ex. 170, 171.

As to revocation by subsequent birth of a child, see article by Marvin H. Altizer in 9 Va. L. Reg. 473, 519 (Oct. and Nov. 1903), for state statutes and cases interpreting them; and see also 17 Harv. L. Rev. 210.

By the express provisions of the act of 1 Vict. the marriage of the testator, whether man or woman, amounts to a revocation; 1 Jarm. Wills 106–173. See 89 Law T. 20. Subsequent marriage revokes the antenuptial will made by a wife; Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; *contra*, Fellows v. Allen, 60 N. H. 439, 49 Am. Rep. 328. The adoption of a child does not revoke an antecedent will of the adopting parent; Davis v. Fogle, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485.

Divorce procured by the wife after the execution of a will by the husband two years before his death does not revoke by implication a will containing a legacy to her, describing her as his wife; Jones' Estate, 211 Pa. 364, 60 Atl. 915, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221. Other cases decline to imply a revocation of a will by reason of divorce; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; *contra*, Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545 (where a settlement *inter partes* was somewhat relied on). See 19 Harv. L. Rev. 69; In re Jones' Estate, 211 Pa. 364, 60 Atl, 915, 107 Am. St. Rep. 581, 3 Ann. Cas. 221, 69 L. R. A. 940, with note on the subject which concludes that divorce is not a revocation unless the court is irresistibly convinced of an intention to that effect.

Where a will is executed in duplicate, only one part of which the testator retains, if he destroys that one, an intention to revoke is presumed; Snider v. Burks, 84 Ala. 53, 4 South. 225.

REPUBLICATION. This, under the statute of frauds, could only be done in the same manner a will of lands was required to be first executed. And the same rule obtains under the statute of 1 Vict., and in many, perhaps most, of the American states. The general rule may be said to be, that a will can be republished only by an instrument of as high a nature as that which revoked it. Thus a will once revoked by written declaration cannot be republished by parol; Witter v. Mott, 2 Conn. 67; Jackson v. Potter, 9 Johns. (N. Y.) 312; Sawyer v. Sawyer, 52 N. C. 134. In Pennsylvania, a parol republication is allowed. But the intention of the testator to republish must be clearly proved; Wallace v. Blair, 1 Grant, Cas. (Pa.) 75; Jones v. Hartley, 2 Whart. (Pa.) 103. It is doubtful, however, if parol evidence alone is sufficient; Battle v. Speight, 32 N. C. 459. A codicil ratifying and confirming a will, in whole or in part, will amount to a republication of the will, as of the date of the codicil; Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

Constructive republication is effected by means of a codicil, unless neutralized by internal evidence of a contrary intention; 1 Ves. Sen. 437; Miles v. Boyden, 3 Pick. (Mass.) 213.

PROBATE OF WILLS. The proof of a will of personal property must always be made in the probate court. But in England the probate of the will is not evidence in regard to real estate. In most of the states the same rule obtains in regard to real as to personal estate—as the probate court has exclusive jurisdiction, in most of the states, in all matters pertaining to the settlement of estates; 9 Co. 36, 38 *a*; 4 Term 260; 1 Jarm. Wills 118; Poplin v. Hawke, 8 N. H. 124; Hutchins v. Bank, 12 Metc. (Mass.) 421; Swazey's Lessee v. Blackman, 8 Ohio 5.

As the authority to make wills is derived from the state, matters of probate are not

strictly within the federal jurisdiction. But where the state law, by statute or custom, gives to the citizens of the state in a suit *inter partes* a right to question at law the probate of a will, or to assail it in equity, the federal courts, in administering the rights of citizens of other states or aliens, will enforce such remedies; but such suit must relate to independent controversies and not to such merely as might arise on an application for probate, or a mere method of procedure ancillary to the original proceeding; Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

A will refused probate for want of testamentary capacity in the state of testator's domicil has been admitted to probate in another state, where lands passed under it; Rice v. Jones, 4 Call (Va.) 89; and see Succession of Gaines, 45 La. Ann. 1237, 14 South. 233. See PROBATE OF A WILL.

The probate of a will has no effect out of the jurisdiction of the court before which probate is made, either as to persons or property in a foreign jurisdiction; 8 Ves. Ch. 44; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Ives v. Allyn, 12 Vt. 589 (but see *supra*, under MODE OF EXECUTION).

In regard to the probate of wills passing realty, the *lex rei sitæ* governs; personalty is controlled by the *lex domicilii;* Whart. Confl. Laws §§ 570, 587, 592; Schultz v. Dambmann, 3 Bradf. Sur. (N. Y.) 379; Story, Confl. Laws §§ 69, 431; 10 Moore, P. C. 306. But the indorsement of negotiable paper by the executor or administrator in the place of his appointment will enable the indorsee to maintain an action in a foreign state upon the paper in his own name; Robinson v. Crandall, 9 Wend. (N. Y.) 425. But see Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; Thompson v. Wilson, 2 N. H. 291, where the rule is held otherwise. The executor may dispose of bankshares in a foreign state without proving the will there; Hutchins v. Bank, 12 Metc. (Mass.) 421.

Any person interested in the will may compel probate of it by application to the probate court, who will cite the executor or party having the custody of it; Stebbins v. Lathrop, 4 Pick. (Mass.) 33; 3 Bacon, Abr. 34. *Executors.* The judge of probate may cite the executor to prove the will at the instance of any one claiming an interest; Stebbins v. Lathrop, 4 Pick. (Mass.) 33; 1 Jarm. Wills 224. The attesting witnesses are indispensable, if the contestants so insist, as proof of the execution and authenticity of the will and the competency of the testator, when they can be had; 2 Greenl. Ev. § 691; 1 Jarm. Wills 226. But if all or part of the subscribing witnesses are absent from the state, deceased, or disqualified, then their handwriting must be proved; 9 Ves. Ch. 381; Jackson v. Le Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; 1 Jarm. Wills 226. And see Walker v. Hunter, 17 Ga. 364; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Smith v. Jones, 6 Rand. (Va.) 33. It will be presumed that the requisite formalities were complied with when the attestation is formal, unless the contrary appear; Welty v. Welty, 8 Md. 15; Lewis v. Lewis, 11 N. Y. 220; Vernon v. Kirk, 30 Pa. 218; 1 Jarm. Wills 228; Burkett v. Whittemore, 36 S. C. 428, 15 S. E. 616. But it has sometimes been held that no such presumption will be made in the absence of a subscribing witness who might be called; Jackson v. Le Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237. While the probate of a will settles the question of due execution, it does not establish validity, or determine its force and effect upon titles to real estate claimed under it; Ware v. Wisner, 50 Fed. 310. Wills over thirty years old, and appearing regular and perfect, and coming from the proper custody, are said to prove themselves; 1 Greenl. Ev. §§ 21, 570. See LOST INSTRUMENT.

In most of the states statutory provision has been made for proving foreign wills by exemplified copy; 3 Jarm. Wills (Rand. & Talc. edition) 725, note.

GIFTS VOID FOR UNCERTAINTY. Where the subject-matter of the gifts is not so defined in the will as to be ascertained with reasonable certainty; Kelley v. Kelley, 25 Pa. 460; Wootton v. Redd's Ex'r, 12 Gratt. (Va.) 196; the person intended to be benefited may not be so described or named that he can be identified. But, in general, by rejecting obvious mistakes, this kind of uncertainty is overcome; 1 Jarm. Wills 330. Determinate meanings have now been assigned to numerous doubtful words and phrases, and rules of construction adopted by the courts, which render devises void for uncertainty less frequent than formerly; 1 Jarm. Wills 356–383. A will otherwise effective, should not be refused probate because certain bequests contained therein are void for uncertainty; Estate of Shillaber, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; Adams v. Berger, 18 N. Y. Supp. 33; Brown v. Richter, 76 Hun 469, 27 N. Y. Supp. 1094; Armstrong v. Douglass, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85.

The testator's body cannot be disposed of by his will, because the law recognizes no property in a dead body, and it is the duty of the executor to bury it; 21 Am. L. Reg. N. S. 508. See DEAD BODY.

PAROL EVIDENCE, HOW FAR ADMISSIBLE. The rule in regard to the admissibility of parol evidence to vary, control, or to render intelligible the words of a will, is not essentially different from that which obtains in regard to contracts. It may be received to show the state of the testator, the nature and condition of his property, his relation to the contestants, and all the surrounding circumstances. But this is done to place the court in the condition of the testator, in order as far as practicable to enable them the

more fully to understand the sense in which he probably used the language found in his will; 1 Nev. & M. 524; Brown v. Thorndike, 15 Pick. (Mass.) 400; 1 Jarm. Wills 349; Kinsey v. Rhem, 24 N. C. 192. To ascertain the intention of testator, circumstances existing at the date of the execution of a will, but not those subsequent thereto, are admissible in evidence; Morris v. Sickly, 133 N. Y. 456, 31 N. E. 332; Gilmor's Estate, 154 Pa. 523, 26 Atl. 614, 35 Am. St. Rep. 855; White v. Holland, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87.

Letters and oral declarations of the testator are not admissible to show the intention of the testator; 2 Vern. 625; Mann v. Mann, 14 Johns. (N. Y.) 1, 7 Am. Dec. 469; Lewis v. Lewis, 2 W. & S. (Pa.) 455. But see Ryerss v. Wheeler, 22 Wend. (N. Y.) 148. Parol evidence is not admissible to supply any word or defect in the will; Negro Cesar v. Chew, 7 Gill & J. (Md.) 127; Comstock v. Hadlyme, 8 Conn. 254, 20 Am. Dec. 100; Hyatt v. Pugsley, 23 Barb. (N. Y.) 285. Parol declarations of the testator about the time of making the will are often admitted to show the state of mind, capacity, and understanding of the testator; but they are not to be used to show his intention; that must be learned from the language used; Comstock v Hadlyme, 8 Conn. 254, 20 Am. Dec. 100; Foster v. Smith, 156 Mass. 379, 31 N. E. 291. Parol evidence is inadmissible to prove that a gift to a nephew was really intended for the wife's nephew of the same name; Root's Estate, 187 Pa. 118, 40 Atl. 818; but see 12 Harv. L. Rev. 210. See, generally, Tud. Lead. Cas. R. P. 918; Wigram, Wills.

Parol evidence has also been admitted in the case of mistake in the description of the subject matter of the devise, as where "the tract of land on which I now live" was held to prevail over courses and distances; Thomson v. Thomson, 115 Mo. 56, 21 S. W. 1085, 1128; Board of Trustees of M. E. Church v. May, 201 Mo. 360, 99 S. W. 1093 (where the numbers of the lots were wrongly given); Douglas v. Bolinger, 228 Ill. 23, 81 N. E. 787, 119 Am. St. Rep. 409 (where the north half of a section was stricken out and the west half held to pass, the latter being owned by the testator).

The doctrine that a non-testamentary document may be admitted to probate with a will (1) if referred to in the will as an existing document, (2) if written before the will was made, and (3) if actually in existence at the time of the execution of the will, is said to be firmly established in England; 13 L. R. Ir. 13; L. R. 1 P. & D. 198; also as to the first point; 34 L. J. P. 105; and as to the third; 3 App. Cas. 404; L. R. 1 P. 19. It may be sufficiently identified by reference in the will; 3 Sw. & Tr. 192. American courts generally seem to adopt the doctrine; Lucas v. Brooks, 18 Wall. (U. S.) 436, 21 L. Ed. 779; Skinner v. Bible Soc., 92 Wis. 209, 65 N. W. 1037; Fickle v. Snepp, 97 Ind. 289, 49 Am. Rep. 449; Beall v. Cunningham, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; Newton v. Seaman's Friend Soc., 130 Mass. 91, 39 Am. Rep. 433; Pollock v. Glassell, 2 Grat. (Va.) 439; Gerrish v. Gerrish, 8 Or. 351, 34 Am. Rep. 585; In re Bresler's Estate, 155 Mich. 567, 119 N. W. 1104. See note in 19 Harv. L. Rev. 528.

The same doctrine is recognized in Magnus v. Magnus, 80 N. J. Eq. 346, 84 Atl. 705; but in that case a provision giving property to be disposed of according to "my instructions to her" failed because not identifying the instructions; and a bequest to creditors as shown by a list to be found with the will was void as an attempt to bequeath property to persons only ascertainable by reference to a non testamentary paper; Hartwell v. Martin, 71 N. J. Eq. 157, 63 Atl. 754.

In New York the doctrine was followed in early cases: Jackson v. Babcock, 12 Johns. (N. Y.) 394, where it was said that "there is no question, since the statute of wills, as well as before;" and that there was never any doubt that when a paper is referred to, its contents become a part of the will, and the requirement of signing at the end is not affected; Tonnele v. Hall, 4 N. Y. 140, where the paper was a copy of a map annexed after the signature. The doctrine was, however, not applied in the case of wills not actually signed at the physical end (as where some material part of the will followed the signature); In re Andrews, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; and in other cases the doctrine seems to have been rejected, and it was said that an unattested paper of testamentary nature referred to cannot be taken as part of the will; Vogel v. Lehritter, 139 N. Y. 223, 34 N. E. 914; In re Emmons, 110 App. Div. 701, 96 N. Y. Supp. 506, where a will invalidly executed was not made valid by a subsequent codicil properly executed referring to it, and it was said generally that no testamentary provision in other unexecuted or unattested papers can be incorporated into a will; where there was no indication that testator intended to make an agreement part of a will and it would make no change, it should not be included; In re Martindale, 69 Misc. 522, 127 N. Y. Supp. 887.

The paper must be described in clear and definite terms, and where a sum of money was given to be held in trust "for purposes set forth in a sealed letter, which will be found with the will," it was held not to designate a specific existing document with such definiteness as to admit of its incorporation in the will; Appeal of Bryan, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393; and where the letter directed to whom the money should be paid, being testamentary in character it was ineffective, not being executed as a will; Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, 107 Am.

St. Rep. 64. As to the precision required in the clause incorporating the document, there is some doubt; parol evidence has been admitted to show what paper it was; 11 Moore P. C. 427; 1 Nev. & Man. 576; the reference must be certain as to the exact paper and as to its existence; [1902] L. R. P. D. 238; In re Young's Estate, 123 Cal. 342, 55 Pac. 1011; Phelps v. Robbins, 40 Conn. 273; at the time the will was made; Chambers v. McDaniel, 28 N. C. 226; Johnson v. Clarkson, 3 Rich. Eq. (S. C.) 305; St. John's Parish v. Bostwick, 8 App. D. C. 452.

Provisions of a trust deed not attested as a will cannot be incorporated by reference for the purpose of denoting a bequest not made by the will; Hatheway v. Smith, 79 Conn. 506, 65 Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99; nor can an ambiguous deed of bargain and sale be converted into a will by parol evidence tending to show an *animus testandi* in the maker; Noble v. Fickes, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203 and note, 12 Ann. Cas. 282; Clay v. Layton, 134 Mich. 317, 96 N. W. 458, followed in Dodson v. Dodson, 142 Mich. 586, 105 N. W. 1110.

See DEVISE; LEGACY. See also Schouler; Jarman; Theobald, Wills; CANCELLATION; LATENT AMBIGUITY; AMBIGUITY; MURDER; NUNCUPATIVE WILL; UNDUE INFLUENCE; PRECATORY WORDS.

As to conditions in restraint of marriage, see CONDITION; RESTRAINT OF MARRIAGE.

As to what is necessary to constitute a devise by implication, see 10 L. R. A. 816, n.

FOREIGN WILL. Where a German testator specially appointed a person in England to realize on his English estate and transmit the proceeds to the German executor, the court declined to grant probate to these persons as executors according to the tenor of the will; [1894] 2 Q. B. 260.

Where property was settled upon English trustees with power of appointment, the owner of the power exercised the power it gave by will made in English form but invalid by French law. It was held that the appointment was valid; L. R. 1 P. D. 90.

There may be independent wills in different jurisdictions; [1894] P. 9; [1896] P. 65.

Where a testator made two separate wills dealing separately with English and Scotch assets, the court being satisfied that no creditor would be prejudiced, granted letters under the English will without requiring the Scotch will to be incorporated, upon condition that a copy thereof should be filed and a note to that effect made on the probate, [1891] P. 285. And where a resident of England made two wills, one termed the "English will" relating solely to property in England, and the other the "American Will" relating solely to property in this country, the original of the latter was held entitled to probate in Kansas, the statute authorizing record of the probate of foreign wills being held as enlarging not restricting the jurisdiction of the probate court; Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658. So where a resident of Delaware executed a will there called the "American will," and removed to England and executed another one, called the "English will," recognizing the former, the two were held to constitute one will; Flinn v. Frank, 8 Del. Ch. 186, 68 Atl. 196.

Where an executor was absent and expected to be absent for two years and had given X a power of attorney to act for him, administration with the will annexed was granted to X for the benefit of the executor; [1891] P. 251.

As to wills of persons long absent, see ABSENTEE. As to forfeiting a gift by contesting the will, see FORFEITURE. See FACSIMILE.

In Criminal Law. The power of the mind which directs the action of a man.

In criminal jurisprudence, the necessity of the concurrence of the will is deemed so far indispensable that, in general, those persons are held not amenable as offenders against the law who have merely done the act prohibited, without the concurrence of the will. This has reference to different classes of persons who are regarded as laboring under defect of will, and are, therefore, incapable of committing crime.

Infants, who, from want of age, are excused from punishment. See INFANT.

Persons laboring under *mental imbecility* are not amenable for crime. See INSANITY; LUCID INTERVALS.

Persons subject to the power of others. This exemption from crime, in the common law, extends to the wife while in the immediate presence and under the power of the husband, but not to a child or servant. See COERCION. The distinction between the wife and the child and especially the servant, where the relation of master and servant is of a permanent character, or where the law gives the master unlimited control over the acts of the servant, seems not to rest upon any well-founded basis in present social relations. The English law does not regard one in the power of robbers or of an armed force of rebels as responsible, *criminaliter*, for his acts. No more should one be who is wholly under the power of another, as a child or servant may be; 1 Russ. Cr. 14. See Ch. J. Howe, 18 St. Trials 293. These questions should, in strictness, be referred to the jury as matters of fact. See DURESS; COERCION.

As to ignorance of law or fact, see IGNORANCE; INTENT.

WILL, ESTATES AT. See ESTATES AT WILL.

WINCHESTER, STATUTE OF. An English statute, 13 Edw. I. relating to the internal police of the kingdom. It required every

man to provide himself with armor to aid in keeping the peace; and if it did not create the offices of high and petty constables, it recognized and regulated them, and charged them with duties answering somewhat to those of our militia officers. The statute took its name from the ancient capital of the kingdom. It was repealed by the statute of 7 & 8 Geo. IV. c. 27. See 1 Seld. Essays 153.

WINDFALL. See TIMBER; WOODS.

WINDING UP. The process of liquidating the assets of a partnership or corporation, for purposes of distribution. In England a number of statutes, known as the Winding-up Acts, have been passed to facilitate the settlement of partnership affairs; Lind. Part. book iv. c. 3. It is now regulated by Act of 1908 and is transacted in the department for companies winding-up.

WINDOW. An opening made in the wall of a house to admit light and air, and to enable those who are in to look out. Cited in Hale v. Ins. Co., 46 Mo. App. 508.

The owner has a right to make as many windows in his house, when not built on the line of his property, as he may deem proper, although by so doing he may destroy the privacy of his neighbors; Bacon, Abr. *Actions in General* (B).

In cities and towns it is evident that the owner of a house cannot open windows in the party wall, *q. v.*, without the consent of the owner of the adjoining property, unless he possesses the right of having *ancient lights*, which see. The opening of such windows and destroying the privacy of the adjoining property is not, however, actionable; the remedy against such encroachment is by obstructing them, without encroaching upon the rights of the party who opened them, so as to prevent a right from being acquired by twenty years' use, 3 Camp. 82; Levy v. Brothers, 4 Misc. 48, 23 N. Y. Supp. 825. A bay or bow-window that projects over the land of another is a nuisance, and actionable as though it was an actual invasion of the soil; Commonwealth v. Harris, 10 Wkly. Notes & Cas. (Pa.) 10; Wood, Nuisance 113. Where it projects beyond the street line, it has been held in Pennsylvania a *purpresture*, and the erection of it may be restrained by injunction, although authorized by a special city ordinance; Com. v. Harris, 10 Wkly. Notes Cas. (Pa.) 10; see Appeal of Reimer, 100 Pa. 182, 45 Am. Rep. 373; whether the window reached to the ground; *id.*; or was built out of the second story; Com. v. Harris, 15 Phila. 10.

See AIR; ANCIENT LIGHTS; HIGHWAY; BAY WINDOW; LIGHT.

WINE. The fermented juice of the grape. State v. Moore, 5 Blackf. (Ind.) 118. See LIQUOR LAWS.

WIRELESS TELEGRAPHY. The use of wireless telegraphy in the Russo-Japanese war, as a means of transmitting orders and information, gave rise to several difficult problems in the relations between belligerents and neutrals. In consequence, the Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, adopted at the Hague in 1907, provides (art. 3) that "belligerents are also forbidden (a) to erect on the territory of a neutral power a wireless telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea; (b) to make use of any installation of this kind established by them before the war on the territory of a neutral power, for purely military purposes and not previously opened for the service of public messages." Neutral powers are, moreover, required by art. 5 not to allow the acts forbidden to belligerents by art. 3. But, on the other hand, art. 8 states that "a neutral is not bound to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus whether belonging to it, or to companies or to private individuals." Art. 5 of the Convention Relating to the Rights and Duties of Neutral Powers in Maritime War repeats the prohibition in the first paragraph of art. 3. See Hershey, Int. L. and Dip. of the Russo-Japanese War 115–124.

A convention was concluded between the United States and foreign countries and was proclaimed by the President, July 8, 1913.

The Convention for the Safety of Life at Sea was signed at London, January 20, 1914. It has not yet been approved by the United States senate. Only an abstract of its provisions on this subject can be given. Merchant ships which are mechanically propelled, which carry more than twelve passengers and proceed from a port of one of the countries to a port situated outside such country, or conversely, are subject to the Convention. All merchant ships, whether they are propelled by machinery or by sails, and whether they carry passengers or not, shall, when they proceed between such ports, be filled with a radiotelegraphic installation if they have on board 50 or more persons in all.

The governments of any contracting state, if it considers the installation unreasonable or unnecessary, may exempt ships which do not go more than 150 miles from the nearest coast; ships on which the number of persons is exceptionally or temporarily increased up to or beyond 50, by the carriage of cargo hands for part of the voyage, provided the ships are not going from one continent to another and remain between thirty degrees north and south latitude; and sailing ships of primitive build, such as junks, etc.

First class ships are those having a continuous service, including ships intended to carry 25 or more passengers, if they have an

average speed in service of 15 knots, or more, or if they have an average speed in service of 13 knots and when subject to the twofold condition that they have on board 200 persons or more, passengers and crew, and that they go on their voyage more than 500 sea miles between any two consecutive ports. But such ships may be placed in the second class if they have a continuous watch.

Second class. Ships having a service of limited duration. Such ships must maintain a continuous watch for at least seven hours a day, and a watch of ten minutes at the beginning of every other hour.

Third class. They have no fixed period of service. All ships not in the first or second class are in the third class.

WIRES. By the provisions of the Revised Statutes § 5263, electrical companies must so construct and maintain their lines as not to obstruct ordinary travel or navigation. This act grants to the companies which accept its provisions a species of easement or right of way; Western U. Tel. Co. v. New York, 38 Fed. 552, 3 L. R. A. 449. It does not prevent state legislatures from enacting statutes requiring telegraph wires to be placed underground; American R. Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; and when declared a nuisance, they may be forcibly removed, although the subways are not in a condition to receive them; American R. Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764.

The attachment of wires to the roof of a building may be prohibited by municipal ordinance in the exercise of the police power; Electric Imp. Co. v. San Francisco, 45 Fed. 593, 13 L. R. A. 131; and the company is liable to the owner of the premises for making such attachment without permission; Gray v. G. L. Co., 114 Mass. 149, 19 Am. Rep. 324.

Although not an insurer of safety to travellers all reasonable precautions must be taken *in stringing wires;* Western Union Tel. Co. v. Eyser, 2 Colo. 148; *id.*, 91 U. S. 495, note, 23 L. Ed. 377; and in investigating promptly detached or grounded wires; Illingsworth v. Light Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; Texarkana G. & E. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; and in removing dead wires in the case of fire or accident; Nichols v. City of Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56; but the mere fact that one was killed by a hanging wire does not prove negligence; Suburban Electric Co. v. Nugent, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700; *contra,* Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786.

In many of the states the insulation of the wire is made the subject of statutory provision, and even in the absence of such provision, it has been held that non-insulation is negligence; Illingsworth v. Light Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552.

A company will be liable for damages if a dead wire, coming into contact with a live wire of another company, becomes charged and causes injury or death; Texarkana G. & E. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

One whose occupation requires his proximity to an electric wire may presume it to be insulated; Clements v. Light Co., 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; and he is not required to make an examination in order to ascertain if such be the case; Giraudi v. Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114. A traveller may pick up a wire from the street and throw it outside the regular line of travel without being guilty of contributory negligence; Bourget v. Cambridge, 156 Mass. 393, 31 N. E. 390, 16 L. R. A. 605; Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; Texarkana G. & E. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30. For injuries so received damages may be recovered either from the city; Bourget v. Cambridge, 156 Mass. 393, 31 N. E. 390, 16 L. R. A. 605; or from the company; Texarkana G. & E. L. Co. v. Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30. But in order to sustain an action for damages, it must be clearly shown that there was no contributory negligence; Moore v. Illuminating Co., 43 La. Ann. 792, 9 South. 433. It has been considered contributory negligence to step on a live wire after a warning; Cook v. Electric Co., 9 Houst. (Del.) 306, 32 Atl. 643.

The wires of electric light and electric railway companies, unlike those of telegraph and telephone companies, carry a strong and dangerous current, and such companies are bound to the highest degree of care in the pursuit of their business; Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786.

If a telephone wire has been negligently allowed to drop across a trolley wire, the owner of the latter is jointly liable with the owner of the telephone wire for injuries to a third person caused by electricity conveyed through it from the trolley wire; City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262. See Denver C. E. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; 9 Harv. L. Rev. 505; Keasbey, Electric Wires; Croswell, Electricity; ELECTRIC LIGHT; TELEGRAPH AND TELEPHONE; NEGLIGENCE; MASTER AND SERVANT.

WISBY, LAWS OF. See CODE. They are printed in 30 Fed. Cas. 1189.

WISCONSIN. One of the states of the United States.

It was originally part of the Northwest Territory. See OHIO. It was made a separate territory, with the name of Wisconsin, by act of April 20, 1836. The territory was afterwards divided, and the territory of Iowa set off, June 12, 1838. It was admitted into the Union May 29, 1848.

The constitution was adopted by a convention at Madison, on February 1, 1848. This constitution, as modified by amendments, is still in force.

WITCHCRAFT. Under 33 Hen. VIII. c. 8 and 1 Jac. I. c. 12, the offence of witchcraft, or supposed intercourse with evil spirits, was punishable with death. These acts were not repealed till 1736. 4 Bla. Com. 60.

A charge to a jury was upheld that, if the accused believed in witchcraft founded on the belief that the Scriptures taught it and, that if, as a result of such belief, he considered he had a right to kill one accused of causing deaths among his people, though he knew such killing was contrary to human law, it was not an insane delusion; Hotema v. U. S., 186 U. S. 419, 22 Sup. Ct. 895, 46 L. Ed. 1225.

WITE. An atonement among the early Germans by a wrong-doer to the king or the community. It is said to be the germ of the idea that wrong is not simply the affair of the injured individual, and is therefore a condition precedent to the growth of a criminal law. 2 Holdsw. Hist. E. L. 37. See 1 Sel. Essays, Anglo-Amer. L. H. 100.

WITENA-GEMOT (spelled, also, wittena-gemot, gewitena-gemote; from the Saxon *witta*, a wise man, *gemote*, assembly,—the assembly of wise men). The king's council of wise men. There is said to be more authority for this short form (Witan) than for Witena-Gemót (not Witenágemot). Pollock, in 1 Sel. Essays in Anglo-Amer. L. H. 90 (14 L. Q. R. 291); Pollock, Expansion of C. L. 140; Vinagradoff (Engl. Soc. 6) gives it as witana-gemote.

It was the grand council of the kingdom, and was held, generally, in the open air, by public notice or particular summons, in or near some city or populous town. These notices or summonses were issued upon determination by the king's select council, or the body met without notice, when the throne was vacant, to elect a new king. Subsequently to the Norman conquest it was called *commune concilium regni, curia regis* and finally *parliament;* but its character had become considerably changed. It was a court of last resort, more especially for determining disputes between the king and his thanes, and, ultimately, from all inferior tribunals. Great offenders, particularly those who were members of or might be summoned to the king's court, were here tried. The casual loss of title-deeds was supplied, and a very extensive equity jurisdiction exercised. 1 Spence, Eq. Jur. 73; 1 Bla. Com. 147; 1 Reeve, Hist. Eng. Law 7; 9 Co. Pref.

The principal duties of the witena-gemot, besides acting as a high court of judicature, was to elect the sovereign, assist at his coronation, and co-operate in the enactment and administration of the laws. It made treaties jointly with the king, and aided him in directing the military affairs of the kingdom. Examination into the state of churches, monasteries, their possessions, discipline, and morals, were made before this tribunal. It appointed magistrates, and regulated the coin of the kingdom. It also provided for levying upon the people all such sums as the public necessities required; and no property of a freeman was, in fact, taxable without the consent of the gemote. Bede, lib. 2, c. 5; 3 Turner, Angl. Sax. 209; 1 Dugdale, Mon. 20; Sax. Chron. 126, 140.

The deliberations of their body had great weight; all important actions, such as law-making, were done by their advice; but they could not and did not pretend to do without the consent of the freeholders when a capital decision—such as the voting of a tax, the election of a king, the passing of a law—was in question. At first the king of the English would go around with his proposed laws to the several folk-mote, getting the separate consent of each, but in the tenth century the kings bethought them of summoning the moots of the various shires to meet them at some convenient central spot, as Oxford or London, and what this collective moot or *Mycel-gemot* agreed to need not be confirmed again, since men from every shire were present. The Mycel-gemot was the *Magnum Concilium* of the Normans and developed into the High Courts and Parliaments of the thirteenth century. 1 Social England 136. See Stevens, Sources of the Constitution 62.

WITH STRONG HAND. In Pleading. A technical phrase indispensable in describing a forcible entry in an indictment. No other word or circumlocution will answer the same purpose. 8 Term 357.

WITHDRAW. To take away what has been enjoyed; to take from. Central R. & B. Co. v. State, 54 Ga. 409.

WITHDRAWAL OF OPINION. In a case in E. B. & E. 746, in the Exchequer, where there was an evenly divided court, it is stated in the syllabus that, the junior judge *having withdrawn his opinion*, a motion to enter verdict on the plea for the plaintiff was discharged. The case then went to the Exchequer Chamber; both cases are reported together.

WITHDRAWING A JUROR. An agreement made between the parties in a suit to require one of the twelve jurors impanelled to try a cause to leave the jurybox; the act of leaving the box by such a juror is also called the withdrawing a juror.

This arrangement usually takes place at the recommendation of the judge, when it is obviously improper the case should proceed any further. And it seems now settled that in civil cases the court has power

to do this, in the exercise of a sound discretion, without the consent of the parties, instead of nonsuiting the plaintiff; People v. Judges of New York, 8 Cow. (N. Y.) 127.

A refusal under the special circumstances was held error in McKahan v. R. Co., 223 Pa. 1, 72 Atl. 251, 16 Ann. Cas. 173.

The effect of withdrawing a juror puts an end to that particular trial, and each party must pay his own costs; 3 Term 657; 1 Cr. M. & R. 64. In Pennsylvania, the costs abide the event of the suit; Tr. & H. Pr. § 689. But the plaintiff may bring a new suit for the same cause of action; Ry. & M. 402; 3 B. & Ad. 349. See 3 Chitty, Pr. 917.

In American practice, however, the same cause goes over, or is continued, without impairing the rights of either party, until the next term.

It is usually a mere method of continuing a case, for some good reason. Most of the cases hold that it is the proper practice when it is necessary to prevent the defeat of justice, and that it may be done by the consent of the parties in a civil case.

The cases are collected in a note in 48 L. R. A. 432. It was held in the case there reported that the practice does not obtain in Oregon. There, however, the request appears to have been made immediately after a motion to continue for the absence of material evidence had been refused. In Glendenning v. Canary, 64 N. Y. 636, it was held the proper practice where any accident or misapprehension or disappointment would render a trial unjust. It is said to be proper in criminal cases, though without defendant's consent; State v. Weaver, 35 N. C. 203; U. S. v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; *contra*, in a capital case; State v. Ephraim, 19 N. C. 162; a felony; 2 Stra. 984. But see JEOPARDY.

In the federal court (Illinois) where, at the conclusion of plaintiff's testimony, the court would, if a verdict were rendered for him, set the same aside, and a motion is made by defendant to direct a verdict for him, plaintiff is not allowed to take a nonsuit, but may withdraw a juror and discontinue; Wolcott v. Studebaker, 34 Fed. 8.

Where the plaintiff, at the suggestion of the judge, withdraws a juror, with the understanding of bringing the matter to a final conclusion, it amounts to an undertaking not to bring an action for the same cause; and if a second action be commenced, the court will stay the proceedings as against good faith: 1 Chit. Arch. Pr. 285. It is held that, if a juror is withdrawn, no future action lies for the same cause of action; 14 M. & G. 808.

If, after a prisoner has pleaded to an indictment, and after the jury have been sworn and evidence offered, the public prosecutor, without the consent of the prisoner, withdraw a juror merely because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment; People v. Barrett, 2 Caines (N. Y.) 304, 2 Am. Dec. 239; Arch. Cr. Pr. & Pl. 347.

WITHDRAWING RECORD. The withdrawing by plaintiff's attorney of the *nisi prius* record filed in a cause, before a jury is sworn, has the same effect as a motion to postpone. 2 C. & P. 185; 3 Camp. 333.

WITHERNAM. The name of a writ which issues on the return of *elongata* to an alias or pluries writ of replevin, by which the sheriff is commanded to take the defendant's own goods which may be found in his bailiwick, and keep them safely, not to deliver them to the plaintiff until such time as the defendant chooses to submit himself and allow the distress, and the whole of it to be replevied; and he is thereby further commanded that he do return to the court in what manner he shall have executed the writ. Hamm. N. P. 453; Co. 2d Inst. 140; Fitzh. N. B. 68, 69.

WITHHOLD. Withholding property is not equivalent to concealing property. To withhold commissions implies a temporary suspension rather than a total and final denial or rejection of the same. U. S. v. Dumas, 149 U. S. 278, 13 Sup. Ct. 872, 37 L. Ed. 734.

WITHIN. In the limits or compass of. 54 Ala. 531. It may be used in the sense of in or at the end of. Adams v. Cummiskey, 4 Cush. (Mass.) 420.

WITHOUT. Outside; beyond. Welton v. Missouri, 91 U. S. 277, 23 L. Ed. 347; Ainslie v. Martin, 9 Mass. 456.

WITHOUT DAY. This signifies that the cause or thing to which it relates is indefinitely adjourned: as, when a case is adjourned without day it is not again to be inquired into. When the legislature adjourn without day, they are not to meet again. This is usually expressed in Latin, *sine die*.

WITHOUT IMPEACHMENT OF WASTE. When a tenant for life holds the land without impeachment of waste, he is, of course, dispunishable for waste, whether wilful or otherwise. But still this right must not be wantonly abused so as to destroy the estate; and he will be enjoined from committing malicious waste; Bac. Abr. *Waste* (N); 2 Eq. Cas. Abr. *Waste* (A, pl. 8). See IMPEACHMENT OF WASTE; WASTE.

WITHOUT PREJUDICE. See COMPROMISE.

WITHOUT RECOURSE. See SANS RECOURS; INDORSEMENT.

WITHOUT RESERVE. These words are frequently used in conditions of sale at public auction, that the property offered, or to be offered, for sale, will be sold *without reserve*. When a property is advertised to be sold without reserve, if a puffer be employed to bid, and actually bid at the sale, the courts will not enforce a contract against a purchaser, into which he may have been drawn

by the vendor's want of faith; 5 Madd. 34. See PUFFER; AUCTION.

WITHOUT THIS, THAT. In Pleading. Technical words used in a traverse (*q. v.*) for the purpose of denying a material fact in the preceding pleadings, whether declaration, plea, replication, etc. The Latin term is *absque hoc* (*q. v.*). Com. Dig. *Pleader* (G 1); 1 Chitty, Pl. 576, note *a*.

WITNESS (Anglo-Saxon *witan*, to know). One who testifies to what he knows. One who testifies under oath to something which he knows at first hand. 1 Greenl. Ev. §§ 98, 328.

One who is called upon to be present at a transaction, as, a wedding, or the making of a will. When a person signs his name to a written instrument to signify that the same was executed in his presence, he is called an attesting witness.

The principal rules relating to witnesses are the same in civil and in criminal cases, and the same in all the courts, as well in those various courts whose forms of proceeding are borrowed from the civil law, as in those of the common law; 3 Greenl. Ev. §§ 249, 402; 2 Ves. Ch. 41; Dwight v. Pomeroy, 17 Mass. 303, 9 Am. Dec. 148. There is no presumption that a witness will or will not speak the truth; Chicago U. T. Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; State v. Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575; State v. Halverson, 103 Minn. 265, 114 N. W. 957, 14 L. R. A. (N. S.) 947, and note, 123 Am. St. Rep. 326; *contra*, Cornwall v. State, 91 Ga. 280, 18 S. E. 154; State v. Jones, 77 N. C. 520. In California there is a statutory presumption that a witness, uncontradicted, tells the truth; Code Civ. Proc. § 1847; and this requires an instruction to the jury to that effect; Fries v. American Lead Pencil Co., 141 Cal. 612, 75 Pac. 164. See BIAS.

AS TO THE COMPETENCY OF WITNESSES. The question of the competency of a witness is for the court, and not for the jury; State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605; State v. Doyle, 107 Mo. 37, 17 S. W. 751; Mead v. Harris, 101 Mich. 585, 60 N. W. 284; and the determination, being of a matter of fact, is not, as a matter of principle, reversible; Freeny v. Freeny, 80 Md. 406, 31 Atl. 304; Com. v. Robinson, 165 Mass. 426, 43 N. E. 121; and an objection to competency is not necessarily waived if not taken before his examination in chief; Hill v. Postley, 90 Va. 200, 17 S. E. 946.

All persons, of whatever nation, may be witnesses; Bacon, Abr. *Evidence* (A). But in saying this we must, of course, except such as are excluded by the very definition of the term; and we have seen it to be essential that a witness should qualify himself by taking an oath. Therefore, all who cannot understand the nature and obligation of an oath, or whose religious belief is so defective as to nullify and render it nugatory, or whose crimes have been such as to indicate an extreme insensibility to its sanctions, are excluded. And, accordingly, the following classes of persons have been pronounced by the common law to be incompetent.

Infants so young as to be unable to appreciate the nature and binding quality of an oath. A child under the age of fourteen is presumed incapable until capacity be shown, but the law fixes no limit of age which will of itself exclude. Whenever a child displays sufficient intelligence to observe and to narrate, it can be admitted to testify; 7 C. & P. 320; McGuff v. State, 88 Ala. 151, 7 South. 35, 16 Am. St. Rep. 25; Com. v. Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709. A child five years old has been admitted to testify; 1 Greenl. Ev. § 367; 3 C. & P. 598; Com. v. Hutchinson, 10 Mass. 225; State v. Juneau, 88 Wis. 180, 59 N. W. 580, 24 L. R. A. 857, 43 Am. St. Rep. 877; Wheeler v. U. S., 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244. But if the child is not sufficiently instructed on this "point," the trial may be put off, in order to give the necessary instruction; 2 Leach, C. C. 86; but only in the discretion of the court; 2 C. & K. 246. The law presumes that all witnesses tendered in a court of justice are not only competent but credible. If a witness is incompetent, this must be shown by the party objecting to him; if he is not credible, this must be shown either from his examination, or by impeaching evidence *aliunde;* 1 Whart. Ev. § 392.

Idiots, lunatics, intoxicated persons, and, generally, those who labor under such privation or imbecility of mind that they cannot understand the nature and obligation of an oath. The competency of such is restored with the recovery or acquisition of this power; Livingston v. Kiersted, 10 Johns. (N. Y.) 362; Evans v. Hettich, 7 Wheat. (U. S.) 453, 5 L. Ed. 496; but the question of their credibility should be left to the jury; Walker v. State, 97 Ala. 85, 12 South. 83. And so a lunatic in a lucid interval may testify; 1 Greenl. Ev. § 365; even though an inmate of an insane asylum; State v. Brown, 2 Marvel (Del.) 380, 36 Atl. 458 (where the testimony was admitted by a divided court); Pittsburgh & W. Ry. Co. v. Thompson, 82 Fed. 720, 27 C. C. A. 333; or one who has been adjudged insane; Wright v. Exp. Co., 80 Fed. 85; and the question whether a lunatic has sufficient understanding to testify is to be determined by the court; District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, where it was said that the rule as laid down in Reg. v. Hill, 5 Cox C. C. 259, "has never been overruled." Persons deaf and dumb from their birth are presumed to come within this principle of exclusion until their competency is shown; 1 Greenl. Ev. § 366; but such a person is not deemed to be an idiot; State v. Howard, 118

Mo. 127, 24 S. W. 41. A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; Steph. Ev. art. 107. See Com. v. Casey, 11 Cush. (Mass.) 417, 59 Am. Dec. 150. A person in a state of intoxication cannot be admitted as a witness; Gebhart v. Shindle, 15 S. & R. (Pa.) 235. See Hartford v. Palmer, 16 Johns. (N. Y.) 143. Deficiency in perception must go to the incapacity of perceiving the matter in dispute, in order to operate as an exclusion; hence a blind man can testify to what he has heard, and a deaf man to what he has seen; 1 Whart. Ev. § 401.

Such as are insensible to the obligation of an oath, from defect of religious sentiment or belief. Atheists, and persons disbelieving in any system of divine rewards and punishments, are of this class, and are at common law incompetent as witnesses; Bull. N. P. 292. See 1 Atk. 21; Butts v. Swartwood, 2 Cow. (N. Y.) 431, 433, n.; Arnold v. Arnold's Estate, 13 Vt. 362; Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541; Smith v. Coffin, 18 Me. 157. It is reckoned sufficient qualification in this particular if one believe in a God and that he will reward and punish us according to our deserts. It is enough to believe that such punishment visits us in this world only; 1 Greenl. Ev. § 369; Blair v. Seaver, 26 Pa. 274; Brock v. Milligan, 10 Ohio, 121; Atwood v. Welton, 7 Conn. 66; People v. McGarren, 17 Wend. (N. Y.) 460; State v. Belton, 24 S. C. 185, 58 Am. Rep. 245; see 3 Tayl. Ev. 9th ed. 910, where the cases are collected.

It matters not, so far as mere competency is concerned, that a witness should believe in one God, or in one God rather than another, or should hold any particular form of religious belief, provided only that he brings himself within the rule above laid down. And, therefore, the oath may be administered in any form whatever, and with any ceremonies whatever, that will bind the conscience of the witness; 1 Greenl. Ev. § 371; 1 Sm. L. Cas. 739. See Oath. By statute in England and in most of the states, religious disbelief no longer disqualifies, provision being made for an affirmation instead, and the witness, if testifying falsely, being subject to the penalties of perjury; Whart. Ev. § 395, n. See, generally, 1 Sm. L. Cas. 737, where, under such a statute, the witness testified that he had no belief in a supreme being or a future state of rewards and punishment, it was error to charge that this might be considered as affecting his credibility; Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182.

Persons infamous, i. e. those who have committed and been legally convicted of crimes the nature and magnitude of which show them to be insensible to the obligation of an oath. See Infamy. Such crimes are enumerated under the heads of treason, felony, and the *crimen falsi;* 1 Greenl. Ev. § 373; 2 Dods. Adm. 191. See Crimen Falsi.

The only method of establishing infamy is by producing the record of conviction. It is not even sufficient to show an admission of guilt by the witness himself; People v. Whipple, 9 Cow. (N. Y.) 707; Com. v. Bonner, 97 Mass. 587; but in England a witness may be asked whether he has been convicted, etc.; Steph. Ev. art. 130. Pardon or the reversal of a sentence restores the competency of an infamous person, except where this disability is annexed to an offence by a statute; 1 Greenl. Ev. § 378; 2 Hargr. Jurid. Arg. 221. See U. S. v. Hall, 53 Fed. 352; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Martin v. State, 21 Tex. App. 1, 17 S. W. 430; even if granted for the reason, among others, that his testimony was desired by the government in a cause then pending; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077. See Pardon.

This exclusion on account of infamy or defect in religious belief applies only where a person is offered as a witness; 2 Q. B. 721. But wherever one is a party to the suit, wishing to make affidavit in the usual course of proceeding, and, in general, wherever the law requires an oath as the condition of its protection or its aid, it presumes conclusively and absolutely that all persons are capable of an oath; Skinner v. Perot, 1 Ashm. (Pa.) 57. There is a conflict of authority as to how far a foreign judgment of an infamous offence disqualifies a witness. In New York, he is not disqualified; National T. Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632. In Pennsylvania, he is held not to be disqualified unless the record of conviction be produced, and not then if he has served out his term of imprisonment; Com. v. Hanlon, 3 Brewst. (Pa.) 461. In Massachusetts, the record is admitted merely to affect his credibility; Com. v. Green, 17 Mass. 515. In New Hampshire, the witness will be disqualified if the laws of his own state make him so, and the crime, if committed in New Hampshire, would have had the same effect; Chase v. Blodgett, 10 N. H. 22. In Campbell v. State, 23 Ala. 44; and Uhl v. Com., 6 Gratt. (Va.) 706; the record is rejected altogether; but not so in State v. Candler, 10 N. C. 393. He is disqualified in Nevada; State v. Foley, 15 Nev. 64, 37 Am. Rep. 458. See Whart. Confl. Laws §§ 107, 769. A conviction and sentence can have no such effect beyond the limits of the state in which the judgment is rendered unless the statute of another state give such effect to them; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. If a statute permits a defendant in a criminal case to testify on his own behalf, he may do so, though infamous, but not against a co-defendant; State v. Peterson, 35 S. C. 279, 14 S. E. 617.

When it is said that all persons may be witnesses, it is not meant that all persons

may testify in all cases. The testimony of such as are generally qualified and competent under other circumstances or as to other matters is sometimes excluded out of regard to their special relations to the cause in issue or the parties, or from some other circumstances not working a general disqualification.

Parties to the record were not competent witnesses, at common law, for themselves or their co-suitors. Nor were they compellable to testify for the adverse party; 7 Bingh. 395; Frear v. Evertson, 20 Johns. (N. Y.) 142; but they were competent to do so; although one of several co-suitors could not thus become a witness for the adversaries without the consent of his associates; Bridges v. Armour, 5 How. (U. S.) 91, 12 L. Ed. 64; Evans v. Gibbs, 6 Humph. (Tenn.) 405. Regard was had not merely to the nominal party to the record, but also to the real party in interest; and the former was not allowed to testify for the adverse side without the consent of the latter; Bradlee v. Neal, 16 Pick. (Mass.) 501; Frear v. Evertson, 20 Johns. (N. Y.) 142. Persons who have no interest in the matter in controversy are not incompetent merely because parties to the action; Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

In some jurisdictions a party had the right of compelling his adversary to answer interrogatories under oath, as also to appear and testify. And, in equity, parties could require and use each other's testimony; and the answer of a defendant as to any matters stated in the bill was evidence in his own favor; 1 Greenl. Ev. § 329; 2 Story, Eq. Jur. 1528.

There were other exceptions to this rule. Cases where the adverse party had been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence than that of the complainant himself could be had of the amount of damage,—cases, also, where evidence of the parties was deemed essential to the purposes of public justice, no other evidence being attainable,—were exceptions; 1 Greenl. Ev. § 348; Herman v. Drinkwater, 1 Greenl. (Me.) 27.

On this same principle, *persons directly interested in the result of the suit* (see INTEREST), or in the record as an instrument of evidence, were excluded; and where the event of the cause turned upon a question which if decided one way would have rendered the party offered as a witness liable, while a contrary decision would have protected him, he was excluded; Stark. Ev. 1730. But to this rule, also, there were exceptions: Stark. Ev. 1731; of which the case of agents testifying as to matters to which their agency extended, forms one; 1 Greenl. Ev. § 386; so also an employé of a charitable institution; Appeal of Combs, 105 Pa. 155; or a taxpayer of a town to which a library was given by will; Hitchcock v. Shaw, 160 Mass. 140, 35 N. E. 671; were not incompetent for interest.

In both England and the United States, the rules of exclusion on the ground of interest have been abrogated. The object of the statutes has been to remove all artificial restraints to competency so as to put the parties upon a footing of equality with other witnesses, both in their admissibility to testify for themselves, and in their being compellable to testify for others; Texas v. Chiles, 21 Wall. (U. S.) 488, 22 L. Ed. 650. In most of the statutes, however, cases are excepted where a suit is brought by or against executors or administrators. In these cases where one of the parties to a contract is dead, the survivor is not permitted to testify; Karns v. Tanner, 66 Pa. 297; but this exception does not exclude directors or stockholders of a corporation which is a party, when the other party is dead; Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654; Ullman v. Loan Co., 96 Ga. 625, 24 S. E. 409. But the exception does not make the surviving party incompetent, it only precludes him from testifying to communications with the deceased; Kelton v. Hill, 59 Me. 259; Stonecipher v. Hall, 64 Ill. 121. The test is the nature of the communications. The witness cannot testify to personal communications with the deceased party; Hatch v. Peugnet, 64 Barb. (N. Y.) 189; Richardson v. Haney, 76 Ia. 101, 40 N. W. 115; Blackwell's D. T. Co. v. McElwee, 100 N. C. 150, 5 S. E. 907; but it has been held that if documents can be proved by independent evidence, the case is not within the exception; Moulton v. Mason, 21 Mich. 364. A husband may testify to conversation between his wife and the decedent, in which he took no part; Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701; but one who is interested in the contest of a will cannot testify as to conversations between testator and another in which the witness took no part; In re Palmateer's Will, 78 Hun 43, 28 N. Y. Supp. 1062. If the suit is brought against co-defendants, of whom only one is dead, when the contract was made either with the living co-defendants, or with the living and dead concurrently, the case is not within the exception; Doody v. Pierce, 9 Allen (Mass.) 144; Hubbell v. Hubbell, 22 Ohio St. 208. But where an action was brought against three partners, one of whom subsequently died, and his executors were substituted, the plaintiff is not a competent witness as to anything which occurred during the lifetime of the deceased partner although the latter may have taken no part in the contract on which the action was brought; Brady v. Reed, 87 Pa. 111. In an action by a surviving partner on a book account, the defendant is competent to testify to payments by him to the deceased partner; Wood v. Stewart, 9 Ind. App. 321, 36 N. E. 658.

Under these statutes, which confine the exception to suits against executors and ad-

ministrators, the death of an agent of one party, through whom the contract was made, does not prevent the surviving party from testifying to the contract; American L. I. & T. Co. v. Shultz, 2 Wkly. Notes Cas. (Pa.) 665; but under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him; Cornell v. Barnes, 26 Wis. 473. See Sprague v. Bond, 113 N. C. 551, 18 S. E. 701. An agent who makes a sale of goods for his principal is not incompetent to testify to the circumstances of the transaction because of the death of the buyer; Shaub v. Smith, 50 Ohio St. 648, 35 N. E. 503. Unless the exception expressly covers all suits against executors and administrators, it does not exclude the plaintiff from proving matters occurring since the death of the party of whom the defendant is executor; Brown v. Brown, 48 N. H. 90. The exception in statutes where the exclusion relates only to the surviving party in contracts does not include torts; Entwhistle v. Feighner, 60 Mo. 214. When the deposition of a deceased party afterwards is put in evidence, the other party being still living, such other party should be admitted as a witness in reply; Monroe v. Napier, 52 Ga. 385; Stone v. Hunt, 114 Mo. 66, 21 S. W. 454. See, generally, Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836. As to exclusion of testimony against a decedent on the ground of interest, see Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836.

Husband and wife were excluded at common law from giving testimony for or against each other when either was a party to the suit or interested. And neither was competent to prove a fact directly tending to criminate the other. This rule was founded partly on their identity of interest, and partly, perhaps chiefly, on the policy of the law which aims to protect the confidence between man and wife that is essential to the comfort of the married relation, and, through that, to the good order of society. Whether or not the disability of husband or wife may be removed by consent of the other is matter of dispute; 3 C. & P. 551; 1 Greenl. Ev. § 340. In England, by stat. 16 & 17 Vict. c. 83, consent removes the disability; Whart. Ev. § 428. It is not removed by death, nor by the dissolution of the marriage relation, so far as respects information derived confidentially during marital intercourse; Ryan v. Follansbee, 47 N. H. 100. She may, however, testify as to matters which transpired subsequently to a divorce; Long v. State, 86 Ala. 36, 5 South. 443.

The wife of a member of a partnership is not competent as a witness in a suit against the partnership; McEwen v. Shannon & Co., 64 Vt. 583, 25 Atl. 661.

The rule is not ordinarily affected by statutes permitting husband or wife to testify for or against each other; People v. Reagle, 60 Barb. (N. Y.) 527; nor does the statute as to the evidence of parties in interest generally affect their common-law incapacity to testify; Lucas v. Brooks, 18 Wall. (U. S.) 452, 21 L. Ed. 779.

Some exceptions to this rule; 1 Greenl. Ev. § 343; are admitted out of necessity for the protection of husband and wife against each other, and for the sake of public justice, as in prosecutions for violence committed by either of them upon the other. See 1 Greenl. Ev. § 334; Ry. & M. 253; Bassett v. U. S., 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762. It is not error to receive the testimony of the wife of a person on trial for murder by consent of his counsel if she is advised by the court that she need not testify unless she desires to do so; Benson v. U. S., 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

Parties to negotiable instruments are, in some jurisdictions held *incompetent to invalidate these instruments* to which they have given currency by their signature. Such seems to be the prevailing, but not universal, rule in the United States; while in England such testimony is admitted, the objection going only to its credibility; 1 Greenl. Ev. § 383; 1 Term 296; Dickinson v. Dickinson, 9 Metc. (Mass.) 471; Harding v. Mott, 20 Pa. 469; Pecker v. Sawyer, 24 Vt. 459.

And, finally, there are certain *confidential communications;* 1 Greenl. Ev. § 236; to which the recipient of them, from general considerations of policy, is not allowed to testify. But the privilege may be waived by the party entitled to claim the benefit of it, as when two physicians were in consultation, a party by calling one waives the right to object to the testimony of the other against her; Morris v. Ry. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675. See CONFIDENTIAL COMMUNICATIONS.

Judges are not compellable to testify to what occurred in their consultations; but they may be examined as to what took place before them on the trial in order to identify the case, or prove the testimony of a witness; 1 Whart. Ev. § 600; see Huff v. Bennett, 4 Sandf. (N. Y.) 120; but in England there is a doubt as to the latter proposition; Steph. Ev. art. 111; and it is said that in England a barrister cannot be compelled to testify as to what he said in court in his character of barrister; *id.*

Whether *attorneys and counsel* are disqualified as witnesses in a trial in which they participate has always been a question of difficulty, and it can hardly be said that it is settled upon any principle. Of course, the primary disqualification of interest has become obsolete by the general abolition of rules for the disqualification of witnesses upon that ground. There remains, however, an objection which is based upon public policy and this has been generally recognized and frequently expressed by courts as well as by

members of the bar. Strong expressions of disapproval of the practice by courts are found, by Lewis, J., in Mishler v. Baumgardner, 4 Clark (Pa.) 266, where he says that in 25 years experience he has seldom known an attorney received as a witness for his client on a disputed point without loss of reputation, and to some extent, reproach upon the profession; by Sanford, J., in Little v. Keon, 1 Code Rep. (N. Y.) 4, who, while conceding that there is no legal objection, assumes that the practice will be confined to case of unforeseen necessity, and that the evil will work its own cure by the loss in character of those who indulge in it; by Lawrence, J., in Ross v. Demoss, 45 Ill. 447, who considers that one occupying the attitude of both witness and attorney subjects his testimony to criticism if not suspicion; and in an anonymous case, 5 West L. J. 457, the court said that the exclusion should rest upon peculiar grounds, "not because his integrity may be exposed to temptation, but because it will be exposed to suspicion." Porter, J., in Cox v. Williams, 5 Mart. N. S. (La.) 139, approved a prohibitory statute on the subject as being doubtless based upon the idea that the attorney could not be safely entrusted to testify for his client because of his natural identification with him in feeling if not in interest. The result of the controversy on the subject is stated to be that the force of the objection has been realized, but the courts have declined as a general thing to lay down a prohibitory rule; Wigm. Ev. § 1911. It is, however, suggested that this is due doubtless to the fact that the evil would arise rather from an inveterate custom than from casual instances, and that the strong expressions of the court upon the subject have sufficed to prevent a general indulgence in the practice.

Another reason sometimes given for the exclusion of counsel as a witness is that, if he afterward argues the case, his statements as a witness and his arguments as counsel might be confused in the minds of the jurors and the latter thus acquire undue weight; this objection was strongly stated in argument in 4 Dowl. & L. 395. But this rule was not followed in England, and those cases were discredited in 1 E. & B. 11, where the right of a party to testify and to argue his own case was held not inconsistent, though the practice was disapproved as "contrary to good taste and good feeling" and "revolting to the minds of the jury." This rule was not expressly but inferentially applied to counsel as witness, but the court said: "If the practice does gain ground to a degree seriously injurious, the judges have power to make a rule against it." In Canada, counsel was not allowed as witness in 3 Kerr 398; 4 U. C. Q. B. 96; but it was permitted in 2 Pugs. 462, with a disapproval of the case in 3 Kerr 398, and also with the expression of an opinion that the proceeding was indecent and should be discouraged, and in 39 U. C. Q. B. 452, the case in 4 U. C. Q. B. 96, and one which followed it (*id.* 189), were overruled and the testimony of counsel admitted, though the proceeding was characterized as not "desirable." In some American cases the testimony was held to be admissible; Madden v. Farmer, 7 La. Ann. 580 (but not as full proof); Potter v. Ware, 1 Cush. (Mass.) 519 (only proper in rare cases). In Folly v. Smith, 12 N. J. L. 139; Tullock v. Cunningham, 1 Cow. (N. Y.) 256, and Caniff v. Myers, 15 Johns. (N. Y.) 246, he was held competent to prove his power of attorney. In Mott v. Bernard, 97 Mo. App. 265, 70 S. W. 1093, he was allowed to prove a paper even where there was a contingent fee. So in Abbott v. Striblen, 6 Ia. 191, he was held competent to prove a copy of a paper and the loss of the original, and in Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 3 S. E. 420, he was held competent, but not compellable, under a statute to that effect. In Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276, he was held competent, though acting upon a contingent fee, and in Hall v. Renfro, 3 Metc. (Ky.) 51, he was held competent, but the practice was apparently disapproved. In some cases the attorney is held not to be in any case a competent witness for his client; Pritchard v. Henderson, 3 Pennewill (Del.) 128, 50 Atl. 217, where even one who was in his office and helped in the preparation of the case was incompetent; also 72 Me. 566, and 6 N. H. 580, in both of which there was a general rule of court forbidding the practice, and in Voss v Bender, 32 Wash. 566, 73 Pac. 697, such a rule, being challenged, was held proper. In other cases it has been held that there was no law to prevent such testimony, but the practice was almost in every case disapproved; Thresher v. Bank, 68 Conn. 201; State v. Seymour, 7 Idaho 548, 63 Pac. 1036; Wilkinson v. People, 226 Ill. 135, 80 N. E. 699; Frear v Drinker, 8 Pa. 520 (no law to forbid it, but a "highly indecent practice"); Bell v. Bell, 12 Pa. 235 (competent, though it is "commendable delicacy to withdraw from argument"); but in a later case the exclusion of the attorney as a witness was held reversible error, and it was said that "the question may therefore be considered as settled in England and Pennsylvania and also in Massachusetts," citing Potter v. Ware, 1 Cush. (Mass.) 519; Follansbee v. Walker, 72 Pa. 228, 13 Am. Rep. 671; and still later, where the witness was admitted, the court said that counsel "who has a just sense of propriety" should decline unless under absolute necessity, but there is no interest or policy of law to exclude him, and absolute duty may sometimes be disclosed which he cannot disregard; Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; Mealer v. State, 32 Tex. Cr. Rep. 102, 22 S. W. 142 (counsel was not disqualified); but in Spencer v. Kinnard, 12 Tex.

180, such testimony was said to be sometimes necessary, but only to be tolerated by the courts in "cases of pressing necessity." Other cases are Reid v. Colcock, 1 Nott & McC. (S. C.) 592, 9 Am. Dec. 729 (not disqualified, but "a matter of much delicacy"); McLaren v. Gillispie, 19 Utah 137, 56 Pac. 680 (competent, but he should not be "called unless indispensable and he should then withdraw from the case if possible with safety to the client's interest"); Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703 (necessary in some extreme cases, but ordinarily much to be regretted); Hardtke v. State, 67 Wis. 552, 30 N. W. 723 (where counsel for prosecution testified to an admission by defendant, "the propriety" of it was "very questionable"). In French v. Hall, 119 U. S. 152, 7 Sup. Ct. 170, 30 L. Ed. 375, it was said that while there is nothing in the policy of the law, as there is no positive enactment, to hinder the attorney from testifying, "in some cases it may be unseemly."

Persons in possession of secrets of state or matters the disclosure of which would be prejudicial to the public interests, are not allowed to testify thereto; 1 Greenl. Ev. § 250. See SECRETS OF STATE.

Grand jurors and persons present before a grand jury; 1 Greenl. Ev. § 252; are not permitted to testify to the proceedings had before that body; 1 Phill. Ev. 177. See CONFIDENTIAL COMMUNICATIONS.

THE MEANS OF SECURING THE ATTENDANCE AND TESTIMONY OF WITNESSES. In general, all persons who are competent may be compelled to attend and testify.

A statute providing that judges shall appoint expert witnesses changes the character of criminal procedure and endangers the constitutional safe-guards by giving undue weight to the testimony of the experts appointed by the court and the statute is invalid; People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688.

As to compelling expert witnesses to attend, see EXPERTS.

Provision has been made by statute, in most if not in all of the states, for the case of persons living at an inconvenient distance from the place of trial, as well as for the case of such as are sick or about to leave the state, or otherwise likely to be put to great inconvenience by a compulsory attendance, and also for such as are already in a foreign jurisdiction, by allowing the taking of their deposition in writing before some magistrate or officer near at hand, to be read at the trial; 1 Greenl. Ev. § 321.

In criminal cases, all persons are compellable to appear and testify without any previous tender of their fees; and any bystander in court may be compelled to testify without a previous summons or tender of fees; 1 Greenl. Ev. § 311; Ex parte Chamberlain, 4 Cow. (N. Y.) 49; Robinson v. Trull, 4 Cush. (Mass.) 249.

Where a witness before a police court was ordered to give surety for his appearance at the trial, and in default thereof was detained in jail for eighty days, it was held that he was entitled to witness fees as "in attendance" upon the court for that period; Kirke v. Strafford Co., 76 N. H. 181, 80 Atl. 1046, Ann. Cas. 1912C, 807.

But in civil suits which are between man and man, a party is allowed to compel the attendance and testimony of a witness only on condition of a prepayment or tender of his fees for travel to the place of trial, and for one day's attendance there. This seems, as a general rule, to be the least that can be tendered; 1 Greenl. Ev. § 310; Howland v. Lenox, 4 Johns. (N. Y.) 311; White v. Judd, 1 Metc. (Mass.) 293; Hutchins v. State, 8 Mo. 288; Gunnison v. Gunnison, 41 N. H. 121, 77 Am. Dec. 764. See Bonner v. People, 40 Ill. App. 628; and a witness who attends without the payment or tender of his fees, waives their tender or payment in advance; Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262. In the courts of the United States, as well as in England, a witness may require his fees for travel both ways; 1 Greenl. Ev. § 310; 6 Taunt. 88. And in civil cases a person cannot be compelled to testify, although he chance to be present in court, unless regularly summoned and tendered his fees; 1 Phill. Ev. 338. Being in attendance in obedience to a summons, he may, nevertheless, refuse to testify from day to day, unless his daily fees are paid or tendered; 2 Phill. Ev. § 376. Whether or not he may refuse to *attend* from day to day without the prepayment or tender of his daily fees, is a matter about which there are different decisions; Mattock v. Wheaton, 10 Vt. 493; 14 East 15.

A witness may maintain an action against the party summoning him for his fees; Stark. Ev. 1727. Federal courts allow mileage and *per diem* fees, although no subpœna was issued; Pinson v. R. Co., 54 Fed. 464; Eastman v. Sherry, 37 Fed. 844. As to additional compensation to experts, see EXPERTS; Dixon v. People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116.

Witnesses are also compellable to produce papers in their custody to which either party has a right as evidence, on the same principle that they are required to testify what they know; 1 Greenl. Ev. § 558. See DISCOVERY; SUBPŒNA DUCES TECUM.

This rule as to title-deeds appears to be peculiar to England. In this country, it is said that a witness, not a party, may be compelled to produce any of his private papers. Whether the court, on inspection, will require them to be put in evidence may be a matter of discretion; Steph. Ev. art. 118, n. See Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

The attendance of witnesses is ordinarily

procured by means of a writ of subpœna; sometimes, when they are in custody, by a writ of *habeas corpus ad testificandum;* and sometimes, in criminal cases, by their own recognizance, either with or without sureties; 1 Greenl. Ev. §§ 309, 312. If a witness disobey the summons, process of attachment for contempt will issue to enforce his attendance and an action also lies against him at common law; 1 Greenl. Ev. § 319; 6 C. B. 703.

Nor can any third party intervene to prevent the attendance of a witness. Neither can he take advantage of a witness's attendance at the place of trial, to arrest him on civil process. See PRIVILEGE FROM ARREST.

Where a non-resident is in attendance on a trial in a circuit court of the United States as a witness in a case therein pending, he is privileged from service of summons in a civil action issued from a state court of such state, and the privilege extends to a reasonable time after the disposition of the cause to enable him to return to his own state; Atchison v. Morris, 11 Fed. 582; see In re Healey, 53 Vt. 694, 38 Am Rep. 713; and this is the general rule.

As to the EXAMINATION OF WITNESSES. In the common-law courts, examinations are had *viva voce*, in open court, by questions and answers. The same course is now adopted to a great extent in equity and admiralty courts, and other proceedings according to the forms of the civil law. But a usual method of examining in these last-named courts, as also in the court of claims, is by deposition taken in writing out of court; 2 Story, Eq. Jur. § 1527; 3 Greenl. Ev. § 251.

A trial court may ask a witness such questions as it deems necessary for its own information and that of the jury; State v. Nickens, 122 Mo. 607, 27 S. W. 339.

The court permitted the state to ask an extremely ill witness a single question and no more; accused was not refused a cross-examination, but it was held that he could not be compelled to take the risk to the witness of doing so, with perhaps fatal result, and a conviction was reversed; Wray v. State, 154 Ala. 36, 45 South. 697, 129 Am. St. Rep. 18, 16 Ann. Cas. 362.

On motion, in civil and criminal cases, witnesses will generally be excluded from the court-room while others are undergoing examination in the same case; this, however, is not matter of right, but within the discretion of the court; 1 Greenl. Ev. § 432; 4 C. & P. 585; Nelson v. State, 2 Swan (Tenn.) 237. This may extend to a medical expert witness; Paul v. Ry. Co., 82 Mo. App. 500; it is too late if the request be made after some testimony has been received; Pritchard v. Henderson, 3 Pennewill 128, 50 Atl. 217; some of the cases seem to regard exclusion as the usual practice; Colbert v. Garrett, 57 S. W. 853; Timberlake v. Thayer, 76 Miss. 76, 23 South. 767; Sharpton v. Ry. Co., 72 S. C. 162, 51 S. E. 553. If a witness violates an order of exclusion, the party calling him will not be deprived of his evidence; Murray v. Allerton, 3 Neb. (Unoff.) 291, 91 N. W. 518; it affects only his credit; Ferguson v. Brown, 75 Miss. 214, 21 South. 603.

Witnesses are required to testify from their own knowledge and recollection. Yet they are permitted to refresh their memory by reference, while on the stand, to papers written at or very near the time of the transaction in question. See MEMORANDUM.

Being once in attendance, a witness may, in general, be compelled to answer all questions that may legally be put to him. See EVIDENCE. Yet there are exceptions to this rule. He is not compellable where the answer would have a tendency to expose him to a penal liability or any kind of punishment, or to a criminal charge or a forfeiture of his estate; 1 Greenl. Ev. § 451. See PRIVILEGE; INCRIMINATION.

The court, it is said, decides as to the tendency of the answer, and will instruct the witness as to his privilege; Com. v. Shaw, 4 Cush. (Mass.) 594, 50 Am. Dec. 813; Close v. Olney, 1 Denio (N. Y.) 319. It has been held that the question whether an answer would have this tendency is to be determined by the oath of the witness; 17 Jur. 393. And in point of fact, from the necessity of the case, it is a matter which the witness may be said practically to decide for himself. The witness may answer if he chooses; and if he do answer after having been advised of his privileges, he must answer in full; and his answer may be used in evidence against him for all purposes; People v. Mather, 4 Wend. (N. Y.) 252, 21 Am. Dec. 122; Foster v. Pierce, 11 Cush. (Mass.) 437, 59 Am. Dec. 152; Chamberlain v. Willson, 12 Vt. 491, 36 Am. Dec. 356. It is held that a defendant who voluntarily offers himself as a witness on his own behalf waives this privilege of refusing to answer a question because it may tend to criminate him; State v. Thomas, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351. The objection that the answer may tend to criminate can only be made by the witness himself; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698.

Whether a witness be compellable to answer to his own degradation or infamy is a point as to which some distinctions are to be taken; a witness cannot refuse to testify simply because his answer would *tend* to disgrace him; it must be seen to have that effect certainly and directly; 1 Greenl. Ev. § 456. He cannot, it would seem, refuse to give testimony which is material and relevant to the issue, for the reason that it would disgrace him, or expose him to civil liability. A witness is not the sole judge whether a question put to him, if answered, may tend to criminate him. The court must see from the circumstances of the case that

there is reasonable ground to apprehend danger to the witness from his being compelled to answer, in order to excuse him. But if the fact once appear that the witness is in danger, great latitude will be allowed him in judging for himself the effect of any particular question; 26 Ch. Div. 294; 1 Mood. & M. 108; People v. Mather, 4 Wend. (N. Y.) 250, 21 Am. Dec. 122; State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699. See In re Taylor, 8 Misc. 159, 28 N. Y. Supp. 500. A witness may, however, be compelled to testify concerning his criminal acts, when prosecution therefor is barred; Childs v. Merrill, 66 Vt. 302, 29 Atl. 532; but only after it is shown affirmatively that no prosecution is pending against him; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781.

But it would appear that he may refuse where the question (being one put on cross-examination) is not relevant and material, and does not in any way affect the credit of the witness; 3 Camp. 519; Clement v. Brooks, 13 N. H. 92; Smith v. Castles, 1 Gray (Mass.) 108. Whether a witness, when a question is put on the cross-examination which is not relevant and material to the issue, yet goes to affect his credit, will be protected in refusing to answer, simply on the ground that his answer would have a direct and certain effect to disgrace him, is a matter not clearly agreed upon. There is good reason to hold that a witness should be compelled to answer in such a case; 1 C. & P. 85; 2 Swanst. 216; 2 Camp. 637; Respublica v. Gibbs, 3 Yeates (Pa.) 429. But the whole matter is one that is largely subject to the discretion of the courts; 1 Greenl. Ev. §§ 431, 449.

There seems no doubt that a witness is in no case competent to allege his own turpitude, or to give evidence which involves his own infamy or impeaches his most solemn acts, if he be otherwise qualified to testify; Stark. Ev. 1737.

As to the protection to witnesses against self-incrimination, see INCRIMINATION; PRODUCTION OF DOCUMENTS; SEARCH.

The course of examination is, first, a direct examination by the party producing the witness; then, if desired, a cross-examination by the adverse party, and a re-examination by the party producing; 1 Starkie, Ev. 123, 129. As to the *direct* examination, the general rule is that leading questions, *i. e.* such as suggest the answer expected or desired, cannot be put to a witness by the party producing him. But this rule has some reasonable exceptions; 1 Greenl. Ev. § 434. See St. Paul F. & M. Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137; Huntsville B. L. & M. S. Ry. Co. v. Corpening, 97 Ala. 681, 12 South. 295; as, where a witness is hostile, leading questions are proper; Meixsell v. Feezor, 43 Ill. App. 180; McBride v. Wallace, 62 Mich. 451, 29 N. W. 75; also when the answers of a witness have taken by surprise the party calling him; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. A court of error will not reverse because a leading question was allowed, Farmers' Mut. F. Ins. Co. v. Blair, 87 Pa. 124; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Van Doren v. Jelliffe, 1 Misc. 354, 20 N. Y. Supp. 636; *contra*, Coon v. People, 99 Ill. 368, 39 Am. Rep. 28. As the allowance of leading questions is largely in the discretion of the trial judge, the appellate court will reverse for such cause only where there has been an abuse of discretion; Badder v. Keefer, 91 Mich. 611, 52 N. W. 60. See King v. R. Co., 75 Hun 17, 26 N. Y. Supp. 973; Proper v. State, 85 Wis. 615, 55 N. W. 1035; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; State v. Pugsley, 75 Ia. 742, 38 N. W. 498. See LEADING QUESTION.

Leading questions, however, are allowed upon cross-examination. See CROSS-EXAMINATION.

The right of re-examination extends to all topics upon which a witness has been cross-examined; the witness cannot at this stage, without permission of the court be questioned as to any new facts unconnected with the subject of the cross-examination and not tending to explain it; 1 Greenl. Ev. § 467.

But the court may in all cases permit a witness to be called either for further examination in chief, or for further cross-examination; Steph. Ev. art. 126; and may itself recall a witness at any stage of the proceedings, and examine or cross-examine, at its discretion; 6 C. & P. 653. If new matter is introduced on the re-examination, by permission of the court, the adverse party may further cross-examine upon that matter; Steph. Ev. art. 127.

As a general rule no one can impeach his own witness; Pollock v. Pollock, 71 N. Y. 137. This rule of the common law applies only to one who has given evidence material to the issue; 7 C. & P. 64; 2 Moo. & R. 273. It rests on the theory that a party calling the witness guarantees his veracity; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. Rep. 349; Pollock v. Pollock, 71 N. Y. 137; but this reasoning has been characterized as artificial and unsatisfactory; 13 Harv. L. Rev. 60, citing 11 Am. L. Rev. 261. But a witness summoned by one party and examined by him on an immaterial point may be impeached by him if called by the other party as a general witness; Fall Brook C. Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095, 43 L. R. A. 676, 70 Am. St. Rep. 466; though in that state the common law rule against impeaching one's own witness remains in force; Coulter v. Exp. Co., 56 N. Y. 585; but this rule has been largely altered by statute; 13 Harv. L. Rev. 60. So a party may contradict his own witness when not selected by him but by the law as necessary to prove the particular fact; Morris v.

Guffey, 188 Pa. 534, 41 Atl. 731; Crocker v. Agenbroad, 122 Ind. 587, 24 N. E. 169; and a party is sometimes, in cases of hardship, permitted to contradict him by other testimony; 1 Stark. Ev. 147; 1 Greenl. Ev. § 442. And a party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate him, as to previous declarations alleged to have been made by him inconsistent with his testimony, the object being to prove the witness's recollection, and to lead him, if mistaken, to review what he has said; 1 Whart. Ev. § 549. See *infra*.

"Adverse" witness, in the sense of the statutes allowing contradiction by the party calling him, means really "hostile" and not merely "unfavorable"; Fisher v. Hart, 30 W. N. C. (Pa.) 208; he must have "'proved adverse in the sense of showing a mind hostile to the party calling him"; 5 C. B. N. S. 786, 788, where the subject is discussed at length by all the judges, with the curious result that Cockburn, C. J., having decided as above stated, and his associates having affirmed his decision, he himself suggested a doubt arising out of the discussion, and concluded by saying that "without, therefore, actually dissenting from it, it is enough to say that I do not wholly concur in it." In L. R. 1 P. & D. 70, counsel said, in objecting to evidence contradicting a witness from the side which called him (a necessary witness—to a will): "He is not a hostile witness, for he gave his evidence fairly and with no *animus* against the plaintiff. He is an adverse witness, for he did not give the evidence which the plaintiff wished him to give; but that does not entitle the plaintiff to contradict him on a collateral matter." The court said: "The counsel is right in the distinction he draws between an adverse and hostile witness. A hostile witness is a witness who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court." See Tayl. Ev. (p. 1132 of 3d ed.) and § 1288. See also cases cited in 1 Rosc. N. P. Ev. 174.

The opinion of the trial judge as to whether a witness is hostile is conclusive; 5 C. B. (N. S.) 786; 16 Q. B. D. 681; where Coleridge, C. J., refused to look at an affidavit made by a witness to show that he was hostile, being of opinion that there was nothing in his demeanor or the way he gave his evidence to show that he was hostile, and this view was affirmed by full bench, on motion for new trial.

A report of an employé to his master may be called for to impeach the employer as witness; Freel v. Ry. Co., 97 Cal. 40, 31 Pac. 730.

The credit of an adversary's witness may be impeached by cross-examination, or by general evidence affecting his reputation for veracity (but not by evidence of particular facts which otherwise are irrelevant and immaterial), and by evidence of his having said or done something before which is inconsistent with his evidence at the trial. Also, of course, he may be contradicted by other testimony; 1 Greenl. Ev. § 401. But he cannot be contradicted as to collateral and irrelevant matter on which he was cross-examined; Kuhns v. Ry. Co., 76 Ia. 67, 40 N. W. 92; Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; State v. Ballard, 97 N. C. 443, 1 S. E. 685; Jones v. Lumber Co., 58 Ark. 125, 23 S. W. 679. In some states evidence may be given of a witness' general reputation (*q. v.*); People v. Mather, 4 Wend. (N. Y.) 257, 21 Am. Dec. 122; State v. Boswell, 13 N. C. 209; State v. Raven, 115 Mo. 419, 22 S. W. 376. But the testimony of a witness cannot be impeached by evidence of particular crimes; Lowery v. State, 98 Ala. 45, 13 South. 498; nor can a woman be impeached by evidence of her lack of chastity; People v. Mills, 94 Mich. 630, 54 N. W. 488. See IMPEACHMENT.

In order to test a witness' accuracy, veracity, or credibility, he may be cross-examined as to "his relations to either of the parties or the subject-matter in dispute; his interest, his motives, his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity; his means of knowledge and powers of discernment, memory, and description—may all be revelant." May's Steph. Ev. art. 129. But it has been said that questions otherwise irrelevant cannot be asked for the purpose of testing his moral sense; Com. v. Shaw, 4 Cush. (Mass.) 593. He cannot be discredited by asking him if he has not been impeached as a witness upon the trial of another action; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.

The essence of the right to refresh the memory of a witness by reference to a writing is that the matter so used be contemporaneous with the occurrence testified to; Putnam v. U. S., 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118; Maxwell v. Wilkinson, 113 U. S. 656, 5 Sup. Ct. 691, 28 L. Ed. 1037, in both of which the cases are collected. In the case first cited, a report of testimony given four months after the occurrence was not so contemporaneous and could not be used. In this case the exception, held by some courts to exist in the case of surprise to the party calling the witness, is discussed at length and the authorities critically examined and the exception disapproved. See note on use of paper to refresh memory; Republic F. Ins. Co. v. Weide, 14 Wall. (U. S.) 375, 20 L. Ed. 894. See MEMORANDUM.

Generally, where proof is to be offered that a witness has said or done something inconsistent with his evidence, a foundation must first be laid.

See CROSS-EXAMINATION.

In England and Massachusetts, by statute, the same course may be taken with a witness on his examination in chief, if the judge is of opinion that he is hostile to the party by whom he was called, and permits the question. Apart from statute such evidence has not generally been considered as admissible; May's Steph. Ev. art. 131; Coulter v. Express Co., 56 N. Y. 585; People v. Jacobs, 49 Cal. 384; if the sole effect is to discredit; but if the purpose be to show the witness he is in error, it is admissible; 15 Ad. & E. 378; Bullard v. Pearsall, 53 N. Y. 230.

Proof of declarations made by a witness out of court in corroboration of the testimony given by him at the trial is, as a general rule, inadmissible. See Fallin v. State, 83 Ala. 5, 3 South. 525; Thurmond v. State, 27 Tex. App. 347, 11 S. W. 451. But when a witness is charged with having been actuated by some motive prompting him to a false statement, or with having fabricated his story, it may be shown that he made similar statements before any such motive existed; Conrad v. Griffey, 11 How. (U. S.) 480, 13 L. Ed. 779; Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413. See State v. Rowe, 98 N. C. 629, 4 S. E. 506.

Evidence of general good reputation may be offered to support a witness, whenever his credit is impeached, either by general evidence affecting his reputation, or on cross-examination; 1 Greenl. Ev. § 469; Pulliam v. Cantrell, 77 Ga. 563, 3 S. E. 280.

A party cannot attack the credibility of his own witness in the case, even after he has become the witness of his adversary; White v. State, 87 Ala. 24, 5 South. 829; except where the witness does not testify as he did on the preparatory examination and his testimony is unfavorable; National Syrup Co. v. Carlson, 42 Ill. App. 178; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; the contradiction of such witness may be allowed; Hollingsworth v. State, 79 Ga. 605, 4 S. E. 560; Chester v. Wilhelm, 111 N. C. 314, 16 S. E. 229.

Under statutes forbidding comment upon the failure of the accused to testify in his own behalf or providing that it shall not create any presumption against him, it was held error for either court or counsel to refer to it; Ruloff v. People, 45 N. Y. 213; or for the judge to permit, against objection, allusion to it by the prosecution; Crandall v. People, 2 Lans. (N. Y.) 309; but not where the reference was in a retort by counsel to an interruption of his argument by the prisoner; Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121; and see People v. Tyler, 36 Cal. 522; but the error resulting from such comments by the district attorney was held to be cured by the court calling attention to the provisions of the statute; People v. Priori, 164 N. Y. 459, 58 N. E. 668. Though in another case where the prosecuting attorney made such comments, and the court subsequently directed the jury to disregard them, it was held reversible error; State v. Marceaux, 50 La. Ann. 1137, 24 South. 611; otherwise, where the court made such comments; [1899] 1 Q. B. D. 77; State v. Lawrence, 57 Me. 574. The failure of a federal court to condemn emphatically such comment by a prosecuting officer was held reversible error under the federal statute of the same character; Wilson v. U. S., 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650.

The failure to produce a witness equally accessible to both sides cannot be made the subject of unfavorable comment by the prosecuting officer; Brown v. State, 98 Miss. 786, 54 South. 305, 34 L. R. A. (N. S.) 811, and note collecting the cases on this point and also as to comments on character and failure to prove it. But the rule was held inapplicable in the case of a railroad failing to produce its engineer who caused the accident; Story v. R. R., 70 N. H. 364, 48 Atl. 288.

MODIFICATIONS OF THE COMMON LAW. There have been various important modifications of the common law as to witnesses, in respect of their competency and otherwise, as well in England as in this country. A general and strong tendency is manifest to do away with the old objections to the competency of witnesses, and to admit all persons to testify that can furnish any relevant and material evidence,—leaving these to judge of the credibility of the witnesses. Such is the law and practice in most English and American jurisdictions. The statutes vary in their terms, and the decisions should be read in connection with them.

As to the proper question to be put to a medical expert, see MEDICAL EVIDENCE.

A New York statute authorizing the granting of a subpœna to compel a witness to appear in a criminal trial in another state is unconstitutional, as depriving a person of liberty without due process of law; In re Com. of Pa., 45 Misc. 46, 90 N. Y. Supp. 808, where it was said that the effect of the statute would be to deprive a person of his liberty and banish him temporarily from the state without a hearing, and not being passed in the interest of New York, cannot be treated as an exercise of the police power.

WITTINGLY. Knowingly; designedly. Harrington v. State, 54 Miss. 493; Osborne v. Warren, 44 Conn. 359.

WITWORD. A legally allowed claim, more especially the right to vindicate ownership or possession by one's affirmation under oath. Vinogradoff, Engl. Soc. in 11th Cent. 9.

WOLF'S HEAD. See CAPUT LUPINUM.

WOMEN. All the females of the human species. All such females who have arrived at the age of puberty. *Mulieris appellatione etiam virgo viri potens continetur.* Dig. 50. 16. 13.

A woman by the fact of marriage invests herself with the nationality of her husband; 13 Op. Att. Gen. 128; 14 *id.* 402; *contra*, 2 Knapp, P. C. 364. See DOMICIL.

Single or unmarried women have all the civil rights of men; they may, therefore, enter into contracts or engagements; sue and be sued; be trustees or guardians; they may be witnesses, and may for that purpose attest all papers; but they were, generally, not possessed of any political power; and were not as citizens eligible to public office or entitled to vote; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627.

In Finland, Norway and Iceland all women have the full parliamentary vote on the same terms as men. In Sweden all women have the municipal or communal suffrage on the same terms as men, and in Denmark women who pay taxes or whose husbands have the municipal vote.

In Australia, New Zealand and the Isle of Man women have full parliamentary suffrage. England, Ireland, Scotland and Wales have given women municipal suffrage on the same terms as men. In eight provinces of Canada taxpaying widows and spinsters have the municipal franchise, and in Nova Scotia married women whose husbands are not voters are included.

In the United States women have the full suffrage in Wyoming since 1869, in Colorado since 1893, in Utah and Idaho since 1896, in Washington since 1910, in California since 1911, in Kansas, Oregon and Arizona since 1912, and in Alaska since 1913. The Illinois constitution permits the legislature to confer suffrage for any official whose election is not provided for in the constitution. An act passed thereunder which has been held constitutional confers it on women.

School suffrage was granted to certain classes of women subject to various restrictions in Kentucky, 1838; Kansas, 1861; Michigan and Minnesota, 1875; Colorado, 1876; New Hampshire, 1878; Massachusetts, 1879; Vermont, New York and Mississippi, 1880; Nebraska, 1883; Montana, New Jersey, North Dakota, South Dakota and Arizona, 1887; Oklahoma, 1890; Connecticut, 1893; Ohio, 1894; Delaware, 1898; Wisconsin, 1900.

Limited suffrage other than school is given to women taxpayers in Montana since 1897 on questions of special taxation and for school trustees; in Iowa, 1894, on issuing bonds or increasing the tax levy; in Minnesota, 1898, for library trustees (in addition to school officers since 1875). In New York, 1901, taxpaying women of towns and villages may vote upon propositions for special taxation, and in 1910 the law was amended to include the issuing of bonds. Women of towns and villages who have children of school age or who are assessed for over $50 may vote at district school meetings. In Michigan in 1893 women were given the municipal franchise by act of the legislature which was held unconstitutional. In 1908, through a new constitution, taxpaying women were given a vote on all questions of special taxation, and the granting of franchises. Kansas in 1861 came into the Union with school suffrage in her constitution; in 1887 she gave women municipal suffrage; in 1912 full suffrage. In 1869 Wyoming, then just organized as a territory, enfranchised women, and after twenty years a convention which met to form a constitution for statehood adopted as its first clause: "Equal political rights for all male and female citizens."

A woman was held not eligible as a candidate for admission to the bar; Bebb v. Law Society, 50 W. N. (Eng.) 355. They have never been admitted as solicitors in England, though the Solicitor's Act does not prevent; Odgers, C. L. 1431.

Some American courts, even without positive statutory enactment, have held women qualified to practice as attorneys; In re Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701; In re Thomas, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538. Others have reached this result only after such enactments; Mass. Acts, 1882, c. 139; In re Robinson's Case, 131 Mass. 376. By statute women have been granted the right to practice before the United States Supreme Court; U. S. Comp. Stat. 1901 (Supp. 1911), § 255. See ATTORNEY.

If the constitution of a state prevents a woman from being a member of a school committee, it must be by force of some express provision thereof or else by necessary implication arising from the nature of the office itself; 115 Mass. 602; and where an office is created and regulated by statute and the constitution confers upon the general court authority to name and settle all civil officers within the commonwealth, the election and constitution of whom are not otherwise provided for in the constitution. a woman may fill a local office of an administrative character; *id.*; but see Atchison v. Lucas, 83 Ky. 464, where it was held that when a woman is excluded from the right to vote for any particular office, she is also excluded from the right to hold the office voted for. In California they may pursue *any* lawful business or profession; Cons. of Cal. art. 20, § 18. In Illinois, a woman may be a master in chancery; Schuchardt v. People, 99 Ill. 501, 39 Am. Rep. 34; and in Iowa, a county recorder; Laws of 1880, c. 40. In Colorado, a deputy clerk; Jeffries v. Harrington, 11 Colo. 191, 17 Pac. 505; a policeman; In re Duggan, 19 Co. Ct. (Pa.) 657; a county clerk; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515.

It has been held that a woman may not be a justice of the peace; Opinion of Justices, 62 Me. 596; or a jailer; Atchison v. Lucas, 83 Ky. 457; or a superintendent of a medical hospital for the insane; State v. Wil-

son, 29 Ohio St. 347; or a member of a board of workhouse directors; State v. Rust, 4 Ohio Cir. Ct. R. 329 (*contra*, In re Opinion of Justices, 136 Mass. 578); or county superintendent of schools; State v. Stevens, 29 Or. 464, 44 Pac. 898; (*contra*, Russell v. Guptill, 13 Wash. 360, 43 Pac. 340; Wright v. Noell, 16 Kan. 601); or school director; State v. McSpaden, 137 Mo. 628, 39 S. W. 81; or a notary public; State v. Adams, 58 Ohio St. 612, 51 N. E. 135, 11 L. R. A. 727, 65 Am. St. Rep. 792; Opinion of Justices, 150 Mass. 586, 23 N. E. 850, 6 L. R. A. 842. In England a woman may be elected to the office of sexton; 7 Mod. 263; but a woman is not entitled to vote at elections for members of parliament; 38 L. J. C. P. 25.

See MARRIED WOMAN; NATURALIZATION.

Anne, Countess of Penbroke, Dorset and Montgomery,' held the office of hereditary sheriff, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench; Co. Litt. 326 *a*; but it is said to be very improbable that she habitually discharged the duties of the office in person, as she could not have done so without violating the well-settled law; 4 Craik's Romance of the Peerage 162.

In 1673, Lady Braughton held the office of the keeper of the gatehouse prison; Rex v. Braughton, 3 Keb. 32. On the authority of the Braughton Case, it was held in 3 Salk. 2, that the keeper of the workhouse at Chelmsford, being a woman, was not disqualified on account of her sex. The court said "she may be capable of executing the office either by herself or deputy as the Lady Braughton did." And in 2 Ld. Raym. 1014, it was held that the appointment of a woman as governor of a workhouse was good, and she could act by deputy. A woman held the office of custodian of a castle; Lady Russell's Case, Cro. Jac. 17; 5 Comyns' Dig. 189; of forrester; 4 Co. Inst. 311, 5 Comyns' Dig. 189; of overseer of the poor; 2 T. R. 395; of sexton of the parish, 2 Str. 1114; 7 Mod. 263, where it was also held that, as she was the owner of the property, she was a qualified voter for the purpose of electing such officer.

The office of Great Chamberlain of England was hereditary and upon the death of the incumbent leaving two sisters, the office was held to belong to both; they could exercise it by deputy, subject to the king's approval of the deputy; 2 Bro. P. C. (2d Ed. 146). So the office of marshal of the court will descend to a woman and she may exercise it by deputy: Callis, Sewers, 253, citing B. R. 5 Car. I. The hereditary office of Constable of England descended to two daughters of the Duke of Buckingham. It was held that they might exercise it by deputy, and that after the marriage of the elder, her husband should exercise its function alone, if the king did not refuse such services; 3 Dyer 285 *b*.

Robert Callis, in his fourth lecture on the statute 23 Henry VIII. ch. 5, delivered at Gray's Inn, in August, 1622, said that "although it is uncouth in our law to have women justices and commissioners, and to sit in places of judicature, yet by the authorities ensuing you shall find this a point worth insisting upon, both in human, and in divine learning." He then quotes from the first chapter of Genesis and proceeds: "This was the first commission that ever was granted; and it passed under the divine immediate seal of the Almighty, and extended over the whole world. And by virtue of the word 'domina-mini,' in the plural number, God coupled the woman in commission with the man." He further shows that, while woman was created a commissioner over fishes and over birds and beasts, such commission extended over neither man nor woman; but after citing various cases of divine authority to sustain that doctrine, he called attention to many instances of ancient and modern history, and concluded that, a woman might be commissioner of sewers in London; Countess of Warwick's Case, Callis, Sewers 250 (Callis's Reading on Sewers is a "good authority"; Marvin, Leg. Bibliogr., citing 2 Dunnf. & E. 365; 5 B. & Ad. 282).

Queen Eleanor held the office of Lady Keeper of the Great Seal and performed the duties, both judicial and ministerial, for more than a year.

It is said that the simplest statement of the common law situation is that, while women did not generally hold office and the question of their competency was not well settled, they did in fact hold various offices, some of which were of great importance. Some were hereditary, and the duties thereof were often performed by deputy. But in every instance in which a woman's right to hold office was questioned prior to the present generation she was held to be competent, although the court often took occasion to say that women were not competent to hold all offices; 38 L. R. A. 208, note.

In 1647, Margaret Brent claimed the right to sit in the Assembly of Maryland as executor of Lord Baltimore. Abigail Adams (wife of John Adams) and two others claimed the right of direct representation for women taxpayers.

In New Jersey, under the first constitution, women could vote from 1776 to 1807.

WOODGELD. **In Old English Law.** To be free from the payment of money for taking of wood in any forest. Co. Litt. 233 *a*. The same as PUDZELD.

WOODMOTE. The court of attachment. Cowell.

WOODS. A piece of land on which forest-trees in great number naturally grow. According to Lord Coke, a grant to another of *omnes boscos suos*, all his woods, will pass not only all his trees, but the land on which

they grow. Co. Litt. 4 b. See State v. Howard, 72 Me. 459. A field grown up in wiregrass surrounded by a fence and used for pasturing is not a woods. Achenbach v. Johnston, 84 N. C. 264; but see Hall v. Cranford, 50 N. C. 4. See TIMBER; SALE.

WOODS AND FORESTS. By Act of March 3, 1891, and subsequent acts, the secretary of agriculture was authorized to make provisions for the protection against destruction by fire and depredations of the public forests and forest reservations and to make such rules and regulations and establish such service as would insure the object of the reservations, namely, to regulate their occupation and use, and to preserve the forests thereon from destruction. This act was held constitutional and not to be a delegation of legislative power; Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570; the power conferred is administrative; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

The federal courts have been divided on the question as to whether violations of the regulations of the secretary of agriculture constitute a crime, but in U. S. v. Grimaud, 220 U. S. 506, it was held that, where the penalty for a violation of regulations to be made by an executive officer is prescribed by statute, the violation is not made a crime by such officer, but by congress, and congress, and not such officer, fixes the penalty, nor is the offense against such officer, but against the United States, reversing U. S. v. Grimaud, 170 Fed. 205, and sustaining a regulation made by the secretary of agriculture as to grazing sheep on forest reserves.

In Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570, it was held that where cattle were turned loose under circumstances showing that the owner expects and intends that they shall graze upon a reserve, for which he has no permit, and he declines to apply for one, and threatens to resist efforts to have the cattle removed, and contends that he has a right to graze his cattle, he can be enjoined at the instance of the government, whether the land has been fenced or not. Not decided whether the United States is required to fence property under the laws of the state.

The location of a mining claim within a forest reserve was held not to operate to withdraw the land embraced therein from the jurisdiction of the secretary of agriculture, nor to give to locators having acquired a possessory interest only any authority to use the surface for the erection of a saloon, without a permit from the secretary of agriculture; U. S. v. Rizzinelli, 182 Fed. 675.

Whatever rights the holders of unpatented mining claims may have in the timber on their claims are subject to the paramount title of the government. When such claims are in a national forest, timber thereon which is dead, matured, and infested with insects, so as to be a menace to the young and growing trees, may be sold by the forest service under the regulations prescribed by the secretary of agriculture; Lewis v. Garlock, 168 Fed. 153.

WOODWARDS. Officers appointed by owners of forest lands, whose duty it was to protect their master's property and the king's venison. 1 Holdsw. Hist. E. L. 342.

WOOLSACK. The seat of the lord chancellor in the house of lords, without back or arms, with a large cushion of wool covered with red cloth. The custom arose from wool being a staple of Great Britain from early times. Encyc. Amer.

WORDS. See CONSTRUCTION; INTERPRETATION; LIBEL; SLANDER.

WORK AND LABOR. In actions of assumpsit it is usual to put in a count, commonly called a common count, for work and labor done and material furnished by the plaintiff for the defendant; and when the work was not done under a special contract the plaintiff will be entitled to recover on the common count for work, labor, and materials. 4 Tyrwh. 43; 2 Carr. & M. 214. See ASSUMPSIT; QUANTUM MERUIT.

WORKHOUSE. A prison where prisoners are kept in employment; a penitentiary A house where the poor are taken care of and kept in employment.

WORKING DAYS. In Maritime Law. Working days include all days except Sundays and legal holidays and do not include days on which, by the custom of the port, baymen stop work on the day of the funeral of one of their deceased members; Wood v. Keyser, 84 Fed. 688. In settling lay-days, or days of demurrage, sometimes the contract specifies "working days"; in the computation, Sundays and custom-house holidays are excluded; 1 Bell, Com. 577.

Running or calendar days on which the law permits work to be done. The term excludes Sundays and legal holidays, but not stormy days; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650, 2 U. S. App. 297; Pedersen v. Engster & Co., 14 Fed. 422; The Cyprus, 20 Fed. 144; The Oluf, 19 Fed. 459; and a Saturday half-holiday; Holman v. S. S. Line, 186 Fed. 96, 108 C. C. A. 208.

Working or lay-days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading; 1 H. & C. 388; Tweedie Trading Co. v. Barry, 205 Fed. 721, 124 C. C. A. 15; although she was obliged to await her turn to berth; Swan v. Wiley, Harker & Camp Co., 161 Fed. 905, 88 C. C. A. 510.

But where such place is a dock, it has been held that they begin when she enters the dock, and not when she reaches her place of discharge in the dock; 1 Bing. N. C. 283.

The parties may, however, stipulate as they please as to the time when they shall commence; 5 Bing. N. C. 71. And it sometimes depends on the usage of the port; 24 E. L. & Eq. 305. Usage, however, cannot be admitted to vary the express terms of the contract; Pars. Ship. & Adm. 313. See DEMURRAGE; LAY-DAYS.

WORKMAN. One who labors; one who is employed to work for another. See MASTER AND SERVANT.

WORKMEN'S COMPENSATION ACTS. Acts regulating this subject have been passed in Arizona, California, Connecticut, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Washington, West Virginia, and Wisconsin. Congress has passed acts relating to the Canal Zone, government manufacturing establishments, arsenals, navy yards, the construction of river and harbor, and fortification work, hazardous employment on construction work in the reclamation of arid lands, also such employment under the bureau of mines, the forestry service, and in the lighthouse service.

A Uniform Act has been prepared by the Commissioners on Uniform Laws, but not passed in any state.

Legislation providing for stated benefits payable without suit or proof of negligence, was first enacted in the United States in the form of a co-operative insurance law of Maryland in 1902. This law was of restricted application and was declared unconstitutional, as depriving parties of the right of trial by jury and conferring on an executive officer judicial or at least quasi-judicial functions. The legislation, antedating what may be called the commission period, is of limited application, either locally or as to the classes of employees affected; and there appears to have been but little regard to actuarial requirements in its enactment. Later most of the laws were drawn up by a commission, and after their enactment were administered by a commission.

While all the laws under consideration are compensation laws, in that they provide for fixed awards in case of industrial accidents, proof of negligence and legal actions being dispensed with, some of them go beyond the simple determination of the right to compensation, and provide insurance systems, either under state supervision or otherwise. While, therefore, the laws are all classifiable as compensation laws, they may be distinguished for convenience as compensation laws and insurance laws.

A question, second only in importance to the right of the workman to compensation for industrial accidents, is the security of payments. Under some of the acts, the provision is made that the employer must give satisfactory evidence of his solvency, or must give bond for the payment of any sums for which he may become liable, or must insure his responsibility in some approved company.

The establishment of a state fund involves a considerable departure from the experience of the past in this country, and the question of its advisability is warmly discussed.

There is wide variety in the scope of the laws and of the test adopted for the inclusion or exclusion of industries. In most cases, domestic and agricultural labor is excluded, while in some only extra-hazardous employments are concerned (which, however, cover the great majority of employments).

Under the acts, methods are usually prescribed for the expression by employers and workmen of their preference as to the acceptance or rejection of the compensation system. This ranges from each workman filing a written rejection to a presumed acceptance in the absence of formal rejection.

Under the elective system in most of the states, it is made an inducement, which has been criticized as coercive, that where employers refuse to come within the provisions of the compensation law, the customary defenses to actions for injuries shall not be allowed them. In some cases where the law applies only to employers having in excess of a certain number of employees, the abrogation of these defenses does not affect employers of a small number of employees. The same is true also in cases in which the employee rejects the compensation system and sues an employer who has accepted such a system.

The bringing of suits for damages seems not absolutely forbidden in any state, though after electing to accept compensation, or failing to give notice of a rejection of the system, as the case may be, the employee may not sue unless the employer was guilty of serious or wilful misconduct or failed to comply with the safety laws.

Substitute schemes or modifications of the employer's liability under the law by agreements between employers and employees are not usually forbidden, but the employer is not allowed to reduce his liability as fixed by law. Where the burden is entirely on the employer by the statute, if the employee makes any contribution to the fund or to any substitute system, he must receive additional compensation benefits.

With practical uniformity the states have placed the entire burden of the compensation or insurance systems on the employer. The exceptions to this rule are Oregon and West Virginia.

Most of the laws fix a time during which no compensation is payable immediately following the accident causing disability. This ranges from six days to two weeks, during which time no compensation is allowed in most states, other than such provision as is made for medical or surgical attendance. In

a few instances, however, if the disability is prolonged beyond a designated time, benefits are payable for the first week or weeks of disability.

Compensation proper falls into three classes: for death, for total disability, and for partial disability. For disability of any class there may be also different provisions for temporary and permanent disability. Besides these compensation provisions, a number of the acts provide for medical, surgical, and hospital attendance, and in a number of cases for burial in case of fatal injuries.

The benefits for death are in most cases based on the earnings of the injured person, usually approximating three or four years' wages, payable in installments, ranging from 50 to 66⅔ per cent of the weekly or monthly wages. In a few cases the amounts are fixed monthly payments, uniform for all classes of employees, without reference to their previous income. Minimum and maximum amounts for weekly or monthly payments and for the total are frequently prescribed. The provisions as to children who are beneficiaries usually are that the benefits payable in their behalf shall cease on their reaching the age of 16 years, though in a few cases the limit is 18 years. In West Virginia, benefits to children cease when they reach the legal age of employment, which in that state is 14 years. A few states have the provision also that benefits shall not cease at the ages named if the recipient is mentally or physically incapacitated from earning a living.

The remarriage of a widow is made to terminate benefits in a number of cases, though in a few instances a lump sum is payable on such remarriage, either a fixed amount or representing a fixed number of months of benefit payments. If the beneficiary is a widower, no provision is made for a similar allowance in case of his remarriage.

A few states recognize the fact that a permanently disabled workman is a greater economic loss to his family than if he were killed outright at the time of the accident, and allow in case of permanent total disability a larger amount of compensation than in case of fatal accidents, some continuing payments for such disability for the full period of the injured workman's life. For the most part, however, this basis of the payments is the same as for death.

Limitations are placed on the time for giving notice and for making claims under the acts, notice usually being required within from ten to thirty days, and a claim within from six months to six years. A number of the acts contain the provision that no notice is necessary where the employer has other knowledge of the fact or where the accident was a fatal one. The time set may also be extended if it is shown that the employer was not prejudiced by the delay. The time for presenting the claim or bringing action thereon appears usually to be fixed absolutely.

On the failure of the employer and his workmen or the claimant to reach an agreement as to the amount of compensation or other facts involved, recourse may be had in a number of states to a special commission or board which is created to have charge of the administration of the law. In other states arbitrators chosen for the purpose or any standing committee of the employer and his workmen may take cognizance of the disputes. In some states the disputes are referred to the courts. In all cases an appeal, sometimes only on certain phases of questions involved, may be had to the courts.

The provisions as to beneficiaries residing abroad are quite various, some of the acts giving them the same standing as other beneficiaries, others excluding them entirely, while still others permit persons only of certain degrees of kinship to receive benefits or limit the amount payable to non-residents.

Injuries Arising out of, and in the Course of, the Employment. The injuries compensated are usually all of those which arise out of, and in the course of, the employment and are not due to wilfulness or intoxication. An accident is said to arise "in the course of" a man's employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time; Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458. A workman, while on his way by a route which he was permitted to take by his employers, attempted to get on a tram car to ride up an incline, which was in violation of his employer's rules, and fell and was killed. Held, that the accident did not occur in the course of his employment; Pope v. Hills Plymouth Co., 105 L. T. Rep. 678. A workman receives injuries by accident "arising out of" his employment when the accident was due to the nature of the work, or was incidental to it, as where a man undertakes to do something and the required exertion which produces the injury is too great for him, whatever the degree of exertion or the condition of his health; Clover, etc., Co. v. Hughes, 102 L. T. Rep. 340. A man employed to collect insurance premiums from door to door slipped on some stairs while pursuing the duties of his employment and was injured. It was held that the accident arose out of his employment; Refuge Assurance Co. v. Millar, 49 Sc. L. Rep. 67. A young woman was employed as lady's maid and serving maid. She was sitting in the nursery room on a warm evening with the window open, doing some sewing for herself which she was allowed to do. A beetle flew into the room, and the young woman threw up her hand to keep it from striking her face, and in doing so struck her eye with her hand in such a way as to cause serious and permanent injury. Held, that

the accident did not arise out of her employment; Craske v. Wigan, [1909] 2 K. B. 635. A locomotive engineer was injured while on duty by a stone thrown by a boy from a bridge, under which the engine was passing at the time. It was held that the injury arose out of and in the course of his employment; Challis v. London, etc., R. Co., 93 L. T. Rep. 330. A workman employed in the construction of a building was struck by lightning when working at the height of twenty-three feet. The evidence showed that a man working in that position incurs a risk substantially greater than the normal risk of being struck by lightning. It was held that the accident arose out of the employment; Andrew v. Failsworth Industrial Society; [1904] 2 K. B. 32.

Employment does not commence the moment the workman leaves home on his way to work, nor does it continue until he reaches home after the day's work is done. Nor does it continue while the workman steps aside—that is, leaves his work—for purposes of his own. Thus, a railway engineer, on his way to work earlier than was necessary, went out of his course for purposes of his own to talk to a signal-man. In order for him to reach the man it was necessary to cross some railroad tracks, but on a direct route from his home to the engine shed where he signed on for work every morning there were no tracks to cross. When he had finished speaking to the signal-man, he started back across the tracks and was struck and killed by an engine. It was held that the accident was not one arising out of and in the course of the employment; Benson v. Lancashire, etc., R. Co., [1904] 1 K. B. 242. There is considerable difficulty in ascertaining precisely when a workman's employment begins. Each case must be decided on its individual facts. Generally speaking, the factory gate or yard, or the like, indicates the boundary, but in particular instances there may be a wider margin in favor of the workman. The fact that an accident happens at a time when there is a temporary cessation of work does not permit its being one arising out of and in the course of the employment. The employment continues during all the time from the employé's arrival on the premises until his departure, providing he is engaged in the employment or something ancillary thereto; Blovelt v. Sawyer, [1904] 1 K. B. 271. Minor employés occupying a platform where they were sent to rest during an intermission in the performance of their duties, were held to continue as employés in the service of their employer during such time; Chambers v. Mfg. Co., 106 Md. 496, 68 Atl. 290, 14 L. R. A. (N. S.) 383. It has been held that the relation of master and servant continues to exist during the servant's noon hour, where it is understood that the servant will remain on the master's premises to eat his meal.

Where workmen are employed to work at a certain place, and are transported to and from such place by the employer, as a part of their contract of employment, the period of service continues during transportation; Ryan v. C. R. Co., 23 Pa. 384.

If a workman is about his own affairs at the time an accident happens, such accident cannot be said to arise out of and in the course of his employment. If he deliberately and for no reason leaves the work he is employed upon, and attempts to do something he knows he is not employed to do, it would be contradictory to say that he is acting within the scope of his employment.

Where injury occurs to a workman acting in an emergency, the rule is that the workman does not go out of his employment if he endeavors to prevent the danger from taking effect. Acting in an emergency, the employé is not expected to act as he would under circumstances that give time for more deliberate action.

The work of a girl employed in a mill ended on Wednesday, but she could not be paid until two days later. She returned to the mill on the following Friday to secure her pay, and while there fell down stairs and was injured. Held that the employment existed at the time; Kiley v. Holland, [1911] 1 K. B. 1029.

Notice. The acts generally require an injured workman to give notice to his employer of his injury within a specified time. Most of the statutes give thirty days within which the notice must be given. The notice must be in writing and state the time, place and, in ordinary language, the cause of the injury. It must contain the name or names of the person or persons claiming compensation, and must be served on the employer in the manner specified by statute, which is generally by personal service on the employer or some representative or superintendent, or by registered mail. Usually the want of or any defect or inaccuracy in the notice, or in its service, will not defeat the right to compensation unless the employer is prejudiced thereby. If the failure to give notice, or the giving of a defective notice, is occasioned by mistake, physical or mental incapacity, or other reasonable cause, it is not fatal.

Aside from the fact that the giving of notice of injury to the employer has a tendency to defeat any fraudulent claim and the making of a stale demand, it is intended to put the employer in possession of the facts of the particular accident, so that he may make investigations of the details of the accident in order to ascertain whether or not he is liable to pay compensation, and to prepare his defense if he desires to contest the claim.

The requirement that the notice state the place where the accident occurred is not complied with by giving the name of the town in which it occurred, or by any other such general statement. A notice under the New York statute which stated that because of the slip-

pery, greasy and defective condition of the floor around the machine at which the employé worked, he slipped and his left hand was caught in the machine, was held not sufficiently definite as to the place and cause of the injury to authorize an action; Welch v. Waterbury Co., 144 App. Div. 213, 128 N. Y. Supp. 974. By requiring a statement of the cause of the injury, it is meant a statement of the physical cause; Valentino v. Machine Co., 139 App. Div. 139, 123 N. Y. Supp. 959; and not a statement of the particular violation of the employer's duty by reason of which the injury occurred; Impellizzieri v. Cranford, 141 App. Div. 755, 126 N. Y. Supp. 644. It means that the accident should be so described that a person of ordinary intelligence who knows nothing about it could understand how it happened. It is not necessary that all the facts going to establish a cause of action should be stated, as they would in a complaint or petition; Dippolito v. Brown, 148 App. Div. 116, 131 N. Y. Supp. 1021.

The compensation statutes as a rule do not require the workman himself, or, in case of his death, his dependents, to give notice of the injury. They merely require that notice of the injury be given the employer. It may, therefore, be given by any one on behalf of the workmen, but it is thought it must purport to come by authority of the workman. Thus, a mere report of an accident made by a third person at the instance of the employer is thought not to be sufficient; Roberts and Wallace, Duty and Liability of Employers (3d Ed.) 317; although such fact may go to show that the employé was not damaged by the want of notice. A notice signed "Corcoran and Parker, Attorneys for Charles Dolan," purports to be signed on behalf of Charles Dolan, and, in the absence of evidence to the contrary, sufficiently shows that the attorneys were authorized to sign it; Dolan v. Alley, 153 Mass. 380, 26 N. E. 989.

Under a statute providing that "the notice may be served by post or letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post," it is immaterial that the notice in fact never reaches the person to whom it is addressed; Hurley v. Olcott, 198 N. Y. 132, 91 N. E. 270, 28 L. R. A. (N. S.) 238. It has been held that notice given or claim made by or on behalf of one dependent does not inure to the benefit of the other dependents; Kyle v. McGinty, 48 Sc. L. Rep. 474.

An injured workman will be excused for delaying to give notice, where the injury at first appears to be of little or no consequence, but later proves to be serious. An honest mistake of this kind is well within the statutory exception; Tibbs v. Watts & Co., 2 Butterworth's W. C. Cas. 164. As soon as it becomes apparent, however, that the injury is likely to prove serious, the workman should hasten to give notice. Ignorance on the part of the workman of the existence of a compensation statute in the state in which he works, or of his rights thereunder, or of the requirements of such statute relative to giving notice of injury, is not such a mistake that will excuse the giving of notice to the employer of an injury within the time required by the statute; Koles v. Pascall, [1911] 1 K. B. 982.

Most of the statutes excuse the failure to give notice if there was no intention to mislead the employer and he was not in fact misled thereby. The wording of the statutes varies greatly, but the purpose seems to be to excuse the want of notice when the employer is not prejudiced thereby. Ordinarily the *onus* of proving that the failure to give notice of an accident has not prejudiced the employer is on the one making claim for compensation; Roles v. Pascall, [1911] 1 K. B. 982. By the terms of some of the statutes in this country the burden is put upon the employer to show that he has been prejudiced thereby, while in others the burden of proof is not placed on either party, but naturally it is on the applicant for compensation, because unless it affirmatively appears during the proceedings that the employer was not so prejudiced no recovery can be had. The notice of injury which compensation statutes require to be given employers should be liberally construed; Jones v. Francis, 70 Wash. 676, 127 Pac. 307.

Accident. Most of the states have followed the English act in many respects, including the requirement that, to entitle an injured workman to compensation, his injury must have been due to an accident. The House of Lords has declared that the word is used in its popular and ordinary sense, and means "an unlooked-for mishap, or an untoward event, which is not expected or designed"; Fenton v. Thorley & Co., [1903] A. C. 443. This definition was adopted in Bryant v. Fissell, 84 N. J. Law 72, 86 Atl. 458. To constitute an accident, a happening must be capable of being described as having occurred on a particular date; it must be an event, as distinguished from a gradual growth, the commencement of which is uncertain; Marshall v. East Holywell Coal Co., 93 L. T. Rep. 360. Thus, the contraction of lead-poisoning from the continual use of red and white lead, by absorbing it through the pores, or inhaling the poison into the lungs, or by eating food to which small particles have adhered, is not an accident, as the development of the disease is a gradual process, generally taking considerable time; Steel v. Cammell, etc., Co., [1905] 2 K. B. 232. So an abscess in the knee, gradually developed by kneeling while at work, is not due to an accident; Gorley v Backworth Collieries, 93 L. T. Rep. 360. The

event, to constitute an accident, must be one that is unforeseen by the person injured by its occurrence, and it has been declared that an occurrence is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen; Clover, etc., Co. v. Hughes, [1910] A. C. 242. An event may constitute an accident, although the person causing it did so intentionally. Thus, an engineer was injured while driving the engine of an express train by a stone thrown by a boy from a bridge under which the train was passing at the time. It was held that the injury was due to an accident, that the circumstance of the throwing of the stone being a wilful act on the part of the boy was immaterial; [1905] 2 K. B. 154. The fact that the physical condition of the injured person is a contributory cause of the event does not prevent its being an accident; [1908] A. C. 437.

Whether or not the contraction of a disease constitutes an accident depends upon the nature of the disease. It must be one the contraction of which can be definitely fixed in point of time as an event. This would seem not to include idiopathic diseases. On the other hand, a disease contracted as by infection from the lodgment of bacilli comes well within the definition of an accident. A workman was employed to open and sort bales of Persian wool. While so engaged his eye became infected with anthrax which necessitated an operation, from which he died. The disease was caused by a bacillus alighting on his eye. In this instance it could be told definitely the day on which the injury occurred, and with considerable certainty the manner in which it occurred, and it was held to be due to an accident; [1905] A. C. 230. While employed in clearing a mill-race, a workman caught a sudden chill, caused by immersion in the water. Inflammation of the kidneys supervened, and he died several days later. The evidence showed that the attack could only have been brought on by exposure to cold water. It was held that death was due to an accident; [1910] Ir. Rep. 105. A workman of poor physique was employed in the stoke-hold of a vessel. The conditions there were normal, but as usual the place was very warm. The man suffered from a heat stroke, which resulted in his death. It was held that his death was due to an accident; [1908] A. C. 437.

Shock and fright are included within the meaning of accident, although the injury is purely mental, and not physical; [1896] 3 Q. B. 248. Death from heart disease; 4 Butterworth's W. S. Cas. 190; death or injury from inhalation of gas; [1911] 2 K. B. 747; or from lightning; [1904] 2 K. B. 32; have been held accidents. The question of accident is one of fact and law; [1903] A. C. 443.

Dependents. The compensation acts usually award benefits to those who are dependent upon the deceased workman. There are various statutory provisions as to just who are dependents.

Romer, L. J., in [1899] 1 Q. B. 1005, said: "I think that the 'dependents' who are entitled to claim compensation under the act must be dependents in the proper sense of the word, and not merely persons who derive a benefit from the earnings of the deceased. I also think that a 'dependent' must be a person who is dependent upon the deceased for the ordinary necessaries of life having regard to the class and position of the parties."

This view has since been very materially changed; it being held that no standard of living can be considered. Consequently the fact that a person may be able-bodied and well able to make a living for himself and family, so far as necessaries are considered, does not prevent his being dependent upon another. Thus, Main Colliery Co. v. Davies, [1900] A. C. 358, holds that a father is part dependent on the earnings of a son who contributes to the support of the family, which the father is bound by law to maintain. A woman may be dependent on her husband or children, or on her husband and her children at the same time, the question being one of fact. The widow and children of a workman have been held to be no less wholly dependent upon the workman because the latter had been enabled, through the receipt by him, either directly or through his wife as his agent, of money from wage-earning sons or of money coming to him through other channels, to augment the fund out of which he has been legally bound to maintain, and had maintained, his house-hold; Senior v. Fountains, [1907] 2 K. B. 563. The earnings of a father, and son and two daughters were put in a fund from which the expenses of the entire family, including a mother and three other children, were paid. The son was killed in his employment, and the parents applied for compensation, and the court found as a fact that the parents were partly dependent upon the son's earnings; Main Colliery Co. v. Davies, [1900] A. C. 358.

The fact that a wife is not living with her husband at the time of his death is of no consequence, aside from some express statutory provision to the contrary. The question is still one of fact whether she is being supported by him. Aside from statutory provision, and contrary to the earlier English decisions on the question, it is now settled that there is no legal presumption of the dependency of the wife upon her husband, on account of the legal obligation of the husband to support her; New, etc., Collieries v. Keeling, [1911] A. C. 648.

A husband and wife quarreled at a time when he was unemployed. He went to another town and secured employment, and earned regular wages for about three weeks, when he was killed by an accident. This

was about four months after his separation from his wife. During this time the wife had subsisted on her own small casual earnings and occasional small contributions from relatives, and for one week she was in the work-house. In her testimony she stated that she expected her husband back every day to provide a home for her. It was held that the wife was dependent upon her husband's earnings, and entitled to compensation; Coulthard v. Consett Iron Co., [1905] 2 K. B. 869. Upon the death of her mother a daughter, who had previously been earning wages, remained at home to keep house for her father. For this she received board, lodging and clothing, but no wages. She applied for compensation on the death of her father, and was awarded the same on the ground that she was dependent upon him; Moyes v. Dixon, 42 Sc. L. Rep. 319.

A posthumous child may be a dependent within the meaning of the compensation statutes; Williams v. Ocean Coal Co., [1907] 2 K. B. 422. Whether or not an illegitimate child can be dependent depends primarily upon the provisions of the particular statute, but unless there appears a contrary intention an illegitimate child may be dependent; Schofield v. Orrell Colliery Co., [1909] 1 K. B. 178.

In the absence of any statutory prohibition an alien is within the definition of a dependent, although he still resides in a foreign country.

The fact that one is lending assistance to another does not conclusively prove that he himself is not a dependent. Where it was claimed that a father was partly dependent upon the earnings of his son only because he supported a crippled brother, who lived with him, and it was true that the father was doing his best to help the brother, the court held that that was a circumstance but was not conclusive on the question of the father's dependence; Leggett v. Borke, 39 Sc. L. Rep. 448.

A husband and wife are living together when there has been no legal separation, and no actual separation; as, for instance, where there has been an estrangement, or a separation with the intention of continuing it permanently. The length of time the parties are separated and the distance intervening between them is not necessarily material to the solution of the question. The true intention of the parties is the test by which the matter is determined; Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, 142 N. W. 271.

Workmen. In some of the statutes the term "employé" is used, while others use that of "workman." The two words are synonymous, and are used interchangeably.

One is not a workman unless there exists between him and his employer a contract of service. In this regard there is a distinction between a contract of service and a contract for services. The latter not only includes the relation of master and servant, but other relations in which the employer has no control over the employé, who may be rendering services as an independent contractor. The former is a contract which creates the relation of master and servant. While it is a contract for services, it is something more, the distinguishing feature of which is the right of control the employer has over the way in which the services shall be rendered, not only generally, but in regard to details; [1910] 1 K. B. 543.

As to casual employment, Buckley, L. J., in Hill v. Begg, [1908] 2 K. B. 802, said: "The words are not 'who is casually employed,' but 'whose employment is of a casual nature.' I have to investigate what is the character of the man's employment, not what is the tenure of his employment. Is the employment one which is in its nature casual? To take an analogy or illustration from a different subject, say land. The question is, what is the nature or quality of the land—is it, for instance, building land or agricultural land—not what estate is held in the land? Suppose that a host, when from time to time he entertains his friends at dinner, or his wife gives a reception or dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host whether he gives any, and how many dinner parties or receptions, and the number of men he will want varies with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of casual nature."

A window-cleaner called and cleaned the windows of the house of a physician about once a month, without receiving a special invitation or permission to do so on each occasion, and there was no formal contract between the parties. A portion of the house was used by the physician in connection with the practice of his profession. On one occasion, while cleaning a window of the dining room, the cleaner received an injury. Held, that the employment was of a casual nature, and that the man was not employed for the purpose of the employer's trade or business; Rennid v. Reed, 45 Sc. L. Rep. 814.

A woman worked regularly without fresh instructions for an employer on every Friday and alternate Tuesdays for eighteen months. She worked at home and for others on the other days of the week. While at work at this employer's house on one of the specified days, she met with an accident. It was held that the contract of service was of a periodic nature, and that the employment was not casual; Dewhurst v. Mather, [1908] 2 K. B. 754.

If a man is employed for the purposes of the employer's trade or business, it matters not that the employment is of a casual nature.

A laborer complained of the height of a hedge which extended between his garden and the land of a farmer; the hedge being located entirely on the land of the latter. The former agreed to give the laborer ten shillings to cut the hedge, and he (the farmer) would use the poles on his farm. While employed at this work the laborer met with an accident. Held that, while the employment was of a casual nature, it was for the purpose of the farmer's trade or business, and that the laborer was a workman engaged in that employment; Tombs v. Bouford, 106 L. T. Rep. 823.

One May, a real estate agent, who had been instructed to let a dwelling house, decided to take the house himself. He was allowed a sum to pay for redecorating and repairing the house, and he contracted with one Smith to do the work under his (May's) supervision. Smith employed a man to help, who was injured in the course of the work. Held, that this was not a contract in the course of or for the purpose of May's trade or business; Brine v. May, etc., CQ., 6 Butterworth's W. C. Cas. 134.

The members of an employer's family are not workmen. A man, twenty-six years of age, was employed as an ordinary workman by his father, with whom he lived, paying board and lodging. While employed by his father on work at another town, where he lodged for the time, he received an injury, for which he applied for an award of compensation. The son maintained that, being self-supporting, he was not a member of the employer's family and that, being absent at the time of the accident, he was not "dwelling in his house." It was held that at the time of the accident he was a "member of the employer's family dwelling in his house," and accordingly was not a "workman"; McDongall v. McDongall, 48 Sc. L. Rep. 315.

An independent contractor is not a workman; indeed, when a person undertakes to do work as a contractor, that fact negatives the idea that he is a workman. Thus a man was employed by timber merchants to bring his horse and drag logs from one place to another, for which he was paid by the day. His work was to lead the horse, and this he might have done by a means of a substitute, it not being understood that he should perform the work personally. It was held that he was an independent contractor, and was not entitled to compensation for injuries received while so engaged; Chrisholm v. Walker & Co., 46 Sc. L. Rep. 24.

A partner may be a workman for the firm. One of three partners, owners and operators of a coal mine, worked in the mine as working foreman, under an agreement with the other partners that he should receive weekly wages like an ordinary workman. While so engaged he met with an accident, which caused his death, and a claim for compensation was made by his widow against the surviving partners. It was held that, as the deceased had been a partner in the firm, there was not the relation of employer and employed contemplated by the statute; Ellis v. Ellis & Co., [1905] 1 K. B. 324. It was said that the deceased man might come within the definition of "workman," if the definition were considered separate from the other provisions of the act, but, in view of the fact that the act contemplates the existence of the relation of employer and employed, and it being evident that the same man cannot be both employer and employed, the relation in its true sense did not exist, and the applicant must therefore fail.

Employé of a charitable institution is a workman. A blind pauper was injured while working in the industrial department of a charitable institution, which supplied charitable instruction to blind persons. The institution was not self-supporting, but depended partly on charity. On account of this pauper the institution received fourteen pounds eight shillings a year from his parish, and twenty pounds a year from a charitable fund. The institution supplied the pauper with board, lodging and clothing, and paid him five shillings a month. Held, that the pauper was a workman; MacGillivay v. Northern Counties Institute, [1911] Sc. Sess. Cas. 897. A man employed by a society for the purpose of giving work to unemployed persons has been held to be a workman; Porton v. Central Body, [1909] 1 K. B. 173.

A dispensary physician was held not to be a workman; Murphy v. Enniscorthy Board, 42 Ir. L. T. 246. Persons engaged in the business of copying or translating legal documents or manuscripts, and who are known as "law writers," are held to be workmen; McKrill v. Howard & Jones, 2 Butterworth's W. C. Cas. 460.

Whether or not an employé is a workman depends upon his contract of employment. If he is employed as a workman, the fact that he has a university degree does not render him any less a workman. On the other hand, if he is employed in a capacity of a scientist, the fact that he performs manual labor in connection with the work for which he was employed does not make him a workman; Bagnall v. Levinstein, [1907] 1 K. B. 531. A professional foot-ball player has been held a workman; Walker v. Crystal Palace Football Club, [1910] 1 K. B. 87; but not a lecturer; Waites v. Franco-British Exhibition, 25 T. L. Rep. 441.

Serious and Wilful Misconduct. The word "serious" refers to the conduct, not to the results of the conduct, and the misconduct of a workman is not necessarily serious because it results in serious consequences. It has been held, however, that any neglect is serious which, in view of reasonable persons in

a position to judge, exposes any person including the person guilty of it, to the risk of serious injury; Hill v. Granby Consol. Mines, 12 Br. Col. 118.

It may be contended that, on account of the necessity for strict discipline among employees engaged in establishments where machinery is used, and the grave danger attendant upon a general laxity of discipline, a violation of any rule is serious. If such contention were true it would render the word "serious," as used in the statutes, mere surplusage. The word must be taken to have a meaning, and it must be given full weight. It is very evident that the legislatures did not intend that the workman should be deprived of compensation merely because a breach of some rule attended the accident.

"Serious" and "wilful" do not refer to conduct, but to "misconduct." In the first place, there must be misconduct; then it must be wilful; and, finally, it must be serious. Conduct may often be wilful, and its consequences serious, but yet not amount to misconduct. "Misconduct" means wrong conduct.

"Wilful" means by one's own volition or will; intentional. It imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment; Johnson v. Marshall Sons & Co., [1906] A. C. 409. It is not enough that the act is wilful; it must be done by the workman with the intention or knowledge of being guilty of misconduct; Bist v. London, etc., R. Co., [1907] A. C. 209.

Wilful misconduct must mean the doing of something, or the omitting to do something, which is wrong to do or omit, where the person who is guilty of the act or omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or omit; and it involves the knowledge of the person that the thing which he is doing is wrong; Beven, Workmen's Compensation (4th ed.) 396.

A miner was killed by a tram car while going from his work. He was leaving the mine by the usual way. There were manholes at intervals along the way, which were to be used in avoiding trains of tram cars. He was warned by a fellow-workman to get into a manhole as the "journey" was coming near. He did not heed the warning, and was overtaken by the cars and killed. The trial judge found that he was guilty of serious and wilful misconduct, and, on appeal, it was held that there was evidence to support the finding; John v. Albion Coal Co., 18 T. L. Rep. 27.

Serious and wilful misconduct is something more than contributory negligence, as the latter will not defeat recovery of compensation; Praties v. Broxbune Oil Co., 44 Sc. L. Rep. 408.

A locomotive engineer left the foot-plate of his engine while it was running at considerable speed, in order to get coal from the tender, and was killed while so doing. His conduct was in violation of a rule of the employer that "enginemen and firemen must not leave the foot-plate of their engine when the latter is in motion." There was evidence that the engineer knew of this rule and could have gotten coal without leaving the foot-plate. The court held that the accident was due to serious and wilful misconduct; Bist v. London, etc., R. Co., [1907] A. C. 209.

In order that the violation of a rule of the employer shall militate against the workman, he must have notice, either actual or constructive, of the rule. But it is held that knowledge on the part of the workman is sufficient, regardless of the way in which such knowledge was acquired; Port Royal & W. C. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833. On the other hand, it has been held that a mere statement by the foreman to the workman that a certain rule exists is insufficient to charge the workman with notice; Daubert v. Meat Co., 135 Cal. 144, 67 Pac. 133; and a printed rule was declared insufficient to constitute notice to a workman who could not read; Himrod Coal Co. v. Clark, 197 Ill. 514, 519, 64 N. E. 282.

Whether or not a workman has been guilty of serious or wilful misconduct is a mixed question of law and fact. After the facts have been found, whether or not they constitute serious or wilful misconduct is a question of law; Dailly v. Watson, 8 Sc. L. T. 73. Whether or not there is any reasonable evidence to support a finding of serious and wilful misconduct is a question of law; British Columbia Sugar Refining Co. v. Granick, 44 Can. Sup. Ct. 105.

In this article the provisions of the English workmen's compensation act and the cases thereunder have been considered principally, inasmuch as some or all of their provisions have been incorporated in many of the statutes enacted in the United States, and their construction in this country will doubtless be substantially the same as in England.

See Elliott on Workmen's Compensation Acts, Labatt on Workmen's Compensation, and Butterworth's Workmen's Compensation Cases, containing cases in Great Britain and Ireland, and another series for Canada.

For the law in foreign countries not above referred to, reference may be had to the works above mentioned. The department of labor has published (December 23, 1913) the laws of the United States and foreign countries.

WORSHIP. Honor and homage rendered to God. State v. Norris, 59 N. H. 536. See CHRISTIANITY; DISTURBANCE OF PUBLIC WORSHIP; RELIGION.

In English Law. A title or addition given to certain persons. Co. 2d Inst. 666; Bacon, Abr. *Misnomer* (A 2).

WORTHIEST OF BLOOD. An expression used to designate that in descent the sons are

to be preferred to daughters, which is the law of England. See some singular reasons given for this in Plowd. 305.

WOUND. A solution of the natural continuity of any of the tissues of the body. Taylor, Med. Jurispr.

In jurisprudence a wound may be said to exist even if there is no effusion of blood or severing of the skin. No question is raised as to the nature of the tissue damaged, be it skin and appendages, bone, joint or internal organ; and it is even urged that the result of disease upon tissue be described as wounds.

Under the statute 9 Geo. IV. c. 21, s. 12, it has been held in England that to make a wound, in criminal cases, there must be an injury to the person by which the skin is broken; 6 C. & P. 684. See DEATH.

WRECK (called in law Latin *wreccum maris*, and in law French *wrec de mer*). Such goods as after a shipwreck are cast upon the land by the sea, and left there within some country so as not to belong to the jurisdiction of the admiralty, but to the common law. Co. 2d Inst. 167; 1 Bla. Com. 290. A ship becomes a wreck when, in consequence of injuries received, she is rendered absolutely unnavigable, or unable to pursue her voyage, without repairs exceeding the half of her value; Wood v. Ins. Co., 6 Mass. 479, 4 Am. Dec. 163. A sunken vessel is not a wreck, but derelict; *wreck* applies to property cast upon land by the sea; Baker v. Hoag, 7 N. Y. 555, 59 Am. Dec. 431; to jetsam, flotsam and ligan; Murphy v. Dunham, 38 Fed. 503.

Wrecks and shipwrecked goods under a state act are confined, in their ordinary legal meaning, to ships and goods cast on shore by the sea, and do not include a boat or other property not cast ashore or thrown overboard or lost from a vessel in distress; Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500.

Coal lying in a sunken ship in Lake Michigan is not a wreck of the sea; Murphy v. Dunham, 38 Fed. 503; the United States has no title to it; *id.*

See SUNKEN WRECK.

Goods found at low water, between high and low water mark, and goods between the same limits partly resting on the ground, but still moved by the water, are wreck; 3 Hagg. Adm. 257, 294.

Wreck, by the common law, belongs to the king or his grantee; but if claimed by the true owner within a year and a day the goods, or their proceeds, must be restored to him, by virtue of stat. Westm. I., 3 Edw. I. c. 4. Ships and goods found derelict or abandoned at sea belonged until lately to the office of the lord high admiral, by a grant from the crown, but now belong to the national exchequer, subject, however, to be claimed by the true owner within a year and a day; 1 Hagg. 383.

But in America the king's right in the sea-shore was transferred to the colonies, and therefore wreck cast on the sea-shore belongs to the owner of the shore, as against a mere stranger, if not reclaimed; Barker v. Bates, 13 Pick. (Mass.) 255, 23 Am. Dec. 678. See Proctor v. Adams, 113 Mass. 377, 18 Am. Rep. 500.

In this country, the several states bordering on the sea have enacted laws providing for the safekeeping and disposition of property wrecked on the *coast*. In one case, it was held that the United States succeeded to the prerogative of the British crown, and are entitled to derelict ships or goods found *at sea* and unclaimed by the true owner; but in the southern district of Florida it is held that such derelicts, in the absence of any act of congress on the subject, belong to the finder or salvor, subject to the claim of the true owner for a year and a day. Marv. Wreck.

Wrecked goods, upon a sale or other act of voluntary importation, become liable to duties; The Concord, 9 Cra. (U. S.) 387, 3 L. Ed. 768.

A wrecked vessel, in common phraseology, includes a sunken vessel; see Gilchrist v. Godman, 79 Fed. 970.

The act of congress, March 3, 1899, provides that, whenever a vessel is wrecked and sunk in a navigable channel, it shall be the duty of the owner immediately to mark it by a buoy or beacon by day and a lighted lantern by night. Failure to do so within six hours (one hour only being required) rendered the owner of a canal boat liable in damages to a passing vessel colliding with the wreck; The Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48; so when not marked for two days; The Macy, 170 Fed. 930, 96 C. C. A. 146.

Marking a sunken yacht (18 feet) with pieces of wood, two partly submerged buckets and a pocket handkerchief on a pole, was insufficient; The Fred. Schlesinger, 71 Fed. 747.

The act also requires the owner to commence the removal of the wreck at once; failing which (or upon its earlier abandonment) it may be removed by the secretary of war. The owner is required to maintain the mark during all this period; Second Pool Coal Co. v. Coal Co., 188 Fed. 892, 110 C. C. A. 526.

See SALVAGE; TOTAL LOSS.

WRIT. A mandatory precept, issued by the authority and in the name of the sovereign or the state, for the purpose of compelling the defendant to do something therein mentioned.

It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be under seal and tested by the proper officer, and is directed to the sheriff or other officer lawfully authorized to execute the same. Writs are divided into—original, of

mesne process, of execution. See 3 Bla. Com. 273; Gould, Pl. c. 2, s. 1.

The list of original writs was not the reasoned scheme of a provident legislator, calmly devising apt remedies for all conceivable wrongs, rather it was the outcome of the long and complicated struggle whereby the king drew into his court all the litigation of the realm. The statute of Westminster 2d (1285) allowed the chancery to vary the old forms so as to suit new cases, but only new cases which fall under old law.

This gave in time one new form of action—trespass upon the special case—and this again threw out branches which came to be considered distinct forms of action, namely, assumpsit and trover. Equity, again, met some of the new wants, but others had to be met by a stretching and twisting of the old forms which were made to serve many purposes for which they were not originally intended; Poll. Torts (5th ed.) 535, note by F. W. Maitland.

See Maitland, Register of Original Writs (3 Harv. L. Rev. 97, 167, 212; 2 Sel. Essays in Anglo-Amer. L. H. 549), with a classified list of writs.

A writ is "issued" when it is delivered to an officer, with the intent to have it served; Wilkins v Worthen, 62 Ark. 401, 36 S. W. 21; Michigan Ins. Bk. v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. Ed. 1080; Webster v. Sharpe, 116 N. C. 466, 21 S. E. 912.

Although a writ which the court had power to issue was irregularly issued, the marshal must still act under it; Bryan v. Ker, 222 U. S. 107, 32 Sup. Ct. 26, 56 L. Ed. 114.

As to the history of assumpsit, see 2 Harv. L. Rev. 1, 53, by Prof. J. B. Ames. See WESTMINISTER 2D, STATUTE OF; BREVIA FORMATA.

WRIT DE BONO ET MALO. See DE BONO ET MALO; ASSIZE.

WRIT DE EJECTIONE FIRMÆ. See EJECTMENT.

WRIT DE HÆRETICO COMBURENDO. See DE HÆRETICO COMBURENDO.

WRIT DE HOMINE REPLEGIANDO. See DE HOMINE REPLEGIANDO.

WRIT DE ODIO ET ATIA. See DE ODIO ET ATIA; ASSIZE.

WRIT DE RATIONABILI PARTE BONORUM. A writ which was sued out by a widow when the executors of her deceased husband refused to let her have a third part of her late husband's goods, after the debts were paid. Fitzh. N. B. 284.

WRIT OF ASSISTANCE. A writ issuing out of chancery in pursuance of an order, commanding the sheriff to eject the defendant from certain lands and to put the plaintiff in possession. Cowell; 3 Steph. Com. 602; Bruce v. Roney, 18 Ill. 67. An ancient writ issuing out of the exchequer. Moz. & W.

A writ issuing from the court of exchequer to the sheriff commanding him to be in aid of the king's tenants by knight's service, or the king's collectors, debtors, or accountants, to enforce payment of their own dues, in order to enable them to pay their own dues to the king. 1 Madox, Hist. Exch. 675.

A writ commanding the sheriff to assist a receiver, sequestrator, or other party in chancery to get possession of land withheld from him by another party to the suit. Quincy, Mass. Appx.; 2 Dan. Ch. Pr. 1062.

A process issuing in equity to enforce its decree, and coextensive with the court's jurisdiction to hear and determine the rights of the parties; Fox v. Stubenrauch, 2 Cal. App. 88, 83 Pac. 82.

Its office is to give effect to chancery decrees, where the rights of the parties are fixed thereby; Ramsdell v. Maxwell, 32 Mich. 285; or to put a party into possession; Sills v. Goodyear, 88 Mo. App. 316; rests in sound discretion, and will issue only when the right is clear; Hagerman v. Heltzel, 21 Wash. 444, 58 Pac. 580.

These writs which issue from the equity side of the court of exchequer or from any court of chancery are at least as old as the reign of James I., and were formerly in common use in England, Ireland, and some of the United States; 1 Ves. 454; 3 Swanst. 299, n.; but whether from the odium attached to the name in Massachusetts or from the practice in that state to conform processes in equity to those at law, no instance is known of such a writ having been issued in that commonwealth. Quincy, Mass. Appx. 369, with note by Horace Gray.

A writ of assistance is founded on the general principle that a court of equity will, when it can do so justly, carry its own decrees into full execution without relying on the co-operation of any other tribunal; Beatty v. De Forest, 27 N. J. Eq. 482, where it was remarked that it was of comparatively recent use in that state, the first instance being in 1853. It can issue only against parties affected by the decree; Howard v. R. Co., 101 U. S. 849, 25 L. Ed. 1081; Sills v. Goodyear, 88 Mo. App. 316; and not against one who entered on land *pendente lite* on claim of right; Merrill v. Wright, 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645; the right to it may be lost by laches; Hooper v. Yonge, 69 Ala. 484. The order granting this writ is not appealable; Bryan v. Sanderson, 3 MacArthur (D. C.) 402.

It will not issue in favor of a purchaser at an execution sale, where there is a *bona fide* contest as to the right of possession; Stanley v. Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245.

Writs of assistance to seize uncustomed goods were introduced by statute 12 Charles II., c. 19, and were perhaps copied from the

sheriff's patent of assistance; 4 Doug. 347; these writs authorized the person to whom they were issued, with the assistance of the sheriff, justice of the peace, or constable, to enter into any house where the goods were suspected to be concealed. One acting under this writ and finding nothing was not justified; 4 Dougl. 347. See Quincy, Mass. Rep. Appx.; 1 Thayer, Cas. Const. L.; 2 Dan. Ch. Pr. 1062.

WRIT OF ASSOCIATION. In English Practice. A writ whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and sergeants; and they are required to admit the said persons into their society in order to take the assizes. 3 Bla. Com. 59. See ASSIZE.

WRIT OF CONSPIRACY. The name of an ancient writ now superseded by the more convenient remedy of an action on the case, which might have been sued against parties guilty of a conspiracy. Fitzh. N. B. 260.

It did not lie at common law, in any case, except when the conspiracy was to indict the party either of treason or felony; all the other cases of conspiracy in the books were but actions on the case; Hutchins v. Hutchins, 7 Hill (N. Y.) 104.

WRIT OF COVENANT. A writ which lies where a party claims damages for breach of covenant, *i. e.* of a promise under seal.

WRIT OF DEBT. A writ which lies where the party claims the recovery of a debt, *i. e.* a liquidated or certain sum of money alleged to be due to him.

This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called the debt *in the detinet*, which lies for the specific recovery of *goods* under a contract to deliver them. 1 Chitty, Pl. 101.

WRIT OF DECEIT. The name of a writ which lies where one man has done anything in the name of another, by which the latter is damnified and deceived. Fitzh. N. B. 217.

The modern practice is to sue a writ of trespass on the case to remedy the injury. See DECEIT.

WRIT OF DETINUE. See DETINUE.

WRIT OF DOWER. A writ which lies for a widow claiming the specific recovery of her dower, no part having been yet assigned to her. It is usually called a writ of dower *unde nihil habet*. 3 Chitty, Pl. 393. There is another species, called a *writ of right of dower*, which applies to the particular case where the widow has received a part of her dower from the tenant himself; and of land lying in the same town in which she claims the residue. This latter writ is seldom used in practice. See DOWER.

WRIT OF EJECTMENT. See EJECTMENT.

WRIT OF ENTRY. See ENTRY, WRIT OF.

WRIT OF ERROR. A writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and commanding them, in some cases, themselves to examine the record, in others to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. Steph. Pl. 138; 2 Saund. 100, n. 1; Bac. Abr. *Error*.

The first is called a writ of error *coram nobis* or *vobis*. When an issue in fact has been decided, there is not, in general, any appeal except by motion for a new trial; and although a matter of fact should exist which was not brought into the issue, as, for example, if the defendant neglected to plead a release, which he might have pleaded, this is no error in the proceedings, though a mistake of the defendant; Steph. Pl. *118. But there are some facts which affect the validity and regularity of the proceeding itself; and to remedy these errors the party in interest may sue out the writ of error *coram vobis*. The death of one of the parties at the commencement of the suit, the appearance of an infant in a personal action by an attorney and not by guardian, the coverture of either party at the commencement of the suit, when her husband is not joined with her, are instances of this kind; 1 Saund. 101; Steph. Pl. *119; Day v. Hamburgh, 1 Browne, Pa. 75. The writ of error *coram vobis*, is used to correct errors of fact and not of law; Maple v. Havenhill, 37 Ill. App. 311.

The second species is called, generally, writ of error, and is the more common. Its object is to review and correct an error of the law committed in the proceedings, which is not amendable or cured at common law or by some of the statutes of amendment or jeofail. See, generally, 1 Vern. 169; 1 Salk. 322; 2 Saund. 46, 101; 3 Bla. Com. 405.

It is the usual way of bringing up a case; an appeal is an exception; Carino v. Insular Government, 212 U. S. 456, 29 Sup. Ct. 334, 53 L. Ed. 594. There cannot be two in the same case at the same time; Columbus Const. Co. v. Crane Co., 174 U. S. 600, 19 Sup. Ct. 721, 43 L. Ed. 1102.

See APPEAL AND ERROR; BILL OF EXCEPTION.

WRIT OF EXECUTION. A writ to put in force the sentence that the law has given. See EXECUTION.

WRIT OF EXIGI FACIAS. See EXIGENT; EXIGI FACIAS; OUTLAWRY.

WRIT OF FORMEDON. This writ lies where a party claims the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner, upon the determination of an estate in tail. Co. Litt. 236 *b*. See FORMEDON.

WRIT OF INQUIRY. See INQUISITION; INQUEST.

WRIT OF MAINPRISE. A writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence and bail has been refused, or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, commonly called mainpernors, and to set him at large. 3 Bla. Com. 128. See MAINPRISE.

WRIT OF MESNE. In Old English Law. A writ which was so called by reason of the words used in the writ, namely, *Unde* idem A *qui medius est inter C et præfatum B;* that is, A, who is mesne between C, the lord paramount, and B, the tenant paravail. Co. Litt. 100 *a.*

WRIT OF PRÆCIPE. This writ is also called a writ of covenant, and is sued out by the party to whom lands are to be conveyed by fine,—the foundation of which is a supposed agreement or covenant that the one shall convey the land to the other. 2 Bla. Com. 349.

WRIT OF PREVENTION. This name is given to certain writs which may be issued in anticipation of suits which may arise. Co. Litt. 100. See QUIA TIMET.

WRIT OF PROCESS. See PROCESS; ACTION.

WRIT OF PROCLAMATION. A writ which issues at the same time with the *exigi facias*, by virtue of stat. 31 Eliz. c. 3, s. 1, by which the sheriff is commanded to make proclamations in the statute prescribed.

When it is not directed to the same sheriff as the writ of *exigi facias* is, it is called a foreign writ of proclamation. 4 Reeve, Hist. Eng. Law 261.

WRIT OF PROHIBITION. See PROHIBITION.

WRIT OF QUARE IMPEDIT. See QUARE IMPEDIT.

WRIT OF RECAPTION. A writ which lies where, pending an action of replevin, the same distrainer takes, for the same supposed cause, the cattle or goods of the same distrainee. See Fitzh. N. B. 169.

This writ is nearly obsolete, as trespass, which is found to be a preferable remedy, lies for the second taking; and, as the defendant cannot justify, the plaintiff must necessarily recover damages proportioned to the injury.

WRIT OF REPLEVIN. See REPLEVIN.

WRIT OF RESTITUTION. A writ which is issued on the reversal of a judgment commanding the sheriff to restore to the defendant below the thing levied upon, if it has not been sold, and, if it has been sold, the proceeds. See RESTITUTION.

WRIT OF RIGHT. The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee-simple, founding his title on the right of property, or mere right, arising either from his own seisin or the seisin of his ancestor or predecessor. Fitzh. N. B. 1 (B); 3 Bla. Com. 391.

"Originally a writ of right is so called because it orders the feudal lord to do full right to the demandant, *plenum rectum tenere.* . . . But when possessory actions have been established in the king's court, 'right' is contrasted with 'seisin,' and all writs originating proprietary actions for land . . . come to be known as writs of right;" Maitland, in 2 Sel. Essays, Anglo-Am. Leg. Hist. 563.

At common law, a writ of right lies only against the tenant of the freehold demanded; Green v. Liter, 8 Cra. (U. S.) 239, 3 L. Ed. 545.

This writ brings into controversy only the rights of the parties in the suit; and a defence that a third person has better title will not avail; Green v. Watkins, 7 Wheat. (U. S.) 27, 5 L. Ed. 388; Inglis v. Sailor's Snug Harbour, 3 Pet. (U. S.) 133, 7 L. Ed. 617; 3 Bingh. N. S. 434; 6 Ad. & E. 103.

WRIT OF SUMMONS. See SUMMONS.

WRIT OF TOLL. In English Law. The name of a writ to remove proceedings on a writ of right patent from the court-baron into the county court. 3 Bla. Com. App. No. 1, § 2.

WRIT OF TRIAL. In English Law. A writ directing an action brought in a superior court to be tried in an inferior court or before the under-sheriff, under stat. 3 & 4 Will. IV. c. 42. It is now superseded by the County Courts Act of 1867, c. 142, s. 6, by which a defendant in certain cases is enabled to obtain an order that the action be tried in a county court; 3 Steph. Com. 515, n.

WRIT OF WASTE. The name of a writ to be issued against a tenant who has committed waste of the premises. See WASTE.

WRIT PRO RETORNO HABENDO. The name of a writ which recites that the defendant was summoned to appear to answer the plaintiff in a plea whereof he took the cattle of the said plaintiff (specifying them), and that the said plaintiff afterwards made default, wherefore it was then considered that the said plaintiff and his pledges of prosecuting should be in mercy, and that the said defendant should go without day, and that he should have return of the cattle aforesaid. It then commands the sheriff that he should cause to be returned the cattle aforesaid to the said defendant without delay, etc. 2 Sell. Pr. 168.

WRITER OF THE TALLIES. In England. An officer of the exchequer whose duty it was to write upon the tallies the letters of tellers'

bills. The office has long been abolished. See TALLY.

WRITERS TO THE SIGNET. In Scotch Law. Anciently, clerks in the office of the secretary of state, by whom writs passing the king's signet were prepared. Their duty now is to prepare the warrants of all lands flowing from the crown, and to sign almost all diligencies of the law affecting the person or estate of a debtor, or for compelling implement of decree of superior court. They may act as attorneys or agents before the court of sessions and have various privileges. Bell, Dict. *Clerk to Signet.* They are members of the Society of Writers to His Majesty's Signet, the head of which is the Keeper of the Seal.

WRITING. The act of forming by the hand letters or characters of a particular kind, on paper or other suitable substance and artfully putting them together so as to convey ideas.

The word "writing," when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. In law the term "writing" is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds, and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets, and the literary and scientific productions of authors; U. S. v. Chase, 135 U. S. 258, 10 Sup. Ct. 756, 34 L. Ed. 117.

It differs from printing, which is the formation of words on paper or other proper substance by means of a stamp. Sometimes by writing is understood printing, and sometimes printing and writing mixed. See Henshaw v. Foster, 9 Pick. (Mass.) 312. A theatre ticket is the subject of forgery. "Printing" is "writing" in the legal sense of the term, and an instrument, the words of which are printed either wholly or in part, is equally valid with an instrument written by a pen; In re Benson, 34 Fed. 652; Benson v. McMahon, 127 U. S. 467, 8 Sup. Ct. 1240, 32 L. Ed. 234.

Many contracts are required to be in writing; all deeds for real estate must be in writing, for it cannot be conveyed by a contract not in writing, yet it is the constant practice to make deeds partly in printing and partly in writing. Wills, except nuncupative wills, must be in writing, and signed by the testator; and nuncupative wills must be reduced to writing by the witnesses within a limited time after the testator's death.

Records, bonds, bills of exchange, and many other engagements must, from their nature, be made in writing.

The notes of a stenographer, taken when the witness gives his oral testimony in court, is a "taking in writing," as required by a statute; Nichols v. Harris, 32 La. Ann. 648.

See ALTERATION; FORGERY; FRAUDS, STATUTE OF; LANGUAGE; SALE; TYPEWRITING; STENOGRAPHER; SIGNATURE; WILL.

WRITING OBLIGATORY. A bond; an agreement reduced to writing, by which the party becomes bound to perform something or suffer it to be done.

WRITTEN INSTRUMENT. A judgment and a tax duplicate have been held not to be written instruments, within the meaning of a statute requiring a copy to be filed with the pleadings; Wyant v. Wyant, 38 Ind. 48; Hazzard v. Heacock, 39 Ind. 172.

WRONG. An injury; a tort; a violation of right.

In its broad sense, it includes every injury to another, independent of the motive causing the injury; Union Pac. Ry. Co. v. Henry, 36 Kan. 570, 14 Pac. 1.

A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only; Williams v. Hays, 143 N. Y. 447, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743.

In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made; 3 Bla. Com. 158.

A *public* wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence; and it is punishable in various ways, such as indictments, summary proceedings, and, upon conviction, by death, imprisonment, fine, etc.

Private wrongs, which are injuries to individuals, unaffecting the public; these are redressed by actions for damages, etc. See REMEDIES; TORT.

For a classification of wrongs, see Holland, Jurispr. 270.

WRONG-DOER. One who commits an injury; a *tort-feasor.* See Dane, Abr.

WRONGFUL ACT, DEATH BY. See DEATH BY WRONGFUL ACT.

WRONGFUL CONVICTION. An act in Wisconsin, 1913, provides compensation for

persons wrongfully convicted and imprisoned under the judgment; not more than $1,500 for each year or $5,000 in all can be paid, but the board (created for this purpose) may recommend to the legislature an additional payment.

See INNOCENCE.

WRONGFULLY. In a wrong manner; unjustly; in a manner contrary to the moral law, or to justice. Webster, cited Board of Com'rs of Howard County v. Armstrong, 91 Ind. 536.

WRONGFULLY INTENDING. In Pleading. Words used in a declaration when in an action for an injury the motive of the defendant in committing it can be proved; for then his malicious intent ought to be averred. This is sufficiently done if it be substantially alleged, in general terms, as wrongfully intending. 3 Bouvier, Inst. n. 2875.

WYOMING. One of the states of the United States.

By act of congress, approved July 25, 1868, the territory of Wyoming was constituted. See MONTANA; NEW MEXICO.

Wyoming became one of the states of the Union by virtue of the act of congress of July 10, 1890.

Its constitution was amended in 1912, so as to provide for initiative, referendum and recall. Woman Suffrage was introduced in 1869.

Y

YACHT. A light sea-going vessel for the purpose of pleasure, racing, and the like. See VESSEL. A steam pleasure yacht is an "ocean going vessel" and not a coasting vessel; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218.

Yachts may be licensed by the secretary of commerce and may then proceed from port to port of the United States and to foreign ports without entering or clearing at the custom house, except yachts of over 15 gross tons returning to the United States. Act Aug. 20, 1912.

As to the tax on foreign-built yachts, and as to what are such, see TONNAGE; VESSEL; SHIP; NAVIGATION RULES.

YARD. A measure of length, containing three feet, or thirty-six inches.

A piece of land inclosed for the use and accommodation of the inhabitants of a house. In England it is nearly synonymous with backside. 1 Chitty, Pr. 176; 1 Term 701.

YARDLAND. In Old English Law. A quantity of land containing twenty acres. Co. Litt. 69 *a*. See VIRGATA.

YEAR. The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed.

The civil year differs from the astronomical, the latter being composed of three hundred and sixty-five days, five hours, forty-eight seconds and a fraction, while the former consists sometimes of three hundred and sixty-five days, and at others, in leap-years, of three hundred sixty-six days.

The year is divided into half-year, which consists, according to Co. Litt. 135 *b*, of one hundred and eighty-two days; and quarter of a year, which consists of ninety-one days. *Id.*; 2 Rolle, Abr. 521, l. 40. It is further divided into twelve months.

The civil year commences immediately after twelve o'clock at night of the thirty-first day of December, that is, the first moment of the first day of January, and ends at midnight of the thirty-first day of December twelve months thereafter. See Com. Dig. *Annus;* 2 Chitty, Bla. Com. 140. Before the alteration of the calendar from old to new style in England (see BISSEXTILE) and the colonies of that country in America, the year in chronological reckoning was supposed to commence with the first day of January, although the legal year did not commence until March 25, the intermediate time being doubly indicated; thus February 15, $172^{4}/_{5}$, and so on. This mode of reckoning was altered by the statute 24 Geo. II, c. 23, which gave rise to an act of assembly of Pennsylvania, passed March 11, 1752, 1 Smith, Laws, 217, conforming thereto, and also to the repeal of the act of 1710.

In New York it is enacted that whenever the term "year" or "years" is or shall be used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; half a year, of a hundred and eighty-two days; and a quarter of a year, of ninety-two days; and the day of a leap year, and the day immediately preceding, if they shall occur in any period so to be computed, shall be reckoned together as one day. Rev. Stat. vol. 2, c. 19, t. 1, § 3. The meaning of the term "year," as used in a contract, is to be determined from the connection in which it is used and the subject-matter of the contract; Brown v. Anderson, 77 Cal. 236, 19 Pac. 487; Knode v. Baldridge, 73 Ind. 54.

See AGE; ALLOWANCE; TIME; REGNAL YEARS; OLD STYLE.

The omission of the word "year" in an indictment is not important, provided the proper numerals are written after the month and day of the month; State v. Munch, 22 Minn. 67. An indictment which states the

year of the commission of the offense in figures only, without prefixing "A. D.," is insufficient; Com. v. McLoon, 5 Gray (Mass.) 91, 66 Am. Dec. 354; but it has been held otherwise in Maine under a statute; State v. Bartlett, 47 Me. 388.

See YEAR OF OUR LORD.

YEAR AND DAY. A period of time much recognized in law.

It is not in all cases limited to a precise calender year. In Scotland, in computing the term, the year and day is to be reckoned, not by the number of days which go to make up a year, but by the return of the day of the next year that bears the same denomination; 1 Bell, Com. 721. See Bac. Abr. *Descent* (I 3). In the law of all the Gothic nations, it meant a year and six weeks.

It is a term frequently occurring; for example, in case of an estray, if the owner challenged it not within a year and a day, it belonged to the lord; 5 Co. 108. So of a wreck; Co. 2d Inst. 168. This time is given to prosecute appeals and for actions in a writ of right, and, after entry or claim, to avoid a fine; Plowd. 357 *a*. And if a person wounded die in that time, it is murder; Co. 3d Inst. 53; 6 Co. 107. So, when a judgment is reversed, a party, notwithstanding the lapse of time mentioned in the statute of limitations pending that action, may commence a fresh action within a year and a day of such reversal; 3 Chitty, Pr. 107. Again, after a year and a day have elapsed from the day of signing a judgment no execution can be issued till the judgment be revived by *scire facias;* Bac. Abr. *Execution* (H).

An acquittal on an indictment was no bar to an appeal. After such acquittal the accused remained in prison for a year and a day in order to see if the relative of the murdered man wished to begin an appeal; 2 Holdsw. Hist. E. L. 307.

Protection lasted a year and a day; and if a villein remain from his master a year and a day in an ancient demesne, he is free; Cunningham, Dict. If a person is afraid to enter on his land, he may make claim as near as possible,—which is in force for a year and a day; 3 Bla. Com. 175. In case of prize, if no claim is made within a year and a day, the condemnation is to captors as of course; The Avery, 2 Gall. 388, Fed. Cas. No. 672. So, in case of goods saved, the court retains them till claim, if made within a year and a day, but not after that time; Stratton v. Jarvis, 8 Pet. (U. S.) 4, 8 L. Ed. 846.

Coke gives various rules as to the proposition that the common law has often limited year and day as a convenient time. See Co. Litt. 254 *b*; 5 Rep. 218.

See Possession for Year and Day, by F. W. Maitland, in 5 L. Q. Rev. 253.

The same period occurs in the Civil Law, in the Book of Feuds, the Laws of the Lombards, etc.

YEAR-BOOKS. Books of reports of cases. From Edward I to Richard III, they are almost continuous. During the reigns of Henry VII and Henry VIII, they became intermittent, the last being in 27 Hen. VIII. They were compiled by eye-witnesses or from the narration of eye-witnesses. They are contemporary reports of the utmost value. The former belief that some of them were compiled by paid official reporters is now doubted. Holdsworth in 2 Sel. Essays, Anglo-Am. Leg. Hist. 104. See Pollock, First Book of Jur. 284.

Charles C. Soule, the eminent legal bibliographer, in a "Preliminary Sketch for a Bibliography of the Year-Books" (14 Harv. L. Rev. 557), gives the following list of the last edition of the Year-Books, "made up of eleven parts, one part printed in 1678, one in 1680, and the other nine in 1679, so that it may be properly called the 1679 (or 'Standard') edition":

Part I. Memoranda *in Scaccario* (only) 1 to 29 Edw. I. Year Books, 1 to 19 Edw. II.
Part II. First Part of Edw. III, years 1 to 10.
Part III. Second Part of Edw. III, years 17 to 39 (omitting 19, 20 and 31 to 37).
Part IV. Third Part of Edw. III, years 40 to 50, "Quadragesms."
Part V. "*Liber Assisarum,*" years 1 to 50 Edw. III.
Part VI. Year Books of Hen. IV (years 1 to 14) and Hen. V (years 1, 2, 5, 7, 8, and 9).
Part VII. First Part of Hen. VI, years 1 to 20 (omitting 5, 6, 13, 15, 16, and 17).
Part VIII. Second Part of Hen. VI, years 21 to 39 (omitting 23 to 26 and 29).
Part IX. Edw. IV, years 1 to 22.
Part X. "Long Quinto" or the long report of year 5 Edw. IV.
Part XI. Edw. V (year 1); Rich. III (years 1 and 2); Hen. VII (years 1 to 21, omitting 17, 18 and 19); and Hen. VIII (years 12, 13, 14, 18, 19, 26 and 27 only).

Part V is not exactly a Year-Book, nor yet an "abridgment," but rather a compilation of selected cases from the manuscript Year-Books of Edw. III. Part X covers only a single year, and it ought properly to have found a place beside the regular or short report of 5 Edw. IV. The eight remaining parts are reprints of earlier impressions of Year-Books arranged in chronological order from Edward III to Henry VIII, with various unexplained and unaccountable gaps, which are now being gradually filled up by

the publication of the volumes of the Rolls series.

The current series of Year-Books is reprinted under the editorship of L. Owen Pike, the foremost expert in ancient English legal records.

The Ames Foundation at the Harvard Law School has published the Year Books of 12 Rich. II, under the editorship of George F. Dreiser, of the Philadelphia Bar, who has added a valuable Introduction to the volume.

Professor Wambaugh (Study of Cases § 98) says they "are the work of skilled lawyers; and the reports of cases, when complete, present an adequate view of the pleadings." They were Court Rolls, intended for the preservation of the results in order to fix the rights of the parties, but not adapted for use as precedents. See 1 Dougl. v; 1 Co. XXVI.

YEAR, DAY, AND WASTE (Lat. *annus, dies, et vastum*). A part of king's prerogative, whereby he takes the profits of the lands and tenements of those attainted of petty treason or felony, for a year and a day, but, in the end, may waste the tenements, destroy the houses, root up the woods, gardens, and pasture, and plough up the meadows (except the lord of the fee agree with him for redemption of such waste); after which the lands are to be restored to the lord of the fee. Staundford, Prerog. c. 16, fol. 44. By Magna Carta, it would appear that the profits for a year and a day were given in lieu of the waste. 9 Hen. III, c. 22. But 17 Edw. II declares the king's right to both. It was, in practice, usually compounded for by the person who claimed the escheat. The crown's claim of forfeiture (except in the case of outlawry) was abolished in England in 1870.

YEAR OF OUR LORD. In England the time of an offense may be alleged as that of the sovereign's reign, or as that of the year of our Lord. The former is the usual mode. Hence there "year" alone might not indicate the time intended, but as we have no other era, therefore, any particular year must mean that year in our era. Com. v. Doran, 14 Gray (Mass.) 38. The abbreviation A. D. may be omitted; and the word year is not fatal; State v. Bartlett, 47 Me. 393; *contra*, Com. v. McLoon, 5 Gray (Mass.) 92, 66 Am. Dec. 354. See REGNAL YEARS.

YEARS, ESTATE FOR. See ESTATE FOR YEARS.

YEAS AND NAYS. The list of members of a legislative body voting in the affirmative and negative of a proposition.

The constitution of the United States, art. 1, s. 5, directs that "the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal." See 2 Story, Const. 301.

Constitutional provisions in some states require the yeas and nays to be entered on the journal on the final passage of every bill. See Ryan v. Lynch, 68 Ill. 160; Steckert v. East Saginaw, 22 Mich. 104. These directions are clearly imperative; Cooley, Const. Lim. 171.

The power of calling the yeas and nays is given by all the constitutions of the several states; and it is not, in general, restricted to the request of one-fifth of the members present, but may be demanded by a less number; and, in some, one member alone has the right to require the call of the yeas and nays.

YEOMAN. In the United States this word does not appear to have any very exact meaning. It is usually put as an addition to the names of parties in declarations and indictments. In England it signified a free man who has land of the value of forty shillings a year. Co. 2d Inst. 668; Respublica v. Steele, 2 Dall. (U. S.) 92, 1 L. Ed. 303. The local volunteer militia raised by individuals with the approbation of the queen are also called yeomen. The term *yeomanry* is applied to the small freeholders and farmers in general. Hallam, Cons. Hist. c. 1.

YIELDING AND PAYING. These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent; Platt, Cov. 50; Royer v. Ake, 3 Pen. & W. (Pa.) 464; 2 Lev. 206; 3 Term 402; 1 B. & C. 416; 2 Dowl. & R. 670; but whether it be an express covenant or not seems not to be settled; 2 Lev. 206; T. Jones 102; 3 Term 402.

In Pennsylvania, it has been decided to be a covenant running with the land; Royer v. Ake, 3 Pen. & W. (Pa.) 464. See 1 Saund. 233, n. 1; Kimpton v. Walker, 9 Vt. 191.

YORK-ANTWERP RULES. Certain rules relating to uniform bills of lading formulated by the Association for the Reform and Codification of the Laws of Nations, now the International Law Association.

These rules are commonly incorporated in contracts of affreightment. They are the result of conferences of representatives of mercantile interests from several countries, in the interest of uniformity of law. They have no statutory authority. The text is in Maclachlan's Mercht. Shipping. For a history of them, see Lowndes, Gen. Av.

YORK, CUSTOM OF, is recognized by 22 & 23 Car. II, c. 10, and 1 Jac. II, c. 17. By this custom, the effects of an intestate are divided according to the anciently universal rule of *pars rationabilis*. 4 Burn, Eccl. Law 342.

YORK, STATUTE OF. The name of an English statute, passed at York, 12 Edw. II, 1318. It contains many wise provisions and explanations of former statutes. Barrington, Stat. 174. There were other statutes made at York in the reign of Edward III, but they do not bear this name.

YOUNG ANIMALS. It is a rule that the young of domestic or tame animals belong to the owner of the dam or mother, according to the maxim, *Partus sequitur ventrem.* Dig. 6. 1. 5. 2; Inst. 2. 1. 9. See WHELP.

YOUNGER CHILDREN. When used with reference to settlements of land in England, this phrase signifies all such children as are not entitled to the rights of an eldest son, including daughters who are older than the eldest son. Moz. & W.

YOUTH. This word may include children and youth of both sexes. Nelson v. Cushing, 2 Cush. (Mass.) 519, 528.

Z

ZAMINDAR, or ZEMINDAR. A landholder in India, who is the responsible collector of revenues on behalf of the government. Wilson's Gloss.

ZINC ORE. A mineral body, containing so much of the metal of zinc as to be worth smelting. Lehigh Z. & I. Co. v. New Jersey Z. & I. Co., 55 N. J. L. 350, 26 Atl. 920.

ZOLL-VEREIN. A union of German states for uniformity of customs, established in 1819. It continued until the unification of the German Empire, including Prussia, Saxony, Bavaria, Würtemberg, Baden, Hesse-Cassel, Brunswick, and Mecklenberg-Strelitz, and all intermediate principalities. Whart. Lex.

[END OF VOL. 3]